In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **WILLIAM CLINTON CLARK,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S066946

Orange County Superior Court, Case No. 94CF0821
The Honorable John J. Ryan, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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I. THE TRIAL COURT PROPERLY DENIED CLARK'S *BATSON/WHEELER* MOTION FOR FAILURE TO MAKE A PRIMA FACIE CASE OF DISCRIMINATION

Clark claims he was denied his state and federal constitutional rights when the trial court denied his motion claiming the prosecutor improperly exercised a peremptory challenge against a Native American prospective juror. (Supp. AOB 2-12.) Clark complains that the trial court used an unconstitutionally high standard that required him to show a pattern of discrimination involving more than one minority juror. (Supp. AOB 2.) To the contrary, the trial court properly found that Clark had not made a prima facie showing of discriminatory intent.

The use of peremptory challenges to strike prospective jurors on the basis of bias against an identifiable group of people, distinguished on racial, religious, ethnic or similar grounds, violates the right of a criminal defendant to be tried by a jury drawn from a representative cross-section of the community under Article I, section 16, of the California Constitution, and the right to equal protection under the United States Constitution. (*People v. Mills* (2010) 48 Cal.4th 158, 173; *People v. Hamilton* (2009) 45 Cal.4th 863, 898, citing *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277, overruled in part in *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129]; *Batson v. Kentucky* (1986) 476 U.S. 79, 88 [106 S.Ct. 1712, 90 L.Ed.2d 69], overruled in part in *Powers v. Ohio* (1991) 499 U.S. 400 [111 S.Ct. 1364, 113 L.Ed.2d 411]; *People v. Davis* (2009) 46 Cal.4th 539.) When a defendant believes the prosecutor's reason for exercising a peremptory challenge is based upon such discrimination, a timely *Batson/Wheeler* motion must be made. (*People v. Young* (2005) 34 Cal.4th 1149, 1172.)

There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination. (*People v. Mills*, *supra*, 48 Cal.4th at p. 184; *People v. Bonilla* (2007) 41 Cal.4th 313, 343.) Accordingly, the defendant carries the burden of establishing the prosecutor exercised a peremptory challenge based on group bias. (*Rice v. Collins* (2006) 546 U.S. 333, 338 [126 S.Ct. 969, 973-974, 163 L.Ed.2d 824]; *Purkett v. Elem* (1995) 514 U.S. 765, 767-768 [115 S.Ct. 1769, 131 L.Ed.2d 834].)

> "The United States Supreme Court has recently reaffirmed that *Batson* states the procedure and standard trial courts should use when handling motions challenging peremptory strikes. 'First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citations.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination." [Citation.]'"

(*People v. Hawthorne* (2009) 46 Cal.4th 67, 78, quoting *People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1008-1009, quoting *Johnson v. California*, *supra*, 545 U.S. at p. 168; see also *Snyder v. Louisiana* (2008) 552 U.S. 472, 476-477 [128 S.Ct. 1203, 1208, 170 L.Ed.2d 175].) Excluding even a single juror for impermissible reasons requires reversal. (*People v. Huggins* (2006) 38 Cal.4th 175, 227.)

A defendant satisfies his burden of making a prima facie showing "'by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.'" (*People v. Taylor* (2010) 48 Cal.4th 574, 611, quoting *Johnson v. California*, *supra*, 545 U.S. at p. 170.) The defendant "must show under the totality of the circumstances it is reasonable to infer discriminatory intent." (*People v. Kelly* (2007) 42

Cal.4th 763, 779; see also *People v. Bonilla*, supra, 41 Cal.4th at p. 341 [defendant must show inference of discrimination in exercise of peremptory challenges from totality of relevant facts].) "'The defendant should make as complete a record of the circumstances as feasible.'" (*People v. Taylor*, *supra*, 48 Cal.4th at p. 614, quoting *People v. Wheeler*, *supra*, 22 Cal.3d at p. 280.)

