In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **KENNETH McKINZIE,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S081918

Ventura County Superior Court Case No. CR40930
The Honorable Vincent J. O'Neill, Jr., Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On August 7, 1998, the Ventura County District Attorney filed a second amended information charging appellant in count 1 with murder (Pen. Code, § 187), in count 2 with first degree residential robbery (Pen. Code, § 211), in count 3 with residential burglary (Pen. Code, § 459), in count 4 with carjacking (Pen. Code, § 215, subd. (a)), in count 5 with kidnapping for robbery (Pen. Code, § 209(b)), and in counts 6, 7, and 8 with commercial burglary (Pen. Code, § 459). The information alleged the special circumstances that appellant committed the murder during the commission of the crimes of robbery and burglary (Pen. Code, § 190.2, subd. (a)(17)). The information also alleged as to counts 2, 3, 4, and 5, that the victim was 65 years of age or older (Pen. Code, § 667.9, subd. (a)). (1 CT 195-200.) Appellant pleaded not guilty to the charges and denied the special allegations. (1 CT 201-204.)

On September 28, 1998, trial commenced. (1 CT 216.) Following the prosecution's case-in-chief, the court granted a motion by the defense pursuant to Penal Code section 1118 and dismissed count 7 (commercial burglary). (2 CT 338.) On November 3, 1998, the jury returned a guilty verdict on all of the remaining counts and found the special circumstances and allegations to be true. (2 CT 441-454, 470-472; 18 RT 3347-3352.)

The penalty phase began on November 10, 1998. (2 CT 488-493.) The jury retired to deliberate on November 16, 1998. (2 CT 546-548.) After the jury deliberated for approximately five days, the jury was unable to reach a verdict on the penalty and the trial court declared a mistrial as to the penalty phase on November 23, 1998. (2 CT 557-558, 565B-565D, 572-573-580; 584-585; 3 CT 591-594; 21 RT 4002-4004.)

On May 5, 1999, the trial court empanelled a second jury and the second penalty phase trial commenced. (3 CT 751A-751F; 30 RT 5951-

5952.) On May 19, 1999, the jury returned a verdict of death. (3 CT 871; 4 CT 873-874; 37 RT 7259-7261.)

After denying appellant's motion to modify the verdict (37 RT 7295-7298), the trial court sentenced appellant to death by execution on count 1 (first degree murder, Pen. Code, § 187, subd. (a)). (4 CT 913-923; 37 RT 7303-7304.) The court also imposed consecutive terms on the remaining counts as follows: as to count 5, a life term with an additional one year pursuant to Penal Code section 667.9, subdivision (a); as to count 4, nine years plus an additional year pursuant to Penal Code section 667.9, subdivision (a); as to count 3, a total of sixteen months; as to counts 6 and 8, eight months on each count; and as to count 2, six years stayed pursuant to Penal Code section 654. (4 CT 917-920, 924-927.) The court ordered appellant to pay $10,000 to the state restitution fund (Pen. Code, § 1202.4, subd. (b)) and to provide blood and saliva samples (Pen. Code, § 290.2). (4 CT 917-920, 924-927.)

Appellant's appeal is automatic pursuant to Penal Code section 1239, subdivision (b).

STATEMENT OF FACTS

I. GUILT PHASE

A. Prosecution Case

1. Introduction

On December 21, 1995, Ruth Avril, a 73-year-old woman who lived alone in an apartment in Oxnard, walked down to her garage late at night. Avril usually closed her garage door at approximately 11 p.m. every night. The garage opened to an alley that ran behind Avril's apartment complex. Appellant lived in another apartment complex across the alley from Avril with his girlfriend, Peggy Garner. Appellant knew Avril. He sometimes helped her carry groceries up to her apartment and had helped her set up a Christmas tree a few days before December 21.

The night of December 21, when Avril walked into her garage, appellant attacked her and brutally beat her. Appellant then put Avril into the trunk of her Ford Taurus, slamming the lid of the trunk on her head several times. Appellant drove to his parents house, changed clothes, then drove to the end of Arnold Road, a remote road in an agricultural area near the beach. Avril was still alive while she was in the trunk. After stopping the car at the end of Arnold Road, appellant pulled Avril from the trunk, manually strangled her, then dumped her body in a ditch at the bottom off the side of the road.

Appellant then drove back to Avril's apartment. He entered the apartment, ransacked it, and stole several items including her stereo, VCR, camera, several wrapped Christmas presents, credit cards, ATM cards, and driver's license. In the early morning hours of December 22, 1995, appellant sold the VCR to his friend, Ralph Gladney. He then recruited another friend, Theresa Johnson, to help him use the credit and ATM cards to obtain money. The two of them used the cards to obtain cash from an

ATM machine in a grocery store and a 7-Eleven market. Later that same early morning, appellant told Johnson that he thought he may have killed a lady that lived down the alley from him. He told Johnson several details about the crime, including how he attacked the victim in her garage, stuffed her into the trunk of the car, and then dumped her body in a ditch filled with water. Then next day, appellant also told Gladney that he may have killed a woman.

Appellant gave some of the gifts he stole from Avril's apartment to his daughter for Christmas. One of the gifts was a peach colored robe that Avril's daughter-in-law sent to Avril for Christmas. Appellant also gave his daughter a camera that had belonged to Avril. When the film in the camera was developed by investigators, several photographs of Avril were discovered.

Avril's body was discovered on December 22, 1995, at approximately 9 a.m. by two surfers. Avril's body was unidentified for over a week. The medical examiner determined the cause of death to be blunt force trauma to Avril's brain and manual strangulation. On January 1, 1996, Maria Aragon, a tenant in Avril's apartment complex, reported Avril missing. The Oxnard Police Department determined that the body found off Arnold Road was Ruth Avril.

2. Discovery of Ruth Avril's Body

On December 22, 2005, Randolph Loganbill, a college student home for winter break, drove to a beach in Ventura County at the end of Arnold Road with his brother. (11 RT 2114-2116.) Arnold Road was located in an agricultural area of the city of Oxnard. (11 RT 2120.) The brothers parked their car at the end of Arnold Road at around 9 a.m. and walked to the end of the dead-end road to look at the surf conditions. As Loganbill walked back to the car, he noticed a body in a ditch down an embankment off the side of the road. Loganbill called his brother over, but they did not go

down to where the body was. The brothers walked to an agricultural business approximately one-quarter of a mile away and called the police. The dispatcher told them to go back to the body and wait for the police to arrive, which they did. The police arrived at around 9:15 a.m. (11 RT 2114-2122.)

Detective Michael Palmieri of the Oxnard Police Department responded to the scene at Arnold road at approximately 10 a.m. He described the scene as follows: Arnold Road dead-ended into an agricultural area right next to the southern beach of Oxnard. Along the west side of the road was a drainage canal for farmland drainage. Past the side of the road is a military base surrounded by chain link fence and barbed wire. (11 RT 2222-2225.) The victim's body was in 1 ½ to 2 feet of water. (11 RT 2226.)

3. Medical Examiner

Dr. Janice Frank was an Assistant Medical Examiner for Ventura County. She arrived at the scene at approximately 11:45 a.m. The victim's body was lying cross-wise in a drainage ditch next to Arnold Road. The ditch was partially filled with water. (11 RT 2123-2127.)

Dr. Frank conducted a preliminary examination at the scene. The body was removed from the ditch and placed on a litter. There was no identification found on the body. In order to determine the time of death, Dr. Frank took the temperature of the body, observed the extent of rigor mortis, examined the skin for evidence of blood settling, and took fluid from the eyes for chemical analysis. Dr. Frank did not observe any detectable rigor mortis (stiffness in the extremities), or livor mortis (settling of the blood). (11 RT 2128-2131.)

The next day, at approximately 8:30 a.m., Dr. Frank performed an autopsy of the victim's body at the Ventura County morgue. She noted two injuries to the left side of the victim's head. One injury was a laceration, an

abrasion, bruising, and bleeding under the skin. The injuries were blunt force injuries, but Dr. Frank could not determine whether a fist or an object caused the injuries. (11 RT 2131-2136.) The second injury to the left side of the victim's head was a contusion on the rim of the ear. (11 RT 2137.)

Dr. Frank observed several different injuries to the left side of the victim's face. There was a laceration surrounded by bruising at the left temple. There was a group of lacerations surrounded by bruising at the outer corner of the left eye. A single blow would have been enough to cause the injury at the left temple. The injuries at the left eye could have been caused by a single blow or multiple blows. There was also bruising over the bridge of the nose, a faint bruise at the left corner of the mouth, and a bruise on the left side of the neck, just below the angle of the jaw. (11 RT 2139-2143.)

Dr. Frank observed petechial hemorrhaging inside of the victim's lower eyelids. These hemorrhages are produced by compression of the neck blood vessels, such as during strangulation, which causes tiny blood vessels in the eyelids to rupture. (11 RT 2144-2147.)

Dr. Frank noted abrasions on the victim's forehead and nose. Inside of the victim's mouth there was a contusion in the mucus membrane that lines the inside of the cheek and corner of the mouth, a laceration of the mucus membrane. This laceration was directly underneath a bruise at the outside corner of the left mouth. The laceration was caused by the impact of the inside of the mouth hitting the teeth. There were also abrasions and bruising on the right side of the upper lip. (11 RT 2147-2151.)

Avril had several injuries to the right side of her face. The entire right side had one continuous bruise from the forehead through the temple and down to the jaw. (11 RT 2151. There was also a deep laceration on the outer corner of the right eye extending from the eyebrow to the cheekbone. (11 RT 2151.) The right eye was so swollen that the medical examiner had

a difficult time opening it. (11 RT 2151-2154.) The inner corner of Avril's right eye was dark red and had two or three superficial lacerations. The wounds on Avril's face were inflicted before her death. (11 RT 2151-2154.)

Avril had bruising on her chest, shoulders, and arms. Small bruises on Avril's right arm were consistent with finger pressure from being grabbed. Avril also had bruising on the backs of her hands. Such injuries are often seen when the hands are held up in a defensive posture to ward off blows, or after banging the hand against a hard surface. (11 RT 2158-2163.)

Dr. Frank conducted a dissection of Avril's neck. She found injuries caused by manual strangulation. (11 RT 2163-2164, 2171-2176.) Avril had three areas of hemorrhaging underneath her scalp that would have been produced by impact or blunt force injury. The internal hemorrhaging corresponded with the bruises on Avril's left eye, right face, and the top of her head. (11 RT 2167-2171.)

According to Dr. Frank, the cause of death was blunt force injury to the head and manual strangulation. The injuries around Avril's brain and inside her skull were produced by impact to her head and face. Avril had hemorrhaging over the surface of her brain, primarily in the area directly behind her forehead. (11 RT 2177-2180.)

Dr. Frank estimated that Avril's death occurred between approximately 9 p.m. on December 21, 1995 (the day before the body was discovered) and 3 a.m. on December 22. (11 RT 2180-2182.)

In the spring of 1998, Dr. Frank also examined Avril's Ford Taurus. She looked at the trunk lid and trunk and determined that the injuries to Avril's head could have been caused by forcible contact with the edge of the trunk lid or the sill of the trunk. (11 RT 2182-2183.)

4. Ruth Avril Is Reported Missing

Maria Aragon was lived in the same apartment building as Avril for 19 years. Avril was Aragon's landlord. Aragon normally saw Avril every day when Aragon returned home from work. Avril had a black four-door Ford Taurus that she parked in her garage. Avril typically walked from her apartment down to the garage every night at 11 p.m. to close the garage door. (11 RT 2198-2207.)

On December 26, 2005, a mail carrier told Aragon that the mail was beginning to stack up at Avril's apartment. Aragon checked the doorknob of Avril's apartment and noticed that it was locked. She gathered up Avril's mail and took it to her apartment. (11 RT 2209-2211.)

The last time Aragon saw Avril alive was on December 21, 1995 at approximately 12:40 p.m. Aragon was sure of the date because it was her last day of work at a nearby school before the winter break. (11 RT 2209.)

On January 1, 1996, Aragon filed a missing person report regarding Avril at the police station. After she filed the report, an officer accompanied her to Avril's apartment. The two entered Avril's apartment. Aragon noticed that the apartment was messy and that the stereo and speakers were missing. Avril's purse was on the floor and a checkbook was outside the purse. (11 RT 2209, 2211-2214.)

Officer Steven Funk of the Oxnard Police Department was on duty on January 1, 1996. He spoke with Aragon and went with her to Avril's apartment to investigate. He walked up to Avril's apartment door and saw no signs of forced entry. The front door was unlocked, so he opened it. He called out for Avril, but there was no response. He walked into the apartment and saw that all of the rooms were ransacked, except for the bathroom. The refrigerator door was open and he smelled rotting food. In the living room, a stereo cabinet was open, but there were no stereo components inside. There was a Christmas tree, but no presents under the

tree. A purse was on the floor with its contents spilled out next to it. In the main bedroom, the dresser drawers were pulled out, clothes were on the floor, gift-boxes were on the floor, and a jewelry box had its drawers removed. In the other bedroom, there were several empty boxes for various stereo components. Officer Funk noted the serial numbers of the components. (11 RT 2232-2236; 12 RT 2384-2388.)

Officer Funk saw a picture of Avril on the wall. He recognized a piece of jewelry she was wearing in the picture because he had been shown the same piece of jewelry by Detective Palmieri. He called for backup and several other officers, including Detective Palmieri, arrived to investigate. (12 RT 2388-2395.)

5. Appellant's Actions

In December 1995, a few days before Christmas, Theresa Johnson[1] was in the process of moving from one apartment to another in Oxnard. Appellant arrived at Johnson's apartment around midnight. Johnson had known appellant since 1990. (11 RT 2257-2258.)

Appellant wanted some cocaine. Appellant showed Johnson some credit and ATM cards and a driver's license with the photo of a white, older, female on it. Appellant asked her if she knew how to use the cards and she told him that she did. (11 RT 2259-2262.)

The two of them left the apartment and got into Avril's car. Appellant told Johnson to put socks on her hands and not leave any fingerprints in the car. They drove to a Hughes Market. At the market Johnson used the ATM card in a machine located inside the store. She obtained Avril's PIN

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[1] In July 1996, the Oxnard Police Department received an anonymous tip from a female caller stating that a woman named Theresa Johnson had information regarding Avril's murder. Detective Palmieri contacted Theresa Johnson at a drug addiction recovery center. (11 RT 2236.)

number from a piece of paper that was with the cards Appellant had. Johnson thought that the cards were stolen and that she was committing a crime. She used the card two separate times on the ATM machine, each time withdrawing at least $100. She gave the money to Appellant. (12 RT 2263-2268.)

Appellant and Johnson then left the market and drove to a 7-11 convenience store. Johnson used Avril's ATM card in a machine inside the store to obtain more money. She then gave the money to appellant and left the store with him. On the way back to Johnson's apartment, appellant gave her $160.[2] Appellant dropped her off at the apartment and said he would be back later. (12 RT 2269-2272.)

A short time later, appellant returned to Johnson's apartment with rock cocaine. Appellant and Johnson smoked cocaine together.[3] She had also smoked cocaine before appellant arrived at her apartment. Appellant told Johnson, "I think I killed somebody." (12 RT 2281.) He said it was the lady that lived down the alley from the apartment where he used to live.

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[2] Kathy Wood Smith, a supervisor in the Fraud Investigation Department of Associates National Bank and Credit Card Services, testified that Avril had an account with the bank in December 1995. On December 22, 1995, there were three withdrawals from her account: $40 at 4:12 a.m., $200 at 4:13 a.m., and $200 at 4:25 a.m. (12 RT 2356-2366.) The first two withdrawals were from an ATM machine in a Hughes Market in Oxnard. The third withdrawal occurred at 7-11 store in Oxnard. (12 RT 2366-2372.)

[3] Johnson smoked cocaine frequently at the time. She had used cocaine for at least 17 or 18 years, and had three misdemeanor convictions for being under the influence of narcotics. Johnson stopped using cocaine in November 1996 and went into a rehabilitation program. She remained clean for the most part, only using cocaine for a brief period during February and March 1998. (12 RT 2276-2278.)

He also said he recently brought her Christmas tree into her apartment for her.[4] (12 RT 2281-2282.)

Appellant said he waited in the lady's garage because he knew she turned the garage light off at night. He wanted to rob her. When the lady walked in, he approached her from behind and tried to knock her out by hitting her with his fist, but was unsuccessful. He continued to hit her with his fist, but could not knock her out. The lady started screaming. Appellant said he "couldn't knock the bitch out." (12 RT 2284.)

The lady turned around and saw him. The truck lid of the lady's car was up, so he hit her in the head with the trunk lid, pushed her in the trunk, and closed the lid. (12 RT 2284-2285.)

Appellant said he drove with the lady in the trunk to a back road. While he was driving the lady was making noise and screaming. He stopped the car on the back road and pulled the lady out of the trunk. He hit her and then threw her in a ditch with water in it. Appellant told Johnson that the lady was alive when he left. (12 RT 2285-2286.)

As appellant told Johnson what happened, he had tears in his eyes and was upset. He looked at Johnson and said it could happen to her if she told anyone. (12 RT 2287.)

Appellant and Johnson then went to another bank automated teller machine to use the ATM card. They each wore a disguise – appellant put on sunglasses and Johnson wore a wig. Johnson initially refused to use the card because there were cameras at the machine. However, appellant said

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[4] Donnie Bullard was Peggy Garner's son. He lived across the alley from Avril. He knew Avril because he had helped her carry groceries up to her apartment a few times. One day he was in the alley with appellant when he saw Avril struggling to remove a Christmas tree from the trunk of her car. Bullard and appellant helped Avril with the tree and carried it upstairs to her apartment. They brought the tree into her living room and helped set it up. (12 RT 2372-2383.)

he needed help, so she walked up to the machine to try and assist him. But the card would not work, so they left. (12 RT 2293.)

A couple of hours later, appellant returned to Johnson's house in a taxi. (12 RT 2288.) Appellant said that he "ditched" the car, but did not say where. (12 RT 2295.)

Later that day or the next day, appellant returned to Johnson's with several wrapped Christmas presents, stereo components, and a VCR. Appellant said he got them from the victim's house. (12 RT 2297.) Appellant left the stereo components at Johnson's place, but took the presents and VCR with him when he left. (12 RT 2302.) Johnson called her brother-in-law, C.J. Brewer, and told him that she had stereo components for sale. (12 RT 2299-2302.)

In December 1995, before Christmas, C.J. Brewer bought the stereo components from appellant at Johnson's apartment. Brewer paid appellant $150 for a cassette player, compact disc player, and an amplifier. When Brewer asked appellant if the stereo was stolen, appellant replied that it was not. (13 RT 2446-2454.)

Erania McClelland was appellant's girlfriend from 1980 until 1987. She was the mother of appellant's daughter, Kenisha. In late December 1995, appellant arrived at her house with Christmas gifts for Kenisha. Appellant gave his daughter a small television, a camera, a shirt, and a bathrobe. The robe was peach-colored and quilted. The camera did not work. Several weeks later, appellant called her to get the camera back, but she did not return it to him. (13 RT 2456-2463.)

The robe that appellant gave Kenisha matched the robe that Janet Avril, Ruth Avril's daughter-in-law, sent to Ruth Avril as a Christmas gift. The film in the camera that appellant gave Kenisha was later developed by the Ventura County Sheriff's crime lab. Five photographs were printed, one of which was of Ruth Avril. (13 RT 2509-2515, 2518-2525.)

Avril's Ford Taurus was found in the parking lot of the Oxnard Elk's Lodge. Ms. "Jay" Hazard, an employee of the Elk's Lodge, first called someone with the city of Oxnard regarding the car in January 1996. She requested to have the car removed because it had been parked in the lot for awhile. (12 RT 2398.) Nothing was done. On February 12, 1996, Avril's car was still parked in the lot. Hazard saw an Oxnard Police Officer on patrol and pointed the car out to him. The officer ran a check of the license plate, but the car did not come back as stolen. He advised Hazard to have the car towed because it was on private property. (12 RT 2413-2418.) Finally, on March 11, 1996, several Oxnard Police officers arrived to investigate the car. (12 RT 2398-2406.)

6. Ralph Gladney[5]

Ralph Gladney knew appellant for over ten years. A couple of days before Christmas in 1995, appellant arrived at Gladney's house late at night and asked if he wanted to buy a camera. Appellant said he needed money because he was broke, so Gladney gave him some money. (13 RT 2610-2612.)

Later that night, appellant returned to Gladney's house. Appellant asked Gladney if he knew a woman that would help him use a credit card that belonged to appellant's girlfriend. (13 RT 2612-2614.)

The next day, Gladney saw appellant again. Appellant told Gladney that he may have killed someone. Later in the conversation, appellant said that he *did* kill someone. Appellant said that it was a nice lady that he knew. He said he waited for the lady in her garage. When she came into the garage, appellant kept hitting her because she would not stop yelling. Appellant also said that he choked the lady. Appellant did not know what

[5] Gladney died before the trial; therefore, his preliminary hearing testimony was read to the jury. (13 RT 2610.)

to do, so he put the lady in the trunk of her car and dropped her off somewhere in Malibu. Appellant said that he attacked the victim because he needed money to buy Christmas presents for his kids. (13 RT 2615-2619.)

7. Forensic Evidence

Edwin Jones, a Senior Criminologist for the Ventura County Sherriff's Crime Laboratory, analyzed blood found in Avril's garage and Ford Taurus. He examined the Taurus several times beginning in March 1996. There were a substantial amount of blood stains in the trunk of the car. There were also "blood swipes"[6] on the underside of the trunk lid. DNA testing confirmed that the blood in the trunk was Avril's. Based on the blood swipes in the trunk, Jones concluded that Avril was alive while she was in the trunk. (13 RT 2560-2581.)

Hair samples were collected from the cab area of the Taurus. There was insufficient DNA in the samples to make a comparison to appellant, however, the hair sample had matching characteristics to appellant's hair. (13 RT 2591-2593.)

In late January or early February 1996, Avril's son and Pedro Aragon were cleaning out Avril's garage when they discovered blood stains on the garage floor. (13 RT 2544-2548.) Jones analyzed photos of the blood found in the garage. There was evidence of blood pooling on the floor of the garage. There was a blood path from the pool to the opening of the garage. There were also blood spatters on the garage wall. The blood in the garage was Avril's. Based on the evidence, Jones concluded that Avril was struck by a minimum of two blows. The first blow opened a wound,

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[6] A "blood swipe" is blood swiped onto a target, while a "blood wipe" is blood wiped off of a target. (13 RT 2553.)

and the subsequent blow spattered the blood on the wall. (13 RT 2593-2601.)

B. Defense Case

1. Donald Thomas

Donald "Tommy" Thomas knew Avril for approximately 11 to 12 years. He first met her when he was around 7 or 8 years old. Thomas lived two blocks away from Avril. Thomas often hung out at Mike Fontenot's house, which was across the alley from Avril's apartment complex. He would help Avril with yard work, wash her car, and carry her groceries. Thomas had been invited into Avril's apartment many times. She was nice to him. (15 RT 2775-2785.)

In 1991, Thomas set up and connected stereo equipment for Avril. Approximately three months before Avril's death, Thomas moved Avril's stereo for her. He was last in Avril's apartment approximately a month before her death. Thomas and his friend Marlin Jones helped carry groceries up to her apartment. (15 RT 2787-2790.)

Thomas last saw Avril around December 20, 1995. He was in Michael Fontenot's garage, across the alley from Avril's garage, playing cards. Thomas saw Avril going to her car and he waved hello. Thomas recalled that Avril was wearing green pants and a flowered shirt. Avril normally wore a necklace with a watch on it, but Thomas could not recall if she was wearing it that day. (15 RT 2792-2803.)

