In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **GARY LEE GRIMES,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S076339

Shasta County Superior Court Case No. 95F7785
The Honorable Bradley L. Boeckman, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On February 15, 1996, the District Attorney of Shasta County filed a six-count information in superior court, case number 95F7785, charging appellant Gary Lee Grimes and co-defendant Patrick James Wilson[1] with murder (Pen. Code,[2] § 187, subd. (a); count 1) occurring during the commission of a residential robbery (§ 190.2, subd. (a)(17)) and burglary (§ 190.2, subd. (a)(17)). Appellant was also charged with robbery (§ 211; count 2), burglary (§ 459; count 3), conspiracy to commit a robbery (§§ 182, subd. (a)(1), 211; count 4), conspiracy to commit a burglary (§§ 182, subd. (a)(1), 459; count 5), and unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a); count 6). As to counts 1 through 5, it was alleged that appellant inflicted great bodily injury upon the victim, an elderly person (§ 1203.09, subd. (a)), and the offenses were committed while appellant was on parole from state prison (§ 1203.085, subd. (b)). It was further alleged that appellant had served four prior prison terms (§ 667.5, subd. (b)), and had been convicted of one serious or violent felony within the meaning of the Three Strikes law (§ 1170.12). (2CT 183-189.) On June 14, 1996, appellant waived formal arraignment on the charges, plead not guilty, and denied the allegations. (2CT 254.) On January 16, 1997, District Attorney Dennis Sheehy notified counsel that his office would not be seeking the death penalty against appellant or co-defendant Wilson, but it would be seeking a sentence of life without the possibility of parole. (See 4CT 667.) Appellant was represented at the time by James Pearce.

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[1] Wilson plead guilty in exchange for a sentence of life without possibility of parole. He later voluntarily dismissed his appeal that was filed in the Third District of the California Court of Appeal.

[2] All further statutory references are to the Penal Code, unless otherwise indicated.

On May 23, 1997, the court held a *Marsden*[3] hearing on appellant's request to substitute appointed counsel. After the hearing, the court relieved Pearce as counsel of record and appointed Richard Maxion. (3CT 307-310, 314; 3RT 213, 250-251.) On June 6, 1997, newly appointed District Attorney McGregor Scott announced in a closed hearing that his office would be seeking the death penalty against appellant and co-defendant Wilson for Betty Bone's murder. District Attorney Scott further advised the parties that his office would delay a formal announcement of its intent until June 27, 1997, in order for appellant and Wilson to consult with their attorneys and decide whether they wished to plead guilty and receive the maximum sentence offered by former District Attorney Sheehy, namely, life without the possibility of parole. (3CT 316-328; 3RT 260-261.) On June 27, 1997, both appellant and Wilson rejected the offer to plead guilty, and the District Attorney formally announced his office would be seeking the death penalty. (3CT 329, 333-337; 3RT 266-268.) On August 28, 1997, Rolland Papendick was appointed *Keenan*[4] counsel. (See 3CT 358, 360-361.)

On January 23, 1998, appellant filed a motion to sever his trial from co-defendant Wilson (3CT 435-581), and the People filed a nonopposition on February 4, 1998. (4CT 596-597.) On February 5, 1998, the court granted appellant's motion to sever, and the parties proceeded with appellant's trial based on a scheduling conflict with Wilson's attorney that made him unable to proceed to trial at that time. (4CT 600; 3RT 342-344, 348.)

Jury selection commenced on September 1, 1998. (5CT 964.) The trial jury was impaneled and sworn to try the case on October 8, 1988 (5CT

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[3] *People v. Marsden* (1970) 2 Cal.3d 118.

[4] *Keenan v. Superior Court* (1982) 31 Cal.3d 424.

1043-1044), and the alternates were impaneled and sworn to try the case on October 20, 1998 (5CT 1088-1089). On November 20, 1998, the trial court granted appellant's motion to strike the great-bodily-injury enhancement (§ 1203.09, subd. (a)) based on insufficient evidence that appellant personally inflicted great bodily injury. (6CT 1208; 34RT 9092-9098.) On November 25, 1998, the jury found appellant guilty of all charges, and it found true the allegations that the murder occurred during the commission of a robbery and burglary. (6CT 1296-1297, 1306-1313.) At a bifurcated hearing held on December 1, 1998, the trial court found that appellant had served four prior prison terms (§ 667.5) and had committed one serious and/or violent felony (§ 1170.12). (6CT 1317.)

The penalty trial commenced on December 3, 1998. (6CT 1336.) The jury returned a verdict of death on December 22, 1998. (6CT 1438, 1440.)