The trial court did not articulate the standard being applied when it denied Clark's *Batson/Wheeler* motion for failure to make a prima facie case. (41 RT 7294.) The standard being utilized in California at the time of Clark's trial was the "strong likelihood" standard. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 280.) That standard was subsequently disapproved by the high court. (*Johnson v. California*, supra, 545 U.S. at pp. 166-168.) Accordingly, since this Court cannot be certain the trial court used the correct "reasonable inference" standard as later established by *Johnson*, it does not apply the substantial evidence test that would otherwise apply in reviewing the denial of a *Batson/Wheeler* motion. Instead, this Court reviews the record "independently (applying the high court's standard) to resolve the legal question whether the record supports an inference that the prosecutor excused a juror on the basis of race." (*People v. Hawthorne*, *supra*, 46 Cal.4th at p. 79, emphasis in original; *People v. Davis*, *supra*, 46 Cal.4th at p. 582; *People v. Hamilton*, *supra*, 45 Cal.4th at pp. 898-899; *People v. Howard* (2008) 42 Cal.4th 1000, 1016-1017; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 343.)

A. Voir Dire Proceedings

After hardship screening, 306 prospective jurors remained for voir dire in Clark's case. (36 RT 6466.) Voir dire began on March 18, 1996. (39 RT 6829.) A jury was selected after 63 potential jurors and 17 potential alternate jurors were questioned on voir dire. (39 RT 6829 - 41 RT 7367.) During voir dire, eight prospective jurors were excused for cause and 17

prospective jurors were excused by stipulation of the parties. (39 RT 6867-6868, 6872, 6897, 6959; 40 RT 6993, 6999, 7028, 7120, 7137, 7139, 7150, 7155, 7165, 7168, 7174, 7185, 7190-7191; 41 RT 7217, 7219, 7264, 7280.) Three prospective alternate jurors were also excused by stipulation of the parties. (41 RT 7315, 7317, 7338.) In selecting the jury, the prosecutor exercised 12 peremptory challenges. (40 RT 7064, 7085, 7098, 7108, 7118, 7129; 41 RT 7162, 7205, 7215, 7248, 7277, 7285.) The prosecutor exercised four peremptory challenges in selecting alternate jurors. (41 RT 7343, 7351, 7357, 7365.) The defense challenged 14 prospective jurors (40 RT 7076, 7094, 7103, 7113, 7148, 7172; 41 RT 7209, 7226, 7258, 7263, 7283, 7300, 7302-7303) and four alternate jurors (41 RT 7347, 7353, 7359, 7362.) The prosecutor's twelfth challenge excused Prospective Juror P.M., a Native-American man. (41 RT 7285.) The defense objected on the basis that the challenge was improperly based on the fact that Prospective Juror P.M. was Native American and defense counsel made a comment suggesting there was nothing about the prospective juror other than race that would support the exercise of a peremptory challenge. (41 RT 7286-7287, 7289.)

The trial court then conducted a hearing on the motion outside the presence of the other prospective jurors. (41 RT 7285-7286, 7289.) When defense counsel was asked to provide the basis for his objection, he clarified that it was based on the fact that one of two prospective minority jurors on the panel had been the subject of a peremptory challenge. Specifically, defense counsel stated:

> Your honor, my basis is that we've gone through numbers of jurors, this is the only minority juror who has sat, as far as there is one other that's on the panel.... [¶] ... So the basis of the motion is that this is one of two.

(41 RT 7289-7290.)

The trial court then noted that one other Native American prospective juror, Prospective Juror C.T., had been excused by stipulation of the parties after Prospective Juror C.T. had informed the court that, as a result of being the victim of a robbery where a gun had been used against him and his wife, he believed he would "unduly identify with [his] own experience" and that it would therefore be inappropriate for him to sit as a juror in the case. (41 RT 7292-7293.) Clark's counsel clarified that

> My prima facie showing is there has been three [minority prospective jurors], one [Prospective Juror C.T.] [dismissed] by stipulation, one [Juror No. 9, a Hispanic female] is remaining [on the panel], and the only other one [Prospective Juror P.M.] dismissed.

(41 RT 7291-7293.)

Prospective Juror P.M. self-identified as a Native American in his jury questionnaire. (10 CT (Juror Questionnaires) 2368.) Neither the court nor counsel contested the information in the questionnaire, although the court noted that but for the indication in the questionnaire it would not have otherwise been apparent from the juror's appearance. (41 RT 7291-7295.)