Thomas learned that Avril was murdered when he spoke to Detective Palmieri, about a month after he last saw Avril. Thomas had heard from Mike Fontenot that appellant was trying to sell a stereo, so Thomas asked Detective Palmieri if a stereo was stolen. (15 RT 2818-2820.) Thomas was aware that his palm print was found in Avril's apartment because District

Attorney Investigator Fitzgerald told him so.[7] (15 RT 2837.) Thomas told Chris Polk that Avril was beaten to death after Investigator Fitzgerald told him how she was killed. (15 RT 2822-2823.) Thomas denied taking any items from Avril's apartment and stated that he did not have anything to do with her murder. (15 RT 2838.)

Fred DeFazio was a private investigator for the defense. He attempted to interview Thomas, but Thomas would not consent to an in-person interview. Over the phone, DeFazio asked Thomas if he knew where Avril's body was found. Thomas replied that she was found at Arnold Road. Thomas said he knew because a person named Sharon told him. Thomas refused to give DeFazio Sharon's last name or any other information.[8] (15 RT 2900-2906.)

Detective Palmieri contacted Thomas on January 3, 1996. Thomas told him that a local gang called Black Maria Gang was responsible for most of the crime in the area and that they may be responsible for Avril's murder. Thomas also asked if Avril's stereo had been taken. Thomas said that he had set up the stereo and could identify it if it was found. (15 RT 2907-2909.)

On January 24, 1996, Detective Palmieri interviewed Thomas again. Thomas told Palmieri about the last time he had seen Avril alive. Thomas said Avril was wearing a green sweater, pants, and possibly a watch on a

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[7] Bob Morgan, a latent print examiner with the Oxnard Police Department, testified that Thomas's left palm print was found on the stereo cabinet in Avril's apartment. Morgan could not offer an opinion as to when Thomas left the palm print because a print can remain on glass for a very long time. Morgan did not find any other prints that he was able to match; however, he found over 20 glove marks in the apartment, including marks on the boxes taken out of Avril's closet. (15 RT 2884-2900.)

[8] Thomas denied telling DeFazio that a girl named Sharon told him Avril's body was found on Arnold Road. (15 RT 2832.)

necklace, although Thomas was unsure about the jewelry. (15 RT 2907-2908, 2913.) Thomas also said that a person in the area named "Kenny" may have been involved in Avril's murder. Thomas described Kenny as a Black man who used to play dominos in the garage across from Avril's garage. Kenny was the stepfather of one of Thomas's friends. Thomas did not give a basis for his suspicion of Kenny. (15 RT 2909-2913.)

James Young was a friend of Thomas and appellant. One day he was at Thomas's house with Thomas's sister and girlfriend. Young heard Thomas say that he had a television and VCR that he had to sell. Thomas said he got the items from an apartment across the alley from the Fontenot's garage. He said that after he went into the apartment somebody woke up and things got bad, so he left.[9] (15 RT 2864-2878.)

2. Timothy Akers

Timothy Akers met appellant while both were in the Ventura County Jail. Akers contacted appellant in the jail because he had information about appellant's case. Akers knew Ralph Gladney. One day, Akers saw Gladney crying and shaking. Gladney said that he was upset because he lied about a friend's involvement in a murder. He said he lied to the police and told them that his friend, Kenny McKinzie was involved in a murder. Gladney said that he lied because he needed money. Akers did not know appellant prior to meeting him in jail. He was convicted of attempted murder and was serving his state prison sentence at the time of his testimony. (15 RT 2916-2929.)

3. Appellant's Testimony

Appellant had prior felony convictions for attempted robbery, attempted burglary, and auto theft. In December 1996, he was arrested for

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[9] Thomas denied ever telling anyone that he was involved in a burglary. (15 RT 2826-2828.)

being under the influence of cocaine and possession of drug paraphernalia. He has been in prison, and was in Wasco State Prison when he was arrested for Avril's murder. (16 RT 2982-2987.)

In 1995, when appellant was not in jail, he lived with his parents or with Peggy Garner. Appellant knew Avril. He helped her paint her apartment and sometimes helped her carry groceries. Around Christmas in 1995, he and Garner's son helped Avril carry a Christmas tree up to her apartment. (16 RT 2987-2988.)

Appellant had known Donald "Tommy" Thomas since 1991 or 1992. Around Christmas in 1995, appellant saw Tommy near Peggy Garner's apartment after 12 a.m. Tommy was in a car with a group of Hispanic people. Tommy stepped out of the car holding a VCR and some credit cards. Tommy showed Appellant the VCR and asked if he would like to buy some merchandise. Appellant knew that Gladney wanted a VCR, so he asked Tommy if he could take the VCR and sell it. Appellant also asked if he could take the car to Gladney's. Tommy let appellant take the car, VCR, and credit cards. Appellant knew the VCR was stolen and that he could sell it to make some money. (16 RT 2988-2992.)

Appellant drove to Gladney's apartment. He did not recognize the car at first, but when he got to Gladney's house and showed the credit cards to Mona Hall, who lived with Gladney, he saw a picture of a lady that looked like Avril. Appellant sold the VCR to Gladney for 40 dollars. Appellant also showed Gladney the credit cards. Gladney told appellant that Theresa Johnson would know how to use them. (16 RT 2992-2994.)

Appellant went back to the alley behind Garner's apartment and gave Tommy $30 of the $40. Appellant told Tommy that he knew someone who could use the cards, but that he needed to use the car because he did not want to walk because he had drugs on him. Tommy let appellant use the car. Appellant drove to Johnson's apartment. She was putting things away.

Appellant and Johnson smoked some cocaine because appellant thought that once she was high she would help him with the credit cards. (16 RT 2994-2997.)

Appellant showed the cards to Johnson, who said she knew how to use them. Johnson said that they needed a personal identification number (PIN) to use the ATM card. She looked through the cards and found a number on the back of one of them. (16 RT 2997-2999.)

Appellant then left Johnson's before using the cards because he had to meet Tommy. Tommy was not where they were supposed to meet, so appellant returned to Johnson's house and smoked more cocaine with her. (16 RT 2998.)

The two of them drove in Avril's car to a Hughes market. Appellant knew that the car was Avril's because he had seen her picture on one of the cards. He received the key to the car from Tommy. Appellant told Johnson to not leave any fingerprints in the car because it was stolen. They put socks on their hands.

At the market, Johnson initially withdrew $40 from the ATM using Avril's card. While appellant looked around the store for cigarettes and soda, Johnson withdrew an additional $240 from the machine and then gave the money to appellant. (16 RT 2999-3002.)

Johnson then said they should go to the 7-Eleven to withdraw more cash because there were no security cameras there. At the 7-Eleven, Johnson withdrew more money from the ATM with Avril's card. (16 RT 3002-3003.) They then returned to Johnson's house.

Appellant left Johnson's to find Tommy and give him some money. He found Tommy waiting for him. There were two other men with Tommy, but they remained in a car while Tommy spoke to appellant. Tommy asked appellant if he wanted a stereo and then took him to some nearby bushes where a stereo, bathrobe, camera, and other items were

hidden. Tommy told appellant that the items came from Avril's apartment. He said that they beat Avril, put her in the trunk, and then dumped the body in Malibu. (16 RT 3006-3008.)

Tommy and appellant put the stereo and other items into Avril's car. Appellant then drove the car back to Johnson's house and brought all of the items inside. Appellant smoked more cocaine to try and forget what Tommy told him about Avril. However, Appellant could not take it anymore and told Johnson what Tommy had said about beating Avril. Appellant was afraid that the police would trace the stolen items to Johnson and she would say that she got them from him. Appellant told Johnson that he heard that the lady was beaten and her body was dumped. Appellant was crying when he told her this. He said they were both "caught up" because they used the cards, so she could not say anything to anyone. Appellant did not threaten Johnson or complain about his hands hurting. (16 RT 3014-3019.)

Appellant remained at Johnson's house for awhile, then drove Avril's car to the Elk's Lodge. Appellant did not take a taxi from the Elks Lodge back to Johnson's. Instead, he went to a friend's house, but the friend was not home. Appellant also tried to go to Peggy Garner's apartment, but no one was home. Appellant sat on Mike Fontenot's step when he saw Tommy again. Tommy told appellant that they waited on Avril then things got bad. Appellant thought that Tommy also told him about slamming the trunk lid on Avril. (16 RT 3020-3023.)

Appellant was worried that Gladney would get caught with Avril's VCR, so he went and told Gladney not to take the VCR to a pawnshop. Appellant also told Gladney what Tommy had said about Avril. Appellant never told Gladney that he had killed somebody. Appellant did not know why Gladney and Johnson said that he told them he killed Avril. (16 3021-3023.)

Appellant gave his daughter the camera and the bathrobe. He left the stereo at Johnson's. Johnson sold the stereo when he was not there and gave appellant the money. Appellant had planned on taking the stereo to Los Angeles so that it could not be traced back to him. (16 RT 3025-3026.)

Appellant met Akers in jail. Akers sent appellant a note that said he knew something about appellant's case. Akers said that Gladney told him that he lied about a friend's involvement in a murder. Akers asked appellant to help him by lying in his case, but appellant refused. Akers still said he would help Appellant. Appellant had no idea why Akers helped him. He did not see or hear from Akers again until he testified in this case. (16 RT 3026-3028.)

Appellant did not know if Tommy killed Avril, he just knew that Tommy had Avril's property and gave it to appellant. Appellant did not see Avril get killed because he was not there. (16 RT 3023-3024.) He had never been to Arnold Road until the jury view in this case. He knew that selling Avril's property and using her cards was a crime, but he did not beat Avril, put her in the trunk, or dump her in a ditch. (16 RT 3029.)

C. Prosecution Rebuttal

Jeff Robinett knew Donald Thomas and Avril. He once helped Thomas carry Avril's groceries into her apartment and set up her stereo. Thomas never said anything about stealing from Avril, burglarizing her apartment, or participating in her murder. (16 RT 3147-3150.)

Romona Hall was a friend of Gladney's. Years ago, Gladney told her that appellant claimed to have beaten up a woman and put her body in the trunk of a car. Gladney did not say that the woman had been killed. (16 RT 3150-3155.)

On July 17, 1996, Detective Palmieri received a call on the Crime Tip phone line. A female caller said she had information regarding the murder of a lady on Dollie Street. The caller said that a female named Theresa,

who lived in one of the local hotels, had further information. Detective Palmieri found Theresa Johnson and spoke to her. Johnson told Palmieri about Gladney. (16 RT 3157-3164.)

Detective Palmieri found Gladney and met with him. Gladney told Palmieri about appellant's attempt to sell him a camera, his inquiry regarding a female that could help him use a bank card, and his claim that he had killed an old woman and dumped her body in a canal.[10] (16 RT 3165-3175.)

II. PENALTY PHASE

A. Prosecution Case

The first jury was unable to reach a verdict on the penalty phase. The prosecution retried appellant on the penalty phase. The second jury heard testimony of many of the guilt-phase witnesses and appellant's testimony from the guilt phase of the trial was read into the record. (32 RT 6131-6301.). The penalty phase testimony of each of these witnesses was substantially the same as their guilt phase testimony, therefore, their testimony is not summarized here. The prosecution also presented evidence about Avril, the impact of her death on others, and appellant's past violent conduct and criminal acts.

1. Appellant Admitted His Guilt

Deputy Anthony Bellissimo, of the Ventura County Sherriff's Department, was working in the Ventura County Jail on April 24, 1999. At approximately 5:30 p.m. he was walking appellant down a corridor of the jail when another inmate asked appellant how his case was going.

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[10] Gladney's statement to Detective Palmieri was admitted as a prior consistent statement for the sole purpose of assisting the jury in evaluating the credibility of Gladney's testimony. (16 RT 3166.)

Appellant replied that he was meeting with a psychologist, and that the District Attorney did not know it yet, but he was going to admit that he killed a 73-year-old lady. He said he needed to take responsibility for his actions, and if the jury decided to give him the death penalty, he could live with it. (32 RT 6122-6126.)

After appellant returned from his visit, his demeanor changed. He told Deputy Bellissimo, "I shouldn't have said that stuff in front of you guys. It could really mess up my case." Appellant asked the deputy to please not tell anyone what he said. Appellant said he was responsible for the victim's death, but that it was an accident. (32 RT 6126-6128.)

2. Evidence About The Victim

Janet Avril, the victim's daughter-in-law, gave some background about Ruth Avril. Ruth Avril was 73 years old when she was killed. She had worked for General Telephone for many years and retired when she was about 67. Ruth Avril was divorced, and she lived alone in an apartment in a tri-plex she owned in Oxnard. She had one son, Richard, but no other living family members. Richard usually visited his mother every Christmas. He last saw his mother around Christmas in 1994, the year before she was killed. (33 RT 6442-6447.) Janet bought her mother-in-law Christmas gifts every year. In 1995, Janet sent several gifts to Avril, including the bathrobe that Appellant gave to his daughter. (33 RT 6445-6446.) When Janet and Richard cleaned out Avril's apartment after she was killed, there were no gifts under the Christmas tree. (33 RT 6447.)

Maria Aragon knew Avril for 18 years. She first met Avril when she moved into Avril's apartment complex. Avril was very independent and lived alone. Avril was a very nice landlord who fixed problems quickly. Avril liked to do the gardening around the complex. Avril often went to the beach. Avril also liked to bake, sew, and do other crafts. She took two or

three short trips to San Diego every year. Aragon fed Avril's cat while she was gone. Avril also went to church on Sundays. (32 RT 6618-6630.)

Avril sent Christmas cards to Aragon every Christmas, including in 1995. Avril put out a flag on every Fourth of July. Aragon now had the flag and thought about Avril every time she put it out. (32 RT 6622-6624.)

Aragon last saw Avril on December 21, 1995. Avril looked at Aragon's grandson and smiled. Several days later, the police asked Aragon to look at photos of Avril. Avril's face was badly beaten. When Aragon found out that Avril was murdered, she felt angry, sad, and unsafe. She felt guilty for not checking on Avril on Christmas day like she always had in the past. Aragon attended Avril's funeral. (32 RT 6630-6644.)

Aragon learned the details about Avril's murder at the preliminary hearing. She thanked the man who found Avril because he did not let her body remain in the ditch. Hearing about how Avril died was very hard for Aragon. She was upset because she did not get a chance to say goodbye to her. She still thought of Avril every day. (32 RT 6643-6648.)

Some of the plants that Avril planted at the apartment complex were still there. The plants never bloomed when Avril was alive. However, in the summer of 1996, Aragon saw that the plants were in bloom. She remarked to her husband that Avril was still with them. Every January 1, the anniversary of when Aragon reported Avril missing, Aragon went to church to light a candle for Avril. (32 RT 6648-6650.)

3. Erania McClelland

Erania McClelland knew appellant for over 17 years. She was his girlfriend from 1975 until 1987 and they had a daughter together, Kenisha, who was born in 1981. Both McClelland and appellant were incarcerated after Kenisha was born, so they were not available to raise her.

Her relationship with appellant was on and off through the years. They had arguments and violent confrontations. They had an altercation

about twice a year. She suffered injuries, such as black eyes and bruises, to her face, eyes, and mouth, because appellant hit her. (33 RT 6373-6375.) McClelland told Investigator Fitzgerald that appellant would beat her up about ten times a year. (33 RT 6433.) On one occasion, appellant put a gun in McClelland's mouth because he was angry with her. (33 RT 6377-6378.)

In January 26, 1988, at approximately 10:45 p.m., McClelland was in a bar with a friend when appellant walked in. McClelland went outside with appellant. He wanted money from her. McClelland refused to give him any money and started to leave. Appellant told her, "You ain't goin' nowhere, bitch. Give it to me. How much you got?" Appellant punched her several times and McClelland ended up on the ground. Appellant stopped once he took $10 from her. McClelland sustained a black eye and a handprint on her face. McClelland called the police. (33 RT 6377-6383.)

Officer Ralph Nieves of the Oxnard Police Department responded to the scene. McClelland reported that she was the victim of a robbery. She said that she was out with a friend and came across appellant. Appellant asked her for money, but McClelland refuse to give him any. Appellant then started to punch her, slap her, and pull her hair. Officer Nieves observed swelling to the right side of her face, a cut above her lip, and abrasions to the right side of her face. (33 RT 6408-6412.)

4. Appellant's Violence Toward Family Members

Darlene McKinzie was appellant's sister. In January 1990, she lived in her parent's house with her sister Wylene, and her son. On January 28, 1990, she had an argument with appellant and he struck her. She may have thrown the first punch. The police were called. She told the police that appellant grabbed her by the neck and threw her across the room. She also told the police that her mother came into the room and that appellant turned and punched her in the face. (34 RT 6519-6523.)

Darlene told Investigator Fitzgerald that in 1986 or 1987, appellant tried to burn Wylene with an iron after she said something about Garner. He also hit, kicked, and pulled her hair in 1995. She told him that over the years, appellant had been physically violent with her and Wylene at least 20 times. (34 RT 6523-6526.)

5. Peggy Garner

Peggy Garner was appellant's girlfriend and had a child with him. In 1995 she lived in an apartment with her three sons, Ronald, Donald, and Kenneth, across the alley from Avril. During that time, appellant stayed at her apartment a couple of days a week. (34 RT 6538-6540.)

On May 16, 1995, Garner awoke the sound of glass breaking in the kitchen. She went to investigate and saw the kitchen window was broken and appellant was outside knocking on the door. Appellant said he broke the window because he thought she was inside with another man. She let appellant in, and he looked around the apartment. Garner testified that there was a little struggle, but denied that appellant hit her or grabbed her around the neck. She threw something -- it may have been an ashtray -- at appellant. (34 RT 6540-6546.)

Donald Bullard, Garner's son, testified that appellant broke into Garner's apartment through the kitchen window. Bullard opened the front door to the apartment and appellant entered asking where Garner was. When Garner entered the room, she swung an ashtray at appellant's head. Appellant tried to protect himself by holding Garner. He did not grab her around the neck or hit her in the face. Bullard and his brother, Ronald Thompson, tried to separate them. Appellant then left. (32 RT 6310-6314.)

Ronald Thompson, also Garner's son, testified that he heard glass break. He went into the kitchen to investigate and saw appellant coming through the kitchen window. Garner came into the kitchen too. Appellant

came into the apartment through the kitchen window. Appellant "struggled" with Garner, but he did not hit her. Appellant did not hit Thompson. Appellant never had his hands around Garner's neck. (34 RT 6555-6558.)

Officer Epps, of the Oxnard Police Department, responded to a domestic dispute call at Garner's apartment on May 16, 1995, at around 12:45 a.m. Garner said she was asleep and heard banging. Appellant yelled to let him in because he thought she had a man in the apartment with her. Appellant broke the dining room window. Garner opened the front door and appellant ran inside and began looking around to see if another man was inside. Garner tried to restrain appellant because the kids were sleeping. Appellant grabbed Garner around the neck and pulled on her arm. Ronald Thompson came in and tried to get appellant off of Garner. Appellant punched Thompson in the chin. One of the kids called the police. Appellant then ran into the apartment and locked himself in the master bedroom. (34 RT 6573-6577.)

On October 3, 1996, Garner wrote a letter to Carlos Garcia, appellant's parole officer, stating that she did not want appellant around her house and requesting that appellant only have a one hour supervised visit with his son each week. She was concerned for her son's safety. On October 25, 1995, she wrote another letter stating that she did not want appellant around her house or her mother's house. She claimed that appellant hit her oldest son, Ronald. She wrote that appellant could have visits with his son at her mother's house. (34 RT 6552-6553.)

6. The Attempted Robbery of Maria Garcia

On June 15, 1983, at approximately 10:30 a.m., Maria Garcia was inside the First Interstate Bank in Oxnard with her sister, Pauline. She cashed a $1,000 check and put the cash in her purse. While inside the bank, she noticed a man and woman watching her. Garcia recognized appellant

as the man. She walked out of the bank with her sister and went to her car. Pauline got into the drivers seat. As Garcia began to enter the passenger side of the car, she saw appellant running toward her. He ran up to her, hit her in the face a couple of times, and tried to grab her purse. Garcia would not let go of her purse. She scratched his face and tried to push him off of her. Appellant was unsuccessful in taking her purse, and he ran off. (34 RT 6592-6599.) Garcia remained afraid after the attack for several years. (34 RT 6601.)

7. The Robbery of Joel Epperson

Jon Snyder was the Inventory Management Assistant at the Ventura County Jail commissary on June 27, 1994. Inmates were called to the door to receive their commissary. He called the name "Joel Epperson." Appellant approached and showed Snyder an armband with Epperson's name on it. The armband did not appear to Snyder to be standard-issue. Appellant signed Epperson's name on the commissary slip. Snyder did not give appellant the commissary. Instead, Snyder told a deputy sheriff that appellant had a suspicious armband. (34 RT 6604-6610.)

One day, the real Joel Epperson received his commissary a day late. The next day, appellant approached him and said he picked up a felony charge trying to get Epperson's commissary. He demanded half of Epperson's commissary, threatening to kill him if he did not give it. Epperson gave appellant what he asked for and then told one of the deputies what happened. (34 RT 6612-6615.)

8. Appellant's Criminal History

Appellant was convicted of the following felonies: (1) auto theft on May 4, 1978; (2) attempted burglary on October 15, 1979; (3) the attempted robbery of Maria Garcia on June 12, 1983; and (4) possession of a controlled substance on June 24, 1994. (35 RT 6674-6675.)

B. Defense Evidence

1. Erania McClelland

The fights with appellant were mutual and she sometimes started them. She would hit appellant too. She never received any medical treatment for an injury from appellant. When she was pregnant with Kenisha, appellant treated her very well. He stayed with her and comforted her, and she thought he would be a good father. When appellant and McClelland were not available for Kenisha, appellant's mother raised her. McClelland still loved and cared for appellant. Kenisha also loved and cared for her father. Appellant was not a brutal man. (33 RT 6386-6401.)

2. Appellant's Family

Darlene McKinzie testified that she exaggerated to District Attorney Investigator Fitzgerald. Appellant did not touch Wylene with the iron, he only picked the iron up. At the time, she resented appellant because he had not given up drugs. She exaggerated to Investigator Fitzgerald because she thought appellant would get help for his drug problem. She loved her brother dearly. Appellant never injured her. (34 RT 6527-

Peggy Garner still loved appellant. He was good to her and a good father to their son. He took all of her kids to the park. Appellant's son still talked about his father almost every day. (34 RT 6546-6551.) Garner wrote the letters to appellant's parole officer because she was angry with appellant about the broken window. In November 1996, she wrote, "Disregard" on the October 3, 1996, letter. After the incident where appellant broke her window, she got back together with him. (34 RT 6553-6554.)

Ronald Thompson testified that appellant was like a father to him. His real father did not see him as often as appellant did. They went fishing and played sports together. Appellant told him to stay in school and do the

right things. Appellant told him about drugs. His real father did not do these things. Appellant was good to him and his brothers. He loved appellant more than he loved his own father. (34 RT 6559-6562.)

Donald Bullard also testified that appellant was like a father to him. Appellant never harmed him. Bullard had affection for appellant. (32 RT 6307-6310.)

Kenneth McKinzie, Sr., appellant's father, testified that appellant was a pretty good boy when he was growing up, but then he "started to get into things." (35 RT 6808.) He taught his son how to do concrete work. They went fishing together. He loved his son and supported him. Appellant was never disrespectful to his father. (35 RT 6808-6811.)

Betty McKinzie was appellant's mother. When appellant was a child, he was smart and helped her around the house. When appellant was growing up she took him to church. Appellant did hit her on one occasion, but she forgave him. That was the only time that appellant ever did anything like that. (35 RT 6811-6820.) Appellant told Betty that he had killed Avril. Appellant was crying when he told her and he said that he was sorry about what he had done. (35 RT 6819.) Betty visited appellant in jail every Wednesday. She loved her son and missed him. (35 RT 6820.)

3. Appellant's Testimony

Appellant admitted that he was responsible for Avril's death. During jury selection for the retrial, appellant heard the prosecutor ask a potential juror a question regarding an unintentional killing. Appellant tapped his attorney on the leg and whispered to him, "Would you believe if that [*sic*] somewhat what happened with me [?]" (35 RT 6826.) Appellant asked his attorney if he should tell the truth about what happened. His attorney replied that he should. (35 RT 6826.)