On January 12, 1999, appellant filed a motion for new trial and motion in arrest of judgment alleging the trial court had abused its discretion by excusing juror 27417 for misconduct and that two other jurors, jurors 24777 and 28638, had committed misconduct. (6CT 1477-1496; 7CT 1524-1531 [supplemental motion filed on January 14, 1999].) On January 22, 1999, the trial court denied appellant's motion in arrest of judgment. (7CT 1581.) On that same date, the trial court denied appellant's claims in his motion for new trial relating to jurors 27417 and 28638 but granted appellant's request for an evidentiary hearing on his misconduct claim relating to juror 24777. (7CT 1581) After a hearing on the matter, the trial court denied appellant's remaining ground for a new trial on January 26, 1999. (7CT 1590-1591.) On that same date, the trial court denied appellant's oral motion for a new trial based on juror misconduct and his application for modification of the jury's verdict and findings. (7CT 1591) Thereafter, the trial court sentenced appellant to

death for the first degree murder of Betty Bone, plus an unstayed determinate term of ten years, which consisted of three years for unlawful driving or taking of a motor vehicle, doubled under the Three Strikes law, for a total of six years, plus four one-year terms for the four prior-prison-term allegations. The trial court imposed and stayed appellant's sentences on the remaining counts. (7CT 1591, 1603-1609.)

Appellant's appeal is automatic.

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecution case-in chief

a. Robbery/burglary-murder of Betty Bone

In October 1995, 98-year-old Betty Bone lived with her daughter, Barbara Christensen, in a house at the end of Deacon Trail, a rural street in Redding. (25RT 6924; 26RT 7147-7148.) About 1:30 p.m., October 18, 1995, Barbara left the house for an appointment leaving Bone home alone. (25RT 6927, 6984, 6987-6988.) When Barbara returned about four hours later, the garage door was open and her truck was missing. (25RT 6928-6929, 6988.) Inside, Barbara discovered her mother dead in the living room and the house ransacked. (25RT 6929-6930, 6934-6936, 6838-6940, 6943-6944, 6957-6969, 6980-6983, 6991-6992; 26RT 7163-7165, 7195.)

Shasta County sheriff's deputies arrived on scene and found Bone lying on her back on the living room floor dead. (25RT 7012; 26RT 7143.) She had blood on her dress and the right pocket was turned inside out. (25RT 7014-7015, 7049-7050; 26RT 7143, 7147.) A blue and white bandana and the cord from the kitchen telephone were wrapped around her throat. (25RT 7013, 7023, 7050; 26RT 7143-7144.) Her lower dental plate had been knocked out of her mouth and was found underneath her body. (26RT 7147.)

Dr. Harold Harrison, a forensic pathologist, conducted the autopsy on Bone. (25RT 7019-7020.) Bone had been in good health for her age prior to her death. (25RT 7048.) Dr. Harrison opined that Bone died from exsanguinations due to the injuries to her heart with strangulation as a contributory factor. (25RT 7057.)

Dr. Harrison testified that Bone suffered "considerable" blunt force trauma to her head and face that was consistent with being struck multiple times by a hand or an instrument with a large surface area. (25RT 7023-7024, 7027-7028, 7039-7041.) Injuries to the back of Bone's head were consistent with her head being forced repeatedly onto the floor or being knocked to the ground. (25RT 7050-7051; 26RT 7099-7100.) Dr. Harrison opined that the blow could have caused Bone to lose consciousness or stunned her. (25RT 7051.) There was indicia of ligature strangulation and injury to Bone's tongue and a bruise on her mouth. The injuries to Bone's mouth and tongue were consistent with a gag being put into her mouth. (25RT 7024-7030, 7041-7044; 26RT 7091.) Dr. Harrison opined that the bandana and telephone cord were used in conjunction to strangle Bone, and the bandana was also used as a gag. (26RT 7095, 7109.) Bone had bruises to her arms and shoulders, which were consistent with defensive wounds. (25RT 7031-7035, 7056, 7096-7097; 26RT 7124-7127.)

Bone had six stab wounds to her left chest. (25RT 7035-7036.) Three wounds penetrated the chest wall and went through Bone's heart. (25RT 7044-7047.) Two wounds penetrated to the back of the chest wall near the spinal column. (26RT 7067-7068, 7087.) Two wounds fractured Bone's anterior rib. (26RT 7068-7070.) A bruise found on Bone's chest by one of the stab wounds was consistent with the assailant's wrist hitting Bone's chest while stabbing. (25RT 7053, 7059.) The injuries were consistent with one person stabbing Bone with the same knife. (25RT 7052; 26RT 7072.)

Dr. Harrison opined that Bone had been strangled for several minutes and then died seconds after being stabbed. (26RT 7071.) Based on Bone's general health, Dr. Harrison opined that it would have been difficult for one person to immobilize her. (25RT 7056; 26RT 7102-7103.) The bruising to Bone's arms and shoulders were consistent with a struggle during the strangulation. (25RT 7056; 26RT 7096-7097.) Bone's injuries were consistent with one person strangling her while she struggled, asphyxiating her to the point where she could lie still, and then stabbing her. (26RT 7103.) But Dr. Harrison opined that a second person was holding Bone while another person strangled her. (26RT 7107.) Dr. Harrison opined that Bone received the injuries that lead to bruising on her arms and shoulders as the result of someone's restrictive grip. (26RT 7096-7097.)

b. Appellant's activities prior to and after the robbery/burglary-murder

Appellant, who was 33 years old at the time, had been staying with Sheila Abbott on the day of Bone's murder. Also staying with Sheila was her daughter, Misty Abbott, her son, Shane Fernalld, former codefendant Wilson, and Wilson's mother, Bridgette. (27RT 7451-7454, 7580-7581, 7682, 7684-7685; 30RT 8167.) Wilson was 19 years old at the time of the crimes. (30RT 8167.) Misty and Wilson had been dating for about six years and had a child together. (27RT 7484, 7581-7582; 28RT 7641, 7645, 7661.) Appellant and Sheila had briefly lived together in 1992. (27RT 7580, 7608- 7609; 28RT 7619-7620, 7683, 7711.)