The prosecutor argued that Clark had not made the requisite prima facie showing under *Batson/Wheeler* and correctly noted that absent making a prima facie showing the prosecution was not required to state its reasons for dismissing Prospective Juror P.M. (41 RT 7293-7294; see *People v. Zambrano* (2007) 41 Cal.4th 1082, 1105 fn. 3, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421 fn. 22 ["We stress, however, that the prosecutor is not obliged to state his reasons before the court has found a prima facie case."] .) The trial court then concluded that Clark had not made the required prima facie showing, explaining,

> The court is going to rule as follows: that counsel has made his record that a minority has been excused by peremptory. Again, the court believes that there has been no prima facie showing of pattern. I agree that we are not at the

point yet where the court can make a determination of a pattern of discrimination.

This will be noted and of record, counsel, and we still have a long way to go on jury selection, and without prejudice to it being raised again and the court putting the People to proof, I'm making the finding right now that there is inadequate showing at this time of a prima facie showing of discrimination. And if it pops up elsewhere in these proceedings, other peremptories that fall into the same category, then of course, that will be highly suggestive of a prima facie case requiring [the prosecutor] to state the reasons why it was made. It's kind of one swallow does not – we are not there yet.

(41 RT 7294 .)

B. The Record Does Not Support an Inference of Discrimination

Clark contends that he met his burden of showing a prima facie case of discrimination based on the inference of discrimination that could be drawn from the challenge to Prospective Juror P.M. Clark also asserts for the first time on appeal that a comparison between juror questionnaires completed by Prospective Juror P.M. and Prospective Juror R.R. satisfies his burden under the first stage of *Batson/Wheeler*. (Supp. AOB 10-11.) Nothing in the record on appeal supports an inference of discrimination in the prosecutor's exercise of a peremptory challenge against Prospective Juror P.M.

In ruling on Clark's motion, the trial court assumed that a Native American was a cognizable class for purposes of asserting a discriminatory exercise of a peremptory challenge. This Court has not addressed the question of whether Native Americans are a cognizable group for *Batson/Wheeler* purposes. However, a number of federal and state courts have concluded that Native Americans are a cognizable group for purposes of improper race based peremptory challenges. (See e.g. *United States v. Mitchell* (9th Cir. 2007) 502 F.3d 931, 957; *United States v. Plumman* (8th

Cir. 2005) 409 F.3d 919, 927-928; *United States v. Willie* (10th Cir. 1991) 941 F.2d 1384, 1399; *State v. Locklear* (N.C. 1998) 505 S.E.2d 277, 287; *State v. Alen* (Fla. 1993) 616 So.2d 452, 454, fn. 3; *State v. Pharris* (Utah Ct. App. 1993) 846 P.2d 454, 463; *Williams v. State* (Ala. Crim. App. 1993) 634 So.2d 1034, 1037-1038.)

1. A single challenge to a minority prospective juror is not sufficient for a prima facie case of discriminatory exercise of a peremptory challenge

In terms of whether the prosecutor struck most or all of the members of a particular group, or used a disproportionate number of challenges against the group, it has been repeatedly held that it is impossible to draw an inference of discrimination from the challenge of one potential juror. (*People v. Taylor*, *supra*, 48 Cal.4th at pp. 614-615; *People v. Cornwell* (2005)37 Cal.4th 50, 69-70; *People v. Hamilton*, *supra*, 45 Cal.4th at p. 899; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 343, fn. 10; *People v. Howard*, *supra*, 42 Cal.4th at p. 1018, fn. 10.) Moreover, as this Court has observed, as a practical matter, the challenge of one or two jurors can rarely suggest a pattern of impermissible exclusion. (*People v. Bell* (2007) 40 Cal.4th 582, 597.) Nothing in the trial court's comments or ruling is contrary to this Court's holdings regarding the requisite showing to support an inference of discrimination from the exercise of a peremptory challenge to a single prospective juror on the basis of race. Accordingly, the trial court correctly observed that Clark had not met his burden of making a prima facie showing of discrimination by merely noting the exercise of a peremptory challenge against one prospective minority juror.

