In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff & Respondent,* **v.** **MICHAEL WILLIAM FLINNER,** *Defendant & Appellant.*

CAPITAL CASE

Case No. S123813

San Diego County Superior Court Case No. SCE211301
The Honorable ALLAN J. PRECKEL, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

Appellant Michael Flinner and victim Tamra Keck commenced an intimate relationship in 1999. At the time they met, Tamra was only 18 years old. Flinner was over 12 years her senior. In December of that year, Flinner secured a half million dollar life insurance policy on Tamra with himself as sole beneficiary. In order to justify and purchase the policy, he asserted that Tamra was an integral part of his landscaping business.

Over the course of the next six months, Flinner accumulated nearly $200,000 of credit debt as he purchased cars, boats, and other equipment.

Almost as soon as Flinner had obtained the insurance policy, he started inquiring of others what it would cost to have someone killed. He found a willing assassin in codefendant Haron Ontiveros, who worked for Flinner in the landscaping business. Flinner and Ontiveros agreed upon a plan to kill Keck.

On June 12, 2000, while Keck was fulfilling shopping errands, Flinner called her and told her to meet Ontiveros at a gas station so that she could help jump start Ontiveros's stranded car. Keck complied with Flinner's request and met up with Ontiveros at the gas station. Ontiveros got into Keck's car and directed her to a secluded road where his car was parked. Keck parked close to Ontiveros's car and they both climbed out of her car. As Keck opened the hood of her car, Ontiveros came up from behind her and shot her in the back of her head, killing her instantly. Ontiveros then fled in his own car.

STATEMENT OF THE CASE

Following a guilt phase trial, a jury in San Diego County convicted Flinner of conspiracy to commit murder and grand theft (count 1; Pen.

Code, §§ 182, subd. (a)(1), 187, subd. (a), and 487, subd. (a)); first degree murder with the special circumstances of financial gain and lying in wait (count 2; Pen. Code, §§ 187, subd. (a), 190.2, subds. (a)(1) [financial gain], (15) [lying in wait]); mingling a harmful substance with food or drink (count 5; Pen. Code, § 347, subd. (a)); and solicitation to commit murder (count 6; Pen. Code, § 653f, subd. (b)). (11 CT 2498-2501; 16 CT 3751-3752, 3756-3759; 65 RT 10863-10864.)

Following a penalty phase trial, the jury returned a death verdict. (11 CT 2583; 16 CT 3808, 3811; 72 RT 11752.)

The court sentenced Flinner to death for the first degree murder conviction (count 2) with special circumstances. (14 CT 3241-3242; 16 CT 3853-3854; 80 RT 12965-12966.) The court further sentenced Flinner to an indeterminate term of 25 years to life in state prison for the conspiracy conviction (count 1) and determinate terms of four years for the mingling a harmful substance with food or drink conviction (count 5), and six years for the solicitation to commit murder conviction (count 6). The court imposed but stayed the indeterminate and determinate sentences pending the resolution and execution of the death judgment. (14 CT 3237-3242; 16 CT 3854-3855; 80 RT 12966-12967.)

This appeal is automatic. (Pen. Code, § 1239, subd. (b).)

STATEMENT OF FACTS

A. Guilt Phase Evidence

1. Flinner, Keck, Flinner's ailing business, and the life insurance policy

Tamra Keck met Michael Flinner in 1999 and commenced a romantic relationship with him. In the fall of that year, Keck started her senior year of high school. She turned 18 years old on October 26, 1999, and within a

month thereafter, left her mother's home to move in with Flinner. (27 RT 4549, 4552-4553.) During this time, Keck held various part-time jobs, including working at a photo shop and later at a local casino. (27 RT 4550-4551, 4553.) In April of 2000, Keck dropped out of high school. (27 RT 4549, 4579.)

Flinner owned a struggling landscaping business, Alpine Landscape, as sole proprietor. (34 RT 6003-6006, 6018.) By the end of 1999, his business had netted only about $33,000 for the previous six months. (25 RT 4146.) Given how poorly Alpine Landscape was doing, Flinner offered to sell his business to another local landscaper, Timothy Kenney, in early 2000. (26 RT 4329-4331.) Kenney refused to buy Flinner's business but agreed to hire Flinner and Flinner's landscaping crew to work for him. (26 RT 4332-4335.)

On December 29, 1999, Flinner and Keck applied for a $500,000 term life insurance policy for Keck, naming Flinner as sole beneficiary. (25 RT 4060-4064.) In the application for the insurance policy, Flinner represented that Keck was his girlfriend and a vital part of Alpine Landscape. Despite the fact that Keck was still in high school and only worked part-time, Flinner claimed she earned an annual income of $30,000 as an employee of Alpine Landscape and that if she were to die, his company would suffer significant financial hardship. (25 RT 4065-4068; 27 RT 4550-4551, 4553.) Although Flinner did not provide any documentation verifying his representations, AllState issued the $500,000 insurance policy. Flinner made the first premium payment at that time. (25 RT 4068-4069.) The subsequent premium payments were to be made quarterly, with the next payment due in March or April of 2000 and the payment after that, due in June or July. (25 RT 4070.) Flinner timely paid the insurance premium in March 2000 and then made the next premium payment a month later – two months early. (25 RT 4192-4193.)

2. Flinner's financial difficulties

Flinner was not as responsible with his other financial obligations and liabilities. He applied for numerous lines of credit both individually and jointly with Keck, and entered into various lease agreements for automobiles. While he made some token payments for these various debt liabilities, he failed to consistently keep up on his payments and continued to rack up more and more debt. By June 2000, he was over $190,000 in debt. In an effort to keep afloat financially, Flinner sold cars and other things he did not own outright. He represented to the buyers that he would remit the payments they made to him to the bank or auto dealer. Instead, he pocketed the money they gave him.

In November 1999, Flinner secured a $4,416.10 loan, using various household items as collateral. (29 RT 4926-4928.) To obtain the loan, Flinner falsely represented that he owned a $200,000 home outright. (29 RT 4928-4929; 48 RT 8212-8213.) Flinner made five payments on this loan and then stopped making further payments. (29 RT 4926-4928, 4933.)

In February 2000, Flinner obtained a $25,000 loan from the San Diego County Credit Union to purchase a truck. (26 RT 4234-4235.) He made two payments and then stopped. The truck was later repossessed. (26 RT 4236-4237.)

In March 2000, Flinner leased a Chevrolet truck. He made a few late payments and then stopped making payments altogether. This truck was also later repossessed. (29 RT 4935-4938.)

In April 2000, Flinner opened a Visa account with the San Diego County Credit Union, and immediately got several cash advances on the card, taking the account to the maximum credit limit of $5,000. (26 RT 4238.) He made a few payments on the account and then stopped. (26 RT 4239.)

In May 2000, when Flinner applied with the San Diego County Credit Union for a $32,000 car loan and a credit card with a $25,000 credit limit, the bank turned him down. (26 RT 4239-4241.) Although Flinner was unable to obtain more credit that spring with the credit union, Keck was able to get a $15,000 car loan and a $1,000 credit card through that bank. (26 RT 4241-4243; 28 RT 4802-4806.) Flinner accompanied Keck when she applied for these lines of credit. He did all the talking during the credit application process. (28 RT 4802-4806.) To qualify for the car loan, Flinner provided Keck with a fraudulent pay stub from Alpine Landscaping indicating that she had earned $6,000 so far that year. (26 RT 4244-4246; 28 RT 4802-4806.) Upon obtaining the $1,000 credit card, Keck and Flinner received an immediate cash advance on the account, taking it up to the maximum credit limit. Flinner made one payment on the card. (26 RT 4241-4243.) Because Flinner did not pay the auto loan, the bank eventually repossessed the used BMW Keck had purchased with that loan. (26 RT 4246-4247, 4364; 41 RT 7136-7139.)

Sometime in April 2000, Flinner and Keck purchased a boat for about $29,000. (34 RT 5965-5970.) Flinner made one payment for the boat in June and then made no further payments, resulting in the boat being repossessed. (34 RT 5993-5396, 6000-6001.)

At the end of April 2000, Flinner opened a MasterCard account. (35 RT 6146-6147.) By the end of May, he had accrued a debt of about $920, including cash advances. (35 RT 6147-6148, 6151.) By the end of June, Flinner had surpassed his credit limit of $1,500 on this account. (35 RT 6148.) He never made any payments on the account. (35 RT 6149.)

At the end of April 2000, Keck and Flinner leased a Ford Mustang for Keck. The monthly payments for this car was about $380. (26 RT 4280.)

Flinner and Keck made two payments for this car and then no further payments. (26 RT 4291.)

At the beginning of May 2000, Flinner was able to lease a Chevrolet Tahoe. (30 RT 5119.) He falsely represented that he owned a home and presented a fraudulent W-2 form indicating that he earned over $100,000 from Alpine Landscape in 1999. (30 RT 5121-5122; 48 RT 8212-8213.)

That same month, Flinner also leased a Ford F-150 truck. (26 RT 4278.) The truck was worth over $33,000. The monthly payment was just over $900. (26 RT 4278-4279.) Flinner made one payment and then made no further payments. (26 RT 4287-4288, 4291.)

Despite the many cash advances Flinner obtained, he failed to pay a $300 hospital bill in May 2000. (26 RT 4299-4300; 45 RT 7667-7670.) He was also delinquent with a gasoline account he had opened for his business at a local Shell station. He owed the gas station over $1,500. (26 RT 4308, 4311.) Flinner had additional creditors to whom he owed thousands of dollars. (26 RT 4305-4306; 32 RT 5518, 5520-5521; 40 RT 6957-6960; 41 RT 7195-7197.)

Because of his serious financial troubles, Flinner frequently asked to borrow large sums of money from business associates. In March 2000, Flinner sought to borrow $20,000 and later $5,000 from William Lepetri. (26 RT 4321-4322, 4326.) In late May and early June 2000, he tried to borrow $20,000 from David Waitley and $7,500 from David Pemberton. (32 RT 5484-8485, 5537-5538.) In June and July 2000, he also tried several times to borrow money from Van Arabian. A number of times, he asked for as much as $5,000. (41 RT 7139-7140.)

Another way Flinner was able to ensure a continued stream of income was by selling cars or equipment that he did not actually own.

In February 2000, Flinner advertised a green Ford F-150 in the Auto Trader magazine. (31 RT 5253, 5257.) Juan Morales responded to the

advertisement and agreed to take over payments for the truck. Flinner had Morales pay him and agreed to remit the payments to the car dealership. (31 RT 5254-5256.) Three months later, in May, Flinner convinced Morales to trade the Ford truck for a Chevy truck. (31 RT 5260-5262.) Flinner did not keep current with the payments to the dealership on the Chevy truck and the truck was eventually repossessed even though Morales had made regular payments to Flinner. (31 RT 5262-5264.)

In May 2000, Flinner listed the BMW Keck had recently gotten in the Auto Trader. (31 RT 5326.) Timothy and Jennifer Aherns responded to the ad and agreed to give Flinner their Volkswagen Rabbit and pay Flinner four payments of $600 and then make monthly payments of $400 which Flinner would remit to the bank. (31 RT 5327-5329.) After Keck was killed, the Aherns tried to arrange making payments directly to the bank. However, because they had poor credit, they were unable to do so. (31 RT 5330-5334.) When they returned the car to Flinner and explained that they had tried to negotiate directly with the bank, Flinner became upset that they had tried to circumvent him. (31 RT 5335-5338.) However, Flinner asserted that he would give the Aherns $2,000 back. He never did. And he was unable to return the Volkswagen the Aherns had given him because he had sold it to his neighbor, Charles Cahoon. (31 RT 5336-5337; 33 RT 5831.)

In August 1999 and January 2000, Flinner bought some heavy landscaping equipment on credit, including a trailer, jackhammer, and generator. (32 RT 5517-5521.) Flinner made some payments for the trailer and none for the jackhammer and generator. (32 RT 5518, 5520-5521.) However, in May 2000, he offered to sell these items for $3,000 to a general contractor, David Pemberton. (32 RT 5477-5480.) Pemberton was interested in purchasing the jackhammer and generator and offered $1,000. Flinner did not like this counteroffer and offered Keck to orally copulate

Pemberton for an additional $1,000. (32 RT 5481.) Pemberton refused this crass offer, but agreed to purchase the jackhammer and generator for $1,400. (32 RT 5482-5483.)

In May 2000, after getting the green Ford F-150 truck back from Morales (who agreed to trade it for the Chevy truck), Flinner sold it to one of his employees, Robert Pittman. (31 RT 5260-5264; 39 RT 6853, 6877, 6907-6908.) A few weeks later, though Pittman had paid Flinner $3,000, Flinner asked for the truck to be returned to him. Flinner claimed he would give Pittman his money back. Pittman returned the truck, but Flinner never refunded Pittman. (39 RT 6853-55, 6908.) Flinner ended up trading the truck to the dealership for the newer white F-150. (39 RT 6854-6855, 6877, 6908.)

In early 2000, Flinner tried to sell a Jaguar car to one of his landscaping clients who ran an Alzheimer's care facility. He also tried to get that client to invest $35,000 in some vague business venture. (41 RT 7188-7192.)

3. Flinner's strained relationship with Keck

Though they had talked of marriage, Flinner's relationship with Keck was not good. As early as November 1999, the same month Keck moved in with him, Flinner started flirting with a 19-year-old girl, Tiffany Faye, who worked at a local flower shop. He took her out to eat several times. (26 RT 4379-4381; 33 RT 5829.) Flinner assured Faye that although Keck believed she and Flinner were engaged to be married, they were not. (26 RT 4382.) He claimed that in order for he and Keck to separate he would have to take care of some paperwork, such as removing her from his auto insurance; he assured Faye that he wanted to date her and could easily get rid of Keck. (26 RT 4382-4383.)

Keck was not pleased with Flinner and his budding relationship with Faye. But Flinner did not care how Keck felt about this. (26 RT 4402.) Toward the end of December 1999, Faye was with Flinner and Keck at Flinner's apartment. Flinner proposed that the three of them form a ménage à trois. (26 RT 4391-4393.) Faye refused and broke off her relationship with Flinner entirely. (26 RT 4393.)

Flinner did not treat Keck well. (41 RT 7144; 45 RT 7625.) He was controlling and domineering to the point that outside observers believed Keck felt intimidated by him. (27 RT 4597, 4599; 30 RT 5209-5210, 5217-5218.) Flinner barked orders at Keck who obediently ran off to comply with his demands. (30 RT 5209-5210, 5217-5218.) He also referred to Keck with derogatory epithets such as "cunt," "bitch," and "slut." (32 RT 5486-8487.)

Flinner told people that Keck was money hungry and that she was marrying him for his money. (28 RT 4715-4717; 35 RT 6239-6240; 45 RT 7624.) At one point, he told one of his employees, "I can't marry this bitch" because she was going to take all his money. (32 RT 5577-5579.) He also referred to Keck as immature. (29 RT 4867-4868.) Flinner had no problem suggesting that Keck should be killed and tossed into a ditch. (28 RT 4755-4758.)

As a result of the emotional abuse she suffered, Keck lost significant amounts of weight and altered her appearance. (27 RT 4596.) Despite this, she remained with Flinner and continued to believe that they were going to be married. However, on June 9, 2000, Keck called her mother and tearfully reported that the wedding was going to be postponed. (27 RT 4553; 28 RT 4845: 9 CT 2004-2005.)

4. Flinner's preparations for murder

Flinner's financial troubles were so pronounced that he turned to the half million dollar insurance policy on Keck's life as his ticket out of debt.[1] Flinner spoke with people about killing for money. (28 RT 4755-4758.) To some, he mentioned that he was the beneficiary of a one million dollar life insurance policy on Keck's life and that if she were to die, he would become very wealthy. (33 RT 5827; 45 RT 7622-7623.)

As early as December 1999 and January 2000, around the time that Flinner obtained the life insurance policy for Keck, Flinner started making inquiries of his associates what it would cost to have someone killed and whether they would be willing to kill someone for him. (32 RT 5582-5583; 33 RT 5822-5825; 34 RT 5933-5934.)

Sometime in April 2000, Flinner met with Morales to receive a payment for the F-150 truck he had initially sold to Morales. (32 RT 5264-5265.) During their meeting, Flinner asked Morales whether he knew where to get a gun. Morales replied that he did not. (32 RT 5265.)

By June 2000, Flinner was ready to execute a plan to murder Keck. In the days before June 11, 2000, Flinner and his former landscape employee, Haron Ontiveros, went to an auto dealership, Autoport, where Flinner had previously purchased a car. (27 RT 4518, 4520; 45 RT 7754-7755; 60 RT 10212-10213.) Flinner signed a borrower agreement to borrow a small white Nissan NX car for a few days. (27 RT 4520-4522; 45 RT 7754-7755.)

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[1] As explained earlier, a couple of weeks before Keck was killed, Flinner sought to borrow $7,500 from Pemberton and $20,000 from Waitley. (32 RT 5484-5485, 5537-5538.) He told Pemberton that he would be able to pay back $10,000 within a few weeks. (32 RT 5484-5485.) He promised Waitley that he could pay him back within a few days. (32 RT 5537-5538.) Already, Flinner believed that he would receive a swift payout from the life insurance policy once Keck was dead.

On the evening of June 10, in an effort to fabricate an explanation for Keck's eventual murder, Flinner approached two sheriff's deputies and reported to them that a disgruntled customer was "after him." He claimed that the person had tried to run him off the road a couple of times. (47 RT 7962-7964.) However, when the deputies advised Flinner to file a report, he responded that he was not that worried and that he could take care of himself. (47 RT 7963.)

5. The murder

On June 11, 2000, at about 10:45 a.m., Flinner and Ontiveros met at a gas station on Tavern Road. (30 RT 5227, 5229-5231; 31 RT 5395-5399; 35 RT 6052-6055; 41 RT 7207-7210; 47 RT 8034-8042, 8117.) Flinner was driving his truck and Ontiveros was driving the borrowed Nissan. (38 RT 6575-6576, 6597.) The two drove their cars to a secluded cul-de-sac area along Tavern, where they would later lure and kill Keck. (25 RT 3996-99, 4033; 31 RT 5417-5421; 38 RT 6599-6600; 47 RT 8043-8050; 50 RT 8526-8529, 8534-8536, 8543-8544.) Flinner and Ontiveros stayed in the cul-de-sac for several minutes, discussed the murder, and then drove back out of the area. (38 RT 6575-6576; 47 RT 8043-8050; 50 RT 8526-8529.)

Flinner drove to his parents' house where he met Keck. (48 RT 8197; 50 RT 8517-8518.) The family planned a barbecue later that afternoon and Keck set off to obtain provisions for it. (28 RT 4845: 9 CT 2017-2018; 48 RT 8195, 8198.) Flinner took his 10-year-old son and drove to a couple of locations in El Cajon, including to a car wash where he purchased a car wash and to a mall where he made additional purchases. (28 RT 4845: 9 CT 2020, 2048-2050; 30 RT 5192, 5239-5242; 32 RT 5551-5556; 48 RT 8198.)

Meanwhile, Ontiveros returned to the cul-de-sac and parked the Nissan. (38 RT 6599-6600; 47 RT 8049-8052; 50 RT 8537, 8544.) He then walked back up Tavern Road to a gas station where he waited for Keck. (50 RT 8537, 8051-8052.)

After leaving Flinner's parent's home, Keck went to a WalMart in El Cajon. (26 RT 4226-4231; 48 RT 8109-8110; 50 RT 8536-8537.) While there, she purchased a pregnancy test kit as well as other items. (26 RT 4226-4227, 4421-4423.) While Keck was at WalMart, Flinner called her and directed her to meet Ontiveros at a gas station on Tavern Road so that she could help jump start his stranded car. (28 RT 4845: 9 CT 2019; 35 RT 6055-57, 6059.) Keck completed her purchases and checked out at WalMart at about 12:15 p.m. (26 RT 4226-4227.)

Several minutes later, Keck arrived at the gas station where she met and picked up Ontiveros, who was waiting for her. (48 RT 8113; 50 RT 8537-8538.) Keck drove Ontiveros to his Nissan in the cul-de-sac. (26 RT 4417; 38 RT 6598; 48 RT 8112-8113; 50 RT 8539.) She parked her car so that it was facing toward the Nissan. (25 RT 4012; 38 RT 6599-6600.) Keck left the car running. (25 RT 4012; 39 RT 6857-6858.)

Both Keck and Ontiveros got out of Keck's car and Keck went to open the hood of her car. As she was propping the hood open, Ontiveros came up from behind her and shot her in the back of the head. (25 RT 4040, 4427-4428; 27 RT 4435-4441; 29 RT 4983; 39 RT 6857-6858; 43 RT 7480-7485, 7533-7536; 45 RT 7718-7722, 7726.) The bullet passed through Keck's brain, exited through her right cheek, and finally lodged in the firewall of her car in the engine compartment. (26 RT 4425; 29 RT 4973, 4977-4978.) Upon being shot, Keck immediately fell forward into the engine compartment of the car and then crumpled to the ground. (25 RT 3996-3999; 26 RT 4418-4419; 29 RT 4987; 45 RT 7723-7724, 7728-7730.) She died within a minute of being shot. (29 RT 4992-4993.)

Ontiveros rolled Keck over, retrieved the bullet casing, and then fled the scene in his Nissan. (25 RT 3996-39; 27 RT 4439-4441; 45 RT 7730; 50 RT 8539.)

6. Flinner's attempts to appear blameless and derail the investigation

Although he knew Keck had to be dead, Flinner called Keck's cell phone several more times that afternoon. (35 RT 6060-6061.) He returned to his parents' house and asked them whether they had heard anything from Keck. (48 RT 8199-8200.) He called Keck's mother and asked her whether she had heard from Keck. (27 RT 4556-4557.) Later that afternoon, Flinner met with Keck's mother and the two set off in search of Keck. (27 RT 4559-4561.) Keck's mother noted that Flinner seemed very disaffected and unconcerned while she was with him. (27 RT 4560-4561.) They finally called the police to file a missing person report. (27 RT 4562-4563; 50 RT 8563-8564.)

Meanwhile, a motorist who got lost on Tavern Road happened upon Keck's body and called the police. (25 RT 3996-4000, 4010-4012, 4033-4037.)

When Flinner and Keck's mom contacted the authorities, the police directed them to come to the station to be interviewed. (27 RT 4564.) Flinner initially denied being anywhere near the cul-de-sac that day. (35 RT 6166.) However, just as he had related to the Sheriff's deputies a few days before the murder (47 RT 7962-7964), he claimed that there was a person who had been stalking him because of a landscaping job. Flinner also claimed that he had gotten into a physical altercation with the alleged stalker. (28 RT 4845: 9 CT 2022-2036.)