Appellant admitted that he lied to the court and the jury. He apologized for lying under oath. He lied because he was scared and he did

not want his family to know that he killed Avril. After he told his attorney that he did it, he asked for a visit with his parents so that he could tell them himself. Appellant asked God for forgiveness and he knows that he was forgiven. Appellant did not feel right telling the truth to God while lying to everyone else. (35 RT 6826-6830.) He felt he needed to make peace and tell the truth about what happened. He felt bad that Avril's life was cut short because of his mistake. Appellant spoke to the chaplain in the jail. (35 RT 6839-6841.)

Appellant was 39 years old. He completed the 10th grade. High school was hard, so he started to skip school. His mother put him in a special class, but he was embarrassed. He had to stop playing junior varsity football during mid-season because he was failing classes. He eventually stopped going to school and started using drugs such as marijuana and PCP. He sold PCP for three to four years until he went to prison in 1983. Appellant knew that he should have stayed in school and he told his kids to stay in school. (35 RT 6833.)

After appellant got out of prison in 1985, he started using cocaine. His sister picked him up from prison, brought him to her house, and smoked cocaine with him. He smoked cocaine every day from 1985 until he was arrested in this case. He used it because he liked it and it made him feel good. (35 RT 6836-6837.)

Appellant committed crimes in the past and had been to prison before. In 1978 he stole a car, in 1979 he attempted to break into a house, and in 1983 he tried to steal Garcia's purse and possessed cocaine. (35 RT 6841.)

Appellant admitted pushing his sister Darlene against the wall. He went to his mother's house to pick up a stereo. His mother told Darlene to clean up her room and Darlene "got smart" with their mother. Appellant went upstairs to speak with Darlene and she "got smart" with him. Appellant grabbed Darlene and shoved her against the wall. He did not

know if he grabbed her by the neck. Darlene was angry and struck appellant too. (35 RT 6842-6843.) Appellant denied trying to burn his sister, Wylene, with an iron. (35 RT 6843.)

Appellant also admitted breaking the window of Garner's apartment. (35 RT 6846.)

Appellant treated Garner's other sons like they were his own children. Appellant was proud of Ronald Thompson because he was going to college. (35 RT 6849.) Appellant felt bad because his son will grow up without a father. Appellant stained the name of his father and his son with his actions. (35 RT 6846.)

Appellant admitted that he tried to steal Garcia's purse. Appellant was at the bank with Erania and they saw Garcia receive a lot of money from the teller and put it in her purse. Appellant told Erania to get the car. He followed Garcia to her car and when she opened the car door, he grabbed her purse. When she would not let go of her purse, appellant ran away. Appellant was arrested, pleaded guilty, and went to prison for three years. (35 RT 6852-6854.)

Appellant admitted that he asked Deputy Bellissimo not to tell the district attorney what he said about killing Avril because his attorney had told him not to say anything until he let the court know that appellant was going to admit the crime. (35 RT 6855-6856.)

Appellant's testimony during the guilt phase of the trial was mostly lies. (35 RT 6869.) On the night of the murder, appellant had been staying with Garner across the alley from Avril's apartment. Appellant knew Avril and had talked to her in the past. He had been in her apartment and he and Donald Bullard had helped her set up her Christmas tree. (35 RT 6869-6871.)

Appellant wanted money so that he could buy Christmas presents for his children. Appellant went outside Garner's apartment to smoke a

cigarette. He was thinking about how he could get some money. He saw Avril's car in her garage because the garage door was open. He had heard that Avril had been robbed twice before and that she was an easy target. Appellant did not form a plan, but after he heard Avril's door open, he jumped and went into the garage next to hers. He took his socks off his feet and put them on his hands. When Avril went into her garage, appellant followed her. (35 RT 6871-6873.)

After Avril turned off the garage light, appellant grabbed her from behind and put his arm around her neck. Avril tried to make a sound, so appellant put his hand over her mouth, but Avril bit appellant's hand. Avril made a noise that scared appellant so he hit her several times. Appellant then grabbed Avril by the hair and hit her face on the concrete. (35 RT 6871-6876.)

Avril was unconscious on the floor of the garage. Appellant went toward the front of the garage to see if anyone saw him. While he was walking in the dark, he kicked the keys to Avril's car. Appellant picked up the keys and opened the trunk. He picked Avril up and put her in the trunk. Avril started to regain consciousness and raised her head up out of the trunk. Appellant tried to close the lid of the trunk but could not because Avril's head was in the way. He slammed the trunk down on her head and it closed. (35 RT 6876-6877.)

Appellant then drove Avril's car out of the garage. He noticed that he had her blood on his clothes. Appellant drove to his parent's house. (35 RT 6878.) When he arrived at their house, it was late and they were asleep. His mother answered the door. Appellant told her that he had been in a fight and got blood all over himself. Appellant changed into some clean clothes. He left the house and put the bloodstained clothes into a plastic bag then threw them in a dumpster near his parent's house. (35 RT 6878-6879.)

Appellant drove to Arnold Road, where he intended to leave Avril's body. Appellant recalled the exact route he used to drive to the Arnold Road location. He remarked that it was not the route the jury took during the trial. (35 RT 6879.)

When appellant arrived at the end of Arnold Road, he stopped the car and walked to the trunk. He opened the trunk and helped Avril get out. As Avril got out, her foot caught the edge of the trunk and she fell to the ground. Appellant let her fall. He heard the sound of tumbling, and then a splash. When he heard the splash, it did not occur to him that Avril was going to die. He did not know how Avril ended up in a ditch with water. He did not know there was water there. Appellant did not think that Avril was as hurt as she was and he did not think she was going to die. (35 RT 6881-6883.)

Appellant did not strangle Avril. He could never do anything to cause someone to die. He left Avril at the location because he wanted to get away from her. Appellant accepted responsibility for Avril's death, but he would not say that he killed her. (35 RT 6883-6884.)

Appellant left Arnold Road and drove back to Avril's apartment. He used Avril's keys to open the door. When he entered Avril's apartment, he initially wore socks over his hands so that he would not leave any fingerprints. He found gloves inside the apartment and put them on. Appellant found Avril's purse and took her driver's license, credit cards, and $800 in cash. (35 RT 6958-6959.) He took those items and Avril's VCR from the apartment and went to Gladney's house. Appellant wanted to sell the VCR to Gladney and buy some drugs from him. Gladney bought the VCR for $20 and a $40 piece of rock cocaine. (35 RT 6885-6887, 6950-6954.) Gladney told appellant that Theresa Johnson could help him use Avril's cards. (35 RT 6888, 6956.)

After leaving Gladney's house, appellant drove to Johnson's home. Appellant took the cards that he found in Avril's purse with him. He wanted to see if she could use the credit cards to obtain cash. Appellant told Johnson that he had the cards and asked her if she knew how to use them. Johnson asked him about a PIN number. On one of the cards was a number. They drove to some stores and obtained money using the cards and the number. Later, appellant told Johnson that he thought he might have killed someone. Appellant also told Gladney at a later time. (35 RT 6887-6890.)

Later, appellant went back to Johnson's house. The news was on the television and they were showing a ditch. Johnson told appellant that the lady had died. That was when appellant found out that Avril was dead. He was scared. He drove Avril's car to the Elks Club parking lot and left it there. After leaving the car, Appellant walked to a nearby liquor store and called a taxi. The taxi dropped him off at his parent's house, not Johnson's.

Donald Thomas had nothing to do with Avril's murder. Appellant decided to implicate Thomas when he saw in the discovery that Thomas's palm print was found in Avril's apartment. (35 RT 6992-6997.)

Appellant felt bad for what he did to Avril. Avril was a good person. (35 RT 6867, 6890.) Appellant knew that he would spend the rest of his life in prison with no hope of ever getting out. (35 RT 6859.) When Appellant told his mother that he did it, she asked him how he slept at night. He told her that he had nightmares almost every night. Both of his parents still love him. (35 RT 6864-6865.) He knew what he did was wrong. He hoped that his family would not stop loving him. Appellant was very sorry, but he could not undo what had been done. (35 RT 6896-6899.)

I. THE PROSECUTION DID NOT COMMIT MISCONDUCT BY PROVIDING TRANSCRIPTS OF OPEN COURT PROCEEDINGS TO A REPORTER; ANY ERROR WAS HARMLESS

Appellant contends that the lead prosecutor, Deputy District Attorney Donald Glynn, improperly leaked a story to a newspaper reporter during *Hovey*[11] qualification of the second jury regarding his desire to introduce evidence that appellant had threatened to harm him. (AOB 57-87.) He argues that the prosecutor's action constituted misconduct that denied him his rights to due process, jury trial, and a reliable determination of the penalty. (AOB 57.) Respondent disagrees. Appellant has not demonstrated that the prosecutor's release of publicly available information to a reporter "comprise[d] a pattern of conduct 'so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) Further, appellant was not prejudiced by the prosecutor's actions. Accordingly, appellant's claim is meritless.

A. Relevant Facts

On April 21, 1999, after the *Hovey* qualification examination of a prospective juror ended and that juror left the courtroom, appellant exclaimed, "I'll tear his head off," referring to Glynn. (25RT 4899.) Appellant's statement was overheard by Sheriff's Deputies. Appellant was upset because he felt that the prosecution was disrespecting him by repeatedly referring to him as "that man."

The court later made the following record regarding what occurred:

> As one juror was on the – was leaving and we were waiting for the next one to come in, Mr. McKinzie, in a voice audible to me at the bench, at counsel table there was used some kind of phrase about socking Mr. Glynn, and "I have got nothing to lose." And

[11] *Hovey v. Superior Court* (1980) 28 Cal.3d 1

then there were some very aggressive comments apparently made in the lockup area and during the break.

(25RT 4907.)[12] The court then ordered the prosecutors to not refer to appellant as "that man" over Glynn's objection. (25RT 4911.)

On April 26, 1999, the prosecution filed a Third Amended Notice of Proposed Evidence in Aggravation that included an additional item of evidence, namely appellant's "threat of force or violence" against Glynn. (3CT 715-716; 28RT 5606.) That day, the defense asked the court for a tentative ruling on the new item of proposed evidence in aggravation. Glynn argued that he was entitled to a hearing on whether appellant's statements were admissible. The court indicated that its tentative ruling was to exclude the evidence, but set the matter for a hearing on April 30, 1999. (28RT 5608.)

On April 27, 1999, the Ventura Star-Press published an article written by reporter Amy Bentley entitled "Prosecutor to Use Courtroom Threat Against Murderer." (2 Clerk's Transcript of Court's Exhibits 500.) The article stated that appellant threatened to rip off a prosecutor's head. It also reported that the prosecution intended to use appellant's threat as evidence that appellant was "a violent person who should be put to death." (2 Clerk's Transcript of Court's Exhibits 500.) The article provided further details regarding appellant's threat and the events that led up to it. The article cited "court transcripts" as the source of the information. (*Id.*)

Defense counsel brought the article to the attention of the court the same day it was published. (29RT 5610.) He informed the court that Bentley had been in the courtroom the previous day and spoke to the bailiff.

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[12] Argument IV, below, contains a more detailed summary of the events surrounding appellant's outbursts.

The bailiff then spoke to Glynn. Glynn handed a transcript to the bailiff, who then gave the transcript to Bentley. (29RT 5612-5613.)

Glynn admitted providing a copy of the transcript to Bentley. He said the reporter had asked him if anything was going on in the trial and he "directed her to the appropriate day of the transcript." (29RT 5640.)

Defense counsel James Farley argued that Glynn had acted intentionally, knowing that he would not be able to introduce the evidence of appellant's alleged threats at trial. (29RT 5641.) Defense counsel Wiskell asked for the court to take a week off to allow "cooling off." (29RT 5642.) Counsel stated:

> I'm not asking for a mistrial. I'm not asking to do jury selection over again. I'm not asking for any of those things because, quite frankly, I think those things are not – are not proportional. And I don't think there's been any actual showing, which is what [the court is] saying, of prejudice to [appellant]. But that's ... one side of the equation. [¶] What do you do about a deliberate intent to prejudice [appellant]? What do you do about that?

(29RT 5644.)

Glynn denied doing anything wrong or unethical. He stated that the reporter called him and asked if anything was happening in the case. He directed the reporter to read the transcript of the open court proceeding and told her he was going to file an amended notice of factors in aggravation. (29RT 5645.) The reporter asked if she could borrow Glynn's copy of the transcript. Glynn gave her a copy of the transcript and a copy of the amended notice that had been filed. (29RT 5644-5645.) Glynn noted that he was not quoted in the article and that he did not have any conversation about what was going on with the reporter. The reporter did not ask him any questions after reading the documents. (29RT 5645.)

Defense counsel Farley suggested that the court should inquire of all the prospective jurors if they had read the article. If so, counsel and the court would have the opportunity to speak to those jurors in private in order

to determine if reading the article would affect their ability to sit on the case. (29RT 5646.)

The court acknowledged that the reporter could have obtained the same information through other sources, but stated that was not what happened. The court said Glynn "showed very poor judgment" by calling the reporter's attention to the incident. (29RT 5649.) The court noted that Glynn did not tell the reporter that the issue of the admissibility of appellant's statements was unresolved. (29RT 5649.)

Later that same day, Glynn said he wanted to clarify his earlier claim that he had been contacted by the reporter. Glynn stated that he called the reporter initially and left her a message, then the reporter returned his call. Glynn said he did not want to mislead the court as to what occurred. The court replied, "So in other words, you felt the need to have this matter appear in the newspaper, is that it?" Glynn responded that he communicated with Bentley frequently, and that he just directed her attention to what occurred in open court. (29RT 5656.)

At the end day, as both sides were arguing the admissibly of appellant's threatening statement, defense counsel Wiskell stated that he believed Glynn's actions constituted misconduct. Wiskell requested:

> I think you should find there was misconduct and say it on the record, that that was just wrong and unethical. I don't know what else you can do. You cannot put him in the corner, but I think there should be some judicial displeasure ...."

(29RT 5803.)

The court stated that he did not know if it was wrong for the prosecution to alert the press to something that was already public information. However, the court was troubled that Glynn had brought in completely unnecessary issues into the case. (29RT 5804.) The court did not find that Glynn had committed misconduct; but stated that if Glynn's

actions were intended to prejudice the jury, he would be subject to "significant discipline." (29RT 5805-5806)

The court ultimately excluded the evidence regarding appellant's threats. The court ruled that in its view, appellant was "blowing off steam" more than making a threat. In addition, the prosecution would have difficulty proving all of the elements of criminal threats (§ 422). Further, under Evidence Code section 352, there was a danger of undue confusion to the jury and an undue consumption of time if the evidence was admitted. Finally, the court stated, "I would probably keep it out as a sanction for the People's action in orchestrating the newspaper article, even if I felt that it wasn't otherwise inadmissible." (30RT 5807-5808.)

The court stated that he felt that Glynn had acted improperly. The court noted that Glynn should have known that the admissibility of the evidence was "highly questionable and would be strongly contested." (30RT 5809.)

Glynn responded that he believed it was an open courtroom and that Bentley had every right to read the transcript. Glynn stated that he believed the public needed to know "the type of rulings that [the court was] making with respect to shackling a dangerous, convicted murder" and that is why he alerted Bentley to that particular portion of the transcript. (30RT 5810.)

The court replied that it did not know that was Glynn's reason for providing the information to the reporter, and that the court had not asked Glynn his reason earlier. However, the court stated that the outcome was the same. (30RT 5810.) According to the court, Glynn should have, at the least, told the reporter that the admissibility of the evidence was contested. The court concluded by stating Glynn had exercised bad judgment. (30RT 5811-5812.)

B. Glynn's Actions Were Not So Egregious That They Infected the Trial With Unfairness as to Make the Resulting Verdict a Denial of Due Process

A prosecutor's conduct violates a defendant's constitutional rights when the behavior comprises a pattern of conduct so egregious that it infects "the trial with unfairness as to make the resulting conviction a denial of due process. " (*Darden v. Wainwright* (1986) 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144.) The focus of the inquiry is on the effect of the prosecutor's action on the defendant, not on the intent or bad faith of the prosecutor. (*People v. Crew* (2003) 31 Cal.4th 822, 839.) Conduct that does not render a trial fundamentally unfair is error under state law only when it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

Here, the prosecution disclosed the transcript of open court proceedings along with the Third Amended Notice of Proposed Evidence to a reporter. Both of those documents were public records. (30RT 5811.) Appellant has not demonstrated that the prosecutor's disclosure of public records was so egregious that it infected the trial with unfairness as to make the death verdict a denial of due process. (*Darden v. Wainwright*, *supra*, 477 U.S. at p. 181.) Nor has appellant shown that Glynn's actions were a deceptive or reprehensible attempt to persuade the jury. (*People v. Espinoza*, *supra*, 3 Cal.4th at p. 820.)

Glynn readily admitted that he provided the documents to the reporter; he did not attempt to hide his conduct from the court. The court found that Glynn exercised poor judgment, but it did not find that Glynn committed misconduct. (29RT 5804-5805; 30RT 5811.)

Appellant cites Rules of Professional Conduct, [Former] Rule 7-106, which was in effect at the time, as support for his argument. However, the

rule states that an attorney "shall not communicate directly or indirectly with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case." This rule is clearly inapplicable here because Glynn did not communicate with any prospective juror either directly or indirectly.

The primary case cited by appellant, *People v. Brommel* (1961) 56 Cal.2d 629 is also distinguishable from the present case. First, in *Brommel*, the court reversed the defendant's murder conviction because the trial court erroneously admitted into evidence the defendant's involuntary confessions. (*Id.* at pp. 631-634.) The court *did not* reverse the defendant's conviction due to the prosecution's disclosure of the defendant's statements to a reporter. *Ibid.* Instead, in dicta, the court stated that:

> During the course of the trial the district attorney released to the press copies of the confessions and admissions of defendant before they were admitted into evidence by the court, and even before they had been made available to defendant and his counsel. The obvious impropriety of this conduct is only emphasized by the fact that we have now determined that these statements were inadmissible against defendant on the trial. Prosecuting officers owe a public duty of fairness to the accused as well as to the People and they should avoid the danger of prejudicing jurors and prospective jurors by giving material to news-disseminating agencies which may be inflammatory or improperly prejudicial to defendant's rights.

(*Id.* at p. 636.) However, the court did not state that the prosecutor's actions constituted misconduct, or that the prosecutor's conduct warranted reversal. (*Ibid.*) Thus, *Brommel* does not support appellant's argument here that his conviction should be reversed.

Further, the prosecutor in *Brommel* released confessions and admission of the defendant that were not public record, and that had not been made available to the defense; whereas here, everything that Glynn

provided to the reporter was public record and could have been obtained by the reporter even without Glynn's assistance.

Appellant also speculates that Glynn provided the transcripts to the reporter because he was engaged in a "grudge match" with Wiskell and did not want to lose a second trial to him. (AOB 80-82.) Appellant's contention is pure speculation and is not supported by anything other than the fact that the two attorneys had tried another capital case just before this one where the jury returned a verdict of life without the possibility of parole. (AOB 80-81.) Appellant's speculation does not demonstrate that Glynn committed misconduct in this case, or acted with improper motive in providing the reporter the transcript.

Accordingly, appellant cannot demonstrate that Glynn's conduct so infected the trial with unfairness as to make the resulting death verdict a denial of due process. (*Darden v. Wainwright*, *supra*, 477 U.S. at pp. 181-182.) Thus, appellant's death sentence must stand.

C. Appellant Was Not Prejudiced By Glynn's Actions

In any event, regardless of whether Glynn's conduct constituted misconduct, appellant was not prejudiced. Appellant admits that none of the 12 jurors seated for the trial of the penalty phase actually read the article. (AOB 82.) Only one alternate juror stated that she had read "partway into" the article before realizing it was about this case. (30RT 5912.) Since none of the jurors that rendered the death verdict saw the article, appellant cannot show that his trial was unfair.

Appellant claims that even though none of the jurors deciding the case saw the article, he was still prejudiced because Glynn's conduct deprived him of a "fair opportunity to evaluate jurors who may have been qualified to server but for their exposure to coverage in the media." (AOB 82.) However, appellant's attorney at trial did not feel that the conduct was severe enough to request a mistrial. Counsel stated:

> I'm not asking for a mistrial. I'm not asking to do jury selection over again. I'm not asking for any of those things because, quite frankly, I think those things are not – are not proportional. And I don't think there's been any actual showing, which is what [the court is] saying, of prejudice to [appellant].

(29RT 5644.)

Further, as appellant notes, several prospective jurors had been exposed to other media coverage of the trial. (AOB 83-84.) Appellant does not allege that the earlier media coverage was a result of prosecutorial misconduct. Nor does he allege that the prospective juror's exposure to the media coverage rendered his trial unfair. The defense had the opportunity to question jurors regarding their exposure to media coverage of the trial, and challenge those jurors that were unduly influenced. (29RT 5646; see *Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 733 (where prosecutor disclosed her files to the producers of a film about the defendant, the court stated, "if in fact the jury pool in this case has been affected in any way by the release of [the film], this is a matter that can be handled during voir dire through the close questioning of individual prospective jurors.")

Finally, the trial court admonished all of the prospective jurors as follows:

> On Tuesday of this week in the Ventura County Star, there was an article about this case. Undoubtedly, some of you are aware of this article and some of you have read it, and as you're reading it, it dawns on you and kicks in what I told you earlier not to read anything about this case.
>
> I'm not trying to put any of you on the hot seat if you may have read it or heard about it or glanced at it, but to make a very strong point here, as sometimes happens in the course of matters making their way from the actual event to the newspaper, there is a major inaccuracy in the article about this case about what – what evidence is likely to be in the penalty phase of this case.
>
> So this inaccuracy bears directly on what you're going to be hearing as jurors, and it's crucial that it be disregarded if you

know what was printed there. And it's also crucial that you avoid any temptation to go back and read what it was and avoid any future coverage.

There will be coverage of this case undoubtedly in the papers, on the radio, perhaps even the local TV as we actually get into the presentation of evidence.

I'm going to need to know briefly if you know about the article, if you read it and whether it's affected your outlook on this case. If you feel that's of enough concern that it might have affected your views, then we'll probably talk to you more privately about that, again not for the purpose of calling you on the carpet for the fact that you saw it. It's just very important that we know what you saw and you feel about it.

And I can't stress enough that there's an affirmative, direct, substantial inaccuracy in the article, and it happens at times, and that's why we need to – that's a particular reason why we need to address it.

(30RT 5845-5846.)

The trial court's admonishment cured any potential prejudice. It is assumed the jury followed the admonishment and that prejudice was therefore avoided. (*People v. Jones* (1997) 15 Cal.4th 119, 168.)

Appellant contends that the court's additional admonition in response to a question from prospective juror Horan undercut the admonition. (AOB 85.) On the contrary, the court's admonition in response to prospective juror Horan's inquiry reinforced the prior admonition. The court stated:

> The particular area is what the article said about what evidence the jury is going to hear in the penalty phase. It's not accurate. It's not going to happen as stated in the article. And that's because the events did not happen as stated in the article to some extent.

(30RT 5847.) Thus, the court reiterated that the article was inaccurate. The fact that the court stated the events did not occur as reported "to some extent" did not convey to the prospective jurors that the story was to some

extent true. The court repeatedly stated that the article was inaccurate and was to be disregarded. (See *People v. Zapien* (1993) 4 Cal. 4th 929, 994 ("[t]he presumption of prejudice may be dispelled by an admonition to disregard the improper information") Moreover, the trial court instructed the jury with CALJIC Nos. 1.00 and 1.03, which instructed the jury that it "must determine the facts from the evidence received in the trial and not from any other source," and that it must not independently investigate the facts. (2CT 358, 362.)

Accordingly, even if Glynn's actions constituted misconduct, appellant cannot show prejudice because none of the jurors that rendered the verdict read the newspaper article and the court's admonition cured any error. Thus, appellant's claim must be rejected.