John Morris,[5] who was 20 years old at the time, arrived at Sheila's house the morning of October 18, 1995, and then appellant, Morris, and Fernalld went to Terry Crimson's house. Appellant was trying to sell

[5] Morris had dated one of Sheila's other daughters and had been good friends with Fernalld. (28RT 7485-7486, 7683-7684.)

Crimson an abandoned car that was located on the property of his acquaintance, Janelle Walker. Crimson and his girlfriend followed appellant and the others to a house on the corner of Rancho Trail and Deacon Trail where the car was located. (27RT 7434-7438, 7454-7458, 7490-7491, 7687-7688; 30RT 8167; see also 26RT 7259-7262, 7271, 7273-7274; 29RT 7857-7858.) Crimson looked at the car but did not purchase it. (26RT 7272-7274.) Appellant, Morris, and Fernalld then drove back to Sheila's trailer. (27RT 7458.)

Around noon, appellant and Morris returned to Sheila's trailer to get Wilson. (28RT 7688, 7777.) Before leaving, Morris grabbed some medical gloves from Sheila's room. (27RT 7460, 7471-7472, 7491-7493; 28RT 7650, 7695, 7720.) Morris kept a pair and gave appellant and Wilson each a pair of gloves. (27RT 7471, 7493.) Morris and appellant got some bandanas and put them inside their pockets. (27RT 7470-7471; 28RT 7776-7777.) Appellant had a gun. (27RT 7472-7473, 7560.) Appellant, Morris, and Wilson left in Morris's car. (27RT 7460, 7473, 7476, 7541.)

According to appellant's statement to detectives, appellant, Morris, and Wilson entered Bone's home, they ransacked the house and took property, including a truck, and Morris killed Bone by strangling and then stabbing her. (See subdivision d., *ante*.)

Later that afternoon, appellant, Morris, and Wilson returned to Sheila's trailer. (27RT 7460, 7494.) Appellant was driving a truck and Morris and Wilson were in Morris's car. (27RT 7460-7461, 7482, 7495, 7582-7583; 28RT 7642, 7690, 7704, 7717.) Appellant, Morris, and Wilson started to unload items from the truck and bring them inside Sheila's trailer. (27RT 7461-7462, 7474-7475, 7583; 28RT 7622, 7800-7802; 30RT 8119, 8122-8124, 8127.) Sheila told them to put the items back in the truck and leave. (27RT 7463, 7475-7476, 7583; 28RT 7702, 7705-7706.) Misty saw appellant and Sheila looking through a bag of jewelry on the kitchen table.

(27RT 7583-7584; 28RT 7654, 7672; 28RT 7801; but see 28RT 7705, 7710.) Appellant asked Sheila if any was "real," and she told him it was costume jewelry. (27RT 7584, 7604-7605.)

Morris siphoned gas out of the truck, and then appellant drove the truck to Shasta Lake. Morris and Misty followed appellant to Shasta Lake in Morris's car. (27RT 7464, 7549-7550, 7585.) During the ride, Morris told Misty that he had killed a woman; that he had tried to strangle her, but when she did not die, he took a knife from the kitchen and stabbed her. (27RT 7590; 28RT 7608, 7638-7639, 7643-7645.) Appellant pushed the truck into the lake and then rode back to Sheila's with Misty and Morris. (27RT 7585, 7587; 28RT 7679-7681, 7812-7814.) On the ride back, appellant and Morris were laughing, and they both fired guns outside the car's windows. (27RT 7589-7592; 28RT 7632-7635, 7775-7778, 7799.) Misty previously described appellant and Morris as laughing about what had happened and calling each other "down white boys." (28RT 7797-7798, 7810-7811.)

About 4:30 p.m., appellant again met with Crimson to try and sell him the car. (26RT 7263-7264.) Appellant was with Misty and Morris, and they were eating burgers and fries. (26RT 7264, 7278; 28RT 7641.) Appellant and Crimson arranged to meet again on Deacon Trail, but they missed each other. (26RT 7263-7265, 7275-7278; 27RT 7594-7595.) Deputies from the sheriff's department had set up roadblocks on Rancho Trail and East Stillwater Road to monitor vehicle and foot traffic going in and out of the area around Bone's home. (26RT 7292-7293, 7303-7305.) Deputies stopped appellant at both roadblocks. Both times, appellant falsely identified himself as "Gary Woods." (26RT 7295-7300, 7304-7311.) Before arriving at the roadblock, Morris and appellant threw a loaded handgun and a fanny pack containing another loaded handgun into the bushes along Rancho Trail. (27RT 7595-7597, 7628; 28RT 7755-7757,

7766-7770, 7799-7800, 7819-7822, 7827; 30RT 8118-8119, 8173.) The guns and fanny pack were later recovered by law enforcement. (30RT 8161-8163, 8295-8297.)