It is relevant to considering Clark's claim that he is not Native American.

> "[While] the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; [] if he is, and especially if in

> addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention."

(*People v. Bell*, *supra*, 40 Cal.4th at p. 597.) Accordingly, while the fact that Clark is not Native American did not preclude a finding of a prima facie case, it did nothing to support a prima facie case. (See *id.* at pp. 598-599.)

While it is significant "whether the prosecutor failed to engage the prospective jurors ""'in more than desultory voir dire, or indeed to ask them any questions at all'""" (*People v. Taylor* (2010) 48 Cal.4th 574, 615), Clark does not contend that the prosecutor engaged in a desultory voir dire of Prospective Juror P.M. Indeed, in addition to answering a lengthy jury questionnaire (10 CT (Juror Questionnaires) 2368-2379), Prospective Juror P.M. was questioned at some length by the court and both parties, particularly in regards to his views on the death penalty. (31 RT 55782-5790.)

Given the complete absence of any showing from which an inference that Prospective Juror P.M. was challenged on the basis of race, this Court need not examine the record further for a valid non-discriminatory reason on which the prosecutor may have based his peremptory challenge of Prospective Juror P.M. and should deny Clark's claim on this basis alone. (See *People v. Carasi* (2008) 44 Cal.4th 1263, 1294-1295.)

Nonetheless, the record does provide a readily apparent, non-discriminatory reason for the prosecutor's exercise of a peremptory challenge to excuse Prospective Juror P.M. During voir dire, the court asked Prospective Juror P.M. his feelings about the death penalty. (31 RT 5783.) Prospective Juror P.M. responded,

> Well, actually, I've given it some thought, but it seems that, it seems like it lingers too much. I mean, it seems kind of, you know, in a way kind of a cruel thing to say well, a man will

> be in prison for X-number of years, just waiting. But I mean, that's the person's right to try to prove your innocence, whatever. But I don't know, it seems like, to me it seems like not particularly saying a major penalty like that was, as a rule it seems like the courts are a little too lenient on all the others.
>
> Or maybe if somebody would have been, like a child, if when he first does something you slap his hand or something like that, he would know that it wasn't supposed to be done. But if you just say oh, just don't do that, don't do that, and it's not getting across.

(31 RT 5783-5784.)

The court then asked, "You are critical of the time that may expire between the finding that a defendant should be put to death and the actual execution. The lag time concerns you?" (31 RT 5784.) Prospective Juror P.M. responded, "Yes. I mean, if they are going to keep him that long there, have it say life in prison." (31 RT 5784.)

The court then asked if, assuming a verdict of guilt of murder with special circumstances, "would you consider both [death and life without parole], or would you in all cases say I favor death or in all cases I favor life without possibility of parole? Do you have a position on that?" (31 RT 5785.) Prospective Juror P.M. replied, "I would say I figure more or less like life." (31 RT 5785.) When asked, "Would you just rule out death?" Prospective Juror P.M. stated, "Well, in a way I think I would lean more towards life." (31 RT 5785.)

This Court has previously held that a prospective juror's misgivings regarding the death penalty can be a valid, race-neutral reason supporting the exercise of a peremptory challenge. (*People v. Mills*, *supra*, 48 Cal.4th at p. 176; *People v. Smith* (2005) 35 Cal.4th 334, 347-348.) It does not matter that Prospective Juror P.M. was not subject to a challenge for cause. (See *People v. Mills*, *supra*, 48 Cal.4th at pp. 176 & 177, fn. 5.) Prospective Juror P.M.'s responses in voir dire regarding his preference for

life without parole reflects a race neutral basis for exercise of a peremptory challenge. As this Court observed in *Mills*,

> A party's justification for exercising a peremptory challenge "'need not support a challenge for *cause*, and even a "trivial" reason, if genuine and neutral, will suffice.' [Citation.] A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons." [Citation.]

(*People v. Mills*, *supra*, 48 Cal.4th at p. 176, original emphasis.)