The night of the murder, police thoroughly searched Flinner's and Keck's apartment. (35 RT 6163-6164; 49 RT 8335-8336.) During the

search, Detective Rick Scully suggested to Flinner that in his experience, people who were found dead in isolated places were usually involved in either a secret love affair or illicit drug activity. (35 RT 6165.) Flinner rejected this potential theory or explanation for the murder. (28 RT 4845: 9 CT 2070-2071; 35 RT 6165-6166.) The police found nothing in the residence that would indicate drug use on Keck's part. (49 RT 8335-8336.)

However, within two days of the police search, Flinner contacted the police and claimed that he and his mother had found drugs and syringes among Keck's belongings. (35 RT 6168-6172; 35 RT 6172: 9 CT 2138-2139; 49 RT 8346-8348.) Flinner began asserting that the murder was drug-related. (35 RT 6178; 44 RT 7546: 10 CT 2276-2278.)

As police continued their investigation, though, Flinner's story continued to evolve and change. Within a week after the murder, Flinner started asserting that he had received threatening phone calls from a Hispanic man with whom he believed to have been in an altercation a decade earlier. Flinner claimed that he had been romantically involved with the man's girlfriend. (40 RT 7056-7058: 10 CT 2252-2255, 2284-2290, 2292-2296; 41 RT 7143.)

Within a few weeks of the murder, Flinner started to embrace Scully's previous suggestion that the murder was the result of an illicit romantic affair. He claimed to police that Keck had been romantically involved with a fireman. (10 CT 2298.)

Next, he tried to place the blame for the murder upon Marty Baker, one of his landscaping crew members. (27 RT 4565-4567.) Flinner claimed to police that Baker had a romantic interest in Keck. (10 CT 2299-2300.) About a month after the murder, Flinner invited Baker to dinner. During dinner, Flinner drugged Baker with Xanax, causing Baker to pass out. (40 RT 7006; 47 RT 7962, 8055-8064; 48 RT 8149-8159, 8185-8188.) Flinner then called another member of his landscaping crew, Lopez, and

asked Lopez to call his home from a pay phone. When Lopez did, Flinner instructed Lopez to put the receiver down and just let the phone call run until automatically disconnected. (30 RT 5150-5152, 5157; 35 RT 6155-6158; 40 RT 7006-7008; 59 RT 10018-10019.) Later that evening, Flinner called the police and claimed that he had received an anonymous phone call from a woman who told him that Baker had confessed to the murder and had disposed of the gun by tossing it over a bridge. (10 CT 2312, 2316-2329.)

Flinner also tried to frame another member of his landscaping crew, Charles Cahoon. The night of June 29 to 30, 2000, Flinner left an anonymous letter on a police car in which the writer provided details about the Keck murder and claimed that Cahoon had killed Keck. (33 RT 5794-5800, 5838; 60 RT 10242.) Flinner planted a sock which contained bullets matching the bullet that killed Keck in Cahoon's Volkswagen.[2] (33 RT 5832-5837, 5839; 45 RT 7625-7626, 7651-7652.) Later investigation revealed that Flinner's DNA was on the sock. (48 RT 8264-8281.)

When police expressed doubts about Flinner's assertion that Baker was the culprit, Flinner began concocting a story that Keck was killed because of her involvement with a foreign organization involved in the gambling industry. (35 RT 6175: 9 CT 2141-51; 10 CT 2362-2363.) He asserted that a friend, Rick Host, who died about a month after Keck, was involved in a scheme in which the North Korean government was seeking to have special gambling software delivered to mobsters in the United States. Appellant claimed[3] that just before his death, Host explained that

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[2] This was the Volkswagen the Aherns had given Flinner as part of their down payment for the BMW. (31 RT 5327-5329; 33 RT 5831.)

[3] Host passed away around July 15, 2000. (32 RT 5659, 5671.) However, Flinner made no mention to police about what Host allegedly

(continued...)

Keck was killed because she had too much information about the software. (37 RT 6563-64: 6 CT 1292-95, 1318-1321, 1333-1342; 38 RT 6610, 6677-6678, 6694-6697; 42 RT 7400-7402; 46 RT 7823-7836.) Flinner even tried to convince his parents that this story had credibility by sending them an anonymous letter in which the author explained that Keck was killed because she knew too much. The author of this letter directed Flinner's parents to keep him quiet. (38 RT 6670-6673.)

Flinner also tried to make himself look as though he were a targeted victim. (45 RT 7590-7591.) He planted a small container on his parents' property. (35 RT 6240.) Inside was a spent bullet casing with Keck's first name, Tamra, written on the jacket and an unexpended bullet with his first name written on it. (35 RT 6240; 45 RT 7594.) Flinner claimed that he was afraid for his life and that he would be willing to share more of what he knew about the murder but only if he were granted immunity from prosecution. (42 RT 7386-7394, 7400-7402.)

Once Flinner was in custody,[4] he started to express fear of Ontiveros, claiming that Ontiveros was a gang member and had put out a contract on Flinner's life. (38 RT 6602-6604, 6668-6669.) Flinner told police that Ontiveros had killed Keck. He explained that Ontiveros had been having an affair with Keck. (38 RT 6608-6609.) Flinner even sent a letter to the trial judge in which he asserted that Ontiveros was the murderer and that Rick Host was involved. (38 RT 6694-6697, 6706-6711.)

(...continued)
told him until about a month later. (10 CT 2344, 2347-2348; 40 RT 7032-7035; 42 RT 7400-7402, 7450-7054; 44 RT 7566.)

[4] Flinner was taken into custody at the end of July on a parole violation. (27 RT 4644; 55 RT 9419-9420.)

7. Flinner's belief that he would receive the insurance policy proceeds

Flinner believed that as a result of Keck's death, he would quickly benefit financially. Within two days of Keck's death, Flinner contacted the San Diego County Credit Union, the lender for Keck's auto loan and with whom she had opened a $1,000 credit card, to inquire about a $50,000 credit life and disability protection that was on Keck's loan accounts. (26 RT 4241-4243; 28 RT 4802-4806; 29 RT 4869.) Flinner believed that he was entitled to the $50,000 proceeds because of Keck's death. (29 RT 4870.)

About a week after Keck's death, AllState agents contacted Flinner and explained that they would be sending him the necessary paperwork to process the claim on the life insurance policy. (25 RT 4114-4117.) Shortly thereafter, Flinner purchased three copies of Keck's death certificate. (26 RT 4407-4409.) Flinner tried to deflect any suspicions by feigning ignorance about what the insurance policy meant. (26 RT 4117.) At one point, he claimed he had forgotten all about the insurance policy, even though he had paid the premiums for the policy early, and told Keck's mother within three days of the murder that he had insurance documents that would make her happy. (25 RT 4072, 4192-4193; 27 RT 4564-65.)

About two weeks after Keck's death Flinner contacted AllState to find out how long the claims process would take. (25 RT 4123.) When the agent explained that AllState would need to contact law enforcement to ensure there was no beneficiary involvement in the homicide, Flinner asserted that he did not kill Keck and that the police knew he had not because they had already run ballistics tests. (25 RT 4119, 4123-4124.)

In the weeks following Keck's death, Flinner believed he would quickly receive the death benefits from the insurance policy. He tried to buy a truck on one hundred percent credit. He represented to the seller that

he was about to receive $600,000 within about 30 days. (26 RT 4364-4367.) To a separate car salesman he asserted that he wanted to use life insurance proceeds to buy a used truck. (41 RT 7185-7186.) Within days of Keck's death, he contacted the company that had sold him the boat. He explained to the boat sellers that he wanted to upgrade his purchase to a larger boat by using funds he was going to receive from life insurance proceeds. (34 RT 5972-5974.)

However, the insurance claims process did not move with the rapidity Flinner had anticipated or hoped for. Consequently, he asked a friend to find someone who would be willing to buy the insurance policy. This way he could obtain substantial funds immediately. (53 RT 8971-72.) Flinner also tried to get money from Patricia Host. After her husband Rick died, Flinner told her that he had given Rick $20,000 to invest. Flinner asked Patricia to look for the money. (32 RT 5674-5676; 33 RT 5732-5733.) Patricia never found any money Flinner allegedly gave to her husband. (32 RT 5676; 33 RT 5732-5733.)

Nonetheless, Flinner continued to believe that he was going to receive the death benefits from Keck's life insurance policy. (27 RT 4620-4621.) Even after Flinner was in custody, he told fellow inmates that he expected a substantial payout. (37 RT 6435, 6531-6532.)

8. Flinner's payment to Ontiveros for killing Keck

In the days following the murder, Flinner made repeated phone calls to Ontiveros who lived in Mexico. Flinner used a calling card and placed the calls from different pay phones in an effort to conceal his efforts to contact Ontiveros. (35 RT 6202-6208; 40 RT 7086-7087; 45 RT 7682-83, 7685-7686, 7699-7701.)

Flinner needed to pay Ontiveros for killing Keck. Somehow, Flinner obtained a returned check that belonged to Harold and Linda Perry. (27 RT

4647-4650; 35 RT 6180-6181; 40 RT 7082-7086; 45 RT 7682-83, 7685-7686, 7699-7701.) In July 2000, he used his computer to draft a blank check with the Perry's account information on it. (33 RT 5743-5744, 5788; 41 RT 7260-7262; 50 RT 8522-8524.) He gave the check to Ontiveros who made the check out to his father in the amount of $7,000 and asked his father to deposit it. (27 RT 4651-4656; 28 RT 4665-4666; 33 RT 5743-5746; 41 RT 7216-7218.) However, the bank, suspecting possible fraud, did not honor the check and ended up freezing Ontiveros's father's account. (33 RT 5747-5749; 41 RT 7245-7249.)

Flinner also gave Ontiveros the Chevy truck he had leased. (33 RT 5752.) In order to divest himself of liability for the truck, Flinner reported the truck as stolen in mid-June 2000. (30 RT 5125, 5142-5144; 53 RT 9005-9007, 9012; 58 RT 9902-9903.)

9. Flinner's efforts to derail the trial

Not only did Flinner try to derail the police investigation as it unfolded, he also tried to derail his trial. (37 RT 6442-6447.) While in custody, Flinner befriended an inmate, Gregory Sherman, who represented himself in his own criminal case. (37 RT 6430.) Because of his *pro per* status, Sherman had extensive Internet and phone privileges in jail. (37 RT 6432-6434.) Flinner asked Sherman to look up the addresses for potential witnesses that would testify at his trial, as well as the addresses for the prosecutor and trial judge. (37 RT 6439-6441, 6463-6465.) With Sherman's help, Flinner compiled the addresses of scores of witnesses, as well as the addresses for the lead detectives and the prosecutor. (37 RT 6463-6465; 38 RT 6635-6636, 6592-6593.)

Flinner sent his compiled list of witness names and addresses to a former girlfriend, Catherine McLarnan, together with detailed instructions on what she was to do with this information. (38 RT 6615, 6624-6626,

6635-6636.) Flinner provided McLarnan with a cover letter she was to send to all of the witnesses. He instructed McLarnan to use a typewriter to prepare the mailings, wear latex gloves when handling these materials, use the address of his former defense attorney as the return address, and send the letters from somewhere within San Diego. (38 RT 6627-6632.) Flinner's intent was to taint the witnesses so that their testimony would be rendered suspect and impeachable. He sought to sabotage his trial. (37 RT 6442-6445.) McLarnan did not comply with Flinner's directions; instead, she gave everything he sent her to a defense investigator. (38 RT 6640-6644; 46 RT 7862-7869.)

Flinner's secondary plan of sabotage was to tamper with the jury by sending the jurors evidence the court had ruled inadmissible. Flinner planned to ensure only jurors who were property owners with unique names were impaneled. This way, he would be able to easily look up their addresses through property records searches on the Internet. He planned to use the prosecutor's address as the return address to make it appear as though the prosecutor had sent the inadmissible materials to the jury. (37 RT 6446-6447.)

Flinner talked about having various witnesses including the lead detectives killed. (37 RT 6446.) He asked two fellow inmates to kill Ontiveros. (37 RT 6541; 60 RT 10189-10190.) When these inmates began cooperating with the prosecution, Flinner tried to intimidate them. (35 RT 6243-6244; 37 RT 6533-6540; 42 RT 7426-7427; 46 RT 7871-7874.)

Flinner also tried to intimidate the prosecutor by writing to other inmates about him. (42 RT 7406-10, 7415; 46 RT 7852-7854.)

10. Flinner's admissions to others

After Keck was killed, Flinner made various admissions and statements to people showing his knowledge and complicity in the murder.

The day after the murder, Flinner told a member of his landscaping crew that Keck had been shot in the back of the head. (39 RT 6857-6860.) He also described various other details about the crime scene and how Keck was killed – things he could not have known[5] unless he had been complicit in the commission of the murder. (25 RT 4029-4030; 28 RT 4744; 29 RT 4942-4944, 5031-5038; 30 RT 5073-5074, 5079-5085, 5087-5091, 5114-5116; 39 RT 6857-6860; 40 RT 6967-6973, 6996, 6998-6999; 41 RT 7200-7201.)

A few weeks after the murder, Flinner was eating out with Gil Lopez and Marie Locke. During dinner, he drank alcohol. (58 RT 9936-9937.) Flinner became distraught about Keck's death and stated either, "I shouldn't have killed her," or "I shouldn't have had her killed." (58 RT 9923-9924; 59 RT 10005-10006, 10025.) Sometime later, when Flinner was alone with Lopez, and after having ingested several sleeping pills, he said, "I shouldn't have killed her." (59 RT 10012-10013; 61 RT 10376-10377.)

While in custody, Flinner told fellow inmate Michael Theodorelos that the murder was the result of an overseas transaction that had gone awry and blamed Asians for the killing. (35 RT 6239-6242; 60 RT 10189-10192.) However, he admitted to Theodorelos that he made sure the murder happened while he was making credit card purchases so that he would have a proper alibi. (35 RT 6240-6242.) Flinner also admitted that he tried to thwart the investigation. He told Theodorelos about the bullets

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[5] The fact that Keck was shot in the back of the head was only established during the time of the autopsy. (29 RT 4977-4978, 4993; 53 RT 9106.) The autopsy was sealed and information about where the gunshot entered Keck's head was not publicly available. (29 RT 5031-5038; 30 RT 5073-5074, 5079-5085, 5087-5091, 5114-5116; 40 RT 6967-6973, 6996, 6998-6999; 41 RT 7200-7201; 53 RT 9370-9391.)

he planted on his parents' property and about the anonymous note he left on a police car accusing Cahoon of killing Keck.[6] (35 RT 6240; 60 RT 10192.)

11. Defense evidence

In his defense, Flinner strove to challenge the credibility of some of the prosecution witnesses and raise doubt as to the prosecutor's theories of guilt.

To show that he did not have any special knowledge or insight about the crime, Flinner presented evidence that information about Keck having been shot in the head and other details about the crime scene had been released to the media and was therefore widely known. (52 RT 8862, 8864; 53 RT 9106, 9370-9391; 55 RT 9396-9399, 9401-9403; 57 RT 9628-9639.)

To refute allegations that he bore animosity toward Keck, Flinner presented evidence showing he was kind and loving toward her. (52 RT 8884; 53 RT 8926; 55 RT 9459-9460.) He also presented evidence that he was distraught over Keck's death. (58 RT 9795.)

In response to the prosecution evidence that Flinner's DNA was on the sock that was found in Cahoon's car, Flinner presented his own DNA expert who quibbled with the prosecution expert's findings. (52 RT 8755-8765, 8768-8783.)

Flinner tried to lend credence to his exculpatory story that Rick Host was involved in the murder by setting forth evidence about Host's eclectic business ventures, including his associations with casinos and ideas for new gambling games. (52 RT 8873-8874; 53 RT 8967-8969.) However, the

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[6] The police never told Flinner about the anonymous note accusing Cahoon of killing Keck. Therefore the only way Theodorelos could know about it was because Flinner had placed the note and told him about it. (60 RT 10242.)

witnesses Flinner presented also testified that none of Host's gaming or gambling ideas came to fruition. (52 RT 8877-8878; 53 RT 8967-8968.)

In order to establish credibility for his exculpatory story that he and his parents were targeted victims, Flinner introduced evidence that his father had received threatening phone calls. (55 RT 9427-9429.)

Flinner tried to show that his financial situation was not as dire as portrayed by the prosecution's evidence. (57 RT 9564, 9567.) He also presented evidence that he was being responsible in the management of his financial affairs. (55 RT 9355-9363.)

Finally, Flinner sought to discredit some of the prosecution witnesses. He presented evidence that prison inmates Theodorelos and Atkinson cooperated with the prosecution in hopes of receiving a benefit while in custody. (54 RT 9297-9299; 58 RT 9952-9956.) Flinner introduced evidence challenging some of the details of Cahoon's testimony. (54 RT 9277-9280.) And he set forth evidence that Baker's testimony was suspect because he suffered psychological problems. (54 RT 9183-9191; 57 RT 9624.)

B. Penalty Phase Evidence

1. Evidence in mitigation

Flinner was born in June 1967 to John and Carol Flinner. When Carol was about seven weeks pregnant with Flinner, she was involved in a car accident in which she suffered significant injuries which led her to take various pain medications. (69 RT 11360-11361, 11393.) The pregnancy however, continued to full term. (69 RT 11384.)

John was in the Navy and therefore often out to sea on deployment during Flinner's formative years. (69 RT 11363, 11396-11397, 11400.) He

suffered alcohol dependency and anger management problems while Flinner was growing up. (69 RT 11399-11400.)

When Flinner was about three years old, his nine-month-old sister and grandfather passed away. (69 RT 11362-11364.) Because of the loss of her daughter and father, Carol became overly-protective of Flinner. (69 RT 11364.)

At three years of age, Flinner was prescribed phenobarbitol because of his hyperactivity. (69 RT 11362-11363, 11394-11396.)

Flinner suffered typical childhood injuries. (69 RT 11365-11370, 11397-11399.) When he was four years old, he fell from a bunk bed, and split his ear. He received stitches for this injury. (69 RT 11365-11366.) When he was six or seven years old, Flinner played with a stick, tossing it up into the air. The stick hit him in the head, and Flinner again received stitches. (69 RT 11367-11368.)

When Flinner was in school, doctors recommended that he take Ritalin because of his hyperactivity. Later, as he entered his teenage years, doctors changed the Ritalin prescription to Meloril. (69 RT 11366, 11369, 11397.) Flinner did not like school and did not perform well academically. (69 RT 11373-11374.)

At age 15, Flinner experienced intermittent and unexplained blackouts. (69 RT 11372.) At age 16, he threatened suicide. (69 RT 11373, 11400.)

After graduating high school, Flinner enlisted in the Army. However, his time in the Army was short-lived. He left the Army, becoming absent without leave. (69 RT 11376-11378, 11401.)

In his early 20s, Flinner was friends with Kevin Desmond and Bob Brownyard. The three spent time doing things together. (70 RT 11496-11497, 11506.) One evening, as they were driving toward Tijuana, Mexico, they got into a car accident in the middle of the freeway. Flinner helped get

his injured companions out of the car and to the side of the freeway. (70 RT 11497-11500, 11502-11503, 11507-11511.)

Flinner spent eight years in prison. (69 RT 11379.) In 1998, while in custody, he performed the Heimlich maneuver on a fellow inmate who was choking on a piece of apple. (69 RT 11407-11408; 70 RT 11557.)

Flinner presented expert psychological evidence that he suffered slight brain dysfunction. (69 RT 11414, 11425-11428.) Though he had average intelligence, he exhibited poor judgment and insight, as well as an impaired ability to fully grasp the consequences of his actions. (69 RT 11428-11444; 70 RT 11593-11594, 11602-11604.) He exhibited the necessary criteria for a diagnosis of anti-social personality disorder. (69 RT 11451-11456; 70 RT 11581-11583.) However, Flinner's brain dysfunction did not hinder his ability to comprehend right from wrong. (70 RT 11613-11617.)

Flinner introduced evidence that if he were sentenced to a term of life in prison without the possibility of parole, he would spend the rest of his life in a maximum security prison facility. (70 RT 11514, 11522-11523.) He also set forth some evidence about the psychological effects prison life has on him. He presented evidence that he attempted suicide when he was returned to prison in July 2000 and learned that he would spend at least another year there. (70 RT 11539-11541, 11544-11546, 11554-11556, 11641-11642; 71 RT 11660.)

Finally, Flinner introduced evidence of some of his other redeeming qualities. He loves his family, and his family loves him. (69 RT 11379-11383, 11403-11404.) He also has artistic talent. (69 RT 11382-11383.) He has given his son, Jonathan, good advice by counseling him to stay in school, stay away from drugs, stay away from criminal conduct, be honest, work hard, and recognize that fast money is not good. (71 RT 11649-11650.)

2. Evidence in aggravation

a. Victim impact evidence

Keck was born in October 1981. She was raised by her mother and her mother's parents. (68 RT 11244, 11246-11247.) As a teenager, Keck became involved in Job's Daughters, a Masonic organization that espoused the values of fidelity, loyalty, and morality. (68 RT 11248-11250.) Through her participation in Job's Daughters, Keck gained confidence and learned leadership skills. (68 RT 11250-11253.) Later, Keck became involved in a program in which she learned firefighting and emergency medical responder skills. She set a goal for herself to become a firefighter. (68 RT 11258-11260.)

Keck had a close relationship with her mother and older brother. (68 RT 11263-11264, 11266, 11272-11273.) She participated with her mother in various church activities and helped her brother with his school work. (68 RT 11263-11264, 11273.) Prior to her death, Keck had sung in her church choir for four years. (68 RT 11257.)

Keck's death was devastating to her family. (68 RT 11256-11257.) Her grandmother declined both physically and emotionally as a result of the murder. (68 RT 11270.) Keck's death led her family to harbor feelings of sorrow, pain, and anger. Her absence at family gatherings during holidays continued to be palpable and led to a deep sense of loss. (68 RT 11257, 11267, 11269, 11273-11274, 11276.)

b. Flinner's criminal history

Flinner has an extensive history of dominating women and subjugating them to his carnal lusts.

In June 1990, Flinner met Tonia Knisely at a club. After dancing and socializing, they left the club and went to Flinner's apartment. (68 RT

11316-11318.) There, Flinner prepared soup for Knisely. (68 RT 11319-11320.) He put a date rape drug into the soup which caused Knisely to pass out. When she woke up, she was naked. (68 RT 11321-11322.) She felt unstable and confused and decided to take a shower. As she dressed, she noticed a tear in the back of her pants that had not been there before. (68 RT 11323-11324.)