Appellant, Morris, and Misty went back to Sheila's trailer. (27RT 7476.) They grabbed their belongings and some of the stolen items and left for Sacramento. (27RT 7464, 7476; 28RT 7802-7803, 7825-7826; 30RT 8127-8128.) Fernalld rode with appellant; Misty and her baby rode with Morris. (27RT 7465, 7476-7477, 7597-7598.) According to Fernalld, appellant told him, "The old bitch deserved it" while they were driving to Sacramento. (27RT 7478-7479; but see 27RT 7466-7467.) Misty previously told sheriff's deputies that Morris told her on the drive to Sacramento that he had tried to strangle Bone, but when she did not die, he stabbed her. (30RT 8120, 8138-8140.) They drove to Morris's aunt's apartment in Sacramento and stayed the night. (27RT 7555, 7562, 7598; 28RT 7741-7743; 30RT 8107.) The next day, appellant, Morris, Fernalld, and Misty went their separate ways. (27RT 7468-7469, 7598.)

Appellant was arrested in Sacramento on October 23, 1995, five days after Bone's murder. Appellant had a black bag containing a loaded High Standard .22-caliber semiautomatic pistol in his possession. (30RT 8161-8163, 8295-8297.)

c. Crime scene and scientific evidence

In addition to Barbara's truck, other items taken from the house included Bone's wedding and engagement rings, a "boom box," costume jewelry, a gun and rifle, knives, including a butcher knife from the kitchen, and a couple hundred dollars in cash. (25RT 6937, 6939, 6970-6971, 6973-6977, 6988-6900, 6991, 6993-6995; 26RT 7138.) Some of these items were recovered and returned to Barbara, including her truck that was recovered from Shasta Lake. (25RT 6975-6976; 26RT 7151-7152; 28RT 7679-7681, 7745-7746, 7750-7753, 7812-7814; 30RT 8105-8106, 8153-

8155, 8169-8171.)

None of appellant, Wilson, or Morris's fingerprints were found at the scene. (29RT 7870, 7875.) Pieces of Latex gloves were found in the fold of Bone's dress, on the hallway floor, and in the master bedroom, but no usable prints were discovered. (25RT 6970, 7141-7142, 7162; 29RT 7876.) No usable prints were found on the stolen truck. (29RT 7880.)

A butcher knife and a chrome-plated pocket knife were found buried in the dirt adjacent to Sheila Abbott's trailer. The knives were processed for fingerprints but no usable prints were found. (26RT 7153; 29RT 7877, 7852-7853, 7855, 7860; 30RT 8108-8109, 8155-8157.) Blood on the handle of the butcher knife was consistent with Bone's DNA profile. (29RT 7950-7951, 7953-7954.) Blood on the blade of the butcher knife was consistent with a mixture of DNA from Bone and could not exclude Wilson as a source. (29RT 7950-7952, 7955, 7958.) Blood on the pocket knife was consistent with a mixture of DNA from Bone as the major contributor and Wilson could not be excluded as the minor contributor. (29RT 7951.) The possible presence of Wilson's DNA was consistent with Wilson's statement to law enforcement that he had spit on the knives and wiped them with a cloth. (32RT 8635.)

Printed shoe patterns were found in the kitchen and garage. (26RT 7139; 28RT 7817-7818, 7832-7836; 29RT 7845-7846.) The shoe patterns in the garage were inconsistent with shoes taken from Morris or appellant. (29RT 7894-7897.) Two shoe patterns found in the kitchen either matched, or were consistent with, Morris's shoe. (29RT 7901-7903, 7908-7909; 30RT 8091-8092.) Blood spatter on Morris's right shoe was primarily consistent with Bone's DNA. (29RT 7908-7909; 35RT 9158.)

Small drops of blood located on the thigh area of the pants appellant had been wearing at the time of his arrest were consistent with his own DNA. (29RT 7859, 7956-7957; 30RT 8087-8088, 8090.)

d. Appellant's statement to law enforcement

Appellant was interviewed on October 23, 1995, by Detectives Thomas O'Connor and Mike Ashmun. An audiotape of Grimes's interview was played to the jury. (30RT 8288; Peo. Exhs. 42A-C [tape]; Court Exh. 29 [transcript]; see also 26RT 7312-7313.)

Prior to being advised of his *Miranda*[6] rights, appellant told the detectives that he had heard that Morris had hung himself and he was "glad." (27CT 8128.) After being advised of and waiving his *Miranda* rights, appellant immediately told the detectives, "I want you to know, I didn't do it, you know what I mean." (27CT 8129.)

Appellant told the detectives that it had been Morris's idea to break into a house. (27CT 8129-8130, 8137.) Morris had suggested robbing someone appellant knew, but appellant told Morris he was not going to rob his "family" or "friends." (27CT 8130, 8137, 8141.) Prior to arriving at Bone's home, they saw a short-haired woman taking out the trash. (27CT 8142.) Morris looked at the woman and said, "Fuck it, we'll just fuckin' kill her an' look at the house, we got all day long." (27CT 8142.) Appellant told Morris he was "not into killin' people[.]" (27CT 8142.)[7]

Before going up to Bone's house, Morris stuck a gun into his pants. (27CT 8141-8142.) The gun was wrapped in a bandana. (27CT 8181.) Sheila had given Morris, appellant, and Wilson blue bandanas and Latex gloves before they left. (27CT 8157-8158, 8182.) Wilson had a camping knife. (27CT 8151.)