2. Comparative analysis does not Support an inference of discrimination

Clark invites this Court to conduct a comparative analysis of the questionnaires and voir dire of Prospective Juror P.M. and Prospective Juror R.R.[1] for the first time on appeal. (Supp. AOB at 5-6, 10-11.) This Court should decline Clark's invitation.

The purpose of conducting comparative analysis is generally not served in a first stage case, i.e., where the trial court finds no prima facie case of discrimination has been made. (*People v. Howard*, *supra*, 42 Cal.4th at p. 1020.) As this Court has concluded,

> "evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons."

(*People v. Cruz* (2008) 44 Cal.4th 636, 658, quoting *People v. Lenix* (2008) 44 Cal.4th 602, 622.) "'[R]eviewing courts must consider all evidence bearing on the trial court's factual finding regarding discriminatory intent.'" (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 903, quoting *People v. Lenix*, *supra*, 44 Cal.4th at p. 607.)

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[1]Prospective Juror R.R. was excused from the jury after Clark's counsel exercised a peremptory challenge. (41 RT 7226.)

However,

> [i]n a "first-stage *Wheeler-Batson* case, comparative juror analysis would make little sense. In determining whether defendant has made a prima facie case, the trial court did not ask the prosecutor to give reasons for his challenges, the prosecutor did not volunteer any, and the court did not hypothesize any. Nor, obviously, did the trial court compare the challenged and accepted jurors to determine the plausibility of any asserted or hypothesized reasons. Where, as here, no reasons for the prosecutor's challenges were accepted or posited by either the trial court or this court, there is no fit subject for comparison." (*Bell*, *supra*, 40 Cal.4th 582, 600–601.) "Whatever use comparative juror analysis might have in a third-stage case for determining whether a prosecutor's proffered justifications for his strikes are pretextual, it has little or no use where the analysis does not hinge on the prosecution's actual proffered rationales, and we [may properly] decline to engage in a comparative analysis" in a first-stage case. (*Bonilla*, *supra*, 41 Cal.4th 313, 350.)

(*People v. Carasi* (2008) 44 Cal.4th 1263, 1295-1296; see also *People v. Lenix*, *supra*, 44 Cal.4th at p. 622.)

This Court has warned of the unreliability of comparative analysis without a complete record of such an analysis having been developed in the trial court. (*People v. Cruz*, *supra*, 44 Cal.4th at pp. 658-659, quoting *People v. Lenix*, *supra*, 44 Cal.4th at p. 623; *People v. Bell*, *supra*, 40 Cal.4th 582, 600-601; *People v . Bonilla*, *supra*, 41 Cal.4th 313, 350.) Comparative juror analysis is most effectively considered in trial courts where an "inclusive record" of the comparisons can be made by the defendant, the prosecutor has an opportunity to respond to the alleged similarities and the court can evaluate counsels' arguments based on what it saw and heard during jury selection. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 624.) Like the high court's decision in *Snyder*, *supra*, 552 U.S. at p. 479, this Court also recognized the "inherent limitations" of conducting a comparative juror analysis on a cold appellate record. (*People v. Lenix*,

supra, 44 Cal.4th at p. 624) The most troubling aspect of conducting such an analysis on direct appeal is failing to give the prosecutor the "opportunity to explain the differences he perceived in jurors who seemingly gave similar answers." (*Id.* at p. 623.) This is especially true in light of the fact that experienced advocates may interpret the tone of the same answers in different ways and a prosecutor may be looking for a certain composition of the jury as a whole. (*Id.* at pp. 622-623.)

As this Court has observed:

> There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact.

(*People v. Lenix*, *supra*, 44 Cal.4th at p. 622.)

As further recognized by this Court:

> [A]lthough a written transcript may reflect that two or more prospective jurors gave the same answers to a question on voir dire, "it cannot convey the different ways in which those answers were given. Yet those differences may legitimately impact the prosecutor's decision to strike or retain the prospective juror. When a comparative juror analysis is undertaken for the first time on appeal, the prosecutor is never given the opportunity to explain the differences he perceived in jurors who seemingly gave similar answers." [Citation.] Observing that "[v]oir dire is a process of risk assessment" [citation], we further explained that, "[t]wo panelists [i.e., prospective jurors] might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding."