That same month of June 1990, Flinner met Erika Johannes at a restaurant. They exchanged phone numbers and within a few days went out on a date. They returned to Flinner's apartment. (68 RT 11345-11346.) There, Flinner gave Johannes a beer and as they were watching television, she fell asleep. Flinner woke her up, directed her to lay down in his bed, and gave her some pills, claiming they were either aspirin or Tylenol. Johannes passed out on Flinner's bed. (68 RT 11347-11349.) When she awoke, she was naked and had difficulty thinking clearly. Flinner took her home. (68 RT 11349-11350.) Once she was home, Johannes discovered that she was bleeding from her rectum and had a vaginal discharge. She reported what had happened to the police and had a rape exam done. (68 RT 11351-11352.)

In July 1990, Flinner invited Annette Tucker, whom he had befriended sometime in 1989, to his apartment. (68 RT 11303-11304.) As they went to his place, they picked up cheesecake and hot chocolate mix. (68 RT 11304.) Once at his apartment, Flinner prepared the hot chocolate and slipped a date rape drug into Tucker's cup. After drinking her hot chocolate, Tucker began to feel very tired and fell asleep. (68 RT 11306-11307.) When she woke up, she found herself naked in Flinner's bed. She had bruises on her legs and a puncture wound near her pubic bone. (68 RT 11307-11309.) She had Flinner take her home, where she again passed out for several hours. (68 RT 11310.) When she finally recovered, she

reported what had happened to the police. Police later recovered naked pictures of Tucker on Flinner's camera. (68 RT 11311-11312.)

Flinner met Christina Daniels sometime in 1990. They dated and eventually married. (68 RT 11332-11334.) During their relationship, when Daniels told Flinner she was pregnant, Flinner became enraged and ordered her to have an abortion. He grabbed a gun and started swinging it at her. As Daniels tried to flee, Flinner grabbed her arm, twisted it, and slammed her against a door. (68 RT 11336.) On another occasion, Flinner and Daniels were fighting. Daniels ran to the bedroom and called the police. When Flinner learned that she had called the authorities, he became furious and said, "You stupid bitch. The police are going to come now." He threatened Daniels with a gun and warned her not to say anything to the police. (68 RT 11337.)

Flinner tried to isolate Daniels from her friends. Once, when she was about to go out to see a friend, Flinner grabbed her and choked her. (68 RT 11339.) At another point, Flinner trapped Daniels in their kitchen and again threatened her with a gun. He threatened to kill her and himself if she left him. Daniels felt like Flinner controlled her. (68 RT 11340.)

Flinner's criminal history includes convictions for forgery, possession of stolen property, rape by a foreign object, auto theft, grand theft, and failure to appear in court while on bond. (68 RT 11356-11357.)

ARGUMENT

I. FLINNER HAS NOT DEMONSTRATED THAT THE TRIAL COURT OR PROSECUTOR VIOLATED HIS DUE PROCESS RIGHTS WHEN THE SHERIFF MOVED HIM TO A MORE SECURE DETENTION FACILITY PRIOR TO TRIAL

Flinner claims that the prosecutor and trial court violated his due process rights by directing or permitting the San Diego County Sheriff's

Department to move him from a downtown jail facility to a more remote jail facility before trial. He urges that the sheriff, prosecutor, and court interfered with his Sixth Amendment right to effective representation because his move to the more remote jail resulted in an unlawful restriction of his access to counsel. (AOB 46-85.) The claim has been forfeited. It is also devoid of merit because there is nothing in the record substantiating its factual basis.

A. Factual Background

Before trial,[7] in January 2002, defense counsel discussed with the court the possibility that Flinner might be moved from the downtown San Diego detention facility to the jail in Vista, in the northern part of San Diego County. Counsel asked the court to either issue a directive or request that Flinner remain housed in the downtown jail so as to facilitate convenient access for counsel to see him. The court stated that the minutes would reflect its request that Flinner continue to be housed in the downtown jail. However, the court did not issue an order directing the sheriff how, or where, to house Flinner. (3 RT 387; see also 15 CT 3342[8].)

As described above in the Statement of Facts, Flinner engaged in an extensive campaign to thwart the investigation and trial. Among those efforts, Flinner enlisted the aid of fellow inmate, Gregory Sherman, to collect the home addresses of prosecution witnesses. Flinner intended to distribute information about his case to those witnesses, with the hope that this would render their trial testimony suspect. He also obtained the

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[7] Jury selection commenced on July 10, 2003. (18 RT 3001.) The jury was impaneled and sworn on August 1, 2003. (24 RT 3834.)

[8] The minutes provided: "Court requests that the jail continue to house defendant Flinner at the central detention facility to facilitate the preparation of his defense." (15 CT 3342.)

judge's and trial prosecutor's home addresses. (37 RT 6439-6445, 6463-6465; 38 RT 6635-6636, 6592-6593, 6615, 6624-6632, 6635-6636.)

On October 1, 2002, Sherman sent a letter to the District Attorney's Office advising that he had information about Flinner's efforts to sabotage the trial as well as information about threats Flinner had levied against the trial judge, prosecutor, and the lead detectives in the case. Sherman stated that he was interested in a cooperation agreement to reduce his own sentence. (Exhibit 112, Item 1 of 7, see also Item 2 of 7.)

On December 5, 2002, representatives from the District Attorney's Office – an investigator and a deputy attorney – interviewed Sherman in a "free talk." The free talk did not obligate the District Attorney's Office or Sherman in any way. (Exh. 112, Items 3 and 5, of 7.) During the interview, Sherman explained that as a pro per inmate, he had phone and law library privileges. (Exh. 112, Item 5 of 7, at p. 3.) He detailed how Flinner asked him to use his phone privileges to contact the County Recorder's Office to obtain the addresses for dozens of people Flinner claimed were defense witnesses. Included among Flinner's lists were the names of the trial judge and prosecutor. (Exh. 112, Item 5 of 7, at p. 11-13.) Sherman realized that the names were not for defense witnesses but for prosecution witnesses when he saw and recognized one of the names as that of a detective. (Exh. 112, Item 5 of 7, at p. 15-16.) When he confronted Flinner about this, Flinner explained his scheme to flood the witness pool with information about himself so as to destroy witness credibility. Flinner stated that he planned to make it look as though the information had been distributed by one of the lead detectives, whom he planned to have killed. (Exh. 112, Item 5 of 7, at p. 16-18.) Flinner also explained his alternative plan: obtain the addresses of jurors and send them information about the case. Under this alternative plan, he would make it look as though the prosecutor had sent the information to the jurors and he

would then have the prosecutor killed. (Exh. 112, Item 5 of 7, at p. 21-24.) As a last resort, Flinner discussed having the trial judge killed. (Exh. 112, Item 5 of 7, at p. 22-23.)

Based upon all the information Sherman provided, the prosecutor filed an ex parte motion with the court on January 7, 2003. In the motion, the prosecutor explained that what Sherman had revealed appeared to be discoverable as potentially exculpatory evidence to Flinner's co-defendant, Ontiveros. The prosecutor asked the court for an in camera review of Sherman's interview. Additionally, the prosecutor alerted the court that, based on Sherman's interview, Flinner's defense might ask the court to recuse itself. (Exh. 111.)

On January 17, 2003, the court held an ex parte hearing with only the prosecutor present. In that hearing, the court explained that it had received a *Tarasoff*[9] warning from the Judicial Threat Assessment Unit. The warning came as a result of Sherman's interview. (7A RT 1067.) The prosecutor explained some of the efforts his office had made to corroborate Sherman's account. (7A RT 1068-1072.) In the final analysis, the prosecutor concluded that the threat level to the court or anyone else was relatively low. (7A RT 1072-1073.)

Immediately following the ex parte hearing with the prosecutor, the court convened a special security meeting with the prosecutor, members of the court security detail, detectives, the presiding judge for the courthouse, and the assistant sheriff responsible for jail operations. (7A RT 1074-1075.) The meeting focused upon all of the information gathered since Sherman first contacted the District Attorney's Office in October of the previous year. The concern was to maintain security for all court personnel

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[9] *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 434.

as well as any other persons involved in Flinner's case. The assistant sheriff over jail operations suggested that Flinner could be moved to a more secure housing unit to minimize his access to outside sources of information and to minimize his ability to manipulate events outside of the jail. The presiding judge for the courthouse agreed that this sounded like a viable approach to maintain security. (7A RT 1095.) When it was suggested that the jail in Vista had the most restrictive cells, the trial court noted that moving Flinner there would likely raise the ire of defense counsel. But the presiding judge observed that the jails routinely moved inmates around. (7A RT 1096.) The meeting concluded with the sheriff planning to explore possibilities for how to proceed. (7A RT 1096-1097) The court never issued an order that Flinner be transferred to the Vista facility.

On January 24, 2003, the sheriff transferred Flinner from downtown to the Vista detention facility and placed him in administrative segregation. (8 RT 1122.) The sheriff also limited Flinner's phone privileges. (8 RT 1122-1123.)

On February 13, 2003, the court held another ex parte hearing with the prosecutor. The purpose of this hearing was to discuss the prosecutor's disclosure motion, to determine whether the Sherman revelations were to be provided to Ontiveros' and Flinner's defense teams. (7B RT 1106.) At the hearing, the prosecutor advised the court that it was his understanding Flinner had been transferred to Vista, that defense counsel was unhappy about it, and that the defense demanded an explanation from the prosecutor. The prosecutor explained to defense counsel that Flinner's move to Vista was done for reasons known to the jail. (7B RT 1107.) The court and prosecutor then discussed a draft order which would release the Sherman information to Ontiveros's counsel and that it could be shared with Ontiveros. The same information would be released to Flinner's attorneys

but Flinner's attorneys would be barred from also sharing it with Flinner. (7B RT 1112-1114)

On February 28, 2003, the court held a status conference. Flinner was present for this conference. (8 RT 1116.) After discussing various matters, the court invited the attorneys to discuss the status of the case in moving forward to trial. (8 RT 1121.) Defense counsel complained about the fact that Flinner had been transferred to a farther detention facility and that this, together with the restrictions on his phone privileges, was slowing the defense preparation of the case. Counsel, believing that the prosecutor had some involvement in effectuating the transfer, asked the court to order the prosecutor to find out why Flinner's phone access was limited so that any problems could be remedied. (8 RT 1122-1124.)

The court noted that it had not entered any order as to Flinner's custodial circumstances and the court refused to interfere with jail operations. (8 RT 1124-1125.) However, the court placed upon the record its understanding, based on communications from the jail, as to what Flinner's custodial restrictions entailed. Flinner was housed in an isolation cell and was not permitted contact with other inmates. He was granted three 20 minute collect phone calls to his defense attorney Sandra Resnick. Flinner was also permitted 45-minute personal contact visits from either of his defense attorneys with proper notice from the attorneys a day in advance and that these visits were visually monitored by law enforcement but otherwise completely private. (8 RT 1125-1126.) The court went on to explain that it was willing to issue an order to allow other members of the defense team to have visits with Flinner. (8 RT 1126-1128.)

That same day, the court issued a sealed order allowing for the distribution of the Sherman materials to the Ontiveros defense team and to Flinner's counsel. The order barred Flinner's attorneys from discussing Sherman's information with Flinner. (Exh. 124; 8A RT 1138.)

On March 11, 2003, the court held an ex parte hearing with Flinner's counsel. The court noted that it had signed three orders permitting various members of the defense team, including a jury consultant and litigation specialist, to have personal visits with Flinner. (8A RT 1138-1139.) At the hearing, counsel challenged Sherman's credibility and raised concerns about the order barring counsel from conferring with Flinner about Sherman's allegations. (8A RT 1140-1143.) Counsel also complained about the distance to the Vista jail, the jail's searches of counsel's personal effects when entering to visit Flinner, and the phone restrictions. (8A RT 1144-1148.) Counsel also made a veiled suggestion that, in light of what Sherman related, the court might need to be recused. However, counsel immediately noted that this was likely not necessary and that Flinner was pleased with the court's equity and fairness. (8A RT 1148.)

The court reiterated that it did not direct the sheriff to house Flinner in Vista. The sheriff was tasked with maintaining security and was therefore free to make decisions on its own. (8A RT 1150.) The court also observed that it had no concern as to its own ability to remain fair and impartial. (8A RT 1152.)

On March 14, 2003, the court held another ex parte hearing with Flinner's counsel. (8B RT 1160.) At this hearing, the court indicated that it was inclined to issue an order relaxing its prior order that no information be given to Flinner. (8B RT 1164-1165.) The prosecutor later joined this in camera hearing. (8B RT 1170.) The court discussed its willingness to allow defense counsel to discuss the Sherman materials with Flinner so that counsel could maintain a completely open and candid attorney-client relationship with him. (8B RT 1170-1172.) The court reinforced that the jails were under the direction of the sheriff and not the court. (8B RT 1172-1173.) At this point, defense counsel expressed its acceptance, in light of the security concerns raised by Sherman's allegations, that Flinner's

custodial arrangement was directed by the jail and made no further requests as to his custody. (8B RT 1175.) After the court explained its desire to relax its prior order so that defense counsel could discuss the Sherman matter with Flinner, the prosecutor asked for time to ensure all security precautions were taken to protect Sherman. (8B RT 1178.)

On March 19, 2003, after the prosecutor had time to ensure Sherman's safety, the court issued its order permitting Flinner's attorneys to disclose to him Sherman's allegations. (8C RT 1181-82.)

B. Legal Analysis

Flinner asserts that the trial court, prosecutor, and sheriff interfered with his attorney-client relationship and that his due process rights were violated when he was transferred to the Vista detention facility. But Flinner never litigated the violation of his due process or Sixth Amendment rights in the trial court. He never moved for dismissal of the charges, never moved the court to order the sheriff to relocate him, and never moved the court to modify his custodial status. Instead, Flinner simply complained about the custody circumstances to the trial court. (8 RT 1122-1124; 8A RT 1144-1148.) In response, the trial court issued orders to allow additional members of the defense team to have personal contact visits with Flinner. (8 RT 1126-1128; 8A RT 1138-1139.) Flinner also complained about the order barring counsel from discussing the Sherman revelation with him. (8A RT 1140-1143; 8B RT 1175.) In response to this complaint, the court amended its order and permitted disclosure of that material to Flinner. (8B RT 1164-1165, 1178; 8C RT 1181-82.) As stated, Flinner never moved for dismissal on the basis of a due process rights or Sixth Amendment right to counsel violation. His claim has been forfeited. (See, e.g., *People v. Edwards* (1991) 54 Cal.3d 787, 827 [failure to move to dismiss for vindictive prosecution resulted in forfeiture of the issue on

appeal]; *People v. Valdez* (2012) 55 Cal.4th 82, 142-143 ["[f]ailure to press for a ruling on a motion to exclude evidence forfeits appellate review of the claim because such failure deprives the trial court of the opportunity to correct potential error in the first instance"])

The claim is also without merit. First, the record shows that neither the prosecutor nor the trial court were responsible for Flinner's transfer from the downtown jail to Vista. While they may have been present at a meeting in which jail and courtroom security issues were discussed, the ultimate decision how to proceed was made unilaterally by the sheriff who operated the jails. Therefore, Flinner is unable to establish that either the prosecutor or the trial court violated his rights.

Second, Flinner has failed to establish that his relocation to the Vista jail facility violated his due process rights. His claim appears to be grounded upon the notion that he had some sort of due process right or liberty interest in being housed in the downtown jail. But the only thing he presents to support the existence of such a questionable right is his assertion that in January 2002 the trial court "ordered" the sheriff to continue to house Flinner in the downtown facility. (AOB 64-65.) Contrary to Flinner's assertion, the court never issued any such order. Instead, the court noted in the minutes its *request* "that the jail continue to house defendant Flinner at the central detention facility to facilitate the preparation of his defense." (15 CT 3342.) This was not a court order.

And even if it were, Flinner fails to provide a compelling argument that such would create a due process liberty interest that would require procedural formalities such as a judicial hearing if the sheriff determined that a change in custodial arrangement was necessary. As the United State Supreme Court has observed, in speaking about prison policies, courts should pay "appropriate deference and flexibility to state officials trying to manage a volatile environment." (*Sandin v. Conner* (1995) 515 U.S. 472,

483 [115 S.Ct. 2293, 132 L.Ed.2d 418]; see also *Bell v. Wolfish* (1979) 441 U.S. 520, 540, fn. 23 [99 S.Ct. 1861, 60 L.Ed.2d 447] ["In determining whether restrictions or conditions are reasonably related to the Government's interest in maintaining security and order and operating the institution in a manageable fashion, courts must heed our warning that '[such] considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.'"].) Thus, so long as Flinner's pretrial detention conditions did not amount to punishment, he cannot show a violation of his due process rights based upon the location or circumstances of his detention. (*Bell, supra*, 441 U.S. at pp. 535-536.) Indeed, "the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into 'punishment.' " (*Id.* at p. 537.) The jail's imposition of restrictions in order to ensure security does not "constitute unconstitutional punishment." (*Id.* at p. 540.)

Here, Flinner was transferred from the downtown jail to the more secure Vista facility so as to preclude him from having unfettered access to other inmates who might assist him in his efforts to thwart his trial. Thus, the sheriff had a valid security purpose when effecting the transfer. Flinner has not shown that the transfer to Vista amounted to punitive measures. Instead, the record amply demonstrates the sheriff took administrative measures to ensure the integrity of the trial proceedings and the safety of all persons involved in Flinner's case.

Third, Flinner has not shown that his relocation to Vista improperly impinged upon his access to trial council. After the transfer, Flinner continued to enjoy telephone privileges with his attorneys, albeit limited to

three 20-minute phone calls each week. He continued to enjoy the privilege of having personal visits with his attorneys whenever his attorneys scheduled them. And he enjoyed the privilege of having personal visits from other members of his defense team, including the defense investigator, jury consultant, and litigation specialist. At no point did Flinner raise any concerns with the court that his representation was being unduly and prejudicially impacted by his housing circumstances in Vista. Therefore, his claim that his housing in Vista violated his Sixth Amendment right to counsel is specious.

In sum, Flinner has failed to demonstrate that the sheriff, trial court, or prosecutor violated his due process or Sixth Amendment rights. His claim must be rejected in full.

II. FLINNER HAS NOT SHOWN THAT THE TRIAL COURT VIOLATED HIS RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF THE PROCEEDINGS

Related to the previous argument, Flinner asserts the trial court violated his right to be present at all critical stages of the proceedings. He claims that by holding ex parte discussions with jail personnel and in camera discussions with the attorneys, he was improperly excluded from vitally important proceedings. (AOB 86-89.) The claim has been forfeited. It is also without merit because Flinner was not excluded from any outcome determinative proceedings.

At the outset, Flinner never raised any objections or moved for any remedy based on the ex parte conferences the trial court held. Flinner had every opportunity to do so – he learned about the ex parte hearings and learned the purpose of those hearings. Having failed to object or move for a remedy, his claim has been forfeited. (See *People v. Daya* (1994)

29 Cal.App.4th 697, 714 [a defendant should not be permitted to remain mute at trial and then scream foul on appeal].)

In any event, Flinner's claim fails on the merits. It is settled that a defendant has both state and federal constitutional rights, as well as a statutory right, to be present at any stage of the criminal proceedings that is critical to its outcome and his presence would contribute to the fairness of the procedure. (*People v. Blacksher* (2011) 52 Cal.4th 769, 798-799.)

> [T]he federal constitutional right to counsel arises at critical stages of the prosecution or when necessary to assure a meaningful defense. Likewise, a federal constitutional right to be present in court exists where necessary to protect the defendant's opportunity for effective cross-examination, or to allow him to participate at a critical stage and enhance the fairness of the proceeding. Such protections usually do not cover in camera discussions on matters bearing no reasonable, substantial relation to the defense of the charge.

(*People v. Carasi* (2008) 44 Cal.4th 1263, 1299, citations omitted.)

While "[p]roceedings held in chambers and outside the presence of a party are generally disfavored ..., the trial court retains discretion to conduct in camera ex parte proceedings to protect an overriding interest that favors confidentiality." (*Carasi, supra*, 44 Cal.4th at p. 1299 citing, e.g., *People v. Gurule* (2002) 28 Cal.4th 557, 593-594 [privileged attorney-client information]; *People v. Lawley* (2002) 27 Cal.4th 102, 159 [identity of confidential informant]; *People v. Ayala* (2000) 24 Cal.4th 243, 261 [trial strategy]; *People v. Webb* (1993) 6 Cal.4th 494, 516 [privileged psychotherapy records].) Thus, a trial court can hold ex parte proceedings to maintain the confidentiality of a confidential informant. (See *Lawley, supra*, 27 Cal.4th at pp. 159-60.)

There is no entitlement to be present at proceedings at which the defendant's "presence bears no reasonable, substantial relation to his opportunity to defend the charges against him." (*Blacksher, supra,*

52 Cal.4th at p. 799, quoting *People v. Butler* (2009) 46 Cal.4th 847, 861.) It is the defendant's burden to demonstrate that his absence prejudiced his case or denied him a fair trial. (*Blacksher*, *supra*, at p. 799; *People v. Cole* (2004) 33 Cal.4th 1158, 1231; *People v. Bradford* (1997) 15 Cal.4th 1229, 1357.)

Here, Flinner makes no real attempt to argue that his due process rights were violated when he was excluded from the ex parte proceedings in which the court discussed with either the prosecutor, defense counsel, or both, the security concerns based on informant Sherman's allegations that Flinner was engaged in activities to ensure the sabotage of his trial. Flinner simply asserts, in conclusory terms, that his exclusion from these proceedings barred him from a critical stage of the proceedings. But trial had not even commenced yet: no jury had been impaneled and not one witness had been called to testify as to the charges against Flinner. He has not shown anything as to the nature of these ex parte proceedings that could or would have had any bearing upon his ability to defend himself at trial. He has not shown that these ex parte hearings infringed upon his constitutional right to a fair trial. He has not shown that his access to counsel and their ability to defend him at trial was negatively impacted by these ex parte proceedings. Despite his attempt to allege that the ex parte hearings resulted in his transfer to Vista, the record belies his claim: the ex parte hearings did not result in an order or directive from the court or prosecutor to have Flinner moved to Vista. Further, the record establishes that even after his move to Vista, Flinner continued to enjoy regular telephonic communication privileges with counsel as well as regular in-person visits. He also enjoyed the privilege of visits from other members of his defense team, including a jury consultant, defense investigator, and litigation specialist. Flinner has not shown that the ex parte proceedings had had any effect upon the outcome of the trial that was yet to happen. He

has not shown that he was excluded from any proceedings that were critical to the prosecution of the trial. (*Carasi*, *supra*, 44 Cal.4th at p. 1299.) Consequently, his claim necessarily fails.