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[6] *Miranda v. Arizona* (1966) 384 U.S. 436.

[7] Gina Gilmer worked at the Department of Social Services and gave in-home care to a woman who lived on Deacon Trail. (26RT 7240-7241.) About 2:30 p.m., Gilmer went outside to take out the trash and saw a red sports car drive slowly by. (26RT 7241-7242, 7250.) Morris drove a red sports car. (See 27RT 7582-7583.)

Wilson and Morris went to the door and knocked, but there was no answer. (27CT 8132, 8142.) When no one answered, Morris said, "[L]et's do the place," and appellant understood they would be committing "just a burglary." (27CT 8142.) When appellant realized someone was home, he told the others, "I'm not into this," and walked back toward Morris's car. (27CT 8142.) Bone opened the door and Wilson asked if "Debbie Lancaster" was home. (27CT 8142-8143.) Debbie Lancaster was a friend of appellant's. (27CT 8143.) Bone said, "No, my daughter's name is Barbara." (27CT 8142-8143.) Wilson introduced himself and appellant to Bone using fake names. (27CT 8143-8144.) Appellant still thought "it was just gonna be [a] fuckin' burglary." (27CT 8144.) When Bone started to close the door, Wilson rushed the door, hitting Bone with the door and knocking her onto the ground. (27CT 8133, 8144-8145, 8150.) Morris got on top of Bone. (27CT 8144-8145.) Appellant told Morris, "[D]on't hurt no women." (27CT 8133.)

Bone was lying unconscious on the floor to the left of the doorway when appellant entered the house. (27CT 8133-8134.) When Bone gained consciousness, Morris asked her where her money and jewels were hidden. (27CT 8134.) Bone told Morris that her daughter would be coming home. (27CT 8134.) Morris was on top of Bone with his knee in her back. Bone pleaded to Morris to let her go and told him she was a widow. (27CT 8134.) Appellant "couldn't deal with it" and went to the "back part of the house" and stayed. (27CT 8134.)

Appellant stated he did not know how Bone was killed and he had been in the sewing room and then the kitchen area when Bone was killed. (27CT 8145.) But appellant also stated that he saw Morris strangling Bone when he came out of the back bedroom. (27CT 8146-8147.) Appellant asked Morris, "What are you doin' that for?" and Morris replied, "You don't never leave no witnesses." (27CT 8147.) Appellant heard Bone say,

"Let me go I'm an old poor widow." (27CT 8147.) Morris was on Bone's back choking her with his hands but then he got the cord from the kitchen telephone and used that to choke her. (27CT 8148-8149.) While Morris was choking Bone he said, "I can't leave no witnesses," and "that fucking bitch won't die." (27CT 8150.)

Morris stabbed Bone with a camping knife Wilson had been carrying. (27CT 8150-8151.) Morris then got a butcher knife from the kitchen and continued to stab Bone. (27CT 8151-8152.) Appellant described Morris stabbing Bone as "like watchin...'Chuckie's Back.'" (27CT 8151.) Morris stabbed Bone hard, "caving her fucking chest in." (27CT 8151.) Appellant could hear the stabbing. There was blood everywhere. (27CT 8151-8152.) Appellant told the detectives that Bone was killed "for no reason at all.... She didn't have that comin'...." (27CT 8152.) Appellant denied that he killed Bone. He told the detectives he "didn't lay a hand" on her. (27CT 8181.)

Appellant entered the room where Bone lie dead. Wilson was "ghostly white" and "[f]reakin'." (27CT 8145, 8152.) Bone was lying on her back and Morris was on top of her. (27CT 8146.) Morris said, "That bitch wouldn't die. Fuckin' bitch wouldn't die." (27CT 8145.) Morris gave a camping knife and a butcher knife to Wilson and told him, "You fuckin' never leave weapons behind." (27CT 8146.) Morris instructed appellant and Wilson to take the pickup truck from the garage, and he would follow in his car. (27CT 8152-8153.) Appellant drove the truck back to Sheila's trailer where they unloaded the stolen property. (27CT 8153-8154.)

Wilson and Morris siphoned the gas out of the truck and put it in gallon jugs. (27CT 8155-8156.) Appellant, Morris, and Misty went to the lake to dump the truck. (27CT 8155.) Appellant explained that Wilson stayed behind because Morris "wanted to be alone with Misty" and wanted

to "high side.... Like he was proud of it." (27CT 8155; see also 27CT 8159-8160.) Morris instructed appellant to break out the truck's windows and drive it into the lake. (27CT 8156-8157.) Appellant set the car in low gear and let it go into the lake. (27CT 8157.)