II. THE PROSECUTION EXERCISED ITS PEREMPTORY CHALLENGE IN A RACE-NEUTRAL MANNER

Appellant contends that the trial court violated his right to trial by a jury drawn from a representative cross-section of the community as guaranteed by the Sixth Amendment to the United States Constitution and Article I, section 16 of the California Constitution by granting the prosecutor's peremptory challenge to exclude an African-American juror for purportedly racially motivated reasons. Appellant further asserts that the trial court's ruling violated his federal constitutional right to due process and equal protection of the laws under the Eighth and Fourteenth Amendments. (AOB 57-67.) Appellant's argument lacks merit because the record shows that the prosecution had race-neutral reasons for excusing the juror, and the trial court made findings to this effect.

A. Factual Background

Prior to commencing selection of the first jury, the defense requested that the prosecution be required to justify any peremptory challenges to

African-American jurors before they exercised the challenge. (10RT 1923-1925.) The defense made this request due to the small number of African-Americans on the panel.[13] (10RT 1923-1924.) The trial court denied the request. However, the prosecution agreed to approach the bench whenever the People intended to exercise a peremptory on an African-American juror. (10RT 1926.)

The prosecutor, Donald Glynn, later indicated that he intended to exercise a peremptory on prospective juror Kelvin Smith, an African-American. At sidebar, defense counsel objected under *People v Wheeler* (1978) 22 Cal.3d 258, 276-277. (10RT 1983-1984.) In support of the defense motion, counsel argued that although this was the prosecution's only peremptory challenge of an African-American, none of the facts revealed during voir dire constituted legitimate, race-neutral reasons for the prosecutor to exercise a peremptory challenge on Mr. Smith. Defense counsel stated, "Well, I don't think under *Wheeler* that there's been a systematic exclusion of Blacks seeing as how he's the only one we've dealt with. So I can't say that I made a prima facie case. However, defense counsel asserted that Mr. Smith stated that he could be fair, had applied for the police department in 1983, and was "an 8 on the chart for capital punishment." (10RT 1984.)

After the court reviewed Mr. Smith's juror questionnaire, the following exchange occurred:

> The Court: Okay. I find no prima facie case. I do see an issue with Mr. Smith based on the questionnaire and what I recall of his statements earlier. But in an abundance of caution, I'd like the People to state their reasons for the record.

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[13] Defense counsel Wiskell stated that there were "only three, possibly four[,] that are in the 72" prospective jurors on the panel. (10RT 1923-1924.)

Mr. Glynn: Are you finding – making a prima facie finding?

The Court: No. I'm making clear that I'm not. But I would just like to make the record even clearer.

Mr. Glynn: Okay. As starters, Mr. Smith was convicted in 1997 of domestic violence. He's been married for three years but is currently separated from his wife and has been separated for about one month.

The evidence that we will offer in the penalty phase of this case involved the defendant in battering a number of women, including his mother, his sisters and the woman who mothered one of his children – or – yeah, one of his children. So the same issues are involved there. Mr. Smith, as I say, was convicted of domestic violence.

His lifestyle does not particularly thrill me. He put down as spending his spare time playing basketball, darts, and dancing, so he doesn't seem to have a whole lot of depth in areas that I would deem to be important.

Let's see. He also had a bad experience with the police that he told us about. Unfortunately, I didn't write it down, but he checked in the questionnaire that he had a bad experience regarding a traffic stop.

I also note that when he was charged with a domestic violence, that Jorge Alvarado was his attorney, whom I happen to know, and I believe that he actually fought the charge rather than pled guilty to it.

From his personal experience – or personal appearance and attitude, he kind of swaggered into the court, and he's very tall, athletic fellow. And when he was questioned by the Court and counsel, he sat there with his – his chin on his palm of his hand, resting his elbow on the arm of the chair, which seemed to be kind of a disrespectful attitude toward the whole process and the seriousness of this trial that we're coming into, and I put down on my notes that he seemed to have a bad attitude. So for all of those reasons, I exercised a peremptory.

> The Court: Okay. And had I found a prima facie case, I'd be finding those reasons adequate and highlighted by Mr. Smith's own brush with the law.

(10RT 1985-1986.)

B. Applicable Law

Under California law, both the prosecution and defense are entitled to 20 peremptory challenges of prospective jurors in the trial of an offense punishable by death or life imprisonment. (Code Civ. Proc., § 231.) While peremptory challenges are intended to allow parties to reject a certain number of jurors for any reason at all, both the state and federal Constitutions prohibit the use of peremptory challenges to exclude prospective jurors on the basis of race or ethnicity. (*People v. Wheeler, supra*, 22 Cal.3d at 276-277; *Batson v. Kentucky* (1986) 476 U.S. 79, 89 [106 S.Ct. 1712, 90 L.Ed.2d 69].)

A *Batson/Wheeler* motion initiates a three-step process. "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.]" (*Johnson v. California* (2005) 545 U.S. 162, 168, [25 S.Ct. 2410, 162 L.Ed.2d 129], fn. omitted.)

"Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.]" (*Johnson v. California, supra*, 545 U.S. at p. 168, fn. omitted.) These reasons must relate to the particular individual jurors and to the case at issue. (*People v. Alvarez* (1996) 14 Cal.4th 155, 197.) "'But the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause.'" (*People v. Williams* (1997) 16 Cal.4th 635, 664, internal quotations omitted.) "Rather, adequate justification by the prosecutor may be no more than a 'hunch' about the prospective juror

[citation], so long as it shows that the peremptory challenges were exercised for reasons other than impermissible group bias." (*Id.*) In this second step, the appellate courts "rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 282.)

"Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]" (*Johnson v. California*, *supra*, 545 U.S. at p. 168.)

Ordinarily, a trial court's denial of a *Batson/Wheeler* motion is reviewed deferentially, considering only whether substantial evidence supports its conclusions. (*People v. Bonilla* (2007) 41 Cal.4th 313, 341.)

Peremptory challenges may be based on a juror's manner of dress, a juror's unconventional lifestyle, a juror's experiences with crime or with law enforcement, or simply because a juror's answers on voir dire suggested potential bias. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 275.) Peremptory challenges may be predicated on evidence suggestive of juror partiality that ranges from "the virtually certain to the highly speculative." (*Ibid.*)

C. Legal Analysis

In this case, the trial court made a finding that defense counsel had not established a prima facie case "that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.]" (*Johnson v. California*, *supra*, 545 U.S. at p. 168, fn. Omitted; 10RT 1985.) Further, after the court found that the defense did not establish prima facie case, the prosecutor, at the direction of the court, explained his race-neutral reasons

for exercising a peremptory challenge on Kelvin S.[14] The prosecution cited Kelvin S.'s conviction for domestic violence, his marital situation, his negative experience with law enforcement, and his demeanor as the reasons for the peremptory challenge. (10RT 1985-1986.) Thereafter, the trial court denied appellant's motion. (10RT 1986.)

The trial court's ultimate decision to deny the *Batson/Wheeler* motion is supported by substantial evidence. The prosecutor stated that Kelvin S. was convicted of domestic violence. Based on this criminal history, the prosecutor had a valid race-neutral reason for excusing him. (*People v. Panah* (2005) 35 Cal.4th 395, 442; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 277, fn. 18.) In addition, the prosecutor cited his marital situation, his negative experience with law enforcement, and his demeanor as the reasons for the peremptory challenge. These factors clearly constituted race-neutral reasons for excusing him. In sum, as the trial court found, Kelvin S.'s exclusion was not based on discriminatory reasons.

Lastly, appellant asserts that the trial court failed to evaluate the prosecutor's justifications and compare them to other jurors retained by the prosecution to determine if the reasons given actually prompted the prosecutor's exercise of the peremptory challenge. (AOB 94-102.) Appellant did not request the trial court to conduct a comparative juror analysis. (10RT 1984-1986.) Thus, appellant's argument fails because this Court has held that it is not required to undertake a comparative juror analysis for the first time on appeal where the trial court finds that the defense failed to make out a prima facie case. (*People v. Bell* (2007) 40

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[14] Although the court asked the prosecutor for his reasons, the question whether a prima facie case was made was not mooted, nor was a finding of a prima facie showing implied. (*People v. Boyette* (2002) 29 Cal.4th 381, 422; *People v. Welch* (1999) 20 Cal.4th 701, 746.)

Cal.4th 582, 600-601; *People v. Bonilla, supra*, 41 Cal.4th at pp. 349-350.) As stated by this Court:

> [T]his is a "first-stage" *Wheeler/Batson* case, in that the trial court denied [appellant's] motion[] after concluding he had failed to make out a prima facie case, not a "third-stage" case, in which a trial court concludes a prima facie case has been made, solicits an explanation of the peremptory challenges from the prosecutor, and only then determines whether the defendant has carried his burden of demonstrating group bias. [This Court has] concluded that *Miller-El v. Dretke* (2005) 545 U.S. 231 [125 S.Ct. 2317, 162 L.Ed.2d 196] does not mandate comparative juror analysis in these circumstances (*People v. Bell, supra*, 40 Cal.4th at p. 601 ...), and thus [this Court is] not compelled to conduct a comparative analysis here. Whatever use comparative juror analysis might have in a third-stage case for determining whether a prosecutor's proffered justifications for his strikes are pretextual, it has little or no use where the analysis does not hinge on the prosecution's actual proffered rationales, and [this Court should] thus decline to engage in a comparative analysis here.

(*People v. Bonilla, supra*, 41 Cal.4th at pp. 349-350.)

Here, the trial court, in denying the motion, sufficiently explained its reasons for doing so, stating that it did not find that the defense had made a prima facie showing, and in any event, that the proffered reasons given by the prosecution were "adequate and highlighted by [Kelvin S.]'s own brush with the law." (10RT 1986.).) Accordingly, there was no *Batson/Wheeler* error. Therefore, appellant's claim should be denied.

III. THE TRIAL COURT PROPERLY EXCUSED NINE PROSPECTIVE JURORS FOR CAUSE WHOSE VIEWS ON THE DEATH PENALTY SUBSTANTIALLY INTERFERED WITH THEIR ABILITY TO FUNCTION AS JURORS

Appellant contends that the trial court's excusal of several prospective jurors for cause based on their death penalty views violated his rights to a fair and impartial jury and to due process. (AOB 103-128.) Specifically,

appellant argues that nine prospective "life-prone" jurors were wrongly excused, while one "death-prone" juror was wrongly retained in the jury pool. *Id.* Respondent disagrees.

A. Applicable Law

The proper standard for exclusion of a juror based on bias with regard to the death penalty is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]; see also *People v. Ghent* (1987) 43 Cal.3d 739, 767 [adopting the *Witt* review standard in California].)

This standard does not require that a juror's bias be proved with "unmistakable clarity." (*Wainwright v. Witt, supra,* 469 U.S. at p. 424.) To the contrary, as this Court has recognized, "frequently voir dire examination does not result in an 'unmistakably clear' response from a prospective juror, but nonetheless 'there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.'" (*People v. Ghent, supra,* 43 Cal.3d at p. 767, citing *Wainwright v. Witt, supra,* 469 U.S. at pp. 425-426.)

In applying this standard, "where equivocal or conflicting responses are elicited regarding a prospective juror's ability to impose the death penalty, the trial court's determination as to his true state of mind is binding on an appellate court." (*People v. Ghent, supra,* 43 Cal. 3d at p. 768; see also *People v. Jones* (1997) 15 Cal.4th 119, 164, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800 [same].) If there is no inconsistency, "the trial court's judgment will not be set aside if it is supported by substantial evidence." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1285.)

B. Analysis

Here, as to each excused prospective juror, substantial evidence supports the trial court's finding that the juror's views on the death penalty would "prevent or substantially impair" the juror's performance. (*Wainwright v. Witt, supra*, 469 U.S. at p. 424.)

1. Francis T.

During oral voir dire, Francis T. was asked by the court if she could be fair in this case as to the penalty. Francis T. replied, "I don't really know that – I don't know. I don't know that I could make a decision that would go one way or the other." She also stated that she did not know if she would be comfortable with giving the death penalty. (28 RT 5530.)

When asked by the defense if she could consider the death penalty in this type of case, she responded, "[I]t's not that I don't – wouldn't consider it. I just don't know if I personally, as myself, could make a decision like that. I don't know what my feelings would be about having made a decision that so impacted someone's life and death." (28 RT 5533.)

She later stated in response to questioning by the prosecution that, "[M]y feeling right now is it would be extremely difficult for me to do that. I don't know if I could do it, but if I had to say yes or no, if you really needed a yes or no right this very moment, I would say no, I couldn't do it." (29RT 5541.)

The prosecution challenged Francis T. for cause. The defense argued that Francis T. indicated that she did not know whether she would vote for death or life in prison without the possibility of parole. (29RT 5542.) The court excused Francis T. for cause, finding: "I feel that she cannot assure us in any way that she could ever vote for it and that she said similar

things in the questionnaire as well. And so the challenge is granted. (29RT 5543.)

The trial court's determination that Francis T. could not assure the court that she could ever vote for the death penalty is supported by the record. She repeatedly indicated that she did not know if she could personally impose the death penalty, even though she believed it was an appropriate punishment for certain crimes. Francis T. gave conflicting and ambiguous responses regarding her views on the death penalty and whether she could vote to impose it. To the extend Francis T. gave conflicting answers, the trial court resolved those differences adversely to appellant by granting the challenge. (*People v. Harrison* (2005) 35 Cal.4th 208, 227-228 [court properly excused juror who said that "maybe" she could not impose the death penalty and later said it would be "very, very difficult" but that she could "probably do it"]; *People v. Ayala* (2000) 24 Cal.4th 243, 275 [because the potential juror's answers were "inconsistent, but included testimony that she did not think herself capable of imposing the death penalty, we are bound by the trial court's determination that her candid self-assessment showed a substantially impaired ability to carry out her duty as a juror"].) Accordingly, substantial evidence supported the trial court's excusal of Francis T. for cause.

2. Edwin T.

On his juror questionnaire, Edwin T. indicated that he did not believe in the death penalty. (13CT 3709.) He also indicated that the death penalty should be imposed for a "serial killer." (13CT 3709.) He indicated that his view on the death penalty changed "when a death penalty man [was] found to be innocent." (13RT 3709.) On a scale of 1 to 10, with 10 being strongly in favor of having a death penalty law, and 1 being strongly

against having a death penalty law, Edwin T. indicated that he was an "8" in favor of having a death penalty.

During voir dire, Edwin T. stated that what he wrote in the juror questionnaire was a fair indication of what he believed. (13RT 5580.) He explained his answer on the questionnaire that he did not believe in the death penalty as follows: "It would have to be extreme cases. The only thing I could say is like murder and child molestation, serial, that I firmly believe in the death penalty." After the court informed Edwin T. that this case did not involve child molestation or multiple murders, he stated that he would do his best to be open-minded, but that "It would be pretty hard to ask for the death penalty for me, yes, if it . . . wasn't an extreme case." (13RT 5581.) In response to questioning from the prosecution, Edwin T. also stated that in most instances, he would not impose the death penalty for a single murder. (13RT 5585.) Edwin T. maintained his position throughout questioning by the defense. The court granted the People's challenge for cause.

Here, substantial evidence supported the trial court's excusal of Edwin T. for cause. Edwin T. gave conflicting answers regarding his views on the death penalty, initially indicating that he was against it, but then stating it could be imposed in "extreme cases." (13CT 3709; 13RT 5581.) Edwin T.'s responses showed a strong preference against the death penalty, and the trial court properly excused him for cause. (*People v. Bradford*, (1997) 15 Cal.4th 1229, 1320 and cases cited therein [for-cause excusal proper even though the juror could vote for death in "specified, particularly extreme cases"].)

To the extent Edwin T. gave conflicting answers the trial court resolved those differences adversely to appellant by granting the challenge; and, because the trial court's determination as to Edwin T.'s true state of

mind is supported by substantial evidence, it is binding on this Court. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1114-1115.)

3. Francis R.

In her juror questionnaire, Francis R. indicated that she did not have feelings one way or the other regarding the death penalty. Her response to the question, "Do you believe the death penalty serves any purpose?" was "Yes. It puts a person to death." (12CT 3389.) She indicated that she was not sure for what kinds of crimes the death penalty should be imposed. (*Id.*)

During voir dire, Francis R. stated that she was undecided about the death penalty and that she felt that she would have a hard time imposing it. (29RT 5661.) She stated that if she was able to vote on the legality of the death penalty in an election, then she would probably vote against it. She also stated that she would have a hard time as a juror voting for the death penalty even for a heinous crime. (29RT 5661-5662.) However, in response to questions by the defense, she stated that she was not 100 percent opposed to capital punishment. (29RT 5663.) The prosecution followed up on this response and asked what she envisioned the appropriate case to be. Francis R. replied that in cases involving a serial killer, death may be appropriate. She did not know if the death penalty was appropriate for someone that committed a single murder. (29RT 5668.) Francis R. stated that in this case, she probably could not vote to impose the death penalty. (29RT 5670-5671.) Later, Francis R. indicated that if she had to, she could vote for the death penalty depending on the situation. However, she again stated that she would rather not make the decision as to whether or not to impose the death penalty. (29RT 5675-5676.) Francis R. was teary-eyed throughout most of her voir dire examination. (29RT 5674-5677, 5679.)

The People challenged Francis R. for cause. (29RT 5678.) The prosecution argued that Francis R.'s personal feelings about the enormity of the responsibility and her view of the death penalty would severely impair her ability to be a fair juror. Further, she never said that she could impose the death penalty, only that she would consider it. (29RT 5679-5680.) The court granted the challenge, stating:

> I think that she is somebody that would have an extremely hard time ever voting for the death penalty. And she is willing to hear facts, certain facts and tell you she could in that case, but I just don't see her being open within the *Witt* criteria. Physically, I'm impressed by her body language and the tears even just talking about it.
>
> In light of the answers, which admittedly they are somewhat neutral, but they are just, compared to all of the other questionnaires, they are not what we see on somebody that is open. She is not sure about the death penalty in particular in the sense of not sure she could vote for it, is how I read it. All things considered, I'm not sure she could ever vote for it.

(29RT 5684.)

The trial court's determination was proper. Francis R. gave responses that were similar to those of a juror in *People* v. *Holt* (1997) 15 Cal.4th 619, 652-653, and two jurors in *People* v. *Wash* (1993) 6 Cal.4th 215, 255. Each of those jurors repeatedly insisted that they did not know if they could impose the death penalty and could not tell the court the answer to that question. In both cases, this Court concluded that the trial court properly excused the jurors for cause. (*Ibid.*) Similarly, Francis repeatedly could not answer either the trial court or the attorneys' questions about actually imposing the death penalty, and instead only stated that she would consider it. (29RT 5679-5680.) Her responses support the trial court's finding that her views on the death penalty would prevent or substantially impair her performance as a juror. A juror must be able to do more than simply "consider" imposing the death penalty. A juror must be able to consider

imposing the death penalty *as a reasonable possibility*. (*People v. Schmeck* (2005) 37 Cal.4th 240, 262.) Accordingly, the trial court reasonably excused Francis R. for cause.

4. Richard H.

In response to the question regarding his feelings about the death penalty on the juror questionnaire, Richard H. replied:

> It's wrong! I have recently been following the Mathew Sheppard case. And though I feel strongly about hate, I don't feel we have a right to put someone to death.

(11CT 2957.) He also indicated that he did not believe that the death penalty served any purpose and that "it makes a strong statement for the media, but makes Americans look like animals around the world." (11CT 2957.) He indicated that the only crime for which the death penalty should be imposed was the assassination of the president. (11CT 2957.) He also wrote that "death is a crime not a punishment. I don't think I have ever wanted to see anyone put to death for a crime." (11CT 2957.) He believed that the death penalty was imposed "too often." (11CT 2957.) However, Richard H. also indicated that his feelings about the death penalty were not so strong that he would always vote against the death penalty no matter what evidence was presented. (11CT 2958.) He wrote that he "would never feel strongly for the death penalty. It would take some long hard thinking before I could be responsible for another human's death." (11CT 2958.) On a scale of 1 to 10, with 10 being strongly in favor of having a death penalty law, and 1 being strongly against having a death penalty law, Richard H. rated himself a "2." (11CT 2959.)

During voir dire, Richard H. stated that he believed the death penalty was wrong. However, he also stated that his belief was not strong, and if the rest of the jury voted for death, then he would not be completely against it. (29RT 5762-5763.) In response to questioning by the prosecution,

Richard H. stated that he probably could not vote for the death penalty in a case involving a single murder that was not a presidential assassination. (29RT 5767-5768.)

The prosecution challenged Richard H. for cause. The defense objected, arguing that although Richard H. indicated his opposition to the death penalty in the questionnaire, he stated that he could impose the death penalty. (29RT 5771.) The court granted the prosecution's challenge, stating, "I think he both in the questionnaire and the questioning indicated that his categories are so narrow that this case could never fit in it. So he is going to be excused." (29RT 5771.)

Substantial evidence supported the trial court's excusal of Richard H. for cause. Richard H. repeatedly stated that he thought the death penalty was wrong. (11CT 2957; 29RT 5767.) Although he stated that he could vote for the death penalty in an appropriate case, he stated that he would not be able to impose the death penalty for a single murder that was not a presidential assassination. (29TY 5767-5768.) Thus, his responses as a whole indicate that his opposition to the death penalty would "substantially impair" the performance of his duties as a juror.

This juror's responses are similar to those of a prospective juror who was found to have been properly excused for cause in *People v. Jones, supra,* 15 Cal.4th 119. In *Jones*, prospective juror Beeler, like Richard H., stated that, in a theoretical case such as "Charles Manson" or "Jimmie Jones," he might be able to vote for the death penalty, and that he could follow the law regarding the death penalty. However, he stated that while voting for the death penalty would not be "impossible" his ability to return a death verdict would be "impaired." (*Id.* at p. 165.) Here, as well, the trial court reasonably determined that Richard H.'s performance as a juror would be "substantially impaired" by his opinion regarding the death penalty.

5. Rose C.

In the juror questionnaire, Rose C. indicated that before she "knew what was involved in this case she was for the death penalty, but now for me to decide the fate of someone's life might be different in this matter." (9CT 2365.) She indicated that she believed the death penalty served a purpose, and wrote that the death penalty should be imposed in cases involving murder, depending on the brutality of the crime. In response to the question regarding her view on how often the death penalty is imposed, she indicated "about right." (9CT 2365.) She indicated that she did not have any strong views that would prevent her from voting for the death penalty. She rated herself and "8" on a scale of 1 to 10 in favor of a death penalty law. (9CT 2367.) Rose C. indicated that her religious and moral beliefs would make it difficult for her to sit as a juror on a death penalty case. She also wrote that this was because of the way she was raised, but that she felt she could be open-minded. (9CT 2368.)

During voir dire, Rose C. stated, "[d]epending on how brutal the crime, . . . and if there was no remorse, then I guess I am for the death penalty . . . . I guess I would have to hear all the evidence." (27RT 5250.) However, in response to questioning from the prosecution, Rose C. stated that while she believed that the death penalty was appropriate for certain crimes, she did not believe that she would personally be able to impose it on another person. (27RT 5257-5258.) The prosecution challenged Rose C. for cause. The defense submitted without argument. (27RT 5259.) The court granted the challenge and excused her. (27RT 5259.)

Substantial evidence supported the trial court's excusal of Rose C. for cause. Although Rose C. gave conflicting answers regarding whether she could impose the death penalty, she ultimately stated that her religious and moral beliefs would make it difficult for her to personally impose the death penalty. (9CT 2368; 27RT 5257-5258.) When a juror provides such

equivocal responses regarding her ability to impose the death penalty, "the trial court's determination as to [her] true state of mind is binding on an appellate court." (*People v. Ghent*, *supra*, 43 Cal. 3d at p. 768.) Accordingly, the trial court's decision to excuse Rose C. for cause should not be reversed.