III. FLINNER FORFEITED HIS CLAIM THAT THE PROSECUTOR WAS BIASED AND HAS FAILED TO DEMONSTRATE PROSECUTOR BIAS

Flinner argues that the prosecutor was biased against him because of the death threats. He also urges that the prosecutor's bias was manifested when the prosecutor arranged to have him transferred to the Vista jail. (AOB 89-96.) The argument has been forfeited because Flinner never raised a motion to disqualify the prosecutor in the trial court. The argument is also without merit because there is nothing in the record that demonstrates the prosecutor was biased against Flinner in such a way so as to deprive him of due process and a fair trial.

At the outset, Flinner has forfeited his claim. If he believed that the prosecutor was personally biased against him, then it was incumbent upon him to move for disqualification of the prosecutor in the trial court. (*People v. Maury* (2003) 30 Cal.4th 342, 438; see also *People v. Millwee* (1998) 18 Cal.4th 96, 123.) Penal Code section 1424 establishes the procedural framework for a defendant who seeks disqualification of the prosecutor.

Here, Flinner charges that the prosecutor was motivated by personal bias toward him because of the threats Sherman revealed Flinner had issued against him. He argues that this is what animated the prosecutor to have the sheriff relocate him to the Vista jail facility. But all these "facts" were known to Flinner long before trial. His remedy was to seek recusal of the prosecutor at that time rather than "remain mute at trial and scream foul on appeal. ..." (See *Daya*, *supra*, 29 Cal.App.4th at p. 714.) His failure to

move to disqualify the prosecutor "bars appellate review of the claim." (*Maury*, *supra*, 30 Cal.4th at p. 438.)

In any event, Flinner's claim also fails on the merits. In order to show that a prosecutor should be disqualified, section 1424 requires a defendant to satisfy

> a two-part test: (i) is there a conflict of interest?; and (ii) is the conflict so severe as to disqualify the district attorney from acting? Thus, while a "conflict" exists whenever there is a "reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner," the conflict is disabling only if it is 'so grave as to render it unlikely that defendant will receive fair treatment.' [Citation.]

(*People v. Eubanks* (1996) 14 Cal.4th 580, 594.)

Flinner assumes that because the prosecutor was one of the subjects of his death threats, the prosecutor had a severe and disqualifying conflict of interest. But as a matter of public policy, if this were the case, then defendants could routinely "disrupt the course of justice" in their respective trials by threatening the attorneys prosecuting them. (*Millsap v. Superior Court* (1999) 70 Cal.App.4th 196, 204.) Flinner's argument might be more tenable if the prosecutor had been prosecuting him for the death threat. (*Ibid.*) But such was not the scenario here. Flinner has not shown that the prosecutor had a severe conflict that rendered it unlikely he would receive a fair trial. (*Eubanks*, *supra*, 14 Cal.4th at p. 594.)

In an attempt to overcome this substantial hurdle, Flinner attempts to show that the prosecutor's actions demonstrated his personal bias. But his effort is grounded in pure fantasy. Flinner urges that the prosecutor or district attorney's office arranged for his transfer to the Vista jail and caused his access to counsel to be severely limited. But he has pointed to nothing substantiating this fanciful conjecture. As explained above, the sheriff decided how to house Flinner based upon the security concerns that arose when informant Sherman disclosed Flinner's plans to sabotage the

trial. (7A RT 1095-1097; 8A RT 1150; 8B RT 1172-1173.) Nothing in the record supports the notion that the prosecutor suggested, requested, directed, or arranged the transfer. Further, nothing in the record supports that the prosecutor arranged to have Flinner's access to counsel restricted. Instead, the record affirmatively establishes that the sheriff determined what security measures were needed and effectuated them in such a manner so as to ensure that Flinner continued to enjoy ample access to his defense team. (7B RT 1107; 8A RT 1138-1139.) Thus, Flinner has not shown that the prosecutor engaged in any impropriety; he has not shown that the prosecutor was biased. His claim fails.

IV. FLINNER HAS FORFEITED HIS CLAIM THAT HE WAS TRIED BEFORE A BIASED JUDGE; MOREOVER HE HAS FAILED TO DEMONSTRATE THAT THE JUDGE WAS BIASED

Flinner asserts that the trial court was biased against him. He specifically claims that the court was biased against him because of his statement to informant Sherman that he would have the judge killed if necessary to thwart the trial. As a result of Flinner's statement, the judge was issued a *Tarasoff* warning[10] advising him of the existence of the threat. (7A RT 1067.) Consequently, Flinner alleges the court was biased. (AOB 97-101.) Flinner has forfeited his claim because he did not move to have the trial judge disqualified. The claim also has no merit because Flinner has not demonstrated that the judge was biased against him. Further, the rule Flinner would have this Court adopt – that a trial judge who has been threatened by a litigant is presumed to be biased against the litigant – is an

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[10] A *Tarasoff* warning refers to the notice that a mental health professional must give to an intended victim, the police, or others if he or she determines that a patient presents a serious danger of violence to another. (*Tarasoff, supra*, 17 Cal.3d at p. 431.)

unworkable rule that would encourage defendants to routinely threaten judges so as to disqualify them from presiding over their trials.

Flinner's claim of judicial bias is forfeited because he did not raise a motion for recusal in the trial court. The record shows he briefly entertained the idea, but he never pursued it any further. (See 8A RT 1148.) Flinner cannot now be heard to complain that the trial court was biased against him. (See *Daya*, *supra*, 29 Cal.App.4th at p. 714 [defendant should not be permitted to remain mute at trial to then scream foul on appeal].) He has forfeited his claim.[11]

In any event, Flinner's claim fails on its merits because he has not shown that the trial court was biased against him. Due process of law, under both the state and federal Constitutions, protects personal and individual liberty interests and fundamental rights. The Fourteenth Amendment of the United States Constitution provides that no state "shall ... deny any person of life, liberty, or property without due process of law." Likewise, Article I, Section 7, of the California Constitution ensures that "a person may not be deprived of life, liberty, or property without due process of law. (See also Cal.Const., Art. I, §§ 24, 29 [guaranteeing due process of law to both the defendant and the People of the State of California in a criminal action].) Constitutional due process "principally serves to protect the personal rights of litigants to a full and fair hearing."

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[11] Flinner seeks to excuse his failure to move for disqualification of the trial judge by suggesting that he was barred from raising a recusal motion under Code of Civil Procedure section 170.6, subdivision (a)(6), because his codefendant had already filed such a motion earlier against the previously assigned trial judge. (AOB at 97.) While he may not have been able to raise the statutory motion, Flinner has not shown that he was barred from raising a non-statutory, constitutional due process motion for recusal. (See, e.g., *Roth v. Parker* (1997) 57 Cal.App.4th 542, 548 [observing that at least in civil cases, constitutional questions must be raised at the earliest opportunity or risk being forfeited].)

(*Miller v. French* (2000) 530 U.S. 327, 350 [120 S.Ct. 2246, 147 L.Ed.2d 326], see also *Broadrick v. Oklahoma* (1973) 413 U.S. 601, 610 [93 S.Ct. 2908, 37 L.Ed.2d 830] ["constitutional rights are personal and may not be asserted vicariously"]; *Jones v. Omnitrans* (2004) 125 Cal.App.4th 273, 280 ["the right to due process is a personal one"].) The United States Supreme Court has clearly articulated that the due process clause protects fundamental fairness in a trial by requiring "a 'fair trial in a fair tribunal,' [citation], before a judge with no actual bias against the defendant or interest in the outcome of his particular case." (*Bracy v. Gramley* (1997) 520 U.S. 899, 904-905 [117 S.Ct. 1793, 138 L.Ed.2d 97].) "The operation of the due process clause in the realm of judicial impartiality, then, is primarily to protect the individual's right to a fair trial." (*People v. Freeman* (2010) 47 Cal.4th 993, 1000.)

Generally, judges are presumed to be fair and impartial; they are clothed in a heavy presumption of honesty and integrity. (See *Withrow v. Larkin* (1975) 421 U.S. 35, 47 [95 S.Ct. 1456, 43 L.Ed.2d 712].) In light of this presumption of honesty and integrity, only "a possible temptation to the average man as a judge ... not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." (*Bracy, supra*, 520 U.S. at pp. 904-905, quoting *Tumey v. Ohio* (1927) 273 U.S. 510, 532 [47 S.Ct. 437, 71 L.Ed. 749].) Therefore, in order to show a due process violation on the basis of judicial bias, a party must show an objective "probability of actual bias on the part of the judge or decisionmaker [that] is too high to be constitutionally tolerable." (*Withrow, supra*, 421 U.S. at p. 47; see also *Freeman, supra*, 47 Cal.4th at p. 1001, relying on *Caperton v. A. T. Massey Coal Co.* (2009) ___ U.S. ___ [129 S.Ct. 2252, 2262, 173 L.Ed.2d 1208].) Such a showing is possible in only the extreme case presenting extraordinary circumstances. This is because the due process clause sets the constitutional floor within the realm

of judicial disqualification requirements. (*Freeman*, *supra*, 47 Cal.4th at 1005.) Indeed, "'[b]ecause the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution.'" (*Ibid.*, quoting *Caperton*, *supra*, 129 S.Ct. at p. 2267.)

Flinner's is neither an extreme case nor one presenting extraordinary circumstances. Although he uttered a threat that he would have the trial judge killed if his other plans to thwart the trial failed, the judge did not find the remark to be particularly threatening, expressly noting that Flinner's threat was "water off a duck's back.... [I]t's going to take a whole lot more than this to make me concerned about my ability and willingness to do my utmost to perform as an absolutely fair and impartial jurist." (8A RT 1152.)

Flinner has not shown that the court was biased in any way against him. In an attempt to show otherwise, he again tries to assert that his relocation to the Vista detention facility was under the court's direction. But as already explained, it was the sheriff who relocated Flinner and imposed security measures to prevent Flinner from engaging in obstructionist tactics. When Flinner complained to the court about some of the custodial restrictions, the court eased some of them so that he would have greater access to members of his defense team. (8A RT 1138-1139.) These hardly would be the actions of a judge who harbors bias or personal animus toward a defendant. The record shows nothing that compels the conclusion the trial court was biased. Flinner's claim of judicial bias fails because the facts of this case "objectively considered, ... do not pose "'such a risk of actual bias or prejudgment'" [citation] as to require disqualification." (*Freeman*, *supra*, 47 Cal.4th at p. 1006.)

V. FLINNER'S TRIAL WAS PROPERLY JOINED WITH CODEFENDANT ONTIVEROS'S TRIAL

Flinner argues that the trial court abused its discretion by denying his severance motions. He asserts that joinder of his trial with codefendant Ontiveros prejudiced him because they had antagonistic defenses and Ontiveros became a second prosecutor. (AOB 101-115.) Flinner's argument has no merit. The trial court properly exercised its discretion when it denied the severance motion and Flinner has not shown that he was prejudiced by the joint trial with Ontiveros which was tried before two separately impaneled juries.

The Legislature has expressed a preference for joint trials: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court orders separate trials." (Pen. Code, § 1098; *People v. Homick* (2012) 55 Cal.4th 816, 848.) Despite this legislative preference, the trial court retains discretion whether to try codefendants jointly or separately. (*Homick, supra*, at p. 848.) In exercising its discretion to sever, the trial court considers factors such as "an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1286; *People v. Boyde* (1988) 46 Cal.3d 212, 232.) Severance may also be appropriate if "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Homick, supra*, at p. 848.)

Here, to eliminate any serious risk that the fairness of either Flinner's or Ontiveros's trials would be compromised, the court impaneled two separate juries. It is settled that a trial court can appropriately avoid the

necessity of severance by impaneling dual juries to jointly try codefendants. (*Cummings*, *supra*, 4 Cal.4th at p. 1287; *People v. Harris* (1989) 47 Cal.3d 1047, 1070-1077.) This procedure facilitates the Legislature's statutorily established preference for joint trial of defendants and offers an alternative to severance when evidence to be offered is not admissible against all defendants. (*Cummings*, *supra*, at p. 1287.)

Still, Flinner insists that because his defense was inconsistent with Ontiveros's defense, severance was necessary. But inconsistent or antagonistic defenses are generally insufficient to compel severance. (*Cummings*, *supra*, 4 Cal.4th at p. 1287.) Indeed, "no denial of a fair trial results from the mere fact that two defendants who are jointly tried have antagonistic defenses and one defendant gives testimony that is damaging to the other and thus helpful to the prosecution." (*Boyde*, *supra*, 46 Cal.3d at 233, quoting *People v. Turner* (1984) 37 Cal.3d 302, 313.)

This Court reviews a trial court's decision to deny a severance motion and proceed with dual juries for an abuse of discretion. (*Cummings*, *supra*, 4 Cal.4th at p. 1287.) That review is based upon the facts known to the trial court at the time of the severance motion. (*Ibid*; *Homick*, *supra*, 55 Cal.4th at p. 848.) If this Court concludes the trial court abused its discretion, then reversal is "is required only if it is reasonably probable that the defendant would have obtained a more favorable result at a separate trial." (*Homick*, *supra*, at p. 848.) But if the trial court's denial of the severance motion was proper at the time it was made, then reversal is required only if "joinder resulted in gross unfairness amounting to a denial of due process." (*Ibid.*, internal quotes removed.) Likewise, if a defendant claims the trial court erred by denying the severance motion and impaneling dual juries, "the error is not a basis for reversal of the judgment in the absence of identifiable prejudice or 'gross unfairness ... such as to deprive the

defendant of a fair trial or due process of law.'" (*Cummings*, *supra*, 4 Cal.4th at p. 1287.)

Here, Flinner and Ontiveros were "charged with having committed [a] common crime[] involving common events and [a common] victim[]." (*People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 40, internal quotes omitted.) This presented a "classic case for a joint trial." (*Ibid.*) And with the empanelment of two juries, there was no danger of undue prejudice from trying Flinner jointly with Ontiveros.

Flinner raised his first severance motion before trial began. (11 RT 1412.) The court denied the motion but later carefully limited what parts of Ontiveros's confession to police were admissible as to Flinner. (11 RT 1412; 16 RT 2020-2025.) With the empanelment of two juries, the court was well within its discretion when it denied the first severance motion.

Flinner raised another severance motion again during trial based on Ontiveros's cross-examination of Charles Cahoon. On cross-examination, Cahoon testified he was afraid of Flinner, explained how manipulative Flinner was, and denied having anything to do with the murder as alleged in an anonymous letter that was left for the police. (34 RT 5920-5929.) The court denied the severance motion. (34 RT 5989.) Flinner has not shown how the trial court abused its discretion when it denied this mid-trial severance motion. Nor can he. Cahoon's testimony was entirely admissible as to Flinner and it makes no difference that the testimony was elicited by Ontiveros rather than by the prosecutor. (*Boyde*, *supra*, 46 Cal.3d at 233, *Turner*, *supra*, 37 Cal.3d at p. 313.)

Unable to show an abuse of discretion, Flinner complains that the joint trial with Ontiveros prejudiced him. The dominant thrust of his complaint is that his defense was diametrically opposed to Ontiveros's. He claimed to have had nothing to do with Keck's murder, whereas Ontiveros's defense was that Ontiveros acted under Flinner's coercive

directions. But as stated, antagonistic defenses do not compel severance. (*Cummings*, *supra*, 4 Cal.4th at p. 1287.) Nor does it matter that Ontiveros's defense may have involved the introduction of evidence that was damaging to Flinner and thus helpful to the prosecution. (*Boyde*, *supra*, 46 Cal.3d at 233, *Turner*, *supra*, 37 Cal.3d at p. 313.) In *Turner*, a felony murder case, defendant Turner offered no defense whereas defendant Souza testified that he assisted Turner in the robbery because he was afraid of Turner and that Turner was the killer. This Court concluded that these antagonistic positions or defenses did not compel severance or lead to a prejudicially unfair trial. (*Turner*, *supra*, at p. 313.)

Flinner's case is no different. He has pointed to nothing showing that his trial was rendered unfair from the joinder. Despite Flinner's defense that he was not involved in the murder, this was not a case in which only one of the defendants could be guilty. At all times, the prosecutor's theory was that both Flinner and Ontiveros were guilty of first degree murder. (See *Cummings*, *supra*, 4 Cal.4th at pp. 1287-1288.) Thus, the prosecutor did not proceed in hopes that the defendants would establish to the jury which one of them was guilty of murder. And even if there had been such a danger, Flinner and Ontiveros had separate juries that considered the evidence as to each defendant individually and separately.

Flinner has not pointed to any evidence that was admitted for his jury's consideration that should not have been. Instead, he complains about questions Ontiveros's attorneys asked various witnesses. (AOB 103-104.) But, as the jury was instructed, questions are not evidence. (See 63 RT 10496 ["Do not assume to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it helps you to understand the answer."]) The jury is presumed to have followed the court's instructions. (*Weeks v. Angelone* (2000) 528 U.S. 225,

234 [120 S.Ct. 727, 145 L.Ed.2d 727]; *Richardson v. Marsh* (1987) 481 U.S. 200, 211 [107 S.Ct. 1702, 95 L.Ed.2d 176].)

Flinner also complains that during cross-examination of Marie Locke, Ontiveros elicited hearsay evidence that Flinner told Gil Lopez he should not have killed Keck. (AOB 104-105.) This complaint is meritless. First, the trial court struck this hearsay testimony from the record and instructed the jury to disregard it. (27 RT 4499-4500.) Again, the jury is presumed to have followed the court's instructions. (*Weeks*, *supra*, 528 U.S. at p. 234.) Second, the same evidence was properly admitted when Lopez directly testified to what Flinner told him. (59 RT 10005-10006.) Flinner has not shown that the prosecutor could not have introduced the evidence Ontiveros presented during cross-examination and he has not shown any prejudice that resulted from the fact that he was jointly tried with Ontiveros. (See *Cummings*, *supra*, 4 Cal.4th at p. 1288 ["Most of the additional evidence each defendant offered to support his attempt to shift blame to the other would have been admissible had the prosecution sought to offer it."])

In sum, the trial court properly exercised its discretion when it denied Flinner's severance motions and Flinner has not shown he was prejudiced by being jointly tried with Ontiveros.

VI. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF FLINNER'S EFFORTS TO DERAIL THE TRIAL TO SHOW A CONSCIOUSNESS OF GUILT

Flinner contends that the trial court abused its discretion when it admitted evidence that he obtained the addresses of prosecution witnesses, the trial judge, the prosecutor, and planned to get the names and addresses of the jurors. He also argues that the court erred when it admitted evidence of his threats toward the prosecutor and evidence that others were fearful of him or felt intimidated by him. Flinner asserts that this evidence was

irrelevant and unduly prejudicial. (AOB 115-125.) The contention lacks merit because the trial court was well within its discretion in ruling that this evidence was admissible to show Flinner's consciousness of guilt and that its probative value outweighed its prejudicial potential.

It is settled that only relevant evidence is admissible. (*People v. Bivert* (2011) 52 Cal.4th 96, 116; Evid. Code, § 350.) Evidence, including evidence relating to the credibility of a witness, is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The test of relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive." (*Bivert, supra*, at pp. 116-117.) If evidence is irrelevant, or if it is particularly inflammatory and "diverts the jury's attention from its proper role or invites an irrational, purely subjective response" then such evidence should be excluded. (*Id.* at p. 118; § 352.)

The trial court has broad discretion in determining whether evidence is relevant and whether Evidence Code section 352 precludes its admission. (*People v. Carter* (2005) 36 Cal.4th 1114, 1166-1167.) Under section 352, the trial court has wide discretion to exclude evidence on the grounds that its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion. (*People v. Geier* (2007) 41 Cal.4th 555, 581.) The term "prejudice" as used in section 352 refers to evidence that "'uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.'" (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

This Court reviews the trial court's evidentiary rulings for an abuse of discretion. (*People v. Richardson* (2008) 43 Cal.4th 959, 1001.) The erroneous admission of evidence is evaluated under the *Watson* standard for prejudice. (*People v. Partida* (2005) 37 Cal.4th 428, 439 ["Absent

fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error."] Under the *Watson* test, the trial court's judgment may be overturned only if "it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

A. Evidence That Flinner Obtained the Addresses of Witnesses, the Prosecutor, and Judge, and Planned to Obtain the Addresses of Jurors Was Relevant to Show the Extent of His Efforts to Thwart the Trial and Thus His Consciousness of Guilt

Gergory Sherman, who had been housed in jail with Flinner, testified at trial. (37 RT 6430-6431.) He explained that he had extensive law library, Internet, and phone privileges because he was representing himself in his own case. (37 RT 6432-6434.) Flinner asked Sherman to use his privileges and computer skills to obtain the addresses for the trial judge, the prosecutor, and various other witnesses who would likely testify at trial. (37 RT 6439-6441.) Flinner told Sherman that he planned to sabotage his trial by sending the witnesses information about the case they would not otherwise have. In this way, Flinner believed the witnesses would be disqualified from being able to testify. (37 RT 6443-6445.) He planned to frame one of the lead detectives or his prior defense attorney as the person responsible for this witness tampering. (37 RT 6443-6445, 6447.)

Flinner had a secondary plan to tamper with the jury. He would get the names and addresses of the jurors and send them inadmissible evidence so as to disqualify them from jury service. (37 RT 6446-6447.) Flinner planned to make it look as though the prosecutor had tampered with the jury. (37 RT 6447.)

Catherine McLarnan, one of Flinner's former girlfriends, also testified. (38 RT 6615.) She explained that Flinner sent her a list of names and addresses together with instructions on what to mail to these individuals. (38 RT 6624-6626, 6635-6636.) Flinner gave McLarnan a cover letter she was to send to all of the witnesses. He told her to use a typewriter to prepare the mailings, wear latex gloves when handling these materials, use the address of his former defense attorney as the return address, and send the letters from somewhere within San Diego. (38 RT 6627-6632.) McLarnan testified that Flinner wanted to taint the witnesses and render their testimony suspect and impeachable. He wanted to sabotage his trial. (37 RT 6442-6445.) McLarnan explained that she did not follow Flinner's directions; instead she gave everything he sent her to a defense investigator. (38 RT 6640-6644; 46 RT 7862-7869.)

Flinner claims that he objected to the admission of Sherman's and McLarnan's testimony. (AOB 115.) But he does not point to any specific objections in the record he may have raised to the admissibility of this evidence about his efforts to tamper with the witnesses and jury. Absent an objection, the claim that the trial court erred by admitting this evidence is forfeited. (See *People v. Farley* (2009) 46 Cal.4th 1053, 1107; Evid. Code, § 353.)