Consistent with the testimony of prosecution witnesses, appellant stated that he went with Morris and Misty to get something to eat (Morris was unable to eat) and then met Crimson. (27CT 8131-8132, 8159-8162.) They were stopped at a roadblock before appellant was able to meet Crimson at the car's location. (27CT 8132-8133.) Morris threw a gun out the car window prior to the roadblock. (27CT 8166, 8174.)

Appellant left Redding with Morris, Fernalld, and Misty. (27CT 8172, 8175.) Appellant was arrested with a .22-caliber handgun that he had gotten from a friend that same day. (27CT 8169, 8177.) When he was arrested, appellant told the officers, "Man, I'm glad it's over." (27CT 8171.)

e. Testimony from Jonathon Howe

At the time of trial, Jonathon Howe had known appellant for almost 16 years, and, at one time, they had been friends. (31RT 8379, 8392, 8428-8429.) In late May to early June 1998, Howe and appellant had been housed in the same pod at the Shasta County Jail.[8] (31RT 8379-8380, 8507-8508.) Appellant talked to Howe about the current crimes and told Howe that he had never touched Bone, his DNA could not be linked to the killing, and he had ordered Wilson and Morris to tie Bone up and kill her. (31RT 8381, 8383; see also 31RT 8504-8506.) Appellant "bragged several

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[8] In connection with Howe's testimony, the jury also heard evidence about Howe's prior convictions, aliases, and his pending criminal charges and the conditions of his plea agreement, which included testifying truthfully at appellant's trial. (31RT 8383-8392, 8395-8397, 8401-8405, 8421-8427, 8438-8446, 8449-8455, 8457-8459, 8462.)

times" about his case and stated that he did not care he was "getting the death penalty." (31RT 8381.) Howe could not remember if appellant told him that he had "enjoyed watching" Bone killed, but appellant told him he "enjoyed" the fact that she died. (31RT 8382-8383

2. Defense case

Morris was arrested on October 21, 1995, and booked into the Shasta County Jail. Sometime between 2:30 and 4:30 p.m., on October 22, 1995, Morris committed suicide in his jail cell by hanging himself with his bedsheet. (32RT 8637.)

Wilson was interviewed on October 22, 1995, and October 23, 1995, after he was advised of, and waived, his *Miranda* rights. (32RT 8631-8632, 8634-8636.) Wilson admitted participating in the burglary of Bone's residence. (32RT 8632.) Wilson stated that he pushed Bone as they entered the house, she fell backward, and hit her head on the floor. (32RT 8632, 8635.) Wilson watched Bone for about 10 minutes while she was lying face down on the floor. (32RT 8634.) Wilson described Bone as looking unconscious and dazed. (32RT 8635.) Wilson went into all the rooms of the residence and found a .38-caliber revolver in a gray toolbox inside a closet. (32RT 8632, 8635.) The tips of the fingers on one of his gloves broke during the burglary. (32RT 8634, 8636.)

After the robbery/burglary-murder, Wilson spit on the knives, wiped them with a cloth, and then burned the white cloth in a Hibachi at Sheila's trailer. (32RT 8635.) He also siphoned gas from the truck into milk jugs. (32RT 8633, 8635.)

3. Prosecution rebuttal

On October 22, 1995, Morris made two phone calls from jail to his grandfather, Jess Blankenship. The calls occurred at 12:52 p.m. and 1:37 p.m. (32RT 8666, 8704.) During the last conversation, Morris was

"quite upset" and "almost crying." (32RT 8667.) Morris told Blankenship that his friends had turned against him and were going to testify that he had killed Bone. (32RT 8667.) Morris denied that he had killed Bone.[9] (32RT 8667.)

4. Defense surrebuttal

Morris called Sheila's trailer after his arrest and spoke to Ginger Abbott. (32RT 8870-8671.) Morris asked Ginger if she would provide him with an alibi, but she said no. (32RT 8670.) Ginger testified that Morris had spoken to Sheila that same evening prior to calling back and talking to Ginger. (32RT 8672.) Jail records showed that one call was made to the Abbott residence on October 22, 1995, at 1:00 p.m. (32RT 8704-8705.)

5. Prosecution rebuttal

A Redding Police Officer interviewed Ginger Abbott on October 23, 1995. (32RT 8700.) Ginger told the officer that Morris had called on October 22, 1995, asking to speak to Sheila, but Sheila was not home and did not want to speak with him. (32RT 8700-8701.) Morris had wanted Ginger or Sheila to be his alibi, but he preferred Sheila as an alibi. (32RT 8702.) Ginger described Morris as "frantic." (32RT 8703.) Ginger told Morris she was not going to lie for him, and Morris became very angry. (32RT 8703.)

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[9] The court admonished the jury that it could not consider testimony that Morris denied killing Bone for its truth. Instead, the testimony was only relevant in evaluating Misty's testimony regarding Morris's confessions to her. (32RT 8668-8669.)