6. Dolores K.

In the juror questionnaire, Dolores K. indicated that she was opposed to the death penalty. She indicated that the death penalty did not serve a purpose, and that the "guilty party suffer[ed] more in life imprisonment." She believed that the death penalty should not be imposed for any crime and that the death penalty was imposed too often. (11CT 3021.) She also indicated that her feelings against the death penalty were so strong that she would always vote against the death penalty no matter what evidence was presented. (11CT 3022.) She also indicated that during deliberations, she could not vote for death because "it is wrong to take another person's life." (11CT 3024.)

During voir dire, Dolores K. stated that she would only be able to vote for the death penalty in "extreme circumstances." (26RT 4958.) She stated that she belonged to a religion that believed it was wrong to take another person's life. (26RT 4959.) She stated that she may be able to change her mind, but it would take an "an awful lot of convincing right now." (26RT 4959-4960.) In response to questions from the defense, Dolores K. stated that she could follow the law and be fair. (26RT 4962.) She also stated that she was only in favor of the death penalty in "exceptional cases," but that her standard for "exceptional cases" was not so high that it could not be met at all. (26RT 4964.) The prosecution clarified Dolores K.'s definition of "exceptional cases." She stated that she felt the individuals responsible for the shooting "in the Colorado school" should have received the death penalty if they had survived. She believed that in that case the death

penalty would have been appropriate because the crime was premeditated, it was mass murder, and the killers had no remorse. (26RT 4964-4965.) She could not think of an example involving the murder of a single individual where she believed the death penalty would be appropriate. (29RT 4965.)

The prosecution challenged Dolores K. for cause. The defense argued that Dolores K. indicated that although she had a high standard for the death penalty, she stated that she would vote for death in the appropriate case. (26RT 4965-4966.) The court granted the challenge, stating:

> I think my impression of her, even as clarified today of her views, is that she's a juror able, although very interesting woman in the way she approached it, she's not somebody that is reasonably likely to apply the correct test. She's somebody that is going to say you have to have no redeeming value at all here, as opposed to weighing both sides. And I do give a lot of weight to what she wrote as well . . . . And I'm not persuaded by her comments today that she's . . . open-minded in this case.

(26RT 4967-4968.)

Substantial evidence supported the trial court's excusal of Dolores K. for cause. She initially indicated that she did not believe the death penalty should be imposed for any crime. (11CT 3021.) Although she modified this response somewhat during voir dire, she still felt the death penalty should only be imposed in "exceptional cases." (26RT 4964-4965.) Dolores K. is also like the juror who was found to have been properly excused for cause in *People v. Jones, supra,* 15 Cal.4th 119. In *Jones*, the prospective juror Beeler, like Dolores K., stated that, because of his religious convictions, he could not, under any circumstances, vote to impose the death penalty. However, in response to defense questioning, he also said that in a theoretical case such as "Charles Manson" or "Jimmie Jones," he might be able to vote for the death penalty, and that he could follow the law regarding the death penalty. (*Id.* at p. 165.)

Here, as well, the trial court reasonably determined that juror Dolores K.'s performance as a juror would be "substantially impaired" by her opinion regarding the death penalty.

7. Ilise L.

In the juror questionnaire, Ilise L. indicated that she had "mixed feelings" regarding the death penalty depending "on the type of crime committed and the circumstances." (11CT 3101.) She wrote that the death penalty served a purpose to "reassure the person(s) will not commit a crime again." (11CT 3101.) She also wrote that the "I have always believed this is very hard[;] I don't believe in it[,] but it's necessary sometimes." (11CT 3101.) She indicated that the death penalty is imposed "about right." (11CT 3101.) She also indicated that her views were not so strong that she would automatically vote either for or against the death penalty no matter what evidence was presented. (11CT 3102.) She circled "5" on the scale of 1 to 10, indicating that she had "no opinion" about whether there should be a death penalty law. (11CT 3103.)

During voir dire, Ilise L. again indicated that she had mixed feelings regarding the death penalty. In response to questioning from the defense, she stated that she believed she could be fair. However, she indicated that she would have a hard time changing her mind even if the other jurors convinced her that she was wrong. (24RT 4720-4721.) The prosecution asked Ilise L. if she could ever see herself voting for the death penalty in a case like this, and Ilise L. responded, "No." (24RT 2723.) She then stated that she did not know if she could ever vote for the death penalty. (24RT 4724.) Upon further questioning from the prosecutor, Ilise R. said that if the evidence indicated that the death penalty was the appropriate penalty, she thought she could vote for it, but it would make her very unhappy because she was a sensitive person. (24RT 4725.) She also stated that the fact that she would be unhappy about voting for the death penalty in her

future life would probably keep her from voting for the death penalty. (24RT 4726.) She said that she believed that the death penalty and life in prison without the possibility of parole were both "pretty bad," and that when given the choice, she would probably vote for life in prison. (24RT 4726-4727.) Ilise R. then indicated in response to questioning from the defense that she thought she could vote for the death penalty depending on the type of case. (24RT 4728.)

The prosecution challenged Ilise R. for cause. The defense argued that while Ilise R. stated that she was sensitive and that voting for death would make her unhappy, she could be fair and impose the death penalty depending on the crime committed and the circumstances of the case. (24RT 4730-4731.) The prosecution argued that Ilise R. went back and forth depending on who was asking the questions. However, she made it clear that voting for death would make her unhappy in her future life and for that reason she would probably not vote for the death penalty. (24RT 4731.)

The court granted the prosecution's challenge, stating:

> I think that her answer about it bothering her in future life was a pretty unusual type of answer. And that was significant to me. And – and she also falls partly in the category of, ... if I can't tell what their views are then we have got a problem. And to some extent she was that way. [¶] She ... went back and forth. I realize the People phrased it in a certain way, but I think that was a follow-up to something she volunteered. And so I feel that the challenge is valid. So it is granted.

(24RT 4731-4732.)

Substantial evidence supported the trial court's excusal of Ilise R. for cause. She gave conflicting answers about the death penalty in the questionnaire and during voir dire. She wavered on whether she could impose the death penalty under any circumstances. Her responses indicated

that her views on the death penalty would have substantially impaired her ability to perform her duties as a juror.

Further, to the extent Ilise R. gave conflicting or contradictory answers, the trial court resolved those differences adversely to appellant by granting the challenge. Given Ilise R.'s vacillations and contradictions, the trial court's conclusion as to her true state of mind -- that she was unfit to serve as a juror -- must be upheld since it is supported by substantial evidence. (*People v. Griffin* (2004) 33 Cal.4th 536, 558-561 [although at some point, each prospective juror "may have stated or implied that she would perform her duties as a juror," this did not prevent the trial court from finding, on the entire record, that each nevertheless held views that substantially impaired her ability to serve]; *People v. Welch* (1999) 20 Cal.4th 701, 747 [court permissibly excused a juror who said he did not know whether he could ever see himself feeling that death was the appropriate sentence].)

8. Roscoe B.

On the juror questionnaire, Roscoe B., did not write anything in response to the question regarding his general feelings about the death penalty. (7CT 2014.) Roscoe B. indicated that he did not believe that the death penalty served any purpose and that it was imposed too often. (7CT 2014.) He indicated that he did not have views that were so strong that he would always vote for or against the death penalty no matter what evidence was presented. (7CT 2015.) He circled "2" on the scale of 1 to 10 measuring whether he thought there should be a death penalty law. (7CT 2016.) Roscoe B. also indicated his son was convicted of a "sex crime" in 1998 and was in jail. (7CT 2018.)

During voir dire, Roscoe B. stated that it would be very difficult for him to vote for the death penalty, but he thought that he might be able to in the right circumstances. (23RT 4487.) He stated that he did not believe in

the death penalty and that if he made the law, he would not have it. (23RT 4487.) He stated, "I would try to be fair, but I don't believe it's right for us to have laws against killing people and then state go about doing it." (23RT 4488.) He indicated that he may be able to vote for the death penalty for a mass murderer. (23RT 4488.) In this case, Rosco B. said that if he really felt that the death penalty was necessary he could vote for it, but that he really did not believe in the death penalty. (23RT 4488.) During questioning by the defense, Roscoe B. again stated that he would" have a very difficult voting for the death penalty." (23RT 4490.) However, he stated that although he did not believe that the state should have a death penalty, if he was a juror, he would try to be fair and follow the law. (23RT 4490-4491.) Roscoe B. may have told someone that he could never vote for the death penalty. (23RT 4497-4499.) He told the prosecution that he felt very strongly against the death penalty. (23RT 4499.)

Roscoe B. told the prosecution that he felt that his son was mistreated by the District Attorney's office and because of his son's experience, he did not trust the District Attorney's office. He also did not trust the police officers that investigated his son's case. (23RT 4492-4493.) Roscoe B. felt that his son was wrongly convicted. (23RT 4502.)

The prosecution challenged Roscoe B. for cause. The defense argued that Roscoe B. indicated that if the facts called for it, he could vote for the death penalty. (23RT 4502-4503.) The court granted the prosecution's challenge, stating:

> The challenge is granted for a couple of reasons. In particular, the incident with his son is very fresh, and he had no trouble telling Ms. Morgan he mistrusts her on account of it, is the way I interpreted what he was saying. [¶] And then that's secondary to the fact that he appeared to me to be stretching a point to say that he could vote for it and, in particular, he also indicated he could do it if he had to. And as we've discussed at length this morning, the law never tells anybody that they have to. [¶] So I

think he's well below the threshold of a qualified juror as it now stands.

(23RT 4503.)

The trial court properly excluded Roscoe B. for cause. The court indicated that Roscoe B. was biased against the prosecution and that it did not appear as if Roscoe B. could impose the death penalty. Thus, the trial court properly determined that Roscoe B. would be unable to "faithfully and impartially apply the law." (*People v. Ghent*, *supra*, 43 Cal.3d at p. 767, citing *Wainwright v. Witt*, *supra*, 469 U.S. at pp. 425-426.)

9. Linda G.

On the juror questionnaire, Linda G. wrote that her general feelings regarding the death penalty were, "I really have not given it much thought. It's a tough decision. It needs to be handed down, depending on [the] evidence." (10CT 2717.) She indicated that the death penalty served the purpose of "send[ing] out a strong message." (10CT 2717.) She indicated that the death penalty should be imposed for the crime of murder and that the death penalty was imposed "about right." (10CT 2717.) She also indicated that she did not have feelings regarding the death penalty that were so strong that she would always vote for or against it. (10CT 2718.) She circled "7" on the scale of 1 to 10 regarding whether she thought the state should have a death penalty law. (10CT 2719.) She wrote that her religious or moral beliefs would make it difficult for her to sit as a juror on a death penalty case, stating, "It should be difficult, a person's life is a stake, but I know it's a decision that needs to be made." (10CT 2720.)

During oral voir dire, Linda G. stated that it would be very hard for her to impose the death penalty. (27RT 5363.) She stated that the penalty "does sometimes have to be handed down." (27RT 5364.) However, she would be very uncomfortable with imposing death on another person. She could not say whether she could actually impose the death penalty. (27RT

5368-5369.) In response to defense questioning, Linda G. indicated that she would listen to both sides and impose a penalty "depending on what the evidence is." (27RT 5371.) However, in response to the prosecution, Linda G. again stated that she did not think that she could personally impose the death penalty. (27RT 5372.)

The prosecution challenged Linda G. for cause. The defense submitted without argument. The court excused her for cause. (27RT 5372.)

The trial court's decision was proper. Linda G. said repeatedly that she did not think she could actually vote for death. A juror must be able to do more than simply "consider" imposing the death penalty. A juror must be able to consider imposing the death penalty *as a reasonable possibility.* (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 262, emphasis added.) It is apparent from her responses that Linda G. could not. Thus, substantial evidence supported the trial court's excusal of Linda G. for cause.

C. The Court Did Not Err In Denying the Defense's Challenge For Cause Against Juror Number 3

Appellant also contends that the court improperly denied the defense's request to exclude Juror Number 3 for cause. (AOB 120-121.) Respondent disagrees.

At the outset, appellant did not preserve this issue for appeal because he did not exercise a peremptory challenge to excuse Juror Number 3, and the defense did not utilize all of its peremptory challenges. (30RT 5899.) "To preserve a claim of error in the denial of a challenge for cause, the defense must exhaust its peremptory challenges and object to the jury as finally constituted." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 487.) Appellant had ample peremptory challenges remaining to remove Juror Number 3.

Nonetheless, the trial court did not err in denying the defense challenge of Juror Number 3 for cause. In the questionnaire, Juror Number 3 stated that he was for the death penalty. He indicated that the death penalty served the purposes possibly saving someone else's life and saving the tax-payers money. He also indicated that the death penalty was not imposed often enough. His feelings in favor of the death penalty were not so strong that he would always vote for the death penalty, no matter what evidence was presented. (15CT 3915-3916.) He circled "10" on the scale of 1 to 10, indicating that he was strongly in favor of having a death penalty. (15CT 3917.) His responses indicated that he could be fair, listen to the evidence, and deliberate with other jurors. (15CT 3918.)

During oral voir dire, Juror Number 3 stated that he could vote for either penalty in this case. (28RT 5429.) In response to defense questioning, he said that he could vote for life without the possibility of parole for someone convicted of first degree murder if someone changed his views during the course of the trial. (28RT 5431.) In response to prosecution questioning, Juror Number 3 said that not all murderers should get the death penalty, and that the death penalty was not automatic. (28RT 5433-5434.) He said that he could not say what the penalty should be in this case because he needed more information to make a decision. (28RT 5435.) He said that his mind was not made up as to which way he would vote. (27RT 5436.)

The defense then asked Juror Number 3 if his position was that knowing that appellant was convicted of first degree murder, appellant should be executed. Juror Number 3 responded that that was his position. (28RT 5437-5438.) However, in response to the prosecution, Juror Number 3 again stated that he was open to consider both sides. He also said that it would be difficult for him to impose death. (28RT 5438-5439.)

The defense challenged Juror Number 3 for cause. (28RT 5440.) The court denied the challenge, stating:

> [M]y impression of this man is that he's somewhat naïve about the law and was basing a lot of his answers on assumptions about the law, and that's why I tried to ask him a couple of open-ended things. [¶] My gut feeling from him is that he's a fair person who's open to being – being persuaded either way and would become more so probably as the trial goes along rather than less so, just because of being subjected to the process. So I just have a strong feeling you have an open-minded juror here based on all the circumstances.

(28RT 5449.)

The trial court's denial of the defense request was based on substantial evidence. Juror Number 3 repeatedly stated that he could be fair and open to both sides. He stated that he could not decide what penalty should be imposed until he heard the evidence. Great deference is accorded to a trial court's findings regarding a juror's ability to set aside personal beliefs and follow the law. (*People v. Barnett*, *supra*, 17 Cal.4th at pp. 1114-1115.) While it is certainly clear, as appellant points out, that Juror Number 3 had strong personal opinions regarding the death penalty, such beliefs alone did not render him incapable of sitting as a juror, nor would they per se deny appellant a fair trial. (*People v. Coleman* (1988) 96 Cal.3d 749, 765 (applying *Witt* test to defense challenges for cause).

When reviewing a decision to grant or deny a challenge for cause, this Court must consider the voir dire as a whole, rather than as individual and isolated answers to specific questions. (*People v. Cox* (1991) 53 Cal.3d 618, 647-48 [noting that defendant based his objections "on excerpted portions of the voir dire, isolating particular answers out of context, or fail[ed] to accord due deference to the court's fact-finding role."].) As set forth above, Juror Number 3 repeatedly stated that, despite his personal feelings, he would listen to the evidence presented and follow the law as

given by the court. To the extent that the specific answers identified by appellant render Juror Number 3's responses equivocal, then, as noted previously, the trial court's findings are binding on the appellate court. (*Id.* at p. 647.)

Finally, in the absence of any proof establishing that the jury that actually convicted appellant was somehow biased, any error in failing the grant the challenge for cause as to Juror Number 3 was harmless.

Accordingly, substantial evidence supported the trial court's determination that Juror Number 3 could be impartial. Thus, appellant's claim is without merit.

IV. THE JURY DID NOT RECEIVE EXTRANEOUS INFORMATION

Appellant alleges that during *Hovey* qualification of the second jury, some of the prospective jurors may have overheard appellant's outburst stating he would rip the prosecutor's head off. He also alleges that one of the jurors may have been improperly interviewed by a Sheriff's deputy regarding appellant's remark. (AOB 129-239.) However, the record does not support appellant's claims.

A. Relevant Proceedings

On the afternoon of April 21, 1999, the court and counsel were conducting the death-qualification voir dire ("*Hovey*") of individual prospective jurors for the penalty retrial. As Juror Number 7 was leaving the courtroom following the conclusion of her death-qualifying voir dire, appellant's counsel asked for a minute and, after Juror Number 7 had left the courtroom, appellant's counsel indicated appellant was "getting a little irritated" because the prosecutor had referred to appellant as "that man," which appellant felt was "demeaning." Counsel stated appellant's

preference for being referred to as "Mr. McKinzie," but made it clear he was "not suggesting at all that the People are doing it in any demeaning fashion." (25RT 4884.)

The prosecutor noted that there was nothing demeaning about referring to appellant as "that man" when questioning prospective jurors. The court stated its preference that appellant be referred to as "the defendant" or something similar. (25RT 4885-4887.)

Juror Number 4 was then brought into the courtroom for death-qualification voir dire which was conducted without incident. (25RT 4889-4897.) After Juror Number 4 exited the courtroom, Prospective Juror Ikeida entered, but was quickly excused for cause. (25RT 4897-4899.) After Prospective Juror Ikeida had departed from the courtroom, the following discussion between appellant and his counsel was recorded and reported:

> [APPELLANT]: I'll tear his head off.
>
> [APPELLANT'S COUNSEL]: That's a bad –
>
> [APPELLANT]: I'll tear his head off.

(25RT 4899.) Prospective Juror Roman then entered the courtroom and her death qualification voir dire was conducted without incident. After the court excused Prospective Juror Roman for cause and for hardship and Prospective Juror Roman had left the courtroom, the court called for a break until 3:00 p.m. (25RT 4899-4904.)

The next proceedings were conducted in chambers between the court and counsel. (25RT 4904.) The trial court indicated that such proceedings were being conducted in chambers because the subject was appellant's anger over recent events in the courtroom. After appellant's counsel waived appellant's presence, the court advised that its bailiffs had recommended that because appellant was so angry, he should be restrained

by ankle chains during any further proceedings that day. The court also wanted to come up with an agreement to avoid the situation arising again. (25RT 4904-4905.)

Appellant's counsel opposed the use of any chains arguing that appellant would feel he was being unfairly punished for a situation he did not create. Counsel granted that appellant was "in an agitated state," but posited that he did not perceive himself to have done anything wrong. The bailiff advised that a record of the incident would be created for the Sheriff's Department. (25RT 4905-4907.) The trial court related that, as one prospective juror (presumably Prospective Juror Ikeida) was leaving the courtroom and the court and counsel were waiting for the next prospective juror (presumably Prospective Juror Roman) to enter it, appellant stated, in a voice heard by the court, words to the effect that he would "sock" the prosecutor and "I have nothing to lose." The court noted that appellant also made "some very aggressive comments apparently ... in the lockup area during the break." Appellant's counsel indicated that at that point, he and co-counsel immediately told appellant "That's a bad idea. Don't do that. You have a lot to lose," and were able to calm appellant down. (25RT 4907-4908.)

For his part, the prosecutor indicated he could refer to appellant as "the Defendant," but argued that he had not done or said anything insulting, demeaning, or disparaging to appellant. Following further discussion, the court found that the prosecutor had not tried to aggravate, disrespect, or denigrate appellant, but asked that appellant be referred to as "the Defendant" or something similar. (25RT 4908-4914.) The court indicated to its bailiff, Deputy Mary Smith, that it would hold off on ordering appellant shackled, and Ms. Smith indicated a third bailiff would be brought to the courtroom. (25RT 4914-4915.)

Following a further recess, appellant was returned to the courtroom where the court advised him of the seriousness of the situation. Death-qualification voir dire of Juror Number 5 and Prospective Juror Kubo was then conducted without incident and the court recessed for the day. (25RT 4917-4944.)

In the "Jail Incident Report" prepared by Deputy Sheriff Mary Smith, Deputy Smith related that at about 2:30 p.m. on the afternoon in question, during "day 3 of *Hovey* exams to select perspective [sic] jurors for the retrial on the penalty phase," as she was escorting prospective jurors in and out of the courtroom, Deputy Robert Ortiz approached her and told her that, while she was out of the courtroom, appellant was overheard saying, "I have nothing to lose." Deputy Smith looked at appellant who was visibly upset, shaking his head, and arguing with his attorneys. Deputy Smith asked the courtroom clerk to advise the trial court that Deputy Smith would like to take a recess to evaluate the situation. The court called a recess "after we finished a *Hovey* exam." (2 Clerk's Transcripts of Court's Exhibits 507-511.)

During that recess, Deputies Smith and Ortiz secured appellant in the presence of his counsel. Appellant was upset and hostile and stated he was angry about the way the prosecutor referred to him as "that man," which appellant said was disrespectful. Appellant told Deputy Smith that he wanted to "rip [the prosecutor's] fucking head off right now." (2 Clerk's Transcripts of Court's Exhibits 508-509.)

After hearing these statements, Deputy Smith contacted the trial court, which convened in chambers with all counsel, the court reporter, and Deputies Smith and Ortiz. Deputy Smith requested that appellant be placed in leg shackles, which request was objected to by the defense and denied by the trial court. (2 Clerk's Transcripts of Court's Exhibits 509-510.) Appellant was returned to the courtroom without restraints and, "The day

ended without further incidents." (2 Clerk's Transcripts of Court's Exhibits 510-511.)

In the "Jail Incident Report" prepared by Deputy Sheriff Ortiz, he related he was working in the courtroom at about 2:25 p.m. during "pre-jury interviews (*Hovey* exams)." While a prospective juror (presumably Prospective Juror Ikeida) exited the courtroom, Deputy Ortiz heard appellant mutter, "I ain't got nothing to lose" to his attorneys. (2 Clerk's Transcripts of Court's Exhibits 505) Deputy Ortiz closed his very short report with the following:

> I informed Deputy Smith[,], the bailiff for Courtroom #44[,] of [appellant]'s statement. After an interview of a potential juror, Smith requested a court recess to evaluate the situation and inform [the court] of [appellant]'s statement. Refer to Smith's Jail Incident Report for further detail.

(2 Clerk's Transcripts of Court's Exhibits 506.)

B. The Jurors Did Not Receive Extraneous Information

As demonstrated above, none of the prospective jurors were in the courtroom when appellant's outburst occurred. Further, any reasonable reading of the pertinent portions of the record as summarized above shows that the only "interview" conducted of any prospective juror on the date in question was the *Hovey* death-qualification voir dire which was conducted by the court and counsel and was recorded and transcribed in its entirety. Despite Deputy Ortiz's use of the term "interview" in his "Jail Incident Report," the record makes plain that, in reality, there was no "interview" of any prospective juror by Deputy Smith. Indeed, earlier in the same report, Deputy Ortiz referred to the *Hovey* examination as "pre-jury interviews." (2 Clerk's Transcripts of Court's Exhibits 505.)

This case is clearly distinguishable from *Remmer v. United States* (1954) 347 U.S. 227, 229 [74 S.Ct. 450, 98 L.Ed. 654], the primary case

cited by appellant to support his argument. (AOB 131-133.) In *Remmer*, a juror was contacted by an individual and told that he could profit by returning a verdict favorable to the defendant. (*Remmer v. United States*, *supra*, 347 U.S. at p. 228.) The juror informed the trial court of the communication, and the trial court, in turn, informed the prosecution. The juror was not admonished by the court. The defense did not become aware of the improper contact until it was reported in the newspaper after a verdict had been returned. (*Ibid.*) The Supreme Court ultimately reversed the defendant's conviction and ordered a new trial, stating that the "evidence, covering the total picture, reveal[ed] such a state of facts that neither [the juror] nor anyone else could say that he was not affected in his freedom of action as a juror." (*Remmer v. United States* (1956) 350 U.S. 377, 381 [76 S.Ct. 425, 100 L.Ed. 435] ("*Remmer II*").)