(*People v. Cruz*, *supra*, 44 Cal.4th at pp. 658-659, quoting *People v. Lenix*, *supra*, 44 Cal.4th at p. 623.)

Clark's comparison fails for precisely the caveats and concerns expressed by this Court regarding comparative analysis for the first time on appeal. Moreover, the comparisons Clark attempts to draw between the two prospective jurors' views on the death penalty does not withstand scrutiny.

Notably, beyond the prospective juror being Native American, Clark offered nothing else in support of his motion other than to suggest that Prospective Juror P.M. was "as vanilla as you can get" – an apparent reference to Prospective Juror P.M. being indistinguishable from non-minority prospective jurors who had yet to be the subject of a peremptory challenge by the prosecutor. (41 RT 7287.) Clark offered no specific comparisons to the trial court to support his assertion that Prospective Juror P.M. could not be distinguished from non-minority prospective jurors. His one proffer on appeal fails to support any inference of discriminatory intent in the exercise of a peremptory challenge to Prospective Juror P.M.

Clark asserts that "[c]learly [Prospective Juror R.R.] was more likely to impose a life sentence than [Prospective Juror P.M.]." (Supp. AOB at 11.) The record is clear that Prospective Juror R.R. was unequivocal during voir dire in his willingness to consider the death penalty. As Prospective Juror R.R. explained when questioned by the court, "I think [the death penalty] should be used in extreme cases. There's always extenuating circumstances for which it's needed, in my opinion." (18 RT 3716.) Although Prospective Juror R.R. could not "see me taking another person's life unless it is deserved," he indicated that "I'm supportive of the death penalty, but I have to be my own personal judge for that[.]" (18 RT 3718.)

Far from indicating a preference for life without parole, Prospective Juror R.R. clearly and unequivocally indicated a willingness to impose the death penalty under appropriate circumstances. Prospective Juror P.M., on the other hand, indicated that he felt the delay between conviction and execution of sentence in a death penalty case was cruel and that he favored life in prison without the possibility of parole. (31 RT 5783-5785.) Rather than demonstrating that Prospective Jurors P.M. and R.R. were indistinguishable on their views regarding the death penalty, Prospective Juror P.M.'s uneasiness with the death penalty evidences a valid non-discriminatory reason for a peremptory challenge. Moreover, it is impossible to know whether the prosecutor would have exercised a peremptory challenge as to Prospective Juror R.R. because Prospective Juror R.R. was excused from the jury by defense counsel's peremptory challenge. (41 RT 7226.) Accordingly, comparative analysis between these two jurors as Clark urges hardly evidences a discriminatory intent by the prosecutor in the exercise of a peremptory challenge. Clark clearly failed to sustain his burden with respect to a prima facie showing of discriminatory intent and his motion was properly denied.

II. THERE IS SUBSTANTIAL EVIDENCE THAT CLARK INTENDED TO HAVE ARDELL WILLIAMS KILLED TO SUPPORT THE WITNESS-KILLING SPECIAL CIRCUMSTANCE FINDING

Clark contends there is insufficient evidence that he intended to have Ardell Williams killed as required to support the true finding as to the witness-killing special circumstance. He particularly complains of the circumstantial nature of the evidence presented on this element of the special circumstance. (Supp AOB at 12-23.) However, circumstantial evidence has long been found adequate to establish a criminal defendant's guilt and there is ample circumstantial evidence in this record from which a

jury could find that Clark not only shared Yancey's intent to kill Williams, but was the genesis of it.

Under the due process clause of the Fourteenth Amendment, if, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the conviction will be considered to be supported by substantial evidence. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560].) The identical standard applies under article I, section 15, of the California Constitution. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1083, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) A sufficiency of evidence challenge to a special circumstance finding is reviewed under the *Jackson* standard. (*People v. Stevens* (2007) 41 Cal.4th 182, 201.)

This test,

> does not require a court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

(*Jackson v. Virginia*, *supra*, 443 U.S. at pp. 318-319.)