B. Penalty Phase

1. Aggravation case

a. Circumstances related to the current crimes

Appellant was released from prison on parole on August 3, 1995. A little over two months later, he committed the burglary and robbery that resulted in Bone's death. (40RT 10625.) Appellant told law enforcement a few days after Bone's murder that he had bought an "acer of dope" at a motel after the murder and had injected it intravenously. (36RT 9703-9704.) Misty Abbott testified that after they dumped the truck in the lake, she went with appellant and Morris to an apartment or motel on Miracle Mile where they "did a line" of methamphetamine. (36RT 9731-9733.)

b. Appellant's prior criminal activity

(1) Prior felony convictions

The prosecution presented evidence that appellant had been convicted of 10 felonies, including three 1983 convictions for passing a forged check (§ 470), two 1983 convictions for unlawfully taking a motor vehicle (Veh. Code, § 10851), a 1986 conviction for residential robbery (§ 213.5), a 1986 conviction for possession of a dangerous weapon (§ 12020, subd. (a)), a 1986 conviction for unlawfully taking a motor vehicle (Veh. Code, § 10851), a 1991 conviction for felon in possession of a firearm (§ 12021), and a 1991 conviction for escape from a county jail (§ 4532, subd. (b)). (36RT 9764-9765.)

(2) Prior violent crimes

In addition to the fact of the conviction, the prosecution also presented evidence related to appellant's 1986 convictions for residential robbery and possession of a dangerous weapon and his 1991 conviction for felon in possession of a firearm. The prosecution also presented evidence of petitioner's 1993 assault on his then-girlfriend, Marie McCosker.

(a) **1986 residential robbery**

Anna Cline testified that on September 3, 1985, she and appellant had been injecting cocaine and decided to commit a robbery in order to get money for more drugs. (36RT 9583-9584, 9599.) Cline suggested they rob James Leonard. Leonard was in his late fifties or early sixties at that time.[10] (36RT 9594-9585, 9600.) Cline had worked at Leonard's house assisting his wife, and she had also prostituted herself to Leonard. (36RT 9585, 9600.) At the time of the robbery, Cline knew that Leonard had recently sold a car and had $300 in cash. (36RT 9584.)

Appellant and Cline entered Leonard's house. (36RT 9585.) One of them carried a pipe wrapped in a towel to simulate a gun. (36RT 9585-9587, 9590.) They tied Leonard's hands and feet and took $300. (36RT 9585, 9587-9588, 9596.) Cline testified that Leonard had not been physically hurt during the robbery (36RT 9593-9595), and that she and appellant had discussed prior to the robbery that they would not hurt anyone. (36RT 9600-9601, 9602-9603.) After leaving the house, appellant and Cline bought more cocaine. (36RT 9588.)

For her part in the crime, Cline plead guilty to residential robbery and served time in prison. (36RT 9588, 9597.)

The day after the residential robbery, a San Joaquin County deputy sheriff was on routine undercover operations in East Stockton when he saw appellant get out of a car's passenger seat and fire a sawed-off shotgun toward some trees in an orchard. (36RT 9619, 9621-9622, 9624.) The deputy contacted appellant, and appellant gave him a false name. (36RT 9622-9623; 38RT 10015-10016.) The gun was later recovered from under the passenger seat where appellant had been sitting, and three to four

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[10] Leonard was deceased at the time of appellant's trial. (4RT 2051-2052.)

shotgun shells were recovered from the passenger seat. (36RT 9623-9625.) The deputy, who had training and experience in narcotics, opined that appellant had been under the influence of an opiate at the time of the contact. (36RT 9619-9621, 9624.)

Appellant, who was 22 years old at the time of these incidents, made statements to law enforcement about his involvement in the residential robbery and his possession of a sawed-off shotgun. (36RT 9611.) The day after the robbery, appellant told a detective that he had met Cline the night before the robbery. Appellant and Cline went to various locations where Cline committed acts of prostitution so they could buy drugs. (38RT 10017.) During the early morning hours of September 3, 1985, Cline told appellant that she knew "one more place" where she could make "an easy $20." (38RT 10017.) Cline directed appellant to a house, and the two of them went up to the door. (38RT 10017.) Leonard let them inside, and appellant watched as Cline committed an act of prostitution with Leonard. (38RT 10017-10018.) When Leonard went into the bathroom, Cline removed Leonard's wallet from his pants and started to take the money. (38RT 10018.) Leonard came out of the bathroom and was angry that Cline was going through his wallet. (38RT 10018.) Appellant removed a ratchet from his pocket, held it in a threatening manner, and ordered Leonard to lie on the bed. (38RT 10018.) Appellant suggested to Cline that they tie up Leonard so he did not call the police after they left. They tied up Leonard and took about $140 from his wallet. (38RT 10018-10019.) Cline and appellant used the money to buy heroin. (38RT 10019.)

About a month after the robbery, appellant told a San Joaquin County Probation Officer that he had met Cline the day before the robbery. (36RT 9609.) Appellant told the officer that Cline had selected the victim, and they had committed the robbery to get money to buy heroin. (36RT 9609.) At the house, Cline got Leonard to open the door, and then appellant

entered. (36RT 9609.) Appellant carried a piece of pipe wrapped in a towel to simulate a gun. He placed three shotgun shells in his belt to further the impression that he was armed. (36RT 9609.) Appellant entered the house with pieces of rope in order to tie up the victim. (36RT 9609.) Appellant took about $130 to $140 from Leonard's wallet. (36RT 9610.) Appellant and Cline used the money to purchase heroin and then went to a motel where they injected it. (36RT 9610.) During the interview, appellant expressed remorse for the robbery, and he told the probation officer that he had apologized to Leonard before leaving. (36RT 9612-9613.) Appellant also told the probation officer that he had purchased a shotgun for his "personal use" and had sawed it off. (36RT 9610; see also 38RT 10019-10020 [prior statement to detective].)