Here, even if the facts alleged by appellant are true, *Remmer* is distinguishable. In *Remmer*, it was clear that a juror had been contacted by someone offering a bribe. Here, according to appellant, a juror was interviewed by a Sheriff's Deputy regarding an outburst by appellant that occurred while court was in session. Thus, the alleged extraneous information was appellant's own remark made in open court. Appellant cannot now claim that a juror committed misconduct by overhearing the remark during voir dire.

Further, appellant was provided with all information about the incident below including both Deputies' incident reports, therefore, any further inquiry concerning the alleged interview should have been made at trial.

Accordingly, appellant's claim that jurors received extraneous information from the Sheriff's Deputies is meritless.

C. Appellant Was Not Prejudiced

To the extent appellant contends that prospective jurors received extraneous information from the press, appellant was not injured by the misconduct. Inadvertent receipt of information outside the court proceedings is considered "misconduct" and creates a presumption of prejudice which, if not rebutted, requires a new trial. (*People v. Holloway* (1990) 50 Cal.3d 1098, 1108.) However, "whether a defendant has been injured by jury misconduct in receiving evidence outside of court necessarily depends upon whether the jury's impartiality has been adversely affected, whether the prosecutor's burden of proof has been lightened and whether any asserted defense has been contradicted." (*People v. Zapien, supra,* 4 Cal.4th at p. 994.) "[S]ince jury misconduct is not per se reversible, if a review of the entire record demonstrates that the appellant has suffered no prejudice from the misconduct[,] a reversal is not compelled." (*Id.*)

Here, the record demonstrates that appellant was not prejudiced. First, as set forth in full in Argument I, *ante*, none of the jurors that rendered the penalty-phase verdict read the newspaper article reporting appellant's alleged threat. In *People v. Zapien*, *supra*, 4 Cal.4th at p. 993, a juror informed the court that he inadvertently overheard a television news report announcing that defendant had made "threats against the guards ... if he were given the death penalty." (*Ibid.*) "The court informed the juror that evidence of such a threat 'never came before you because it amounted to something probably no more than just a rumor' and asked him whether he could base his verdict solely upon the evidence. [The juror] answered in the affirmative and confirmed, in response to an additional inquiry, that he still could be fair and impartial." (*Ibid.*) This Court "upheld the ruling of the trial court, concluding that the record rebut[ed] the presumption of

prejudice and that there [was] no substantial likelihood the incident prejudiced defendant." (*Id.* at p. 994.)

Likewise, here, as set forth in full in Argument I, *ante*, the trial court admonished the jury that the article reporting appellant's outburst was inaccurate and should be disregarded. This Court has held that "[t]he presumption of prejudice may be dispelled by an admonition to disregard the improper information." (*People v. Pinholster* (1992) 1 Cal.4th 865, 925; *People v. Zapien*, *supra*, 4 Cal. 4th at p. 996.) This Court also generally presumes that the jurors observe such instructions. (*Ibid.*) Accordingly, appellant's claim must be rejected.

V. THE RECORD ON APPEAL IS ADEQUATE

Appellant contends that his conviction and sentence must be reversed because he has been denied his due process right to an adequate record on appeal. (AOB 140-146.) Specifically, he claims should this Court reject his claims in Arguments II and IV, then his sentence must be reversed because approximately 55 juror questionnaires, including the questionnaire completed by prospective juror Kelvin S., as well as the identity of the prospective juror identified in Deputy Ortiz's report, were not included in the record on appeal. Appellant's claim is meritless.

Appellant is entitled under the state and federal constitutions only to a record adequate to permit meaningful appellate review. (*People v. Young* (2005) 34 Cal.4th 1149, 1170; *People v. Seaton* (2001) 26 Cal.4th 598, 699; *People v. Howard* (1992) 1 Cal.4th 1132, 1165-1166.) And, "[a]n appellate record is inadequate 'only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal.'" (*People v. Young*, *supra*, 34 Cal.4th at p. 1170; *People v. Seaton*, *supra*, 26 Cal.4th at p. 699.) The appellant bears the burden of demonstrating that the record is not adequate

to permit meaningful appellate review. (*People v. Young*, *supra*, 34 Cal.4th at p. 1170; *People v. Howard*, supra, 1 Cal.4th at p. 1165.)

Appellant has not met and cannot meet that burden here. All of the voir dire of the prospective jurors actually conducted below was fully recorded and reported. The complete record of the actual proceedings below is necessarily more than adequate for meaningful appellate review, even of any issue concerning appellant's *Wheeler* motion, with or without the missing prospective juror questionnaires.

This Court has addressed the issue of missing juror questionnaires in several cases. (See *People v. Ayala* (2000) 24 Cal.4th 243, 270; *People v. Alvarez*, *supra*, 14 Cal.4th at p. 196, fn 8; and *People v. Haley* (2004), 34 Cal.4th 283, 304–308.) In each, this Court held that lost juror questionnaires did not impede meaningful appellate review." In *People v. Heard* (2003) 31 Cal.4th 946, this Court also found that there was no basis for reversal even though the questionnaires for all prospective jurors except those actually seated were lost. (*People v. Heard*, *supra* 31 Cal.4th at p. 969.) Thus, appellant's claim that the missing juror questionnaires denied him an adequate record on appeal must be rejected.

As to appellant's contention regarding the identity of the prospective juror identified in Deputy Ortiz's report, any reasonable reading of the pertinent portions of the record, as summarized in Argument IV, *ante*, shows that the only "interview" conducted of any prospective juror on the date in question was the *Hovey* death-qualification voir dire which was conducted by the court and counsel and was recorded and transcribed in its entirety. Despite Deputy Ortiz's use of the term "interview" in his "Jail Incident Report," the record makes plain that, in reality, there was no "interview" of any prospective juror by Deputy Smith. As explained by this Court in *People v. Tuilaepa* (1992) 4 Cal.4th 569, 585, the rules authorizing settlement, augmentation, and correction of the record on

appeal "are intended to ensure that the record transmitted to the reviewing court preserves and conforms to the proceedings *actually undertaken in the trial court.*" (Italics added.) Here, because there was no "interview" of any prospective juror by Deputy Smith, the record is not deficient concerning any such purported "interview." (*People v. Tuilaepa*, *supra*, 4 Cal.4th at p. 585.)

Furthermore, as found by the trial court during the record settlement proceedings, because appellant and his counsel were provided with all information about the incident below including both Deputies' incident reports, any further record concerning it, to the extent appellant desired one, could, and therefore should, have been made at trial. (1 August 21, 2006 RT 48; *People v. Tuilaepa*, *supra*, 4 Cal.4th at p. 585 ["The settlement, augmentation, and correction process does not allow parties to create proceedings, make records, or litigate issues which they neglected to pursue earlier"].) Accordingly, appellant has not shown that he was denied an adequate record on appeal; thus, this claim should be rejected.

VI. THE PROSECUTION DID NOT COMMIT MISCONDUCT DURING CLOSING ARGUMENT OF THE PENALTY PHASE TRIAL

Appellant complains that the prosecution committed misconduct by arguing to the jury that the absence of mitigation constituted aggravation and that appellant showed no remorse. (AOB 147- 154.) Appellant waived those claims of error by failing to object to the prosecution's argument or requesting a curative admonition in the trial court. In any event, appellant's claims are meritless.

At the outset, it is well settled that a criminal defendant may not complain of prosecutorial misconduct on appeal in the absence of a timely objection and a request for a curative admonition at trial. (*People v. Poggi* (1988) 45 Cal.3d 306, 335; *People v. Ghent, supra,* 43 Cal.3d 739, 762)

The only exception to this rule is if an objection would have been futile because a retraction by the prosecutor or an admonition by the court could not have obviated the prejudicial effect of the misconduct. Here, appellant did not object at trial to the prosecution's argument. (36RT 7065-7066, 7091, 7116, 7165-7167.) Accordingly, appellant has waived this claim. (*People v. Burney* (2009) 47 Cal.4th 203, 266.)

In any event, appellant's prosecutorial misconduct claim is meritless. Appellant claims that the prosecution argued that appellant's lack of remorse was an aggravating circumstance favoring imposition of the death penalty. (AOB 149-154.) However, a review of the transcript of the prosecutor's closing argument reveals that the prosecution did not argue that appellant's lack of remorse was an aggravating factor. Rather, the prosecution stated that the defense would claim that appellant's remorse was sincere and was a mitigating factor. (36RT 7065.) The prosecution stated that appellant's remorse was not sincere in order to demonstrate that appellant's remorse was not a factor in mitigation. This Court has repeatedly held that a prosecutor is entitled to note the absence of the mitigating circumstance of remorse. (*People v. Burney*, *supra*, 47 Cal. 4th at p. 266; *People v. Salcido* (2008) 44 Cal.4th 93, 160 [finding no statutory bar to a logical comment on a defendants lack of remorse, and finding such remarks proper].)

Moreover, the prosecution did not argue, as appellant contends, that the absence of mitigation constituted aggravation. (AOB 151-152.) On the contrary, most of the prosecutor's comments regarding appellant's lack of remorse occurred while he was discussing the mitigating evidence presented by the defense. (36RT 7079-7103.) Such an argument is not tantamount to arguing that the absence of mitigation constitutes a factor in aggravation. *People v. Burney*, *supra*, 47 Cal.4th at p. 266. Therefore, appellant's claim fails.

Furthermore, any error was harmless because there is no reasonable possibility the error affected the verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 446-448.) The factors in aggravation overwhelmingly outweighed any factors in mitigation. First, the evidence showed that the crime involved extreme brutality in that appellant severely beat the victim, stuffed her in the trunk of her car, strangled her, and then threw her body into a ditch. Further, appellant admitted his guilt only after initially attempting to blame someone else for Avril's murder. The prosecution also proved that appellant had been involved in crimes of violence in the past, including violence against his own family members and loved-ones, and had several prior felony convictions. The circumstances in mitigation argued by the defense included: appellant's acceptance of responsibility for the murder (36RT 7130, 7140); appellant's remorse (36RT 7143-7146); and sympathy for appellant based on the fact that his family loved him (36RT 7147). Thus, the factors in aggravation substantially outweighed the mitigating factors.

Finally, the trial court instructed the jury that "statements made by the attorneys during the trial [were] not evidence." (CALJIC No. 1.02; 3CT 805.) The jury was also instructed regarding the aggravating and mitigating factors it was to consider and that it was to weigh the factors to determine the penalty. (CALJIC Nos. 8.85, 8.88; 3CT 829-831, 850-852.) The jury was specifically instructed that "[t]he absence of a mitigating factor is not, and cannot be considered by you as an aggravating factor." (CALJIC. No. 8.88; 3CT 851.) Thus, in light of the in light of the aggravating factors established by the prosecution, and the trial court's instructions to the jury, there is no reasonable no reasonable possibility that the prosecution's remarks on appellant's lack of remorse affected the verdict. (*People v. Brown*, *supra*, 46 Cal.3d at pp. 446-448.)

VII. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING PHOTOGRAPHS DEPICTING THE VICTIM'S BODY

Appellant contends that the trial court erred in denying his motion to exclude certain photographs of the body of the murder victim, and thereby violated appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and parallel provisions of the state Constitution. (AOB 155-169.) Specifically, appellant argues that the court improperly admitted photographs depicting the victim's body at the scene where she was found (Exhibits 125 and 126) and various autopsy photographs (Exhibits 142-146, 150, and 164) because they were unduly prejudicial. (AOB 155-163.) However, the trial court properly exercised its discretion under Evidence Code section 352 when it considered the relevance and admissibility of the crime scene and autopsy photographs. Accordingly, appellant's contention lacks merit.

A. Procedural Background

The prosecution filed a motion in limine before trial asking the court to allow the jury to see a number of photographs "of the murder scene, of the deceased at the crime scene, and before, during and after the autopsy." (1CT 113-172.) At a pretrial hearing on the motion, the trial court went through the photographs carefully, exercised its discretion under Evidence Code section 352, and admitted some while excluding others, as detailed below.

1. Photographs of the Victim's Body at the Scene Where She was Found

The prosecution sought to admit Exhibits 125 and 126, photographs of Avril's body at the scene where she was found. (1CT 133-134.) The defense did not object to Exhibit 126, but did object to Exhibit 125 as cumulative, arguing that it added nothing to the testimony regarding where

Avril's body was found. (2RT 281-284.) The prosecution countered that Exhibit 125 was a photograph depicting a closer view that showed just the upper portion of the victim. In the photograph the victim's hands were clutched up at the chest, which was "more of a defensive position." (2RT 284.) The prosecution argued that "Photograph number 126, which shows the entire body lying in the ditch, depicts more of the callousness with which he cast her aside in the ditch after he killed her." (2RT 285.) According to the prosecution, Exhibits 125 and 126 were both necessary because Exhibit 125 showed the injuries that the victim sustained just prior to be dumped in the ditch, injuries that were not apparent in Exhibit 126. (2RT 286-287.)

The trial court ruled:

> I am going to allow both of those to be shown. I think that on further reflection, the close-up does reveal something about the victim's condition as close as can be recreated at the time she was left in the ditch, more so than anything at the autopsy or other testimony.
>
> I am mindful of the fact, as stated in the papers, the People may, and undoubtedly have, numerous photos from the scene that they are not offering. [¶] So it is true they're offering one longer shot and one closer, and I think that to the extent they are disturbing, gruesome, et cetera, that it is outweighed by the probative value on the various issues as argued by the People in the papers and here today.

(2RT 291-292.)

2. Autopsy Photographs

The prosecution sought to admit numerous autopsy photographs. (1CT 1385-147.) The defense objected to Exhibits 146, 150, and 151 as cumulative. The prosecution explained that the photographs were selected by the medical examiner because they were instrumental to explain her testimony to the jury. The photographs showed the injuries that the victim

sustained to the face, head, and neck. The prosecution needed photos of the various injuries, even if it meant different photographs of the head. The trial court ruled that photographs 146 and 151 were not gratuitous or cumulative and admitted them. (2RT 295-301.) However, the court sustained the defense objection to photograph 150 and excluded it as cumulative. (2RT 313-315.)

The defense also objected to Exhibits 163, 164, and 165 as "terribly shocking to the senses" and more prejudicial than probative. (2RT 302-304.) The photos depicted internal injuries to the victim's head. (2RT 302.) The prosecution stated that photograph 163 depicted the subdural hematoma, which was a key part of the medical examiner's analysis. (2RT 302.) Photograph 164 depicted the brain from a different angle and showed that there was an additional injury. (2RT 305.) The prosecution withdrew photograph 165. (2RT 306.) The defense argued that the injuries could be adequately described by the medical examiner's testimony, therefore, the jury did not need to see gruesome photographs of the scalp peeled back and the skull removed so that the victim's brain was visible. (2RT 307-308.) The trial court excluded photograph 163, but allowed 164 because it was at a less "inflammatory" angle. (2RT 311.)

The defense also objected to autopsy photographs 144 and 145. The trial court ruled that while the photographs were "not pleasant," they depicted opposite sides of the mouth and were "hardly inflammatory." (2RT 316.)

Finally, the defense objected to autopsy photographs 142 and 143 as cumulative. The court overruled the objections and ruled that both photographs were admissible. (2RT 316-317.)

B. Applicable Law

Evidence Code section 350 provides that all relevant evidence is admissible. (Evid. Code, § 350.) Relevant evidence is that which has "any

tendency in reason to prove or disprove any disputed fact that is of consequence" to the action. (Evidence Code, § 210; *People v. Hall* (1980) 28 Cal.3d 143, 152, overruled on other grounds in *People v. Newman* (1999) 21 Cal.4th 413.) Pursuant to Evidence Code section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. As a general matter, the "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

The trial court "has broad discretion in determining the relevance of evidence [citations], but lacks discretion to admit irrelevant evidence." (*People v. Scheid* (1997) 16 Cal.4th 1, 14.) "The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory. [Citations.] The court's exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect." (*People v. Crittenden* (1994) 9 Cal.4th 83, 133-134.) A trial court's ruling on the propriety of the admission of allegedly gruesome photographs is one of relevance, and the trial court has broad discretion in determining such relevance. (*People v. Scheid*, *supra*, 16 Cal.4th at pp. 13-14.) This Court reviews a trial court's rulings on relevance and admission or exclusion of evidence, including photographs, for an abuse of discretion. (*People v. Martinez* (2003) 31 Cal.4th 673, 692; accord *People v. Medina* (1995) 11 Cal.4th 697, 755.).

In *People v. Gurule* (2002) 28 Cal.4th 557, 624, this Court stated that:

> "[M]urder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant" (*People v.*

Pierce (1979) 24 Cal.3d 199, 211 . . . , quoting *People v. Long* (1974) 38 Cal.App.3d 680, 689, . . . and we rely on our trial courts to ensure that relevant, otherwise admissible evidence is not more prejudicial than probative (Evid. Code, § 352). A trial court's decision to admit photographs under Evidence Code section 352 will be upheld on appeal unless the prejudicial effect of such photographs clearly outweighs their probative value. (*People v. Allen* (1986) 42 Cal.3d 1222, 1256.) Finally, prosecutors, it must be remembered, are not obliged to prove their case with evidence solely from live witnesses; the jury is entitled to see details of the victim's bodies to determine if the evidence supports the prosecution's theory of the case. (*People v. Scheid*, *supra*, at p. 16; *People v. Pride* (1992) 3 Cal.4th 195, 243 . . . .)

C. Analysis

All of the challenged photographs were relevant to prove the manner in which Avril was killed. The photographs of Avril's body in the ditch were relevant to corroborate Loganbill's testimony about finding the body and also illustrated the callousness with which her body was cast aside by appellant. The photographs demonstrated the malice of appellant in killing her and his intent to kill her and leave her body in a remote location." (1CT 133.) The close-up of Avril's torso as she lay in the ditch (Exhibit 125) depicted the severe injuries to her face and head. The blood on Avril's clothes and face indicated the brutality of the attack and the position of her hands in a defensive position corroborated the prosecution's theory that she was trying to defend herself. (1CT 133-134.) In a prosecution for murder, photographs of the murder victim and the crime scene are relevant to prove how the crime occurred, and the prosecution is "not obliged to prove these details solely from the testimony of live witnesses." (*People v. Turner* (1990) 50 Cal.3d 668, 706.)

Likewise, the autopsy photographs were relevant to corroborate the medical examiner's testimony regarding the injuries Avril sustained and the

manner in which she was killed. Each of the photographs depicted different wounds. While the medical examiner testified regarding each of the injuries, the photographs provided the jury the opportunity to visualize what the witness was describing, and gave the jurors the opportunity to see the true nature of the injuries that Avril sustained. (1CT 127-128, 135-147.)

Thus, the crime scene and autopsy photographs were clearly relevant to the manner in which Avril was killed and admissible to assist the jurors in understanding the medical testimony about the autopsy. (See Evid. Code, § 210; *People v. Hoyos* (2007) 41 Cal.4th 872, 908-909; *People v. Roldan* (2005) 35 Cal.4th 646.

Moreover, the record demonstrates that the trial court did not abuse its discretion in determining the probative value of each photograph was not substantially outweighed by its prejudicial effect under Evidence Code section 352. The trial court carefully considered each of the photographs that the prosecution sought to admit. The court did, in fact, exclude some of the autopsy photographs at the defense's request. (2RT 311, 313-315.) However, the court ruled that to the extent that the remaining photographs were "disturbing" or "gruesome," the probative value of the pictures outweighed any prejudice to appellant. (2RT 291-292, 316-317.) Regarding Exhibit 164, the autopsy photograph depicting the victim's brain, the court ruled that the photograph was less inflammatory than Exhibit 163, which was excluded. Further, the court determined that the admitted photographs were not cumulative because they depicted different injuries. (2RT 295-301, 311, 316-317.)

Here, the record does not show that the trial court abused its discretion in admitting the photographs. This Court has previously observed that all photographs of murder victims are disturbing. (See *People v. Heard*, *supra*, 31 Cal.4th at p. 976.) The trial court noted that the photographs

were unpleasant, but considered that they were not unduly gruesome or inflammatory and were relevant to resolve the issues presented in this case. Further, the trial court ruled that the photographs were sufficiently different to not be cumulative to each other. Photographs are not deemed cumulative simply because the witness testimony explaining them goes unchallenged. (*People v. Scheid, supra,* 16 Cal.4th at p. 14.) Moreover, the prosecution is not required to prove a case without photographs of the victim and crime scene even where the defendant stipulates to their truth. The jury was entitled to see how the physical details of Avril's injuries supported the prosecution's theory of the case. (*People v. Crittenden, supra,* 9 Cal.4th at p. 133.) Therefore, the photographs were properly admitted under the applicable evidentiary rules and did not violate appellant's constitutional rights.

Further, even if the trial court had erred in admitting one or more of the photographs, any error would be harmless under the standard of *People v. Watson* (1956) 46 Cal.2d 818. The erroneous admission of photographs would warrant reversal only if this Court concludes that it is reasonably probable the jury would have reached a different result if the evidence had been excluded. (*People v. Heard*, *supra*, 31 Cal.4th at p. 978; *People v. Watson*, *supra*, at p. 836.) The photographs introduced in this case "did not disclose to the jury any information that was not presented in detail through the testimony of witnesses," and they were "no more inflammatory than the graphic testimony provided by a number of the prosecution's witnesses." (*People v. Heard*, *supra*, 31 Cal.4th at p. 978.) In addition, the jury was instructed that it "must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling." (CALJIC 1.00; 2CT 359.) Under these circumstances, it is not reasonably probable that the admission of photographs of the crime scene or autopsies affected the jury's verdict. (*Ibid.*) Further, for the same reasons any error would

also be harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

VIII. THE TRIAL COURT DID NOT INSTRUCT THE JURY ERRONEOUSLY AS TO ACCOMPLICE TESTIMONY

Appellant contends that the trial court erred by limiting the applicable accomplice instructions to Theresa Johnson's testimony regarding counts six and eight (commercial burglary). (AOB 170-177.) He argues that the court should not have limited the requirement of corroboration to Johnson's testimony, but that the court should have instructed the jury that Donald Thomas "could be viewed as an accomplice both to the killing and to appellant's possession of Avril's property and the use of Avril's ATM card." (AOB 172.) Thus, appellant contends, the jury should also have been instructed that Donald Thomas was an accomplice as to all counts and his testimony should be viewed with caution. (AOB 170-177.) Appellant's contentions lack merit. First, there was no evidence that Johnson was involved in any way with Avril's murder. Thus, Johnson was only an accomplice to the use of Avril's ATM card. Second, Thomas was not an accomplice to any of the crimes. Finally, any alleged error was harmless.

A. Applicable Law

Section 1111 states in relevant part, "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense . . . ." Thus, if there is evidence that a witness against the defendant is an accomplice, the trial court must instruct the jury on the definition of an accomplice, to view an accomplice's testimony with caution, and on the state-law requirement that an accomplice's testimony be corroborated. (*People v. Brown* (2003) 31 Cal.4th 518, 555; *People v. Lewis* (2001) 26 Cal.4th 334, 368-369; *People v. Guiuan* (1998) 18 Cal.4th 558, 569.) If the

evidence establishes that a witness is an accomplice as a matter of law, the court must so instruct the jury. On the other hand, if there is a conflict in the evidence, the court must instruct the jury to determine whether the witness is an accomplice. (*People v. Brown, supra*, 31 Cal.4th at pp. 556-557; *People v. Hayes, supra,* 21 Cal.4th at pp. 1270-1271; *People v. Zapien, supra*, 4 Cal.4th at p. 982.) The corroboration requirement for accomplice testimony and the duty to instruct on accomplice testimony are matters of state evidentiary law and do not implicate federal constitutional rights. (*In re Mitchell P.* (1978) 22 Cal.3d 946, 949-950; *People v. Felton* (2004) 122 Cal.App.4th 260, 273-274; see also *Lisenba v. California* (1941) 314 U.S. 219, 226-227 [62 S.Ct. 280, 86 L.Ed. 166].)