> [T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence-that is, 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.)

Penal Code section 190.2, subdivision (a)(10) provides for a penalty of death or life in prison without the possibility of parole for a defendant where:

> The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding. As used in this paragraph, "juvenile proceeding" means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code.

(Pen. Code, § 190.2, subd. (a)(10).)

As this Court has explained,

> The statutory language contemplates the following elements: (1) a victim who has witnessed a crime prior to, and separate from, the killing; (2) the killing was intentional; and (3) the purpose of the killing was to prevent the victim from testifying about the crime he or she had witnessed. [Citations.]

(*People v. Garrison* (1989) 47 Cal.3d 746, 792.)

Clark challenges the sufficiency of the evidence as to the second element, i.e. "that [Clark] intended to have Ardell Williams murdered." (Supp. AOB at 16.) According to Clark,

> Not a single piece of evidence directly supported a finding that Clark exhibited intent to commit murder, whether viewed through an aiding or abetting theory, or through entering into a conspiracy. Instead, the entirety of the evidence was circumstantial.

(Supp. AOB at 17.)

In the first instance, Clark's disparagement of the probative value of circumstantial evidence on the question of his intent is without legal foundation. This Court has previously rejected the assertion that circumstantial evidence should be subjected to more rigorous review than direct evidence in the context of a sufficiency of the evidence argument. (*People v. Towler* (1982) 31 Cal.3d 105, 118-119.) Indeed, as the United States Supreme Court has observed, "'Circumstantial evidence is not only

sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" (*Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, 100 [123 S.Ct. 2148, 156 L.Ed.2d 84], quoting *Rogers v. Missouri Pacific R. Co.* (1957) 352 U.S. 500, 508, fn. 17 [77 S.Ct. 443, 1 L.Ed.2d 493]. Indeed, "[e]vidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.) Thus, "'[a] jury may infer a defendant's specific intent from the circumstances attending the act, the manner in which it is done, and the means used, among other factors.'" (*People v. Park* (2003) 112 Cal.App.4th 61, 68, quoting *People v. Farrell* (1990) 218 Cal.App.3d 828, 834.)

Here, the circumstantial evidence that Clark, either as an aider and abettor or as part of a conspiracy with Yancey, intended that Williams be murdered to prevent her from testifying about his involvement in the Comp USA robbery and murder was not only sufficient, but overwhelming. First, there is no dispute that Williams was a likely witness in the case, having made statements to the police implicating Clark and testifying as a prosecution witness at the preliminary hearing in the case. (14 CT 5410-5448; 49 RT 8626-8627, 8632-8637; 50 RT 8731-8796.)

The conclusion that Clark arranged Williams's murder to prevent her from testifying at his trial is equally inescapable. Williams had partnered with Clark in criminal enterprises in the past: stealing computers from a store where Williams worked as a cashier and passing stolen traveler's checks at a Las Vegas hotel. (48 RT 8585-8594; 49 RT 8613-8615; 50 RT 8782-8783; 51 RT 8871-8882, 8942-8947, 8963-8966; 58 RT 10052-10055.) She had accompanied Clark to the Del Taco restaurant near the Comp USA store prior to the robbery. While she watched, Clark and two of his cohorts who would later participate in the robbery with him

surveilled the store at closing time and then prepositioned a U-Haul trailer nearby for use in the robbery. (50 RT 8737-8739, 8741-8748, 8751-8764.) It was at this time that Clark admitted to Williams that the Comp USA store was his "next target." (50 RT 8747, 8764-8766.) This evidence not only directly connected Clark to the Comp USA robbery and the murder of Kathy Lee, but demonstrated his central role as the mastermind of the robbery.