Regardless, a relevance objection would have been without merit. As explained, relevance simply requires that the evidence have any tendency in reason to prove a material fact or tends to "'logically, naturally, and by reasonable inference' to establish" that fact. (Evid. Code, § 210; *Bivert, supra*, 52 Cal.4th at pp. 116-117.) Sherman's and McLarnan's testimony tended to show that Flinner planned and tried to obstruct his trial. This

evidenced a consciousness of guilt. (CALJIC No. 2.06[12]; see *People v. Hill* (1995) 34 Cal.App.4th 727, 737 [an attempt to eliminate a potential witness evidences a consciousness of guilt].) Sherman's and McLarnan's testimony was relevant and probative because it showed the degree of Flinner's sophistication in his efforts to thwart his trial.

Flinner has not shown how this evidence was unduly prejudicial because he cannot establish that the evidence would have invoked bias or prejudice in the jury. There was nothing in this evidence showing an intent on Flinner's part to threaten or harm the jurors. Instead, his plan was to tamper with the witnesses and alternatively flood the jurors with inadmissible evidence, disqualifying them from service. Thus, under a section 352 analysis, the probative value of Sherman's and McLarnan's testimony outweighed any prejudicial impact. The trial court was well within its discretion in admitting this evidence.

B. Flinner's Threats Toward the Prosecutor

Flinner wrote various letters voicing his hatred for the prosecutor. In some, he expressed his desires to harm the prosecutor. (38 RT 6678; 42 RT 7336-7337, 7407-7412, 7415.) The prosecutor sought to admit these letters to show Flinner's efforts to intimidate the prosecutor and thwart the prosecution of the case. This would prove Flinner's consciousness of guilt. (4 CT 814, 830-832, 844-846, 899-901; 7 CT 1432-1436; 8 CT 1678-1682.)

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[12] The trial court instructed Flinner's jury with CALJIC No. 2.06, providing: "If you find that the defendant attempted to suppress evidence against himself in any manner such as by the intimidation of a witness or by obstructing the investigation or prosecution of this case, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are for you to decide."

Flinner objected to the admission of this evidence. He argued that the evidence was more prejudicial than probative. He urged that he did not intend to subvert the prosecution of his case; instead, his letters simply manifested his frustration with his circumstances and the pending case. (12 RT 1574-1577; 6 CT 1218-1222; 7 CT 1557-1559.)

The trial court disagreed. It found that the evidence showed Flinner engaging in an extensive campaign striving to intimidate the prosecutor and thus thwart the prosecution of the case. However, rather than permit the prosecutor license to introduce all of Flinner's letters, the court carefully detailed which letters the prosecutor could present and which letters were barred. (12 RT 1578-1585.)

Flinner has not shown that the trial court abused its discretion. As explained above, his efforts to taint the prosecution witnesses and sabotage his trial demonstrated his consciousness of guilt. The same is true of his efforts to intimidate the prosecutor. Flinner's letters disparaging the prosecutor, threatening harm to him and his family, and disclosing personal information about him to other inmates were relevant to prove Flinner's efforts to intimidate and thereby influence the prosecutor. (See *People v. Hamilton* (1985) 41 Cal.3d 408, 429 [court described defendant's letter discussing contemplated harm to the prosecutor and witnesses as "a subtle attempt at intimidation"].) This had a "tendency in reason to prove" Flinner's consciousness of guilt. (Evid. Code, § 210.)

Flinner also has not shown that the trial court abused its discretion when it concluded that the probative value of this evidence outweighed its prejudicial impact. (Evid. Code, § 352.) There was nothing inflammatory about the evidence that would have unduly prejudiced or biased the jury when compared with its highly probative value in showing Flinner's efforts to obstruct justice. Moreover, when considered in light of the evidence of

Flinner's actual crimes, there was nothing prejudicial about his letters of intimidation. (See, e.g., *People v. Loy* (2011) 52 Cal.4th 46, 62.)

In sum, the trial court properly exercised its discretion by admitting Flinner's letters designed to intimidate the prosecutor.

C. Others' Fears of Flinner

Flinner also complains that the trial court admitted testimony from three witnesses, Charles Cahoon, Ronald Millard, and Catherine McLarnan, in which they explained that Flinner was manipulative or that they feared him. But a witness's fear of a defendant can be relevant as to the witness's credibility. (*Valdez*, *supra*, 55 Cal.4th at p. 135; see also *People v. Burgener* (2003) 29 Cal.4th 833, 869 ["[e]vidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible"].) Thus, Flinner's claim fails.

1. Charles Cahoon

Flinner tried to frame Cahoon for the murder by planting a sock with bullets inside it in Cahoon's car. (33 RT 5832-5839; 45 RT 7625-7626, 7651-7652; 60 RT 10242.) Cahoon testified about Flinner breaking into his apartment around the time he found the sock in his car. (33 RT 5838-5839.) He explained that he felt intimidated by Flinner and that as a result, he did not initially report to police that Flinner had broken into his apartment. (34 RT 5921, 5935.) Cahoon feared for his safety. (34 RT 5922, 5935.) He also expressed his belief that Flinner was a bad person. (34 RT 5922-5923.) To this latter testimony, the court overruled Flinner's relevancy objection. (34 RT 5923, 5935.)

Cahoon testified that he believed Flinner manipulated codefendant Ontiveros. The court sustained Flinner's objection to this testimony and struck it. (34 RT 5927.)

On cross-examination, Cahoon testified that he did not like Flinner, that he believed Flinner should not be released from custody. (34 RT 5956.) Cahoon also stated that he believed what Flinner was doing to Ontiveros was ridiculous. The court sustained Flinner's objection to this testimony and struck it. (34 RT 5956.) Flinner continued the cross-examination and asked Cahoon about Cahoon's fear of him. (34 RT 5957-5958.)

Flinner claims that Cahoon's testimony that he was scared of Flinner was irrelevant. But Flinner himself asked Cahoon about his fears. Initially, the prosecutor elicited Cahoon's expressions of fear to explain why Cahoon delayed reporting Flinner to the police. Cahoon's fear was therefore relevant as to Cahoon's credibility because it explained his actions. (See *Valdez*, *supra*, 55 Cal.4th at p. 135; see also *People v. Riccardi* (2012) 54 Cal.4th 758, 818-821 [a victim's fear of a defendant can be relevant to show that the victim's actions conformed with that stated fear].)

At trial, Flinner capitalized on Cahoon's expressions of fear. He aimed to impeach Cahoon by showing that Cahoon was biased against him. In other words, Flinner sought to portray Cahoon as a motivated witness who wanted to ensure Flinner's conviction; Flinner wanted to establish that Cahoon's testimony was clouded by his negative feelings toward him. Despite his argument on appeal that Cahoon's testimony about fearing him was wholly irrelevant, at trial, Flinner recognized that Cahoon's fear was relevant to Cahoon's credibility. Flinner should now be estopped from claiming error in the admission of Cahoon's testimony – testimony he himself elicited and capitalized upon. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1139 [if there was error, it was invited and therefore not

cognizable on appeal]; *People v. Escobar* (1996) 48 Cal.App.4th 999, 1022, fn. 4 [not only did the defendant fail to object to the admission of evidence, he actually sought its admission].)

The trial court properly exercised its discretion in admitting evidence of Cahoon's feelings for Flinner.

2. Ronald Millard

Ronald Millard testified that he had worked for Flinner. (35 RT 6107.) On cross-examination, Millard testified that although Flinner had never threatened or harmed him, he felt intimidated by Flinner. (35 RT 6125.) Flinner did not object to Millard's testimony and therefore has forfeited his claim that Millard's testimony was irrelevant. (See *Farley*, *supra*, 46 Cal.4th at p. 1107; Evid. Code, § 353.)

In any event, as with Cahoon's feelings about Flinner, Millard's feelings of intimidation or fear were relevant to his credibility. (*Valdez*, *supra*, 55 Cal.4th at p. 135; *Burgener*, *supra*, 29 Cal.4th at p. 869.) The trial court properly exercised its discretion in admitting evidence that Millard felt intimidated by Flinner.

3. Catherine McLarnan

As stated earlier, McLarnan testified about how Flinner tried to recruit her to help him sabotage his trial by tampering with witnesses. McLarnan ultimately decided not to assist him and testified that she feared what Flinner might do to her or her family when he learned of her decision. (38 RT 6643.) The trial court overruled Flinner's relevance objection to this testimony. (38 RT 6643.)

As with Cahoon, McLarnan's feelings about Flinner and her fear of possible reprisal from him were relevant as to her credibility. (*Valdez*,

supra, 55 Cal.4th at p. 135; *Burgener*, *supra*, 29 Cal.4th at p. 869.) The trial court properly exercised its discretion in admitting evidence of her fear of Flinner.

D. Even Assuming Error, There Was No Prejudice

Even assuming that the trial court erred by admitting the evidence about Flinner's efforts to subvert his trial, evidence about his hatred for the prosecutor, and evidence of others' fears of him, Flinner's trial was not prejudiced by the admission of any of this evidence. As stated, the erroneous admission of evidence is evaluated under the *Watson* harmless error standard. (*Partida*, *supra*, 37 Cal.4th at p. 439.)

Even if the court had excluded this evidence, there remained an overwhelming mountain of evidence of Flinner's guilt. His finances were in complete shambles as he drowned in nearly $200,000 of consumer debt. He viewed his half million dollar life insurance policy on Keck, an 18-year-old girl whom he had tired of, to be his lifeline. Thus he hired Ontiveros to kill Keck. Surveillance footage caught Flinner and Ontiveros on the day of the murder going to and from the murder scene in the hours before Ontiveros shot and killed Keck. The evidence of Flinner's guilt was overwhelming: he was motivated, he had a plan, and he personally oversaw the setting of his plan into motion. Evidence of Flinner's efforts to derail the investigation and trial and evidence of others' fears of him was not so critical that its exclusion would have resulted in a more favorable result.

VII. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF FLINNER'S DISPARAGING REMARKS ABOUT HIS VICTIM

Flinner argues that the trial court abused its discretion when it admitted evidence of his derogatory and disparaging comments to others

about Keck. He claims this evidence was highly inflammatory and would have inflamed the passions of the jury against him. (AOB 126-130.) The argument lacks merit because the way Flinner treated Keck and his feelings about her were highly probative to show his willingness to kill her. In his mind, she was not a person but a mere object to be manipulated and used to advance his own purposes.

Prior to trial, the prosecutor filed an in limine motion to introduce extensive evidence about Flinner's strained relationship with Keck. (1 CT 49-53.) The prosecutor argued that this evidence was relevant because it showed that Flinner, who claimed not to have had any involvement in Keck's murder, harbored sufficient animosity toward the victim such that he was motivated to kill her. (1 CT 53-65.)

Flinner objected to the admission of such evidence. He argued that the evidence was highly prejudicial and largely irrelevant. (1 CT 195-197.) However, he acknowledged that some evidence about his lack of remorse following the murder would be admissible. (1 CT 197.)

The court concluded that evidence about Flinner's and Keck's relationship was relevant to establish motive, identity, and state of mind. (4 RT 654-655.) The court then analyzed the prosecutor's proffered evidence under section 352 and restricted what the prosecutor could present to the jury. (4 RT 655-659, 661-662.)

At trial, the prosecutor introduced evidence that Flinner, when speaking with associates, referred to Keck as a "cunt," bitch," and "slut." Flinner used these epithets even when Keck was present. (32 RT 5486-5487.) The prosecutor also introduced evidence that after the murder, Flinner exhibited no emotional sorrow or remorse: While at a floral shop just before the funeral, Flinner saw a girl passing by and yelled at her, "Hey, baby, I'm single now." He then started to laugh. (26 RT 4384.) When the florist asked about a condolence card for the funeral, Flinner

snapped back, "Tammy's fucking dead. It's not like she can read it anyway." He then laughed again. (26 RT 4384-4385.)

Despite Flinner's complaints that this evidence was irrelevant and unduly inflammatory,[13] the trial court properly admitted it. It is settled that in cases involving violence, evidence that a defendant harbors animus or ill-will toward the victim is relevant and admissible to prove the defendant's motive, state of mind, and identity as the perpetrator of the crime. (*People v. Zack* (1986) 184 Cal.App.3d 409 ; see also *People v. Cartier* (1960) 54 Cal.2d 300, 311 [evidence of quarrels between the victim and accused is admissible to show the state of mind of the accused]; *People v. De Moss* (1935) 4 Cal.2d 469, 473 [quarrels and threats are sufficient evidence to establish motive to kill]; *People v. Weston* (1915) 169 Cal. 393, 396 [same].) Flinner's derogatory comments were relevant to show his lack of affection for Keck and his willingness to have her killed to further his purposes. His demonstrated lack of sorrow following Keck's death also was relevant because it refuted his claims to police that he was deeply in love with Keck and therefore could not have been involved in her murder.

In sum, the court properly exercised its discretion when it admitted the evidence about Flinner's relationship with Keck.

VIII. THE TRIAL COURT PROPERLY ADMITTED THE LETTERS FLINNER WROTE IN AN ATTEMPT TO DERAIL THE INVESTIGATION

Flinner argues that the trial court improperly admitted various letters and a phone call into evidence without proper foundation or authentication.

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[13] Flinner also asserts that his statements to others constituted inadmissible hearsay. (See AOB 127, 129.) But he fails to identify how his rude comments were offered for the truth of anything asserted. (Evid. Code, § 1200.)

(AOB 131-141.) The argument is without merit. First, Flinner has not shown that he objected to the admission of this evidence on authentication grounds. He claims to have objected prior to trial (AOB 134), but his citations do not reflect any authentication objections. Having failed to object, he has forfeited his claim.

And second, Flinner misconstrues why this evidence was admitted in the first place. As will be shown, the prosecutor did not introduce these writings (including the phone call) to prove the truthfulness of what these writings asserted. Instead, the prosecutor introduced the writings for the jury to specifically consider whether Flinner authored or caused their production. From this determination, the jury could then decide whether Flinner indeed tried to fabricate evidence in his efforts to derail the investigation.

Generally, a document must be authenticated in some manner before it is admissible in evidence. (See *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 525; Evid. Code, §§ 1400, 1401.) This rule is grounded in the idea that the writing cannot establish what it purports to be on its own. (*Ibid.*; see also 2 McCormick, Evidence (7th ed.) Writings, § 221, pp. 81-83.) "Authentication is simply a process of establishing the relevancy of a document by connecting it with a person, place or thing." (*R & D Amusement Corp. v. Christianson* (N.D. 1986) 392 N.W.2d 385, 386; see also 2 McCormick, § 221, at pp. 81-83.)

But when the content of the writing or the truthfulness of the assertions in the writing are not at issue, authentication as to authorship is largely unnecessary. (*People v. Adamson* (1953) 118 Cal.App.2d 714, 720 ["the authentication of a document is not necessary when the execution of it is not in issue, but only the fact of the existence of a document of such tenor"]; see also VII Wigmore, Evidence, § 2132.) For example, in *Adamson*, the prosecutor introduced a letter that Pugh received to show

why Pugh acted the way he had. The author of the letter was irrelevant; only the letter's existence, whether Pugh received it, and whether he acted upon what was stated in it, were relevant. (*Adamson*, *supra*, at p. 720.)

Here, Flinner complains about various writings, claiming the prosecutor failed to provide any evidence that he authored or caused the writings to be created. But this underlying question – whether Flinner was the originator, author, or producer of the writings – was ultimately the relevant fact for the jury to determine. As explained below, the prosecutor presented circumstantial evidence sufficient to enable the jury to ascertain that Flinner was responsible for the writings. And the jury was thereby able to determine whether he tried to obstruct justice.

A. Anonymous Letter Framing Cahoon

A few weeks after Keck was killed, an anonymous letter was left on a police car. The content of the letter claimed that Cahoon had killed Keck. (33 RT 5794-5800, 5837-5838; 60 RT 10242.) Flinner urges that this letter was not properly authenticated because the prosecutor failed to present any evidence that he authored it or caused it to be written and delivered. But he has not shown that he objected to the admission of this letter for lack of authentication or foundation. Therefore, his claim is forfeited. (See *Farley*, *supra*, 46 Cal.4th at p. 1107; Evid. Code, § 353.)

But even on the merits, Flinner's claim fails. Flinner does not explain what needed to be authenticated before the letter accusing Cahoon of killing Keck could be admitted into evidence. The letter was a complete fabrication and therefore not admitted to prove anything asserted in it. Instead, the relevance of the letter was that it existed: that some person had created it in an effort to frame Cahoon. The question for the jury was whether Flinner was that person. What was conveyed in the letter was not the point of its admission; instead, the prosecutor introduced the letter with

the aim of having the jury determine whether Flinner authored it in his attempt to frame Cahoon. Authentication did not matter; the letter's existence was all that mattered.

But even if authentication were required, circumstantial evidence showed that Flinner had authored it. In the days around the time the letter was left for the police, Flinner broke into Cahoon's apartment and planted his sock with bullets inside it in Cahoon's car trunk. (33 RT 5832-5837, 5839; 45 RT 7625-7626, 7651-7652.) Flinner's DNA was on the sock. (48 RT 8264-8281.) These circumstances tended to show Flinner was trying to frame Cahoon. The letter was just another part of that effort.

And even if the letter needed to be authenticated, but was not, its admission was harmless. Flinner attempted to use the letter to his benefit. During cross-examination of the computer expert who examined Flinner's computer, Flinner used the Cahoon letter to show that there was no evidence on the computer suggesting the letter had been created on that machine. (41 RT 7269-7270.) Thus Flinner was able to use the letter, together with the forensic computer evidence, to distance himself from the prosecutor's theory that he tried to frame Cahoon. Thus, any error in admitting the letter was harmless.

B. Letter to Flinner's Mother

Flinner's mother testified about receiving an anonymous cryptic letter in February 2001. The words and sentences were composed of letters cut out from magazine newsprint. (38 RT 2270-2271.) The letter included the following excerpt:

> Knowing is not a rationale for not acting. Can we doubt that knowledge has become a weapon we wield against ourselves. My continuing professional work is on improving the reliability of software. I agonize over it. This all leaves me not angry, but at least a bit melancholy. Henceforth, for me progress will be

> somewhat bittersweet. I remain optimistic we will confront the dangerous issues now before us. If only he had stuck around, he'd have seen some real bloodshed. We have got a head start of 100 years. Forced to kill the fiance. She knew too much.

(38 RT 6672.)

Flinner argues that the prosecutor failed to properly authenticate this letter. Again, he has not shown that he objected to the introduction of this evidence. His claim is forfeited. (See *Farley*, *supra*, 46 Cal.4th at p. 1107; Evid. Code, § 353.)

But even on the merits, Flinner fails to show what needed to be authenticated. It was not the letter's author that needed to be established in order to show the relevance of the letter; it was the letter's existence that made it relevant and admissible as evidence that Flinner was the author as he tried to place blame of the murder upon others. The letter was not introduced for its truth. Indeed, the letter's content is largely nonsensical gibberish.

In the months prior to when this letter emerged, Flinner was peddling an outlandish exculpatory tale that Keck was killed because of a soured business venture involving casino gaming software. Flinner tried to pin blame for Keck's death and the failed business venture upon Rick Host – who was conveniently dead. (32 RT 5659, 5671; 35 RT 6175: 9 CT 2141-51; 10 CT 2362-2363; 37 RT 6563-64: 6 CT 1292-95, 1318-1321, 1333-1342; 38 RT 6610, 6677-6678, 6694-6697; 42 RT 7400-7402; 46 RT 7823-7836.)

As with all of Flinner's stories, this one, too, lacked credibility. Even though Host had died in August, and had allegedly explained everything to Flinner on his death bed, Flinner only first started asserting this new casino conspiracy story when police refused to accept his tale that Marty Baker, whom he tried to frame early in the investigation, was the murderer. (27 RT 4565-4567; 40 RT 7032-7035; 42 RT 7400-7402, 7450-7054;

44 RT 7566; 10 CT 2299-2223, 2312, 2316-2329, 2344, 2347-2348.) That Flinner would withhold such important exculpatory evidence blatantly shows his efforts to thwart the investigation. The letter Flinner's mother testified about, was just another piece of evidence, having a "tendency, in reason, to show" that Flinner was fabricating yet another tall tale. (See Evid. Code, § 210.) The trial court properly admitted the letter.

C. Letter Accusing Ontiveros of Killing Keck

Prior to trial, Judge Preckel received an anonymous letter explaining that Ontiveros was the murderer. This letter provided:

> Your excellent judge of the court. This is a very hard story to tell to you. I do not know how to facing my creator when hidden the wisdom he gives to me of the cruel and bad killing which I saw with my two eyes on June 11th, 2000, by Alpine in San Diego. Each night is bad dreaming.
>
> I see Aaron Guzman, but people call him Juan de la Torre or Aaron, too, from T.J. kill the pretty girl on a lonely avenue. I was with him. He is work for Calico Roof Business almost by where he shooted to her head with my 45 pistol. I am scary to loose my family. I do nothing against Jesus bad like Aaron.
>
> I know Aaron many anos y he always have problem. I was there. He wait to her pick him up and he shooted her. He stealing my 45 pistol to kill the girl for a man named Rick. He give to Aaron 5,000 U.S. dollars to kill the girl. I work on gardener with Aaron for Rick property. Rick lives maybe only two killometers to murder avenue.
>
> Aaron with me see the girl boyfriend and Aaron get mad to kill him also. Aaron work for boyfriend to do many building jobs. Aaron tell to me he and Rick have many sex with the girl. Rick and Aaron say the girl will tell the boyfriend and he will get angry to mad.
>
> Rick give car for Aaron to kill the girl. The boyfriend is never know about this. Rick goes to San Diego with Aaron and boyfriend to get car. Boyfriend gives car to Rick. Rick gives

car to Aaron Guzman to kill first, but only boyfriend go to murder avenue, not see Aaron, only me. I scary then to see boyfriend only, no girl.

Maybe two hours and girl go pick Aaron for Petco. The girl kissing Aaron. He say to me he love to her, but she not love to him, only to boyfriend. Aaron get so mad to cry in his eyes. Rick see the girl at market and he tell to her go to get Aaron. She get Aaron and he shooted to her head.

I was wait for Aaron when he walking uphill to Petco. I only was in car. I know how to feel when to love a girl but she love other man only. The girl playing with a man's heart is hurt only. Fat Rick tell Aaron wait three months and kill boyfriend, too. Rick asking for Aaron to say a messaging to I make one call to boyfriend to scare to him, say he die also. I am very so sorry and pray to Jesus to save my heart.