Section 1111, by its terms, is offense-specific. It defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." See *People v. Boyce* (1980) 110 Cal.App.3d 726, 736 [testimony of the defendant's accomplice in sale of stolen property did not require corroboration as to initial receiving of the property]; *People v. Wynkoop* (1958) 165 Cal.App.2d 540, 546 [testimony of the defendant's accomplice in first burglary did not require corroboration as to second and third burglaries]; *People v. Ward* (2005) 36 Cal.4th 186, 212; *People v. Arias* (1996) 13 Cal.4th 92, 142-143.)"

Here, the trial court instructed the jury regarding accomplice testimony pursuant to CALJIC Nos. 3.10 ["Accomplice – Defined"], 3.11 ["Testimony of Accomplice Must Be Corroborated"], 3.15 ["Sufficiency of Evidence to Corroborate an Accomplice"], 3.16 ["Witness Accomplice as Matter of Law"], and 3.18 ["Testimony of Accomplice to be Viewed With Distrust"]. (2CT 413-417; 18RT 3337NNN-3337PPP.) Accordingly, the court instructed that if anyone committed the crimes charged in counts six and eight (second degree commercial burglary), Johnson was an

accomplice as a matter of law, that her testimony was subject to the rule requiring corroboration, and that her testimony implicating appellant should be viewed with caution. (2 CT 414-417; 18RT 3337NNN-3337PPP.)

B. Theresa Johnson Was Not An Accomplice to Murder

Theresa Johnson was not under any theory or evidence presented an accomplice to Avril's murder. In fact, Johnson was not even aware that appellant had murdered Avril until after the burglaries were completed. An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111.) To be so chargeable, the witness must be a principal in the offense, having either directly committed the offense or aided and abetted in its commission. (*People v. Avila* (2006) 38 Cal.4th 491, 564.) "An aider and abettor is one who acts with both knowledge of the perpetrator's criminal purpose and the intent of encouraging or facilitating commission of the offense. Like a conspirator, an aider and abettor is guilty not only of the offense he intended to encourage or facilitate, but also of any reasonably foreseeable offense committed by the perpetrator he aids and abets." (*Ibid.*) Here, there was no evidence that Johnson directly participated in Avril's murder, or aided and abetted appellant in the commission of the murder. Thus, Johnson was not an accomplice to the murder.

Johnson was, however, an accomplice to the burglary because she assisted appellant by using Avril's ATM card at the Hughes Market and 7-Eleven to withdraw cash, knowing that the card was stolen. Accordingly, the court properly instructed the jury as to Johnson's accomplice liability for the burglaries, and properly did not instruct the jury that Johnson was an accomplice to the murder.

C. Donald Thomas Was Not An Accomplice to Any Crime

Donald Thomas was not an accomplice to any of the crimes committed by appellant. Thomas was not liable to prosecution for any of the offenses charged against appellant. Accordingly, the trial court properly did not instruct the jury that Thomas was an accomplice.

"If there is evidence from which the jury could find that a witness is an accomplice to the crime charged, the court must instruct the jury on accomplice testimony. [Citation.] But if the evidence is insufficient as a matter of law to support a finding that a witness is an accomplice, the trial court may make that determination and, in that situation, need not instruct the jury on accomplice testimony." (*People v. Horton* (1995) 11 Cal.4th 1068, 1114; accord, *People v. Hoover* (1974) 12 Cal.3d 875, 880 ["Whether the facts with respect to the participation of a witness in the crime for which the accused is on trial are clear and not disputed, it is for the court to determine whether he is an accomplice'"]; see also *People v. Lewis*, *supra*, 26 Cal.4th at p. 369.) Here, the evidence was insufficient as a matter of law to support a finding that Thomas was an accomplice, thus the trial court was not required to instruct the jury on accomplice liability.

At trial, Thomas denied being involved in Avril's murder. (15RT 2838.) Indeed, there was absolutely no evidence that Thomas was involved in any way in Avril's murder. Thomas testified that he knew Avril and often helped her carry groceries up to her apartment and did other odd jobs for her. (15RT 2818-2820.) He also testified that he had help Avril set up her stereo, which explained why his palm-print was found in her stereo cabinet. (15RT 2787-2790.) When detectives questioned Thomas after Avril's murder, Thomas asked if Avril's stereo had been stolen because he had heard that appellant was trying to sell a stereo. (15RT 2818-2820.) Thomas did not offer any further testimony that implicated appellant.

However, Detective Palmieri testified that Thomas told him that a man named "Kenny" might have been involved in Avril's murder. (15RT 2909-2913.)

Appellant argues that Thomas could have been found to be an accomplice to Avril's murder and the theft of her property based on the testimony of James Young. (AOB 172.) Young testified that sometime in late 1995 or early 1996, he was at Thomas's house with Thomas's sister and girlfriend. Young heard Thomas say that he had a television and VCR that he had to sell. He said he got the items from an apartment across the alley from Mike Fontenot's garage. Thomas said that someone in the apartment woke up and things got bad, so he left. (15RT 2864-2878.) Thomas used the word "we" while talking about being in the apartment, but he did not say who the other person was. (15RT 2876-2877.)

Young's ambiguous testimony did not indicate that Thomas was an accomplice to appellant's crimes. Young provided almost no detail about Thomas's alleged burglary confession. Further, Young did not state that Thomas was involved in a murder. Thus, appellant's contention that Thomas was an accomplice is based on speculative evidence that is clearly not substantial. (See *People v. Lewis*, *supra*, 26 Cal.4th at p. 369 [finding no error for failing to instruct on accomplice liability where "evidence supporting the request for accomplice instructions was not substantial but speculative"].) Thus, the court properly decided as a matter of law that Thomas was not an accomplice. (*People v. Williams*, *supra*, 16 Cal.4th at p. 679.)

However, even if the court should have submitted the issue of whether or not Thomas was an accomplice to the jury, as explained below, any error was harmless.

D. Any Error Was Harmless

"An erroneous failure to give accomplice instructions is deemed harmless as long as there is "sufficient" (or "ample") evidence of corroboration. (*People v. Lewis*, *supra*, 26 Cal.4th at p. 370; *People v. Arias*, *supra*, 13 Cal.4th at p. 143.) "Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. The evidence 'is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.'" (*People v. Lewis*, *supra*, 26 Cal.4th at p. 370, citations omitted, quoting *People v. Hayes*, *supra*, 21 Cal.4th at p. 1271, and *People v. Fauber* (1992) 2 Cal.4th 792, 834,

Here, there was ample evidence of corroboration of the testimony of both Johnson and Thomas connecting appellant to the murder of Avril and the theft of her property. For instance, C.J. Brewer testified that he paid appellant $150 for stereo equipment that had belonged to Avril. (13RT 2446-2454.) Erania McClelland testified that appellant gave his daughter a robe and a camera as Christmas presents. Both "gifts" were stolen from Avril's apartment. (13RT 2456-2463, 2509-2515, 2518-2525.) Finally, Ralph Gladney testified that appellant arrived at his apartment late at night a few days before Christmas in 1995 and tried to sell him a camera. Later that same night, appellant told Gladney that he needed a woman's help to use a stolen credit card. Appellant also told Gladney that he had killed a lady in her garage. He explained that he waited for her to enter the garage, and once she entered, he hit her and choked her. Appellant told Gladney that he put the woman into the trunk of her car and dropped her body off somewhere in Malibu. (13RT 2615-2619.) This evidence demonstrated that appellant was in possession of Avril's property after her death, and that

he admitted killing Avril to Gladney, corroborating the testimony of both Johnson and Thomas.

To the extent appellant argues the jury should have been instructed to view Thomas's testimony with distrust (CALJIC No. 3.18), the other instructions given -- including "[a] witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others" (CALJIC No. 2.21.2; 2CT 373), along with instructions on a witness's credibility (CALJIC No. 2.20; 2CT 370-371) and weighing conflicting testimony (CALJIC No. 2.22; 2CT 374) -- were sufficient to inform the jury to view Thomas's testimony with care and caution, in line with CALJIC No. 3.18.

In addition, any error was harmless because it is not reasonably probable appellant would have achieved a more favorable result had the jury been properly instructed. (*People v. Heishman* (1988) 45 Cal.3d 147, 163-164 [prejudice from failure to give proper accomplice instructions at the guilt phase is measured by the test of *People v. Watson*, *supra*, 46 Cal.2d at p. 836].)

Thus, there was overwhelming evidence connecting appellant with the murder of Avril and the theft of her property. (*People v. Lewis*, 26 Cal.4th at p. 370.) Since there was sufficient evidence of corroboration, any error by the court in failing to instruct the jury regarding the accomplice liability of either Johnson or Thomas was harmless.

IX. THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT THE JURY IT MUST DETERMINE UNANIMOUSLY THE FELONY MURDER ALLEGATIONS WERE TRUE

Appellant contends that the trial court erroneously "failed to instruct the jury that they must agree unanimously as to whether appellant had committed a premeditated murder or a first degree felony murder." (AOB 177-187.) However, the United States Supreme Court and this Court have

rejected appellant's contentions that a jury must unanimously agree on a theory of first degree murder as either felony murder or murder with premeditation and deliberation. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1132; *Schad v. Arizona* (1991) 501 U.S. 624, 630-645 [111 S.Ct. 2491, 2496-2504, 115 L.Ed.2d 555] [unanimity as to the theory under which a killing is deemed culpable is not compelled as a matter of state or federal law].) In *People v. Loker* (2008) 44 Cal.4th 691, 707-708, this Court recently addressed the same argument Appellant makes here, and held:

> Defendant contends the trial court improperly failed to require the jury to unanimously determine whether its murder verdict was based on a theory of premeditation or felony murder. We have "'repeatedly rejected this contention, holding that the jurors need not unanimously agree on a theory of first degree murder as either felony murder or murder with premeditation and deliberation. [Citations.]' (*People v. Nakahara* (2003) 30 Cal.4th 705, 712 . . . (*Nakahara*).) Here, as in *Nakahara*, we 'are not persuaded otherwise by *Apprendi v. New Jersey* (2000) 530 U.S. 466[, 120 S.Ct. 2348, 147 L.Ed.2d 435]. There, the United States Supreme Court found a constitutional requirement that any fact that increases the maximum penalty for a crime, other than a prior conviction, must be formally charged, submitted to the fact finder, treated as a criminal element, and proved beyond a reasonable doubt. [Citation.] We see nothing in *Apprendi* that would require a unanimous jury verdict as to the particular theory justifying a finding of first degree murder. [Citation.]' (*Nakahara, supra*, 30 Cal.4th at pp. 712-713 . . . .)" (*People v. Morgan* (2007) 42 Cal.4th 593, 617 . . . .) Nor, contrary to defendant's contention, are felony murder and premeditated murder separate crimes. (*Ibid.*)

Appellant does not give any reason to justify this Court revisiting its decisions rejecting his contentions; thus, this claim must be rejected.

X. THE VARIOUS STANDARD JURY INSTRUCTIONS DID NOT UNDERMINE THE REASONABLE DOUBT STANDARD

Appellant argues that various standard instructions violated the requirement of proof beyond a reasonable doubt. (AOB 188-203.) Specifically, appellant argues that instructions on circumstantial evidence (CALJIC Nos. 2.90, 2.01, 2.02, and 8.83.1)[15] undermined the requirement of proof beyond a reasonable doubt (AOB 188-194), and that other instructions (CALJIC Nos. 1.00, 2.21.1, 2.22, 2.27, and 2.51)[16] replaced the reasonable doubt standard with preponderance of the evidence test (AOB 195-199). As appellant concedes, however, this Court has repeatedly rejected constitutional challenges to these instructions. (See AOB 199-200; *People v. Kelly* (2007) 42 Cal.4th 763, 792, and cases cited therein; *People v. Nakahara, supra*, 30 Cal.4th at 715.) Further, while appellant asks this Court to revisit its prior decisions on the issues (AOB 199-202), this Court has declined to do so in the past, and appellant does not offer compelling reason to do so now. (See *People v. Samuels* (2005) 36 Cal.4th 96, 131.)

XI. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO MOTIVE WITH CALJIC NO. 2.51

Appellant contends that CALJIC No. 2.51 improperly allowed the jury to determine guilt based upon the presence of an alleged motive and

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[15] CALJIC Nos. 2.90 [Presumption of Innocence—Reasonable Doubt—Burden of Proof], 2.01 [Sufficiency of Circumstantial Evidence – Generally], 2.02 [Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State], 8.83.1 [Special Circumstances—Sufficiency of Circumstantial Evidence to Prove Required Mental State].

[16] CALJIC Nos. 1.00[Respective Duties of Judge and Jury], 2.21.1 [Discrepancies in Testimony], 2.22 [Weighing Conflicting Testimony], 2.27 [Sufficiency of Testimony of One Witness], 2.51 [Motive].

shifted the burden of proof to require appellant to establish the absence of motive to prove his innocence, which "violated constitutional guarantees of a fair jury trial, due process and a reliable verdict in a capital case." (AOB 204-208.) Respondent disagrees.

The trial court instructed the jury according to CALJIC No. 2.51 [Motive], as follows:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to establish the defendant is not guilty.

(2 CT 378; 18 RT 3337RR.)

A. Appellant Waived This Claim by Failing to Object at Trial

First, appellant did not object to CALJIC No. 2.51 at trial. (18 RT 3337RR.) Therefore, appellant has waived this claim. (See *People v. Earp* (1999) 20 Cal.4th 826, 884.) The substantial rights of appellant were not affected as to this claim for the reasons stated below, so as to excuse the requirement of an objection. (§1259.) Additionally, had appellant entertained the reservations that he now contends require reversal, he should have objected, or proposed curative amendments to the instruction and his failure to do so has waived the objection on appeal. (See *People v. Hillhouse, supra,* 27 Cal.4th at pp. 503-504; *People v. Hart* (1999) 20 Cal.4th 546, 622.)

B. CALJIC No. 2.51 Did Not Improperly Shift The Burden Of Proof Or Confuse The Jury

Appellant contends there is no logical way to distinguish motive from intent in this case, and the instruction allowed the jury to determine guilt based on motive alone. (AOB 205-207.) However, this Court has ruled that motive and intent are separate and disparate mental states. The words

have different meanings. "Motive describes the reason a person chooses to commit a crime. The reason, however, is different from a required mental state such as intent or malice." (*People v. Hillhouse, supra*, 27 Cal.4th at p. 504.)

Appellant nevertheless claims that "motive" and "intent" are commonly interchangeable. He contends that by telling the jury that motive is not an element of the crime and need not be proven, there is a potential for conflict and confusion. Appellant cites *People v. Maurer* (1995) 32 Cal.App.4th 1121, in support of his argument. In that case, a former high school teacher was convicted of two counts of misdemeanor child annoyance involving one of his students (§ 647.6). The trial court instructed the jury that to commit the crime, the defendant must be both "motivated" by an impermissible sexual interest and that "motive" need not be shown. The Court of Appeal held that the conflicting instructions removed the issue of intent from the jury's consideration and reversed the conviction. (*Id.* at pp. 1126-1127.)

Here, although intent to commit robbery or burglary was an element of the special circumstances of murder in the commission of robbery or murder in the commission of burglary, motive was not. The trial court instructed the jury that to find the existence of the murder in the commission of robbery and/or murder in the commission of burglary special circumstance, it must find:

> One, the murder was committed while the Defendant was engaged in the commission of a [robbery/burglary], or the murder was committed during the immediate flight after the commission of a [robbery/burglary] by the Defendant; and, two, the murder was committed in order to carry out or advance the commission of the [robbery/burglary] or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the [robbery/burglary] was merely incidental to the commission of the murder.

(CALJIC No. 8.81.17; 2CT 399-400; 18 RT 3337DDD-3337EEE.)

The jury was also instructed that appellant must have had the requisite specific intent as follows:

> In each of the crimes charged, as well as both special circumstances and the allegation regarding the victim's age there must exist a union or joint operation of act or conduct and certain specific intent and/or mental state in the mind of the perpetrator. Unless the specific intent and/or mental state exists, the crime, special circumstance or allegation to which it relates is not committed.
>
> The required specific intent and mental states are included in the definitions of the crimes, special circumstances and allegations set forth elsewhere in these instructions.
>
> The specific intent with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the Defendant guilty of any of the charged crimes, special circumstances or allegation regarding the victim's age unless the proved circumstance are not only, one, consistent with the theory that the Defendant had the required specific intent and/or mental state, but, two, cannot be reconciled with any other rational conclusion.
>
> Also, if the evidence as to any specific intent or mental state permits two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to its absence, you must adopt that interpretation which points to the absence.
>
> Also, if on the other hand one interpretation of the evidence as to the specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(CALJIC Nos. 3.31, 3.31.5, 2.02, 8.83.1; 2 CT 419-420; 18 RT 3337QQQ-3337RRR.)

In sum, the instructions as a whole did not use the terms "motive" and "intent" interchangeably, and therefore there is no reasonable likelihood the

jury understood those terms to be synonymous. (*People v. Cash* (2002) 28 Cal.4th 703, 739.)

Additionally, the instruction did not shift the burden of proof or require appellant to prove his innocence. In a similar attack on CALJIC 2.51, the court in *People* v. *Estep* (1996) 42 Cal.App.4th 733, noted:

> This instruction did not tell the jurors their duty was to decide if defendant was guilty or innocent. The jurors' duty in this respect was explained by CALJIC No. 2.90, stating that "[a] defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt."
>
> CALJIC No. 2.51 did not concern the standard of proof in this case, but merely one circumstance in the proof puzzle – motive.

(*Id.* at p. 738; accord, *People v. Prieto* (2003) 30 Cal.4th 226, 254.)

Also addressing this issue, the court in *People* v. *Wade* (1995) 39 Cal.App.4th 1487, 1497, stated,

> Defendant contends the language indicating that the lack of motive might point to innocence undercuts the prosecution's burden of proof. Again, however, the instruction merely uses innocence as a direction signal or compass. It does not tell the jurors they must find innocence, nor does it lighten the prosecution's burden of proof, upon which the jury received full and complete instructions.

(*Ibid.*; accord, *People v. Prieto, supra*, 30 Cal.4th at p. 254)

Finally, as has been noted by the Supreme Court of the United States,

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretations of instructions may be thrashed out in the deliberative process with commonsense understanding of the instructions in light of all that has happened at trial likely to prevail over technical hairsplitting.

(*Boyde* v. *California* (1990) 494 U.S. 370, 380-381 [110 S.Ct. 1190, 108 L.Ed.2d 316].)

In the present case, under the totality of the instructions given (see, e.g., CALJIC Nos. 2.90, 3.31, 3.31.5, 8.83.1; 2CT 384, 419-420 , there was no reasonable likelihood the jury misconstrued or misapplied the words of the instruction. (*People v. Snow* (2003) 30 Cal.4th 43, 97-98; *People v. Williams, supra,* 16 Cal.4th at p. 675; *People* v. *Dellinger* (1989) 49 Cal.3d 1212, 1222, fn. 2; *People* v. *Burgener* (1986) 41 Cal.3d 505, 538; *People* v. *Clair* (1992) 2 Cal.4th 629, 663.) A full and fair reading of all of the instructions provided establishes that the jury could not have believed appellant had the burden of establishing his innocence or that the prosecution's burden of proof was something less than beyond a reasonable doubt. Accordingly, appellant's claim is without merit.

XII. THE DEATH PENALTY STATUTE AND INSTRUCTIONS PROPERLY SET FORTH THE APPROPRIATE BURDEN OF PROOF

Appellant contends that the California death penalty statute and instructions run afoul of the Sixth, Eighth, and Fourteenth Amendments because they (1) did not instruct the jury on the burden of proof; (2) did not require the state to bear the burden of persuasion at the penalty phase; and (3) did not require jury unanimity as to the existence of aggravating factors. (AOB 209-223.) Appellant's contentions are without merit. This Court has repeatedly rejected each of these claims. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1297 ["Failure to require that the jury unanimously find the aggravating circumstances true beyond a reasonable doubt, to find unanimously and beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances, or to require a unanimous finding beyond a reasonable doubt that death is the appropriate penalty does not violate the Fifth, Eighth, or Fourteenth Amendment guarantees of due

process and a reliable penalty determination."] Appellant provides no new reason why this Court should reconsider its previous decisions. Thus, each of appellant's claims should be rejected.

A. The Trial Court Was Not Required To Instruct The Jury On The Burden Of Proof

Unlike the determination of guilt, the sentencing function is inherently moral and normative, not functional, and thus not susceptible to any burden-of-proof qualification. (*People v. Burgener* (2003) 29 Cal. 4th 833, 884-885; *People v. Anderson* (2001) 25 Cal.4th 543, 601; *People v. Welch*, *supra*, 20 Cal.4th at p. 767; see *People v. Daniels* (1991) 52 Cal.3d 815, 890.) This Court has repeatedly rejected claims identical to appellant's regarding a burden of proof at the penalty phase. (*People v. Welch*, *supra*, 20 Cal.4th at pp. 767-768; *People v. Ochoa* (1998) 19 Cal.4th 353, 479; *People v. Snow, supra,* 30 Cal.4th at p. 126; *People v. Box* (2000) 23 Cal.4th 1153, 1216; *People v. Carpenter* (1999) 21 Cal.4th 1016; 417-418; *People v. Dennis* (1998) 17 Cal.4th 468, 552; *People v. Holt* (1997) 15 Cal.4th 619, 683-684 ["the jury need not be persuaded beyond a reasonable doubt that death is the appropriate penalty"].) Appellant does not offer any valid reason to vary from this Court's past decisions.

Insofar as appellant contends that *Jones v. United States* (1999) 526 U.S 227 [119 S.Ct. 1215, 143 L.Ed.2d 311], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], compel a different conclusion (see AOB 210-219), appellant is mistaken. These cases have been found to have no application to the penalty phase procedures of this state. (*People v. Lewis* (2008) 43 Cal.4th 415, 520-521; *People v. Monterroso* (2004) 34 Cal.4th 743, 796; *People v. Morrison* (2004) 34 Cal.4th 698, 730; *People v. Brown* (2004) 33 Cal.4th 382, 402; *People v.*

Smith (2003) 30 Cal.4th 581, 642; *People v. Prieto* (2003) 30 Cal.4th 226, 262-264, 271-272, 275.)

B. The Sixth, Eighth and Fourteenth Amendments Do Not Require the State to Bear the Burden of Persuasion at the Penalty Phase

This Court has specifically rejected appellant's claim (AOB 219-223) that the constitutional guarantees of equal protection and due process require the prosecution to bear the burden of persuasion at the penalty phase. (See *People v. Lenart* (2004) 32 Cal.4th 1107,1135-1136.) Because of the individual and normative nature of the jury's sentencing determination, the trial court need not instruct that the prosecution has the burden of persuasion on the issue of penalty. (*People v. Combs* (2004) 34 Cal.4th 821, 868; *People v. Kipp, supra,* 26 Cal.4th at p. 1137.) Because appellant offers no valid reason to overturn these past decisions, his claim should be rejected here.

C. The United States Constitution Does Not Require Unanimous Agreement on Aggravating Factors

Appellant contends that the instructions violated the Sixth, Eighth and Fourteenth Amendments to the federal constitution by failing to require juror unanimity on aggravating factors. (AOB 209.) This Court has consistently and repeatedly held that "neither federal nor state Constitution requires the jury to unanimously agree as to aggravating factors." (*People v. Panah*, *supra*, 35 Cal.4th at p. 499; *People v. Combs*, *supra*, 34 Cal.4th at p. 868; accord *People v. Monterroso*, *supra*, 34 Cal.4th at p. 795; *People v. Morrison*, *supra*, 34 Cal.4th at p. 730; *People v. Pollock* (2004) 32 Cal.4th 1153, 1196; *People v. Yeoman* (2003) 31 Cal.4th 93, 157; *People v. Jenkins* (2000) 22 Cal.4th 900, 1053; *People v. Howard, supra,* 1 Cal.4th at p.