There was ample evidence that Clark was only too aware of the damning nature of Williams's prospective trial testimony. During a tape recorded conversation with Williams's sister, Liz Fontenot, Clark stated that if Williams testified against him it would "just kinda like wipe me out." (14 CT 5361.) During this same conversation, Clark urged Fontenot to convince Williams to "come to court and get complete amnesia." (14 CT 5380-5387.) While in Orange County Jail awaiting trial for the Comp USA robbery and murder of Kathy Lee, Clark showed a trial transcript referencing Williams to fellow inmate Alonzo Garrett. (56 RT 9679-9683.) Clark told Garrett, "This is the woman right here that could put me away." (56 RT 9715.) Garrett's conversation with Clark was sufficiently alarming to Garrett that he called Williams, whom he knew, told her that "it's not cool to be snitching on people, because anybody out there can get wind of it[,]" and suggested that she obtain police protection. (56 RT 9788-9793.)

Coupled with the evidence of Clark's desire to prevent Williams from testifying was his connection to Williams's killer. Yancey's phone records for the period of January through March 1994, the time of Williams's murder, indicated numerous calls to Clark's attorney, his investigator, a pay phone in the Orange County Jail accessible to Clark, and to Ardell Williams's home. (60 RT 10156-10157.) From this evidence, the jury could find that Clark and Yancey plotted together to murder Williams. (See e.g. *People v. Jurado* (2006) 38 Cal.4th 72, 141 [finding sufficient

evidence that defendant and coconspirator shared the intent to murder victim where there was evidence that the two were alone together shortly before the killing, during which a discussion and agreement could have occurred.].)

Especially damning were numerous letters written from Clark to Yancey found in Yancey's apartment, including one admonishing Yancey to be careful and indicating that they would be together soon. (55 RT 9565-9581.) Moreover, on the morning of Williams's murder, Yancey visited Clark at 8:45 a.m. for nearly an hour. (60 RT 10155.) Williams was killed sometime between 6:00 and 8:00 a.m. that morning. (54 RT 9471-9472, 9513-9521; 55 RT 9550.)

Clark is correct that the prosecution did not have a "smoking gun," such as a confession or other incriminating statement, directly demonstrating an express agreement between Yancey and Clark to murder Williams. However, such direct evidence was only one possible form of proof and unnecessary to a verdict of guilt. (See e.g. *People v. Bloom*, *supra*, 48 Cal.3d at p. 1208; *People v. Zamora* (1976) 18 Cal.3d 538, 559 ["[T]he unlawful design of a conspiracy may be proved by circumstantial evidence without the necessity of showing that the conspirators met and actually agreed to commit the offense which was the object of the conspiracy."].) Instead, what the prosecution presented was evidence of numerous, highly suggestive circumstances, all pointing to Clark's knowing involvement in Williams's murder and from which his involvement could be directly inferred. It simply strains credulity to believe that these circumstances were somehow merely a coincidence and not evidence of a plot between Clark and Yancey to eliminate a perceived threat, or that the jury was not entitled to draw the reasonable inference from the circumstantial evidence that Clark was aware of and shared Yancey's intent to kill Williams to prevent her from testifying against him. Consequently,

the evidence presented was sufficient to support the jury's finding on the witness-killing special circumstance.

Finally, Clark argues that, should this Court reverse the witness-killing special circumstance, it is reasonably probable the jury would have returned a verdict of life without parole and the death penalty verdict should therefore be set aside. (Supp. AOB 21-22.) Clark's argument fails initially because, as discussed above, his challenge to the witness-killing special circumstance is without merit. Moreover, the jury found a total of five separate special-circumstance-allegations to be true. (8 CT 2772-2790.) Even assuming arguendo the witness-killing special circumstance were subject to reversal, the death verdict should not be reversed because it is not reasonably probable the jury would have returned a verdict of life without parole given the four other valid special circumstance findings. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1140 [death verdict reversed where one of two special circumstances found invalid and prosecutor had relied "entirely" on invalid special circumstance in aggravation.].) Clark's claim must be rejected.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Respondent's Brief, respondent respectfully asks that the judgment of the trial court be affirmed.

Dated: July 26, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Supplemental Respondent's Brief uses a 13 point Times New Roman font and contains 6,180 words.

Dated: July 26, 2010

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. William Clinton Clark**
No.: **S066940**

I declare:

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

On July 26, 2010, I served the attached supplemental respondent's brief by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, 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 July 26, 2010, at San Diego, California.

Kimberly Wickenhagen
Declarant

Kimberly Wickenhagen
Signature

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