Many time I want to talking to police and help to then catch Aaron. Maybe he is only work at Calico Roof business. I go to him there. I tire only. The girl give to Aaron truck like black Chevy to try to make him go away. Aaron say it is boyfriend truck and always is laughing to be funny only.

I move my family to the big city for fear only. I am sad but scary to. I cannot help to you more. I must go now. Only maybe Elias will come from San Francisco to tell you the truth. I'm very wrong and sorry.

(38 RT 6694-6697.) The letter was signed with the letter, "A." (38 RT 6697.)

Flinner claims that the court erred by admitting this letter into evidence without proper authentication. He urges that the prosecutor failed to introduce any evidence connecting the letter to appellant. (AOB 132.) Flinner has not shown that he objected to the introduction of this letter; the claim is forfeited. (See *Farley*, *supra*, 46 Cal.4th at p. 1107; Evid. Code, § 353.)

On the merits, the claim fails because the very point of why the prosecutor introduced the letter was to have the jury to find that, in light

of all the other evidence in the case, appellant authored the letter or caused it to be produced. The prosecutor did not introduce the letter to prove anything its message conveyed – after all, the letter was a fabricated piece of fiction. The prosecutor introduced the letter to raise the inference that Flinner produced it as part of his ongoing efforts to derail the investigation and trial. The trial court was well within its discretion in admitting the letter as relevant evidence bearing upon Flinner's consciousness of guilt.

D. Letter to Ontiveros Warning Him to Keep Quiet

Shortly after codefendant Ontiveros was taken into custody and his arrest was publicly announced, police intercepted a letter addressed to him. (42 RT 7373.) The letter provided:

> JC, do you remember our meeting with Kwan, when we told you not to enter the USA prior to asking first? Now we cannot finish job you were paid for. We only hope that Mike has not spoken to the police. He would have never thought you would kill him and the target. You blew it. We are all so concerned that Rick may have told Mike all that was going on before his death. You were instructed not to call or see Rick after giving him back his car.
>
> What were you doing? ICSC with Rick were acting on behalf of Kwan and they selected the target for a reason. Now with Alex dead, you need to keep your mouth shut. If things go bad, blame everything on Mike. Hopefully, they will let you go.
>
> Kwan never returned to N.Y.C. and we must deal with that for now. Just sit tight, maintain your innocence, and keep your mouth shut. No witness, no case. Remember that. You and Alex should have done him when you saw him on the target street. What was he doing there? I'm going to Seoul for my brother's birthday. Call in and don't speak to anyone in there. When I return I will find you and send you a visitor. Burn this now and keep your mouth shut.

(42 RT 7374-7375.) The letter was signed "Eli." (42 RT 7375.)

Again, Flinner complains that the prosecutor failed to introduce any evidence connecting him with this letter. (AOB 133.) Flinner has not shown that he objected to the introduction of this letter[14]; the claim is forfeited. (See *Farley*, *supra*, 46 Cal.4th at p. 1107; Evid. Code, § 353.)

On the merits, Flinner's authentication claim fails. Again, the point of the letter's introduction was to establish Flinner's efforts to derail the investigation. The letter was purely fictitious and so the prosecutor did not introduce it to prove something its message conveyed. Instead, the prosecutor introduced the letter to prove, together with the other letters, that Flinner produced it. This would then establish Flinner's consciousness of guilt. It was for the jury to analyze the letter in the context of the evidence and decide whether Flinner produced the letter. The trial court was well within its discretion in admitting it.

E. Tape Recording of an Anonymous Phone Call to the Police

A few days after the murder, the sheriff's department received an anonymous phone call from a Spanish-speaking woman. (40 RT 7054, 7056.) The woman claimed that a man by the name of Ernesto told her he killed Keck because he wanted to exact revenge against Flinner. The woman provided details about what Ernesto allegedly told her regarding how and where he committed the murder. (10 CT 2251-2255.)

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[14] Flinner objected to a comparison the prosecutor asked the testifying officer to make between this letter and the letter Flinner's mother received. But this objection was not based upon authentication; rather, it was an objection grounded on whether the officer had the necessary foundational expertise to be able to render an opinion as to how the two letters compared. (42 RT 7376-7377.)

Flinner actually did object to this evidence on foundation and authenticity grounds. The court overruled the objections. (40 RT 7055-7056.)

Flinner again complains that there was no evidence connecting him with the placement of this phone call. Again, he misapprehends the purpose for the introduction of this evidence. Within days after this anonymous phone call, Flinner provided a voicemail message to police he claimed to have received. Flinner claimed the message was from a Hispanic man with whom he had problems a decade earlier. (44 RT 7546; 10 CT 2284-2290, 2292-2296.) The police never told Flinner about the anonymous phone call. (44 RT 7548-7549.) Therefore, either Flinner caused the anonymous phone call to be made, or Flinner's story that some Hispanic man was after him was credible. The story, however, quickly unraveled in light of the fact that Flinner's exculpatory story to police consistently changed over the course of the investigation – Flinner simply could not be trusted to provide any truthful or meaningful intelligence about the murder. Therefore, the only plausible explanation for the anonymous phone call to the police and Flinner's seemingly matching story about a disgruntled Hispanic man from his past is that Flinner fabricated both in an effort to deflect attention away from himself as the murderer.

F. Bullet Casing and Live Bullet Round on Parent's Property

During the investigation, Flinner's father found a container in his yard. Inside was an expended bullet casing with Keck's first name, Tammy, written on it. The container also had a matching live round with Flinner's first name, Mike, written on it. (41 RT 7317-7321.) The casing and bullet were of the same caliber and make as the bullet that killed Keck. (41 RT 7322.)

Flinner complains that the prosecutor did not provide any evidence showing that he had anything to do with planting the bullet and casing on his parents' property. (AOB 133-134.) Flinner has not shown that he objected to the introduction of this evidence; the claim is forfeited. (See *Farley*, *supra*, 46 Cal.4th at p. 1107; Evid. Code, § 353.)

The claim fails on the merits as well. A cooperating informant, Theodorelos, who had been in custody with Flinner testified that Flinner told him about the bullets. Flinner explained to Theodorelos that he had put bullets on his parents' property, that the expended casing had Keck's name on it, and that the live round had his own name on it. (35 RT 6240.) Thus, contrary to Flinner's argument, the prosecutor did introduce evidence connecting Flinner to the bullets. The trial court was well within its discretion in admitting them.

G. John Martin[15] Letters

While in custody awaiting trial, Flinner befriended fellow inmate, John Martin. Later, Flinner sent Martin letters in which he talked about his case. The first of these letters, dated December 6, 2002, provided:

> This did not get photocopied going out, so here's what's up[.] Sometime next month or shortly thereafter a member of my staff will be in contact up that way. He'll be seeing other people too. I need to you remember the times that you and I and Jimmy were walking the track and I had mentioned things like how my folks had received threats from the east coast and how my father found shell casings on his property and things about my business partner telling you that Asians were involved in that deal with my wife and things like that.
>
> You see, the Greek has taken all of what I've shared about matters and twisted them up into his favor, saying that I told him

[15] Flinner erroneously refers to these as letters to Martin Baker. (AOB 134.)

> that I sent the letter from the east to my parents, that I put ... the casings on my dad's property et cetera. He tried to get out based on this shit, but no go. Now he's stuck having to testify, even though he knows he lied.

(50 RT 8569-8570.)

Included in this letter, was a picture of inmate James Theodorelos, with the moniker "Jimmy the Greek" written on the back. (50 RT 8570-8571.)

About a month and a half later, Flinner sent another letter to Martin, stating:

> John, I'm in receipt of your letter. I cannot begin to imagine why you have decided to flip the script. I am not disappointed, only concerned at the idea that now the prosecution has a copy of your letter, has a copy incoming and outgoing mail for [] their review. As I, being a witness for the prosecution, I read between the lines very well. So I encourage you not to go there, please. Then you'll be on the stand for sure. I won't push anything, John. That's not me. John, Whatever you feel is appropriate, run with it. I do know this[,] the district attorney's office will invariably find their way to you now because of this letter I just got from you. How many times have I explained the photocopying shit? You can refuse to speak to them that. That will keep you out of this mess. My guess is it would be smart to trash the stuff I send you as well. ... Put as much space between you and I as possible.

(50 RT 8571-8572.)

At trial, Flinner objected to these letters on foundation and hearsay grounds. (50 RT 8568-8569.) On appeal, he continues to assert that the prosecutor failed to authenticate these letters. But these letters were authenticated because the prosecutor presented ample evidence connecting Flinner with the production of these letters.

In the first letter, the author spoke about (1) the bullet casings having been left on his father's property; (2) the letter his parents received from the east coast; and (3) the alleged Asian conspiracy involving his business

partner. These matters directly connected the authorship of the letter with Flinner: (1) his parents found the bullet casing and live round on their property; (2) his parents received an anonymous letter from the east coast discussing the reason for the murder; and (3) he alleged that Rick Host was his business partner and that Host had been part of a conspiratorial arrangement with an Asian group. Beyond this, the author spoke about Theodorelos as a turncoat for the prosecution. Theodorelos testified at trial about the things Flinner told him. Thus, the prosecutor presented overwhelming evidence establishing that Flinner authored the first letter to Martin.

The second letter is different in that there is nothing about the content of the letter that necessarily ties Flinner to it as author. But, as with the previously discussed writings, the purpose of this letter was for the jury to consider whether Flinner authored it and tried to influence Martin, who was a potential witness. From the overall context – that Martin shared both the first and second letters with the police – the jury could draw a reasonable inference that Flinner was the author of the second letter, just as he was the first. That overall context included the fact that in the first letter, Flinner tried to get Martin to discuss matters with investigators in a way that would be favorable for Flinner's defense. In the second letter, Flinner responded to Martin's refusal to fabricate evidence on Flinner's behalf. Because of this connection, the trial court was well within its discretion in admitting the second letter.

H. Duncan Hunter Letter

After Flinner was indicted, police placed a mail cover on his jail mail so that all of his incoming and outgoing mail would be photocopied. (42 RT 7427-7428.) Flinner wrote a letter to Congressman Duncan Hunter in which he asserted that his trial was about to become the trial of the

century. Flinner explained that Keck's death was the result of an international crime organization. He also explained that his former employee, Ontiveros, was the murderer. Flinner asked Congressman Hunter for political intervention, claiming he was innocent. (42 RT 7431-7433.)

Flinner has not shown that he objected to the introduction of this evidence; the claim is forfeited. (See *Farley*, *supra*, 46 Cal.4th at p. 1107; Evid. Code, § 353.)

Now, for the first time on appeal, Flinner claims the letter to Congressman Hunter should have been suppressed under Penal Code section 2601. That section provides for various civil rights, including confidential communication with members of the State Bar and other public officials, for prisoners confined in state prison. (Pen. Code §§ 2600-2601.) As to this case, Flinner was not in state prison custody – he had yet to be tried. Therefore, Flinner's reliance on section 2601 is entirely misplaced. And regardless, section 2600 explicitly provides that civil rights can be abrogated to the extent necessary to further "legitimate penological interests." Given Flinner's known efforts to obstruct the investigation of his case as well as to thwart his trial, there was a legitimate penal interest in intercepting his letters – including his letter to Congressman Hunter.

I. If Any Error Occurred, It Was Harmless

Flinner argues that he was prejudiced by the erroneous admission of the foregoing writings. As explained above, the court properly admitted the writings. But even if the court erred, Flinner has suffered no prejudice. As stated, the erroneous admission of evidence is evaluated under the *Watson* standard for prejudice. (*Partida*, *supra*, 37 Cal.4th at p. 439.)

As explained, the admission of the writings was largely to prove Flinner's consciousness of guilt. (See 63 RT 10615, 10618-10622, 10635

[prosecutor's argument regarding consciousness of guilt].) As the jury was instructed, consciousness of guilt alone is insufficient to prove guilt. (63 RT 10500 [jury instructions under CALJIC Nos. 2.03 – 2.06].) The writings could not constitute the foundational basis establishing Flinner's guilt. Instead, the jury received other evidence overwhelmingly establishing Flinner's guilt: he was at the murder scene with Ontiveros in the hours before Keck was killed. As beneficiary of Keck's life insurance policy, he had an enormous financial incentive to have her killed. The writings, while certainly demonstrating Flinner's consciousness of guilt, added little to the overwhelming corpus of evidence of Flinner's guilt. Thus, if the writings should have been excluded, Flinner suffered no prejudice from their admission.

IX. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE THAT FLINNER ADMITTED TO KILLING KECK

Flinner argues that the trial court erred when it admitted evidence of statements he made in which he admitted to killing Keck. He claims the evidence was inadmissible hearsay and unduly prejudicial. (AOB 141-148.) The argument is specious. Flinner's statements were declarations against his interest and therefore admissible.

A. Factual Background

During cross-examination of Marie Locke, Ontiveros elicited hearsay evidence that Flinner told her boyfriend, Gil Lopez, that he should not have killed Keck. (27 RT 4490-4494.) Upon Flinner's motion, the trial court struck this testimony as hearsay because Locke had not testified that she heard Flinner make the statements, but had instead testified that Lopez told

her about what Flinner had said. The court instructed the jury to disregard these statements.[16] (27 RT 4499-4500.)

Later, Lopez testified about what he personally heard Flinner say. (59 RT 10005-10006.) Lopez explained that a few weeks after the murder, Flinner was eating out with him and Locke. During dinner, Flinner drank alcohol. (58 RT 9936-9937.) Flinner became distraught about Keck's death and stated either "I shouldn't have killed her," or "I shouldn't have had her killed." (58 RT 9923-9924; 59 RT 10005-10006, 10025.) Still later, when Flinner was alone with Lopez and after having ingested several sleeping pills, he said, "I shouldn't have killed her." (59 RT 10012-10013; 61 RT 10376-10377.)

B. Flinner's Statements Against Interest Were Admissible

Hearsay is an out-of-court statement offered for the truth of the matter asserted and is generally inadmissible. (Evid. Code, § 1200; *People v. Brown* (1994) 8 Cal.4th 746, 754.) Evidence Code section 1230, defining declarations against interest, provides for an exception to the hearsay rule. That section states,

> Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

(Evid. Code, § 1230.)

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[16] Again, the jury is presumed to have followed the court's instructions. (*Weeks*, *supra*, 528 U.S. at p. 234.)

There is no question that Flinner, the declarant of the statement to Lopez, was unavailable: he asserted his Fifth Amendment privilege not to testify. (Evid. Code, § 240 ["[U]navailable as a witness" includes the circumstance that a declarant is exempted from testifying on the ground of privilege.]) And there can be no reasonable question that Flinner's statement that he should not have killed Keck was contrary to his interests. Thus, the statement was admissible under Evidence Code section 1230 as a declaration against interest.

Relying on *People v. Duarte* (2000) 24 Cal.4th 603, 612, Flinner notes that portions of a declaration against interest that are not specifically disserving to the declarant's interest, are less trustworthy, more unreliable, and thus inadmissible. In *Duarte*, the declarant admitted shooting at a house, but did so by minimizing his own culpability, leaving room for the jury to infer or speculate that the defendant bore a greater culpability for the crime than the declarant. (*Id.* at pp. 612-13.) This Court concluded that the trial court erred by admitting the unavailable witness's statements to the extent the statements were not specifically disserving of his penal interest. (*Id.* at p. 613.)

Duarte does not apply here. Flinner's statement, "I shouldn't have killed her," or "I shouldn't have had her killed" was wholly disserving of his interest. By making this inculpatory statement, Flinner, did not excuse or minimize his culpability for the murder. Instead, by making the statement, he accepted full responsibility for Keck's murder. And, unlike in *Duarte* where the declarant was not also the defendant, here, Flinner himself was the declarant of the inculpatory statement. Because the statement was his own and not the statement of another, he could not suffer the kind of prejudice the defendant in *Duarte* suffered when the declarant's statement was admitted into evidence.

In sum, Flinner's statement that he should not have killed Keck was admissible as a declaration against interest. The trial court properly admitted it.

Finally, Flinner argues the trial court should have excluded the statement as unduly prejudicial under Evidence Code section 352. Flinner misconstrues the aim of section 352. The "prejudice" contemplated under that section "applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*People v. Scott* (2011) 52 Cal.4th 452, 491.) It has nothing to do with whether evidence is damaging—after all, that is the point of relevant evidence. "The prejudice that section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." (*Ibid.*, internal quotes removed.) There was nothing about Flinner's admission that would induce the jury to prejudge Flinner based upon some emotional reaction to the statement. (*Ibid.*) The trial court properly admitted his statement.

X. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE KECK MAY HAVE BEEN PREGNANT WHEN SHE WAS KILLED

Flinner urges the trial court erred when it permitted the prosecutor to introduce evidence Keck may have been pregnant when she was killed. He asserts this evidence was unduly prejudicial. (AOB 148-153.) The claim is without merit because the fact that Keck may have been pregnant was relevant as an additional motivating factor for Flinner to kill her. He already perceived her as a financial strain on him. The daunting prospect of having to financially support a child may well have influenced Flinner to kill.

A. Factual Background

Prior to trial, the prosecutor moved to admit evidence about Flinner's strained relationship with Keck, his hostility toward her, his efforts to domineer and control her, and his displeasure with her possible pregnancy. (1 CT 49-53; 4 RT 660.) The prosecutor argued that this evidence was relevant because it tended to refute Flinner's assertions that he was in love with Keck and wanted to father her baby. (1 CT 55.)

Among other evidence about the problems between Flinner and Keck, the prosecutor introduced evidence that Keck may have been pregnant. The pathologist who conducted the autopsy found that the state of Keck's ovaries and uterus suggested she may have been in the early stages of a pregnancy at the time of her death. (29 RT 4994-4996.) Keck believed she may have been pregnant as indicated by her purchase of a pregnancy test kit just before she was murdered. (26 RT 4421-4423.) Flinner also believed Keck may have been pregnant; he said as much to various individuals. (27 RT 4632; 28 RT 4753, 4827; 35 RT 6435; 46 RT 7858-7860,) To some he expressed his annoyance and displeasure that Keck was pregnant. (27 RT 4632; 28 RT 4753.) To others, he used her pregnancy as a means to show his devastation at her death. (28 RT 4827; 46 RT 7858-7860.)

In closing argument, the prosecutor argued that Keck's pregnancy may have been a motivation for Flinner to kill her. (63 RT 10538-10539.)

B. Keck's Possible Pregnancy Was Relevant and Admissible

Although Flinner argues that the trial court should have excluded all evidence about Keck's pregnancy, he has not pointed out trial objections to all of that evidence. He generally objected to evidence about the strained relationship, but nothing specifically about what he said to people about Keck's pregnancy. (1 CT 194-197.) His only objection was that the

pathologist's testimony could not conclusively establish whether Keck was pregnant. The pathologist could only render an opinion that Keck *may* have been pregnant based on his examination of her reproductive organs. Consequently, Flinner argued that the pathologist's testimony was prejudicial because it was speculative. (14 RT 1688; 16 RT 2030-2031.) The trial court overruled this objection. Notably, Flinner did not object to any evidence that he and Keck *believed* she was pregnant. Therefore, Flinner's argument on appeal, that all evidence about her pregnancy should have been excluded, has been forfeited. (See *Farley, supra*, 46 Cal.4th at p. 1107; Evid. Code, § 353.)

His claim also fails on the merits. First, Flinner's belief that Keck was pregnant, coupled with his hostility towards that fact, was relevant as an additional motivating influence for his decision to kill Keck. (See, e.g., *People v. Barnett* (1998) 17 Cal.4th 1044, 1118.) Flinner expressed his frustrations that Keck was money hungry. His financial state was so precarious that he was in no position to also support and care for a baby. Killing Keck would ensure he would not have to.

Second, the pathologist's opinion whether Keck was pregnant was relevant as it tended, in reason, to corroborate her and Flinner's beliefs that she was. (See Evid. Code, §210.) Thus, the court properly permitted the pathologist, who naturally operated in a world of probabilities, to provide an expert opinion that Keck's reproductive organs exhibited signs she may actually have been pregnant. Given the evidence that Flinner and Keck believed she was pregnant, Flinner has not shown how the pathologist's testimony would have unduly inflamed the passions of the jury. Just because the expert's opinion may have been damaging does not mean it was prejudicial. (*Scott, supra*, 52 Cal.4th at p. 491.) Instead, it was admissible expert opinion testimony and the trial court was well within

its discretion in admitting it. (*People v. McDowell* (2012) 54 Cal.4th 395, 425-426.)

In sum, the trial court properly admitted evidence about Keck's likely pregnancy.

XI. MARTIN BAKER WAS COMPETENT TO TESTIFY

Flinner argues that Martin Baker was incompetent to testify at trial. He specifically urges that because Baker made strange and bizarre statements during his testimony, the trial court should have ruled that Baker was an incompetent witness. (AOB 153-160.) The argument is without merit. The trial court properly exercised its discretion when it concluded Baker was competent to testify.

A person is not competent to testify if the person is "(1) [i]ncapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or (2) [i]ncapable of understanding the duty of a witness to tell the truth." (Evid. Code, § 701, subd. (a).) Whether a witness is competent to testify, or has the capacity to express himself concerning a matter, is a determination committed to the sound discretion of the trial court. (*People v. Lewis* (2001) 26 Cal.4th 334, 360; *People v. Anderson* (2001) 25 Cal.4th 543, 572.) On the other hand, whether the witness has "perceive[d] accurately, [did] recollect, or [was] communicating accurately and truthfully" are determinations of credibility reserved for the trier of fact. (*Anderson, supra*, 25 Cal.4th at 572.)

Just because a witness may suffer a mental disorder or is delusional, does not necessarily disqualify that person from testifying at trial. (*Lewis, supra*, 26 Cal.4th at p. 360.) For example, in *Lewis*, the defendant complained that a witness, who had the intellect of a seven year old, was incompetent because his testimony was bizarre and inherently unbelievable.

Specifically, the witness was difficult to understand as he testified "he 'heard' blood and knew how money 'sounds.'" (*Ibid.*) This Court concluded that the defendant had failed to make the necessary showing that the witness was disqualified from testifying or incompetent. This Court explained that "[m]ere difficulty in understanding a witness, however, does not disqualify that witness under Evidence Code section 701, subdivision (a)." (*Id.* at p. 361.) Likewise, in *People v. Avila* (2006) 38 Cal.4th 491, 589, the defendant complained that the witness gave such contradictory answers that he clearly did not understand the obligation to tell the truth. Again, this Court observed that the contradictions were not indicative of incompetence and were properly resolved by the jury in its credibility determinations. (*Id.* at pp. 589-590.)