1196.) Because appellant provides no persuasive reason for departing from this precedent, his claim should be rejected.

XIII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 8.88

Appellant argues that the trial court's use of CALJIC No. 8.88 violated his constitutional rights as follows: the instruction was impermissibly vague and misleading; its "so substantial" standard created a presumption favoring death; it failed to inform the jurors that the central determination is whether the death penalty is the appropriate punishment; and it failed to inform the jurors that a sentence of life without the possibility of parole was required if mitigation outweighed aggravation. (AOB 224-239.) To the extent appellant did not request the specific modifications alleged here, he has waived his claim on appeal. (*People v. Daya* (1994) 29 Cal.App.4th 697, 714 ["defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions"].) In any event, as appellant recognizes, CALJIC No. 8.88 has been found to be constitutional (*People v. Moon* (2005) 37 Cal.4th 1, 41-42; *People v.* Crew, *supra*, 31 Cal.4th at p. 858), and this Court has rejected all of appellant's challenges to the standard instruction (*People v. Ochoa* (2003) 26 Cal.4th 398, 452; *People v. Johnson* (1993) 6 Cal.4th 1, 52, overruled on another ground in *People v. Rogers* (2006) 39 Cal.4th 826, 879). (See AOB 227, 234.)

Indeed, the language of CALJIC No. 8.88 is not unconstitutionally vague; it adequately conveys the weighing process and is consistent with section 190.3. (*People v. Chatman* (2006) 38 Cal.4th 344, 409; *People v. Smith* (2006) 35 Cal.4th 334, 370; *People v. Davenport* (1995) 11 Cal.4th 1171, 1231, overruled on another ground in *People v. Griffin*, *supra*, 33 Cal.4th at p. 555, fn. 5.) The instruction "[i]s not unconstitutional for

failing to inform the jury that if it finds the circumstances in mitigation outweigh those in aggravation, it is required to impose a sentence of life without the possibility of parole [citation]." (*People v. Moon*, *supra*, 37 Cal.4th at p. 42.) The instruction informs the jury regarding the proper weighing of aggravation and mitigation to determine whether death or life without parole is warranted. (*People v. Perry* (2006) 38 Cal.4th 302, 320; *People v. Smith*, *supra*, 35 Cal.4th at p. 370.) The "so substantial" language does not create a presumption for death. (*People v. Salcido*, *supra*, 44 Cal.4th at p. 163; *People v. Maury* (2003) 30 Cal.4th 342, 440.) Rather, it properly admonishes the jury "to determine whether the balance of aggravation and mitigation makes death the appropriate penalty." (*People v. Arias* (1996) 13 Cal.4th 92, 171.) "The statutory language referring to aggravating and mitigating circumstances is not vague or ambiguous. [Citations.]" (*People v. Salcido*, *supra*, 44 Cal.4th at p. 164.) Appellant has not provided any reason for this Court to depart from its past decisions. Accordingly, appellant's claim must be rejected.

XIV. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 8.85

Appellant claims that the trial court erred by denying his request for a special instruction that delineated which factors were aggravating and which were mitigating. (AOB 240-249.) The defense's proposed instruction stated:

> The only factors which you may consider as aggravating factors are those set forth in paragraphs (a), (b) and (c) of the foregoing instruction [CALJIC No. 8.85]. You are not required to find that any of those factors are aggravating, and may find that any of those factors are mitigating. [¶] The other factors set forth in the foregoing instruction can only be considered by you as mitigating factors. The absence of a mitigating fact is not, and cannot be considered by you as, an aggravating factor.

(2 Supp. CT 363.) The trial court added the last sentence of the proposed instruction to CALJIC No. 8.88, and rejected the remainder. (3 CT 851; 35 RT 6782.) In rejecting the proposed instruction, the court cited *People v. Ochoa* (1998) 19 Cal.4th 353, 458, which held that the trial court "did not err by failing to instruct which factors were aggravating and which mitigating."

This Court has repeatedly held that the "instructions in the language of CALJIC No. 8.85 [do not] violate the Eighth and Fourteenth Amendments by failing to delete inapplicable sentencing factors, delineate between aggravating and mitigating circumstances, or specify a burden of proof either as to aggravation (except for other crimes evidence) or the penalty decision." (*People v. Schmeck, supra,* 37 Cal.4th 240 at pp. 304-305; see also *People v. Marks* (2003) 31 Cal.4th 197, 237; *People v. Farnam* (2002) 28 Cal.4th 107, 191; *People v. Taylor* (2001) 26 Cal.4th 1155, 1180; *People v. Anderson, supra,* 25 Cal.4th at p. 601.) Indeed, appellant concedes that this Court has previously rejected similar claims. (AOB 246.) Appellant's claim should fail here as well.

XV. THE TRIAL COURT PROPERLY REFUSED THE PROPOSED DEFENSE INSTRUCTION LISTING EVIDENCE THAT THE JURY MAY CONSIDER AS MITIGATING

Appellant argues that the trial court erred in refusing to give the following instruction proposed by the defense:

> Evidence has been produced concerning the following: 1. Defendant's voluntary confession to the crime, his sorrow for his crime, and his acceptance of responsibility for his crime. 2. Defendant's drug addiction. Defendant's care and love for his children and step children. Defendant's behavior in county jail while awaiting trial. Any or all of the above may be considered as mitigating circumstances.

(1 Supp. Clerk's Transcript 372; 35 RT 6794; AOB 249-255.) Appellant's claim is meritless. As this Court has held, the trial court was not obligated to give the proposed instruction because it was argumentative.

Of course, "[u]pon request, a trial court must give jury instructions 'that "pinpoint[] the theory of the defense,"' but it can refuse instructions that highlight 'specific evidence as such.'" (*People v. Earp, supra*, 20 Cal.4th at p. 886.) Such a pinpoint instruction, which asks the jury to draw inferences favorable to defendant regarding particular items of evidence, "properly belongs not in instructions, but in the arguments of counsel to the jury." (*People v. Wright* (1988) 45 Cal.3d 1126, 1135.) "'[A] court may properly refuse an instruction that is argumentative' [citation] or that 'single[s] out only a partial list of potential mitigating factors for the jury's consideration.'" (*People v. Cox*, *supra*, 53 Cal.3d at p. 678, fn. 21.) Moreover, because the proposed instruction "merely highlighted certain aspects of the evidence without further illuminating the legal standards at issue," no error occurred in the refusal. (See *People v. Noguera* (1992) 4 Cal.4th 599, 648, *People v. Fauber*, *supra,* 2 Cal.4th at pp. 865-866 [upholding refusal of pinpoint factor (k) instruction].) Finally, In *People v. Caitlin* (2001) 26 Cal.4th 81, this Court stated:

> We repeatedly have concluded, however, that an instruction such as the one actually given in the present case, directing the jury that it may consider in mitigation 'any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial,' adequately conveys the full range of mitigating evidence that may be considered by the jury. ([Citations].)

(*People v. Caitlin, supra*, 26 Cal.4th at p. 173-174.)

The trial court similarly instructed the jury in the present case [see CALJIC No. 8.85 (Modified) [Penalty Trial – Factors for Consideration];

3CT 831), and other instructions given (see, e.g., Defense Special No. 4; CALJIC 8.88 (Modified); 3CT 832, 850-851) adequately covered the defense theory in the penalty phase. Those elements of defendant's special instruction that were not argumentative were thus duplicative, and the trial court did not err in declining to give them. (*People v. Wright, supra*, 45 Cal.3d at pp. 1134-1138.) There was no error.

XVI. THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT THE JURY THAT IT COULD RETURN A VERDICT OF LIFE WITHOUT THE POSSIBILITY OF PAROLE EVEN IF IT DID NOT FIND EVIDENCE IN MITIGATION

Appellant claims the court erroneously refused the following proposed instruction: "You may decide to impose the penalty of life without possibility of parole even if you find that there are no mitigating factors present." (AOB 256; 1 Supp. CT 365, 369.) The trial court refused to give the instruction, finding that CALJIC No. 8.88 was sufficient. (35RT 6775.)

Appellant concedes that this Court has held that instructions such as the one proposed by appellant are not required. (AOB 257.) Indeed, this Court has repeatedly held that CALJIC No. 8.88 correctly advises the jury on its discretion to reject the death penalty. *People v. Butler* (2009) 46 Cal.4th 847, 874-875; *People v. Ray* (1996) 13 Cal.4th 313, 355-356; *People v. Roybal* (1998) 19 Cal.4th 481, 525-526. Appellant has not provided reasons for this Court to depart from its past decisions. Accordingly, appellant's claim must be rejected.

XVII. CALIFORNIA'S DEATH PENALTY LAW IS NOT UNCONSTITUTIONAL FOR FAILURE TO REQUIRE WRITTEN FINDINGS WITH RESPECT TO AGGRAVATING FACTORS

Appellant contends that the California death penalty law is constitutionally flawed because it does not require the jury to make written findings regarding the aggravating factors it selects in imposing the death penalty. The lack of such a requirement, appellant argues, makes impossible the constitutionally required meaningful review of the judgment and denies him equal protection of the law. (AOB 262-265.) As he recognizes, this contention has been repeatedly denied. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 405; *People v. Hillhouse, supra*, 27 Cal.4th at p. 510; *People v. Caitlin, supra*, 26 Cal.4th at p. 178; *People v. Ochoa, supra,* 26 Cal.4th at p. 462; *People v. Kraft* (2000) 23 Cal.4th 978, 1078; *People v. Bemore* (2000) 22 Cal.4th 809, 859; *People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-779.) It should fail here as well.

XVIII. THE DEATH PENALTY DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

Appellant contends that his death sentence violates the federal constitutional ban on cruel and unusual punishment under the Eighth Amendment. (AOB 266-269.) This Court has rejected appellant's contention that California's use of the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment to the federal Constitution. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; *People v. Samayoa* (1997) 15 Cal.4th 795, 864-865.) Appellant does not provide sufficient reasoning to revisit the issue here, and thus, his claims should be rejected.

XIX. INTERCASE PROPORTIONALITY REVIEW IS NOT REQUIRED

Appellant contends that the failure to provide intercase proportionality review "violates Appellant's Eighth Amendment protection against arbitrary and capricious imposition of the death penalty and due process and equal protection under the Fourteenth Amendment." (AOB 270-279.) Respondent disagrees. The United States Supreme Court has held that intercase proportionality review is not constitutionally required. (*Pulley v. Harris* (1984) 465 U.S. 37, 51-54 [104 S.Ct. 871, 79 L.Ed.2d 29.) Likewise, this Court has held that "[c]omparative intercase proportionality review by the trial or appellate courts is not constitutionally required." (*People v. Snow* (2003) 30 Cal.4th 43, 126; accord *People v. Demetrulias* (2006) 39 Cal.4th 1, 44; *People v. Blair* (2005) 36 Cal.4th 686, 753; *People v. Stitely* (2005) 35 Cal.4th 514, 574; *People v. Anderson* (2001) 25 Cal.4th 543 at p. 602.) Accordingly, this contention is without merit.

XX. THE TRIAL COURT DID NOT HAVE TO DELETE INAPPLICABLE FACTORS

Appellant's contention that the trial court erred in failing to delete inapplicable factors from the instruction (AOB 280-284) has been rejected by this Court numerous times. (See, e.g., *People v. Anderson, supra,* 25 Cal.4th at p. 600; *People v. Kipp, supra*, 26 Cal.4th at p. 1138; *People v. Carpenter, supra,* 21 Cal.4th at p. 1064; *People v. Davenport, supra,* 11 Cal.4th at p. 1230; *People v. Clark* (1992) 3 Cal.4th 41, 169; AOB 280-284.) It should be rejected here again.

XXI. APPELLANT'S UPPER TERM SENTENCE ON COUNTS TWO AND FOUR SHOULD BE UPHELD

Appellant claims that under *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*), the trial court erred by imposing an upper term sentence on counts two (robbery) and four (carjacking) based on facts that were neither found by the jury nor admitted

by appellant. Accordingly, he claims that his Sixth Amendment right to a jury trial was violated and his sentence should be reversed. (AOB 285-301.) Respondent disagrees because the trial court based the upper term on appellant's recidivism, and any error was harmless beyond a reasonable doubt.[17]

A. Procedural Background

At the sentencing hearing on August 26, 1999, the trial court noted the following aggravating factors: (1) the crime involved an attack on an "elderly, vulnerable victim;" (2) the brutality of the attack; (3) the "many acts of violence inflicted by [appellant] on virtually every woman in his life, including even his own mother on one occasion;" and (4) appellant's attempted robbery in 1983. (37RT 7295-7297.) The court considered the following mitigating circumstances: (1) appellant's "eleventh hour" acceptance of responsibility and expression of remorse; (2) appellant was loved by his family; and (3) the effect of drugs on appellant's life. (37RT 7297.) However, the court found that the mitigating factors were substantially outweighed by the "enormity, brutality and callousness of the crime . . . along with the other aggravating circumstances. (37RT 7297-7298.) Accordingly, the court denied appellant's motion to reduce the death verdict to life without the possibility of parole. (37RT 7298.) The court also relied on the same factors cited to deny the motion to modify the

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[17] In response to *Cunningham*, the Legislature passed a bill amending section 1170, subdivision (b), which the Governor signed as urgency legislation on March 30, 2007. (Stats. 2007, ch. 3, § 3 (Sen. Bill No. 40).) In response to this legislation, the California Judicial Council amended the California Rules of Court on May 23, 2007. (See Cal. Rules of Court, rules 4.405-4.452, as amended May 23, 2007.) Because the trial court sentenced appellant on August 26, 1999, before these amendments took effect, this Court should resolve appellant's claim under the former version of the statute at issue in *Cunningham*.

death verdict to impose the upper term sentences on counts two and four. (37RT 7302-7303.)

B. The *Cunningham* Decision

In *Cunningham*, the United States Supreme Court held that California's procedure for selecting upper terms under former section 1170, subdivision (b), violated the defendant's Sixth and Fourteenth Amendment right to jury trial because it gave "to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence." (*Cunningham, supra*, 549 U.S. at p. 274.) The Court explained that "the Federal Constitution's jury trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." (*Id.* at pp. 274-275.)

C. The Upper Term Was Constitutional Based on Appellant's Criminal History

An upper term sentence based on at least one aggravating circumstance complying with *Cunningham* "renders a defendant *eligible* for the upper term sentence," so that "any additional fact finding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*People v. Black* (2007) 41 Cal.4th 799, 812 (*Black II*).) An aggravating circumstance accords with *Cunningham* if it was based on the defendant's criminal history. (*Black II, supra*, 41 Cal.4th at pp. 816, 818.) This "exception" for a defendant's "[r]ecidivism" must not be read "too narrowly" and encompasses "not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions." (*Black II, supra*, 41 Cal.4th at pp. 818-820 [trial court's finding that a defendant's prior convictions were numerous or of increasing seriousness falls within the exception]; accord,

People v. Towne (2008) 44 Cal.4th 63, 79-84 [trial court's findings that a defendant served prior prison terms, was on probation or parole at the time of the offense, and had unsatisfactory prior performance on probation or parole due to a prior conviction, fall within the exception].)

In imposing the upper term, the trial court permissibly relied on appellant's criminal history, finding that appellant was convicted of attempted robbery in 1983. (37RT 7297.) In addition, during the penalty phase, the prosecution introduced evidence that appellant was convicted of the following felonies: (1) auto theft on May 4, 1978; (2) attempted burglary on October 15, 1979; (3) the attempted robbery of Maria Garcia on June 12, 1983; and (4) possession of a controlled substance on June 24, 1994. (35 RT 6674-6675.) This reliance rendered appellant eligible for the upper term. Under these circumstances, the trial court's reliance on other aggravating circumstance findings did not violate appellant's right to jury trial under *Cunningham*.

D. Any *Cunningham* Error Was Harmless

An appellate court properly finds *Cunningham* error harmless if it "concludes, beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury . . . ." (*People v. Sandoval* (2007) 41 Cal.4th 825, 839; accord, *People v. Wilson* (2008) 44 Cal.4th 758, 812-813 [any *Cunningham* error was harmless because the jury would have found that the victim was vulnerable or that appellant isolated the victim].) Here, each of the trial court's reasons for imposing the upper term was based on overwhelming evidence. The elderly victim was alone in her garage at night when appellant attacked her, savagely beat her, stuffed her into the trunk of her car, drove her to an unpopulated area, and then dumped her body in a ditch. The prosecution

also introduced evidence of appellant's prior convictions, including a 1979 conviction for attempted burglary, a 1983 conviction for attempted robbery, and a 1994 conviction for possession of a controlled substance. (34RT 6674-6675.) Therefore, the jury would have found any of these facts beyond a reasonable doubt, rendering the *Cunningham* error harmless. Accordingly, this Court should reject appellant's contention.

If this Court disagrees and finds prejudicial *Cunningham* error, however, it should remand for resentencing under the reformed system prescribed by the California Supreme Court. (See *People v. Sandoval*, *supra*, 41 Cal.4th at pp. 843-852.) Under this reformed system, the resentencing court would exercise its "discretion to select among the three available terms," giving a statement of reasons for its selection, but with no requirement of an additional factual finding or of a statement of "ultimate facts." (*Id.* at pp. 846-847, 852.) The court would also use the amended rules of court as guidance. (*Id.* at p. 846; see Cal. Rules of Court, rules 4.405-4.452, as amended May 23, 2007.)

XXII. THE TRIAL COURT PROPERLY IMPOSED UNSTAYED SENTENCES ON COUNTS THREE AND FIVE; THE SENTENCE ON COUNT FOUR SHOULD HAVE BEEN STAYED

Appellant argues that the trial court erred in imposing separate, unstayed, sentences on counts three (residential burglary), four (carjacking) and five (kidnapping for the purpose of robbery). He contends that section 654[18] barred separate punishment for those crimes. (AOB 302-306).

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[18] Section 654, subdivision (a) states:

An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but

(continued...)

Respondent agrees that the sentence on count four should have been stayed pursuant to section 654; however, the trial court properly sentenced appellant on counts three and five.

A. Applicable Law

Section 654 bars punishment for conduct that violates more than one statute but that constitutes one indivisible transaction. (*People v. Perez* (1979) 23 Cal.3d 545, 551.) Whether a course of criminal conduct is divisible into more than one act depends on the intent and objective of the actor. (*Ibid.*; *People v. Green* (1996) 50 Cal.App.4th 1076, 1084.) "If [a defendant] entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were part of an otherwise indivisible course of conduct." (*People v. Beamon* (1973) 8 Cal.3d 625, 639; see *People v. Coleman* (1989) 48 Cal.3d 112, 162.) The fact that both violations share common acts or were simultaneously committed is not determinative. (*People v. Beamon*, *supra*, 8 Cal.3d at p. 639; see also *In re Hayes* (1969) 70 Cal.2d 604, 607-609.)

A trial court has broad latitude in determining whether section 654 applies. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) On appeal, the trial court's findings are upheld "if there is any substantial evidence to support them." (*Ibid.*) The trial court's determinations are reviewed "in the light most favorable to the respondent," and "the existence of every fact the trial court could reasonably deduce from the evidence" is presumed. (*Ibid.*)

(...continued)

in no case shall the act or omission be punished under more than one provision.

B. Separate Punishment for Burglary and Kidnapping for the Purpose of Robbery Was Proper; the Carjacking Sentence Should Have Been Stayed Pursuant to Section 654

The trial court sentenced appellant on counts three, four, and five as follows: 25 years-to-life, plus one year pursuant to § 667.9, subdivision (a), on the kidnapping for the purpose of robbery charge (count five); nine years, plus one year pursuant to § 667.9, subdivision (a), on the carjacking charge (count four); and 16 months on the first degree burglary charge (count three).[19] The court ordered the sentences to run consecutively. (37RT 7303; 4CT 924-926.)

The trial court properly imposed separate punishment for kidnapping for the purpose of robbery (count five) and burglary (count three). Each of those crimes derived from distinct acts involving more than one criminal objective. The kidnapping for the purpose of robbery occurred when appellant attacked the victim in her garage, stuffed her into the trunk of her car, and then drove the car away. Appellant's intent to rob and kidnap the victim was distinct from his later intent to kill the victim.

Further, the prosecution specifically argued that the burglary count was based on the entry into the victim's apartment for the purpose of taking her property – the stereo and the various Christmas presents. (17RT 3219.) Thus, the burglary count was not based on appellant's entry into the garage where the robbery, carjacking, and kidnapping for robbery occurred. Appellant harbored a separate intent when he entered the victim's apartment to steal additional property. Thus, the trial court properly imposed separate unstayed sentences on counts three and five.

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[19] The court stayed a six year sentence for first degree robbery (count two) pursuant to section 654. (37RT 7303; 4CT 926.)

Appellant claims that the imposition of consecutive sentences based on facts that were neither found by the jury nor admitted by him violated his Sixth Amendment right to a jury trial. (AOB 304-305.) Both the United States Supreme Court and the California Supreme Court, however, have held that the decision whether to run individual sentences consecutively or concurrently does not implicate the Sixth Amendment right to jury trial. (*Oregon v. Ice* (2009) 129 S.Ct. 711, 714-715, [172 L.Ed.2d 517]; *People v. Black* (2007) 41 Cal.4th 799, 820-823.) This Court therefore should reject appellant's claim. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.)

As to carjacking (count four), appellant appears to be correct that term imposed for that count should be stayed pursuant to section 654, subdivision (a). During closing argument of the guilt-phase trial, the prosecution argued that the property taken during the robbery was the victim's car. (17RT 3210.) The victim's car was also the property taken in the carjacking, and the force used to take the car was the same as that used in the robbery. (17RT 3227; see § 215, subd. (c) ("no defendant may be punished under this section and Section 211 for the same act which constitutes a violation of both this section and Section 211").) Therefore, the kidnapping for robbery (count five) and the robbery/carjacking of the victim were committed "pursuant to a single intent or objective," that is, to rob the victim of her car. To the extent appellant had a single intent and objective in committing the kidnapping and the robbery/carjacking, section 654 precluded multiple punishment on the offenses. (See *People v. Lewis*, *supra*, 43 Cal.4th at p. 519 [where defendant was convicted of both the kidnappings for robbery and the robberies of each of the victims, section 654 required that the robberies be stayed because the crimes were committed pursuant to a single intent and objective which was "to rob the victims of their cars and/or cash from their bank accounts"].) Accordingly,

the sentence imposed on count four – nine-years, plus one year pursuant to § 667.9, subdivision (a) – should be stayed.

XXIII. THE JUDGMENT AND SENTENCE NEED NOT BE REVERSED FOR CUMULATIVE ERROR

Appellant contends that the cumulative effect of errors during the guilt and penalty phases requires reversal of the death verdict. (AOB 307-308.) Respondent disagrees because there was no error, and, to the extent there was error, appellant has failed to demonstrate prejudice.

Moreover, whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Seaton*, *supra*, 26 Cal.4th at pp. 675, 691-692; *People v. Ochoa*, *supra*, 26 Cal.4th at pp. 447, 458; *People v. Caitlin,* 26 Cal.4th at p. 180.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box*, *supra*, 23 Cal.4th at pp. 1214, 1219.) The record shows appellant received a fair trial. His claims of cumulative error should, therefore, be rejected.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the sentence on count four be stayed pursuant to section 654, and in all other respects that the judgment be affirmed.

Dated: March 17, 2009

Respectfully submitted,

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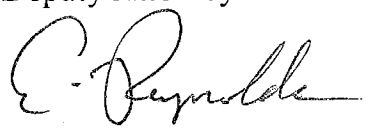

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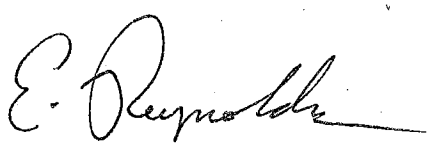
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 36,046words.

Dated: March 17, 2010

EDMUND G. BROWN JR.
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

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No.: **S081918**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

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Declarant

Signature

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