Here, Flinner complains that Baker was incompetent to testify. In support of his claim, he points out that Baker's testimony included bizarre references to reincarnation and Hitler. (AOB 155, 158.) Flinner also claims Baker provided incoherent statements about his involuntary commitment in the county mental health facility for treatment. (AOB 156.) Despite his complaints, Flinner failed to make the requisite showing that Baker was disqualified from testifying. While Baker may have offered, at times, odd testimony, he clearly demonstrated an ability to perceive and recollect events and an ability to convey his recollection understandably to the jury.[17] Baker described how he worked for Flinner's landscaping business. (50 RT 8387-8391.) He discussed how Flinner invited him to dinner and gave him a bowl of chili. (50 RT 8391-8394.) Baker described how he felt drowsy shortly after eating the chili. He testified about the

[17] After trial, during a new trial motion hearing on juror misconduct, one juror specifically recalled Baker's testimony. She testified that he sometimes got off track but always returned to the point. She also noted that he remembered details. (76 RT 12526.)

police waking him up, taking him to the police station, and what he did there. (50 RT 8396-8397.) Baker's unusual, and perhaps delusional, statements during his testimony did not diminish his competence as a witness. (*Lewis*, *supra*, 26 Cal.4th at p. 360; *Avila*, *supra*, 38 Cal.4th at pp. 589-590.) The trial court properly exercised its discretion in concluding that Baker was competent to testify.

XII. ONTIVEROS'S STATEMENTS TO POLICE WERE ADMISSIBLE BECAUSE THEY DID NOT IMPLICATE OR ACCUSE FLINNER OF ANYTHING

Flinner argues that he was prejudiced by the admission of parts of Ontiveros's interview with police. (AOB 160-169.) The claim is without merit because none of Ontiveros's statements directly inculpated Flinner.

A. Ontiveros's Confession

In June 2001, police arrested and interviewed Ontiveros. (38 RT 6594.) The prosecutor introduced parts of Ontiveros's interview at trial. Specifically, the prosecutor presented Ontiveros's admissions that he drove the white Nissan car and that he was alone in that car. (38 RT 6597.) Ontiveros admitted that Keck picked him up and drove him to the cul-de-sac area. (38 RT 6597-6598.) He explained how Keck parked the car with the hood facing the hood of the Nissan. (38 RT 6598-6600.)

B. Legal Analysis

The United States Supreme Court has explained that a non-testifying codefendant's self-incriminating statements which also inculpate the defendant are inadmissible because admission of such statements would violate the defendant's confrontation rights. (*Bruton v. United States* (1968) 391 U.S. 123, 126-137 [88 S.Ct. 1620, 20 L.Ed.2d 476].) But the

high court has also held that if the codefendant's self-incriminating statements do not facially inculpate the defendant, then there is no confrontation problem in the admission of the non-testifying codefendant's statements. (*Richardson, supra*, 481 U.S. at p. 208.)

Here, under the rules announced in *Bruton* and *Richardson*, there was no problem in the admission of Ontiveros's statements to the police because those statements did not expressly inculpate Flinner. The statements were solely Ontiveros's admissions as to what he did; at no point did Ontiveros accuse or implicate Flinner.

But this does not end the inquiry. The United State Supreme Court has also held that the extrajudicial *testimonial* statements of an unavailable witness are inadmissible unless the defendant had a prior opportunity to cross-examine the witness. (*Crawford v. Washington* (2004) 541 U.S. 36, 53, 59, 68 [124 S.Ct. 1354, 158 L.Ed.2d 177].) In making this decision, the court explained the contours of the Confrontation Clause of the Sixth Amendment and how it guarantees a criminal defendant the right to confront and cross-examine the witnesses against him – i.e., his accusers. (*Id.* at pp. 43-44, 51.) Although the high court has not provided a fully comprehensive definition for what makes a statement testimonial, it has held that statements made to police in an interrogation would usually qualify. (*Id.* at 68.)

Here, Flinner asserts that Ontiveros's statements to police during his interrogation were testimonial and therefore should have been excluded under *Crawford*, notwithstanding their admissibility under *Bruton* and *Richardson*. But this argument overlooks the chief evil *Crawford* sought to prevent: the introduction of *accusatory* testimonial statements against the defendant without the benefit of cross-examination. As stated, Ontiveros's statements did not accuse Flinner of anything; they did not mention the involvement of anyone other than Ontiveros. Therefore, Flinner's

confrontation rights were not implicated by the introduction of Ontiverso's statements. (*People v. Stevens* (2007) 41 Cal.4th 182, 199; see also *People v. Lewis* (2008) 43 Cal.4th 415, 506.) In *Stevens*, this Court observed that the introduction of a codefendant's statements that have been redacted to omit any accusation as to the defendant does not violate *Crawford*. This case is no different because "redacted codefendant statements that satisfy *Bruton*'s requirements are not admitted 'against' the defendant for *Crawford* purposes." (*Lewis*, *supra*, 43 Cal.4th at p. 508, citing *Stevens*, *supra*, 41 Cal.4th at p. 199.)

Therefore, there was no error in the admission of Ontiveros's statements.[18]

And even if there were error, it was harmless. As our Supreme Court has noted, "[t]he same redaction that 'prevents *Bruton* error also serves to prevent *Crawford* error.'" (*Stevens*, *supra*, 41 Cal.4th at p. 199, quoting *United States v. Lung Fong Chen* (2d Cir. 2004) 393 F.3d 139, 150.) In other words, the redaction that eliminates any prejudice under *Bruton*, would do the same under *Crawford*. Flinner suffered no prejudice from the admission of Ontiveros's statements because those statements did not inculpate Flinner as responsible for Keck's murder. Therefore even if Ontiveros's statements should have been excluded, admission of those statements was harmless beyond a reasonable doubt. *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 [106 S.Ct. 1431, 89 L.Ed.2d 674] [an otherwise valid conviction should not be set aside for confrontation clause violations if, on the whole record, the constitutional error was

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[18] Although the trial court and prosecutor agreed there was *Crawford* error (79 RT 12934-12940, 12945-12948), neither had the benefit of this Court's decision in *Stevens*.

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

XIII. SUBSTANTIAL EVIDENCE SUPPORTS THE THEORY THAT APPELLANT MURDERED KECK BY MEANS OF LYING IN WAIT BOTH FOR THE SUBSTANTIVE MURDER AND THE SPECIAL CIRCUMSTANCE FINDING

Flinner contends that the evidence was insufficient to establish that he and Ontiveros killed Keck by means of lying in wait. He urges that the evidence was insufficient to support that theory of murder as well as the lying-in-wait special circumstance. (AOB 170-176.) The contention is meritless because the record discloses substantial evidence showing that Flinner and Ontiveros laid in wait to find the opportune time to shoot and kill the unsuspecting Keck.

A. Standard of Review

It is well settled that appellate courts review challenges to the sufficiency of evidence by inquiring "whether, on review of the entire record in the light most favorable to the judgment, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt." (*People v. Young* (2005) 34 Cal.4th 1149, 1180 relying on *People v. Rowland* (1992) 4 Cal.4th 238, 269; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [99 S.Ct. 2781, 61 L.Ed.2d 560].) In other words, the conviction must be based on substantial evidence, or, "evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) Significantly, reviewing courts do not reweigh the evidence, but evaluate whether the evidence presented at trial and the reasonable inferences that could be derived from that evidence

supported the conclusions drawn by the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) This "standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence." (*People v. Story* (2009) 45 Cal.4th 1282, 1296, relying on *People v. Stanley* (1995) 10 Cal.4th 764, 792.)

This same substantial evidence standard of review applies to claims of insufficient evidence supporting special circumstance findings. (*Stevens, supra*, 41 Cal.4th at p. 201.)

B. Legal Analysis

Any homicide that is perpetrated by means of lying in wait is first degree murder. (Pen. Code, § 189.) The lying-in-wait special circumstance includes the elements of a first degree lying-in-wait murder but requires the additional element that the killing was intentional. (Pen. Code, § 190.2, subd. (a)(15); *People v. Mendoza* (2011) 52 Cal.4th 1056, 1073.) Thus, if substantial evidence supports the lying-in-wait special circumstance, then it will necessarily also support the lying-in-wait substantive murder conviction. (*Mendoza, supra*, at p. 1073.)

The lying-in-wait special circumstance requires "an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. ..." (*Mendoza, supra*, 52 Cal.4th at p. 1073, quoting *People v. Moon* (2005) 37 Cal.4th 1, 22; see also *People v. Gurule, supra*, 28 Cal.4th at p. 630 [to prove the substantive first degree murder by means of lying in wait "the prosecution must prove there was a concealment of purpose, a substantial period of watching and waiting for a favorable or opportune time to act, and that immediately

thereafter the defendant launched a surprise attack on an unsuspecting victim from a position of advantage"].)

Here, Flinner concedes that the evidence showed concealment of purpose. He also seems to tacitly acknowledge an intention to kill. But he argues that the evidence fell short of establishing a substantial period of watching and waiting as well as a surprise attack from a position of advantage. (AOB 175-176.) In support of his position, he observes that Ontiveros was only in the cul-de-sac with Keck for about three minutes and he notes that Ontiveros's shooting Keck in the back of the head did not distinguish the murder from any other ordinary premeditated and deliberate murder. (AOB 175-176.)

Flinner's argument is baseless because it unjustifiably narrows the time he and Ontiveros waited and watched for the opportune time to kill Keck. Flinner seems to assume that the waiting and watching was limited to the time Onitveros was actually in Keck's immediate presence. In truth, Ontiveros and Flinner waited and watched for a far lengthier period of time.

About two hours before they killed Keck, Flinner and Ontiveros met at the gas station where Flinner planned to lure Keck to meet Ontiveros. (30 RT 5227, 5229-5231; 31 RT 5395-5399; 35 RT 6052-6055; 41 RT 7207-7210; 47 RT 8034-8042, 8117.) From there, Flinner and Ontiveros drove to the cul-de-sac where Ontiveros would kill Keck. (25 RT 3996-99, 4033; 31 RT 5417-5421; 38 RT 6599-6600; 47 RT 8043-8050; 50 RT 8526-8529, 8534-8536, 8543-8544.) They spent several minutes in the cul-de-sac, presumably discussing the plan to kill Keck and then drove out. (38 RT 6575-6576; 47 RT 8043-8050; 50 RT 8526-8529.) The trap was set. With the plan now in place, Flinner's and Ontiveros's watching and waiting began – Flinner waiting for the right time to send Keck to her death, and Ontiveros waiting for her arrival so that he could execute the plan.

Flinner drove to his parents' house where he, his family, and Keck made plans for a barbecue later that afternoon. Keck set out to shop for groceries for the barbecue. (28 RT 4845: 9 CT 2017-2018; 48 RT 8195, 8197, 8198; 50 RT 8518.) Meanwhile, Ontiveros drove the Nissan back to the cul-de-sac and parked the car. (38 RT 6599-6600; 47 RT 8049-8052; 50 RT 8537, 8544.) He then walked back up to the gas station where he waited for Keck. (50 RT 8537, 8051-8052.)

While Keck was shopping, Flinner called her and directed her to meet Ontiveros at a gas station on Tavern Road so that she could help jump start Ontiveros's "stranded" car. (28 RT 4845: 9 CT 2019; 35 RT 6055-57, 6059.) Several minutes later, Keck arrived at the gas station where she met Ontiveros, who had been waiting for her. (48 RT 8113; 50 RT 8537-8538.) Keck drove Ontiveros to his Nissan in the cul-de-sac and parked her car so that it was facing, and was close to, the Nissan. (25 RT 4012; 26 RT 4417; 38 RT 6598-6600; 48 RT 8112-8113; 50 RT 8539.)

Both Keck and Ontiveros got out of Keck's car and Keck went to open the hood of her car. As she was propping the hood open, Ontiveros came up from behind her and shot her in the back of her head. (25 RT 4040, 4427-4428; 27 RT 4435-4441; 29 RT 4983; 39 RT 6857-6858; 41 RT 7480-7485, 7533-7536; 45 RT 7718-7722, 7726.) In that moment, the trap Flinner and Ontiveros had set, snapped shut; what they had been watching and waiting for was now completed.

In light of this record, it is disingenuous for Flinner to suggest that there was insufficient evidence of a period of substantial watching and waiting. Both Flinner and Ontiveros watched and waited for the right moment to strike and kill Keck. It is also disingenuous for Flinner to argue that there was insufficient evidence of a surprise attack. Ontiveros shot Keck in the back of the head. She never saw the attack and was ambushed while trying to help Ontiveros with his alleged car troubles.

Because substantial evidence supported the lying-in-wait special circumstance, the evidence necessarily also supported the lying-in-wait first degree murder conviction. (*Mendoza*, *supra*, 52 Cal.4th at p. 1073.)

XIV. BECAUSE THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE REQUIRES AN INTENT TO KILL NOT OTHERWISE REQUIRED FOR LYING-IN-WAIT MURDER, THE SPECIAL CIRCUMSTANCE IS CONSTITUTIONAL

Flinner complains that the lying-in-wait special circumstance is unconstitutional because it does not sufficiently narrow the class of murders eligible for capital punishment. (AOB 177-181.) The complaint is meritless because the lying-in-wait special circumstance applies in narrower circumstances than mere lying-in-wait murder. Therefore the special circumstance is constitutional.

Prior to 2000, the lying-in-wait special circumstance required that the intentional murder be committed "while" lying in wait. However, by passing Proposition 18, the electorate amended the special circumstance so that it could be found if the intentional murder was committed "by means of" lying in wait. (*People v. Superior Court (Bradway)* (2003) 105 Cal.App.4th 297, 306-307.) This change, aligned the special circumstance more closely with the substantive lying-in-wait murder. (*Ibid.*) Flinner argues that this change rendered the special circumstance unconstitutionally vague and insufficient to adequately narrow the class of capital murders.

But in making his argument, Flinner fails to appreciate that the special circumstance remains narrower than the substantive lying-in-wait murder because it requires the additional element of an intentional killing. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1140, fn. 2; *People v. Webster* (1991) 54 Cal.3d 411, 448 [recognizing that "murder by means of lying in wait requires only a wanton and reckless intent to inflict injury likely to cause

death"].) Lying-in-wait murder can be committed without the specific intent to kill. (*Webster*, *supra*, 54 Cal.3d at p. 448.) For example, a person can lie in wait with the intent to assault another. If the attack results in the death of the victim, then the homicide is a lying-in-wait murder despite the fact that the killing was unintentional. Only if the killer also harbored the specific intent to kill, would the lying-in-wait special circumstance apply. Thus, the distinction between lying-in-wait murder and the lying-in-wait special circumstance is sufficient such that the special circumstance is constitutional. (*Bradway*, *supra*, 105 Cal.App.4th at pp. 309-310.)

Even assuming Flinner's contention had merit, it would not entitle him to relief. Aside from finding the lying-in-wait special circumstance to be true, the jury also found the financial gain special circumstance (Pen. Code, § 190.2, subd. (a)(1)) to be true. Thus, the lying-in-wait special circumstance was merely a surplus finding. Flinner was already death eligible based on the jury's financial gain special circumstance finding. (*People v. Bonilla* (2007) 41 Cal.4th 313, 333-334 [noting the lying-in-wait special circumstance "was superfluous for purposes of death eligibility and did not alter the universe of facts and circumstances to which the jury could accord aggravating weight"].)

XV. FLINNER HAS FAILED TO DEMONSTRATE JUROR MISCONDUCT THAT RENDERED HIS TRIAL FUNDAMENTALLY UNFAIR

Flinner raises two claims of juror misconduct. He specifically alleges that Jurors Nos. 1 and 10 were either impliedly or actually biased against him. (AOB 182-197 [Arg. XV], 198-208 [Arg. XVI].) Neither claim has merit because Flinner has not shown any evidence establishing the jurors were biased or engaged in misconduct.

A. Factual Background

Following trial, Flinner filed a new trial motion alleging jury misconduct. He alleged, among other things, that jurors had freely discussed testimony and evidence during the course of the trial, visited the crime scene, threatened Flinner, spoken with witnesses during the trial, read newspaper accounts about the case during the trial, pre-judged the case, and failed to report observed misconduct to the court. (12 CT 2629-2644.)

The trial court found that although Flinner had not presented any competent evidence substantiating his claims of juror misconduct, he had nonetheless made a prima facie showing of misconduct sufficient to warrant an evidentiary hearing. (73 RT 11843.)

At the hearing, Juror No. 1's testimony was the centerpiece for Flinner's new trial motion. Juror No. 1 claimed that of the twelve jurors, only she and one other juror tried to faithfully follow the court's admonitions. (73 RT 12018-12019.) Juror No. 1 claimed that jurors regularly discussed witness testimony and credibility as well as other evidence during breaks and lunchtime. (73 RT 11862-11864, 11871, 11879-11880, 12886, 12011-12012; 74 RT 12071-12072.) She accused Jurors Nos. 10 and 12 of being manipulative and that they tried to unduly influence the older women on the jury. (73 RT 11933-11935, 12009.) She also claimed that these jurors made crass sexual comments about Detective Scully and announced during deliberations that their focus needed to be on the victim as opposed to the defendant. (73 RT 11866-11867, 11879, 11902.) Juror No. 1 asserted that Juror No. 2 regularly read newspaper articles about the case during trial. (73 RT 11885; 74 RT 12064-12067.) She also reported that jurors spoke with a witness in the hallway during a break after the witness had testified. Although she conceded that she did not know what they had spoken about, she claimed that she confronted the jurors about speaking to a witness and that the jurors ignored her. (73 RT

11867-11868; 74 RT 12072-12074.) She claimed Juror No. 11 was asleep through most of the trial. (73 RT 11943.) She asserted that Juror No. 8 stated during trial that she had already made up her mind as how to resolve the case. (73 RT 11870, 11900-11901)

Juror No. 1 admitted harboring personal animus toward Juror No. 10. (73 RT 12014.) She accused Juror No. 10 of dressing provocatively to get Flinner's attention during trial. (73 RT 1188.-11884, 11990-11993, 11939-11943, 11963, 11974-11975, 11993-11994.) She claimed that Juror No. 10 silently mouthed the words, "I want you dead," to Flinner during trial and that she made throat slashing gestures toward him. (73 RT 11883-11884, 11990-11993, 11943, 11991.) She also claimed that Juror No. 10 visited some of the places pertinent to the trial. (73 RT 11873-11875, 12001-12005.)

Juror No. 1 reported one incident during deliberations in which Juror No. 10 and the foreperson had a private conversation. (73 RT 11890-11891, 11976-11977, 12034-12035.) When she confronted these jurors about it, she claimed they revealed they had been discussing a strategy to get a holdout juror to change his mind on one of the solicitation to commit murder charges. (65 RT 10799-10800; 73 RT 12034-12035.)

Juror No. 1 was unable to explain why she did not raise any concerns about juror misconduct to the court previously. (73 RT 12038-12039.) She acknowledged that although she met with the prosecutor after trial, she never discussed any concerns about juror misconduct with him. (74 RT 12070; 75 RT 12428-12429.) She admitted that the jury reached consensus as to each of the verdicts. (74 RT 12095.)

During her testimony, Juror No. 1 discussed the fact that there was an outstanding temporary restraining order against her sister's former boyfriend and that during the trial, the boyfriend was brought to the

courthouse for a judicial proceeding unrelated to Flinner's case. (74 RT 12169, 12172-12173.)

Juror No. 1 also discussed the fact that she thought it might be a good idea to write a book or memoir about her jury experience. (73 RT 11876, 12029.) After trial, she discussed the book idea with other jurors. (73 RT 11875-11876, 11950, 11960-11962; 75 RT 12428-12429.) After the trial was over, she sought out potential publishers and successfully secured an advance of funding from one publisher. (73 RT 11866, 11894-11895, 11911.)

The eleven other jurors also testified at the hearing. None corroborated Juror No. 1's allegations of misconduct. Instead, they consistently testified that they each strove to observe the court's admonitions and that they did not see others violate those admonitions. (74 RT 12181-12182, 12209-12210; 75 Rt 12339-12340, 12381-12382; 76 RT 12488, 12587-12589; 77 RT 12720-12725, 12770-12773, 12777-12779.) They did not discuss witness testimony or evidence and did not conduct any private investigation. (74 RT 12185; 75 RT 12282, 12286, 12324-12326, 12329, 12331, 12379-12380; 76 RT 12478-12480, 12482-12485, 12489-12490; 77 RT 12628-12629, 12630-12633, 12637, 12667, 12730-12731.) They avoided reading newspaper accounts about the trial and if they did read something it was purely accidental and had no effect upon their deliberations. (74 RT 12183-12184, 12220; 75 RT 12332-12333; 76 RT 12502-12503; 77 RT 12657-12658, 12660.) They did not feel that other jurors were manipulative. (74 RT 12184-12185, 12254-12254; 75 RT 12289, 12392; 76 RT 12603; 77 RT 12773-12774.) They did not see Juror No. 10 dress inappropriately or attempt communication with Flinner. (74 RT 12186, 12219-12220; 75 RT 12285, 12331, 12387; 76 RT 12497-12498; 77 RT 12635-12636, 12646-12647, 12657, 12663, 12728-12729, 12776, 12782.)

Some of the jurors recalled one witness, Robert Hatch, talking with them in the hallway before he testified. At the time, they did not know he was a witness. (75 RT 12327; 76 RT 12486; 77 RT 12726-12727, 12756-12757.) Not knowing that they were jurors, Hatch initiated contact with them when he overheard them talking about ailing citrus fruit trees; he offered curative advice because he worked in the landscaping business. (75 RT 12309-12312.) At no point did he talk about the case with the jurors. (75 RT 12320-12321, 12327.)

The jurors remembered an incident during deliberations in which Juror No. 1 blew up and accused Juror No. 10 and the foreperson of discussing secrets. They understood that Juror No. 10 and the foreperson briefly discussed a directional approach for the resumption of deliberations after returning from lunch. By this point, the jury had reached verdicts on all but one of the solicitation to commit murder counts. (65 RT 10799-10800; 74 RT 12189, 12215-12217; 75 RT 12288-12289, 12335, 12338; 76 RT 12513-12517, 12590-12591; 77 RT 12642, 12732-12734, 12774-12775, 12781.) Otherwise, the jurors felt the deliberations were conducted in a professional and orderly manner and that all jurors were able to freely voice their views and opinions. (74 RT 12187-12188; 75 RT 12287-12288; 76 RT 12522-12524, 12590; 77 RT 12645, 12773-12774.)

Even the alternate jurors asserted that they did not observe any violations of the court's admonitions or any of the other instances of misconduct Juror No. 1 alleged. (74 RT 12258, 12261-12262; 75 RT 12425-12428; 77 RT 12753-12755, 12768-12769.) Indeed, one alternate testified that Juror No. 1 contacted her after trial and tried to coach her as to what kind of misconduct she should relate to defense investigators. (75 RT 12430-12431.)

Following the hearing, the trial court found that Juror No. 1 was not credible. (79 RT 12906-12907.) The court noted that if misconduct had

occurred in the manner Juror No. 1 described it, such behavior could not possibly have escaped the notice of the court, counsel, court personnel, or spectators. (79 RT 12908.) The court further found that the jury, as a whole, was attentive to the admonitions and that any isolated violations of those admonitions were insubstantial. (79 RT 12908.) The court denied the new trial motion. (79 RT 12909.)

B. Legal Analysis

The trial court may grant a new trial when the jury has "been guilty of any misconduct by which a fair and due consideration of the case has been prevented." (Pen. Code, § 1181, item 3.) When a court is confronted with a colorable claim of juror bias it should undertake an investigation of the relevant facts and circumstances. (*Remmer v. United States* (1956) 350 U.S. 377, 379-380 [76 S.Ct. 425, 100 L.Ed. 435].) The inquiry need not involve a full hearing; due process only requires that all parties be represented, and that the investigation be reasonably calculated to resolve doubts about the juror's impartiality. (See *Smith v. Phillips* (1982) 455 U.S. 209, 215-217 [102 S.Ct. 940, 71 L.Ed.2d 78].)

In reviewing a trial court's denial of a new trial motion based on juror misconduct, this Court first determines "whether there was any juror misconduct." (*People v. Collins* (2010) 49 Cal.4th 175, 242.) In determining misconduct, this Court accepts "the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence." (*People v. Nesler* (1997) 16 Cal.4th 561, 582.)

1. There is no evidence Juror No. 1 engaged in misconduct

Flinner claims Juror No. 1 was biased because she sought to profit from her service as a juror by writing a memoir. He also claims that she

engaged in misconduct by failing to disclose during voir dire the existence of a temporary restraining order against her sister's former boyfriend.

The United State Supreme Court has held that an honest yet mistaken answer to a voir dire question rarely amounts to a constitutional violation; even an intentionally dishonest answer is not fatal, so long as the falsehood does not bespeak a lack of impartiality. (See *McDonough Power Equip. v. Greenwood* (1984) 464 U.S. 548, 555-556 [104 S.Ct. 845, 78 L.Ed.2d 663].) Here, Flinner is unable to point to any material non-disclosure as to Juror No. 1, let alone a mistaken answer during voir dire.

In support of his claim that Juror No. 1 was biased, Flinner relies on the Ninth Circuit's decision in *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970. But *Dyer* is inapposite. During voir dire in *Dyer*, a juror concealed material facts about herself to ensure her seat on the jury. Despite explicit questions about whether she or her family members had been accused of crime or whether she or her family members had been the victims of crime, she inexplicably failed to disclose that several family members had been accused and convicted of crimes, that her brother had been murdered, and that she had been a victim of several burglaries. (*Id.* at pp. 972, 979-981.) The Ninth Circuit was troubled by the juror's failure to disclose these material facts and attributed the nondisclosure to a possible zeal to be seated on the jury. (*Dyer*, *supra*, 151 F.3d at p. 982.) Under such extraordinary circumstances the court found implied bias. (*Ibid.*) In dicta, the court went on to describe a hypothetical scenario in which a prospective juror might seek to serve on a jury because of a secret hope to write a memoir. (*Id.* at p. 982, fn. 19.) The court surmised that such zeal could inject an unwelcome taint into the deliberative process. (*Ibid.*)

Dyer does not support Flinner's argument that Juror No. 1 was biased because of her failure to disclose the temporary restraining order her sister secured against the sister's ex-boyfriend. Unlike in *Dyer*, there is no

evidence that Juror No. 1 concealed anything in order to ensure her seat on the jury. Although Flinner attempts to rely upon her non-disclosure of the temporary restraining order that her sister had secured to prevent an ex-boyfriend from coming near her or her family, this hardly qualifies as something Juror No. 1 was obligated to disclose. Flinner points to nothing in the jury questionnaire or during voir dire that would have compelled disclosure of such an attenuated tangential fact. The restraining order was not secured by Juror No. 1 and did not directly involve her. Instead, it was a matter between her sister and her sister's ex-boyfriend. (74 RT 12169-12174.) Further, the record shows that Juror No. 1 disclosed as much as she could about her sister's rough life and the drug problems her sister struggled with. (17 CT 3870-3872, 3877.) Additionally, Juror No. 1 did not hide her excitement at being summoned for jury service or her desire to serve as a juror. (17 CT 3880.)

Dyer also does not support Flinner's contention that Juror No. 1 was biased because of her literary aspirations. At the outset, *Dyer* had nothing to do with whether implied bias can be found as to a juror because of the juror's intent to write a book or memoir. While the court in *Dyer* suggested in dicta that literary aspirations might taint the writer's impartiality, the United States Supreme Court has never held that a juror's interest in writing a book about his or her jury service leads to a conclusion of implied bias. Nor has Flinner pointed to any evidence here that Juorr' No. 1's interest in writing a memoir improperly influenced the verdict.

Flinner's reliance on *Sims v. Brown* (9th Cir. 2005) 425 F.3d 560, to support his position that Juror No. 1's literary aspirations tainted the verdict, is also unavailing. In *Sims*, the juror misconduct issue had nothing to do with a juror perjuring herself to be seated on the jury in order to write a book. Instead, the juror spoke with a friend and learned that her friend had been a juror in Sims' codefendant's trial. They discussed writing a

book about their experiences as jurors and agreed not to discuss the case until after the Sims trial ended. (*Id.* at p. 576.) Opining that the communication between the juror and her friend may have been unfortunate, the Ninth Circuit held there was no prejudice because the juror and her friend agreed not to discuss the cases until after the trial. (*Id.* at p. 577.) The court also observed that there was no suggestion that the juror's literary plan would result in a financial gain based on any particular outcome of the trial. (*Ibid.*) Therefore, the court concluded that there was no real risk that the communication between the juror and her friend would have improperly influenced the verdict. (*Ibid.*)

As in *Sims*, there is no evidence that Juror No. 1's literary aspirations influenced the verdict. In fact, she did not discuss her literary plans with any of the jurors until after the trial was over.[19] (73 RT 11875-11876, 11950, 11960-11962; 75 RT 12428-12429.) Nor did she seek out publishers until after trial. (73 RT 11866, 11894-11895, 11911.)

Finally, Flinner suggests that because Juror No. 1 provided fanciful, possibly perjured, testimony during the new trial motion hearing, she necessarily was biased during the trial. (AOB 207-208.) But Juror No. 1's actions months after trial do not establish that she was biased during trial or during deliberations. Indeed, the evidence at the new trial hearing revealed that she was not biased at all during the trial and deliberations; instead, she fairly deliberated with all jurors. (74 RT 12095, 12187-12188; 75 RT 12287-12288; 76 RT 12522-12524, 12590; 77 RT 12645, 12773-12774.)

In sum, Flinner has failed to show implied or actual bias on the part of Juror No. 1.

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[19] Flinner suggests that Juror No. 1 spoke about her literary plans with other jurors prior to the end of trial. (AOB 187.) His record citations do not appear to support this.

2. There is no evidence Juror No. 10 engaged in misconduct

Flinner claims Juror No. 10 engaged in misconduct by trying to communicate threats to him during trial. The trouble with this argument is that there is no credible evidence supporting this claim. Other than Juror No. 1's testimony – which was animated by admitted personal antipathy toward Juror No. 10 (73 RT 12014) – not one witness during the new trial motion testified that Juror No. 10 tried to communicate with Flinner during the trial.[20] In the absence of evidence that Juror No. 10 engaged in misconduct, Flinner's claim collapses.

Flinner also claims Juror No. 10 was biased because she was "infatuated" with Detective Scully, the lead detective for the prosecution. Again Flinner has pointed to nothing that shows Juror No. 10 was biased. While she admitted joking with fellow jurors that the detective had a nice buttocks (77 RT 12635-12636), this hardly establishes a bias in favor of the prosecution that would have improperly influenced the verdict.

Flinner's contention that Juror No. 10 was biased fails.

XVI. THE TRIAL COURT PROPERLY REFRAINED FROM ORDERING A COMPETENCY HEARING TO DETERMINE WHETHER FLINNER WAS COMPETENT

Flinner argues that the trial court denied him due process by refusing to conduct a full competency hearing after he allegedly attempted to

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[20] Flinner relies on testimony from Green Juror No. 11 who claimed to have seen Juror No. 10 mime a sexual act for five to ten minutes during court. (AOB 199; 73 RT 11978-11980.) Besides being rather far-fetched because such inappropriate conduct could not possibly have escaped notice by the court, counsel, or others, analysis of this testimony does not support Flinner's contention that Juror No. 10 attempted to communicate with him during trial.

commit suicide while awaiting the verdict. (AOB 208-220.) The argument is without merit because Flinner did not present substantial evidence of a suicide attempt or incompetence. Absent evidence of possible incompetence, the trial court properly refused to suspend criminal proceedings in order to determine whether Flinner was competent.

A. Factual Background

The jury reached its verdict on Thursday, October 16, 2003. Because the jury for Ontiveros was still deliberating, the trial court had the jury seal its verdict to await being read in open court after the Ontiveros jury concluded its deliberations. (65 RT 101798, 10812-10813, 10822.) On Friday and Saturday, defense counsel visited with Flinner and spoke with him over the phone, presumably letting him know that the jury had reached a verdict. (65 RT 10823-10824.)

On Sunday morning, October 19, jail personnel found Flinner lying on the floor in his cell and because he was unresponsive, transported him to the hospital for treatment. (65 RT 10822-10823, 10825.) Flinner was discharged two days later on Tuesday, October 21 and returned to his cell. (65 RT 10825.) Upon his return to jail, Flinner denied any suicidal ideations, denied overdosing on any drugs, and asserted that he did not know what happened to him on Sunday morning. (65 RT 10833.)

The same day that Flinner was discharged from the hospital, the defense filed a motion requesting a competency hearing under Penal Code section 1368. (65 RT 10816; 10 CT 2409.) In the declaration in support of the motion, defense counsel stated that counsel had been "informed that Mr. Michael Flinner attempted to commit suicide on Sunday morning." (10 CT 2412.) Counsel provided nothing further substantiating whether Flinner had actually attempted to commit suicide.

On Wednesday, October 22, defense counsel met with Flinner in person. (65 RT 10824.)

On Thursday, October 23, the court heard the motion to suspend criminal proceedings for a competency evaluation. The court reviewed Flinner's jail and hospital records for the preceding several days, including the log of medications administered to Flinner in jail since April. (65 RT 10817-10820.)

The court asked defense counsel to state whether counsel had a doubt as to Flinner's competence. (65 RT 10827.) Rather than affirmatively declare a doubt, counsel waffled about, clearly struggling on the "horns of a dilemma" as an "officer of the court, but at the same time, ... representing a client in a death penalty case." (65 RT 10829-10830.) The best counsel offered was the following equivocal observation: "I have a duty on behalf of Mr. Flinner to say there may be that possibility at this time in light of the present test, and respectfully suggest to the court that the 1368 procedure has been met. ... [¶] That I guess, Judge, is the position that I must take as an officer of the court and as of one of the attorneys for Mr. Flinner." (65 RT 10830-10831.)

In response, the prosecutor observed that there was no evidence before the court of an attempted suicide. The prosecutor also asserted that Flinner's communication with jail personnel stating that he had not attempted suicide and did not know what had happened to him on Sunday morning, and that he was appropriately responsive and rational, demonstrated his understanding about what was going on around him. (65 RT 10832-10833.)

The court denied the motion. The court noted that it had reviewed the hospital and jail records and found that there was no competent evidence before it that Flinner had attempted to commit suicide. (65 RT 10835.) The court also observed that Flinner, having appeared many times before it,

did not appear to be disoriented in time and space but continued to appear to effectively communicate with the defense team. (65 RT 10835-10836.) The court had no doubt that Flinner was competent. (65 RT 10836.)

B. Legal Principles

It has long been the law that a defendant convicted of a criminal offense is deprived of due process when he or she was legally incompetent at the time of trial. (*Pate v. Robinson* (1966) 383 U.S. 375, 385 [86 S.Ct. 836, 15 L.Ed.2d 815].) California case law that a criminal defendant may not be tried while he or she is mentally incompetent (*People v. Pennington* (1967) 66 Cal.2d 508, 521) is codified in Penal Code section 1367. That section provides, "[a] person cannot be tried or adjudged to punishment while that person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (Pen. Code, § 1367, subd. (a).) The United States Supreme Court has explained a defendant is incompetent to stand trial if he or she lacks a

> sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and ... a rational as well as a factual understanding of the proceedings against him.

(*Dusky v. United States* (1964) 362 U.S. 402, 402 [80 S.Ct. 788, 4 L.Ed.2d 824]; see also *Godinez v. Moran* (1993) 509 U.S. 389, 399-400 [113 S.Ct. 2680, 125 L.Ed.2d 321].)

California's procedure for determining a defendant's competence to stand trial is a creature of statute. (See Pen. Code, § 1368.) While a criminal proceeding is pending and before judgment, if a court has a doubt

as to a defendant's mental competence, it is required to express this doubt and make inquiry of defense counsel or, if the defendant is unrepresented, it must appoint counsel. (Pen. Code, § 1368, subd. (a); see also *People v. Robinson* (2007) 151 Cal.App.4th 606, 616.)

"A defendant is presumed competent unless it is proved otherwise by a preponderance of the evidence." (*People v. Ramos* (2004) 34 Cal.4th 494, 507.) However,

> [b]oth federal due process and state law require a trial judge to suspend trial proceedings and conduct a competency hearing whenever the court is presented with substantial evidence of incompetence, that is, evidence that raises a reasonable or bona fide doubt concerning the defendant's competence to stand trial. [Citations.] ... Evidence of incompetence may emanate from several sources, including the defendant's demeanor, irrational behavior, and prior mental evaluations. [Citations.] [Citation.]

(*Lewis*, *supra*, 43 Cal.4th at pp. 524-525.) Thus, a defendant is entitled to a competency hearing under Penal Code section 1368 as a matter of law if there is substantial evidence showing his mental incompetency. But "to be entitled to a competency hearing, 'a defendant must exhibit more than ... a preexisting psychiatric condition that has little bearing on the question ... whether the defendant can assist his defense counsel.'" (*People v. Rogers* (2006) 39 Cal.4th 826, 847, quoting *Ramos*, *supra*, 34 Cal.4th at p. 508.)

The trial court's decision whether "to hold a competence hearing is entitled to deference, because the court has the opportunity to observe the defendant during trial." (*Rogers*, *supra*, 39 Cal.4th at p. 847.)

Here, Flinner asserts that the trial court abused its discretion because his attempt to commit suicide constituted substantial evidence that he was incompetent. But Flinner never presented any evidence that he attempted to commit suicide. In fact, when Flinner returned to jail after his short hospitalization, he expressly denied being suicidal and simply stated that he did not know what had happened when jail personnel found him on the

floor in his cell. And even if Flinner had attempted to commit suicide, this alone would not have been sufficient to raise a doubt as to his competence to stand trial. (See, e.g., *Ramos*, *supra*, 34 Cal.4th at p. 509.)

Aside from the fact that there was no evidence that Flinner attempted to commit suicide, defense counsel was unwilling to clearly assert a doubt as to Flinner's competence. When directly asked by the trial court to opine on Flinner's present competence, counsel did not offer an unequivocal declaration of doubt. Instead, counsel offered a lengthy, wishy-washy, pontification about competence law and admitted to being on the "horns of a dilemma" as an officer of the court representing a capital litigant. Declaring a doubt would have amounted to counsel foisting a fraud upon the court; declining to do so would have deprived Flinner of the benefit of delay – an apparent premium in capital cases.

Finally, the trial court was able to determine from its own contemporaneous observations whether Flinner appeared to understand what was going on. The court noted that Flinner appeared to communicate understandably with his attorneys, just as he had throughout the entire course of the trial.

The standard for competence is simple: Flinner was incompetent if he lacked "a 'sufficient *present* ability to consult with his lawyer with a reasonable degree of rational understanding – and ... a rational as well as a factual understanding of the proceedings against him.'" (*Dusky*, *supra*, 362 U.S. at p. 402, italics added.) Outside of mere speculation, Flinner offered no evidence raising a question as to his competence. Thus, the trial court properly denied the motion to suspend criminal proceedings under section 1368 for a competency evaluation.

XVII. THERE WAS NO CUMULATIVE ERROR

Flinner argues that the trial errors cumulated such that he was deprived of due process and a fundamentally fair trial. (AOB 220-222.) The argument is without merit. As explained above, none of Flinner's claims of error have merit.

And even if this Court were to conclude that some error existed, the accretion of those errors was utterly insufficient to deny Flinner his due process right to a fair trial. (*People v. Hill* (1998) 17 Cal.4th 800, 844-845; see also *People v. Eubanks* (2011) 53 Cal.4th 110, 152; *People v. Stewart* (2004) 33 Cal.4th 425, 521-522; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1223; *People v. Koontz* (2002) 27 Cal.4th 1041, 1094.) Flinner's trial may not have been perfect, but he received what he was constitutionally entitled to: a trial that was fundamentally fair. (*Stewart, supra*, 33 Cal.4th at p. 522; see also *Darden v. Wainwright* (1986) 477 U.S. 168, 183 [106 S.Ct. 2464, 91 L.Ed.2d 144] [noting that few trials are perfect].) Flinner's claim of cumulative error should be denied.

XVIII. CALIFORNIA'S DEATH PENALTY LAW IS CONSTITUTIONAL

Flinner raises several challenges to California's death penalty law. (AOB 223-239.) This Court has rejected all of them in previous decisions and Flinner provides no compelling arguments justifying reconsideration of those decisions.

Flinner argues that section 190.2 is overbroad in that it sweeps too many murderers within the net of capital punishment eligibility. (AOB 225-226.) But as this Court has held,

> Section 190.2 is not impermissibly overbroad in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. Specifically, the various special circumstances are not so numerous as to fail to perform the

> constitutionally required narrowing function, and the special circumstances are not unduly expansive, either on their face or as interpreted by this court. [Citation.] Nor did the 1978 death penalty law—enacted by the voters by way of initiative in November 1978—have the intended or practical effect of making all murderers death eligible. [Citation.]

(*People v. Jennings* (2010) 50 Cal.4th 616, 688.)

Flinner asserts that a jury's consideration of the circumstances of the crime under factor (a) of section 190.3 is unconstitutional. (AOB 226-228.) But this Court has explained, "[s]ection 190.3, factor (a), does not, on its face or as interpreted and applied, permit arbitrary and capricious imposition of a sentence of death in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution." (*People v. Linton* (2013) 56 Cal.4th 1146 [2013 Cal.LEXIS 5338 at *138], quoting *People v. Brasure* (2008) 42 Cal.4th 1037, 1066.) Indeed, the United States Supreme Court has observed that "[t]he circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence." (*Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 129 L.Ed.2d 750].)

Flinner also complains that there are insufficient safeguards in place to ensure a reliable penalty verdict. Specifically, he asserts that the jury should be required to make written findings, and unanimously find aggravating circumstances to be true beyond a reasonable doubt. (AOB 228-229.) But this Court has held neither the federal nor the state Constitution requires that the penalty phase jury make unanimous findings concerning the particular aggravating circumstances, find all aggravating factors beyond a reasonable doubt, or find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255.) Nor do the federal or state

Constitutions require "the jury to make written findings in which it specifies the aggravating factors on which it relies." (*Id.* at p. 1256)

Still, Flinner attempts to use the United States Supreme Court's recent Sixth Amendment's jury-trial guarantee cases[21] to assert that the jury should have been required to make unanimous, beyond reasonable doubt, aggravation determinations. (AOB 229-235.) But as this Court has clearly held, the high court's recent Sixth Amendment cases do not alter the constitutional viability of California's penalty determination procedures. (*People v. Prince* (2007) 40 Cal.4th 1179, 1297-1298; *People v. Davis* (2005) 36 Cal.4th 510, 572.) "Unlike the guilt determination, 'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification." (*People v. Avila* (2009) 46 Cal.4th 680, 724, quoting *People v. Hawthorne* (1992) 4 Cal.4th 43, 79.)

Flinner asserts that California's death penalty scheme is unconstitutional because it does not *require* inter- or intra-case proportionality review. (AOB 236-237.) This Court has repeatedly explained that inter- or intra-case proportionality review is not constitutionally required. (*McDowell, supra*, 54 Cal.4th at p. 444; *People v. Lee* (2011) 51 Cal.4th 620, 651; *People v. Harris* (2008) 43 Cal.4th 1269, 1322-1323.)

Finally, Flinner claims that California's death penalty law violated international norms of humanity and decency. (AOB 237-239.) This Court has repeatedly rejected this claim as well. (*Lee, supra*, 51 Cal.4th at p. 654

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[21] *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]; *United States v. Booker* (2005) 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621]; *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]

["International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements."]; see also *Linton, supra*, 56 Cal.4th 1146 [2013 Cal.LEXIS at p. *143]; *McDowell, supra*, 54 Cal.4th at p. 444.)

In sum, Flinner's challenges to California's death penalty scheme should be rejected.

CONCLUSION

For the foregoing reasons, respondent respectfully requests this Court to affirm the judgment in full.

Dated: November 12, 2013

Respectfully submitted,

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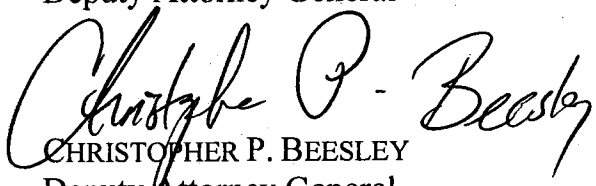

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13-point Times New Roman font and contains 32,591 words.

Dated: November 12, 2013

KAMALA D. HARRIS
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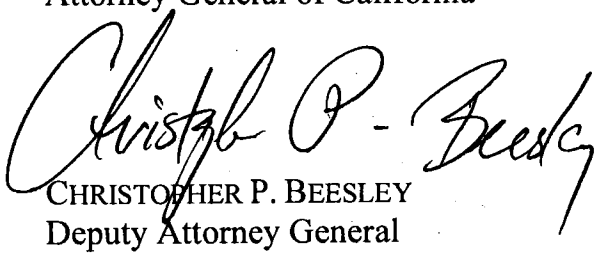

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *People v. Michael William Flinner*
No.: **S123813**

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On November 12, 2013, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 12, 2013, at San Diego, California.

STEPHEN MCGEE
Declarant

Signature

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