(b) 1991 conviction for felon in possession of a firearm

On January 21, 1991, a Modesto police officer encountered appellant in a restaurant bar. Appellant had a loaded .25-caliber semiautomatic handgun in his waistband. (36RT 9698-9700.)

(c) 1993 assault and kidnapping

Marie McCosker, appellant's former girlfriend, testified that she had lived with appellant and his mother in La Grange for about two months in 1993. (36RT 9632-9633, 9644.) On December 29, 1993, appellant and McCosker got into an argument after McCosker told appellant that he could not go with her to visit her sons. (36RT 9633-9634.) Appellant held McCosker against a tree, first by placing his hands on her neck and then with his arm to her chest, to prevent her from getting inside the car. (36RT 9634, 9642-9643.) When McCosker finally broke free and got inside the car, appellant got into the driver's side after her and pushed her toward the passenger side. (36RT 9635.) McCosker was positioned between the two front bucket seats, and appellant used his arm to hold her down while he

drove. (36RT 9635-9636.) McCosker had trouble breathing while appellant held her. (36RT 9643.) McCosker was "really scared" during the 20-minute car ride and was afraid that appellant might hurt her. (36RT 9636-9637.) Appellant kept telling McCosker that he did not want her to leave without him because he was afraid she would not come back. (36RT 9636-9637.)

When they reached Ceres,[11] McCosker was able to free herself from the car in a K-Mart parking lot. (36RT 9635, 9638.) As she tried to escape, appellant told McCosker "[h]e would take...the air that [she] breathe[d] if [she] left him." (36RT 9638.) McCosker ran toward a phone, and appellant followed. (36RT 9638.) A good Samaritan called 911. (36RT 9637, 9638-9639.) McCosker was still struggling to get away from appellant when officers arrived. (36RT 9639, 9646.) Appellant got "real panicky" after the police were called and he put the pocketknife he had been carrying into McCosker's pocket. (36RT 9639-9640, 9646.) McCosker told the police the knife was hers because she did not want to get appellant in trouble. (36RT 9640; see also 36RT 9647.)

An officer who arrived at the scene described McCosker as appearing "very frightened" and in a "submissive posture." (36RT 9647.) "She was shaking physically, and she had very wide eyes." (36RT 9647.) She also had a slight abrasion under her chin. (36RT 9647-9648.) Appellant was placed under arrest. (36RT 9647-9648.)

c. Victim impact statements

Bone's daughter, Barbara Christensen, testified that she was Bone's only child. Her mother had married at 19 and had been widowed at 45. (36RT 9734-9735.) Bone came to live with Barbara and her family in 1965 after Barbara gave birth to twin girls. (36RT 9735-9736.) Barbara later

[11] Ceres is about 35 miles from La Grange. (36RT 9646.)

had two other children. (36RT 9737-9738.) Bone loved children and lived with Barbara and her family until the twins started high school. (36RT 9736-9737.) But even after she moved out, Bone would frequently stay with Barbara and her family, and the twins would stay with Bone as well. (36RT 9737.)

Around 1976, Barbara and her husband bought the property on Deacon Trail. (36RT 9738.) Barbara's husband designed their "dream" home and had it built on the property. (36RT 9738-9739.) Bone moved into the house on Deacon Trail in 1992 after Barbara's husband died. (36RT 9738-9739.) Bone insisted on helping around the house, she regularly attended religious services, and was "really an active person considering her age." (36RT 9739-9741.)

Barbara discovered her mother's body on October 18, 1995. (36RT 9741-9742.) Barbara described how she felt and what she saw on that dreadful day. (36RT 9742-9744.) Barbara never lived in the Deacon Trail house after her mother's murder. (36RT 9744.) She was afraid to live there alone, and she continued to have memories of finding her mother's body. (36RT 9744-9745.) Barbara eventually moved into a house that was located in a gated community. (36RT 9745.) Barbara put security doors on all the outside doors, but even with that she never felt safe. (36RT 9745.)

Bone's death had a "terrible impact" on Barbara's life. (36RT 9744.) Her mother had been her best friend. (36RT 9744.) They had enjoyed doing so many things together. (36RT 9744.) At the time of trial, Barbara was still in counseling to help cope with her mother's death. (36RT 9745.)

Leslie Skowbo, Bone's granddaughter and one of Barbara's twin daughters, testified that Bone had been "like a second mother" to her when she was growing up. (36RT 9752-9754.) Leslie testified that she had been unable to comprehend that her grandmother had been murdered when she first heard the news from her mother. (36RT 9754.) Leslie felt like she had

been "hit by a truck" and had been "absolutely terrified." (36RT 9754-9755.) Her "sense of safety was gone." (36RT 9755.) The "first few months" after Bone's murder, Leslie "hated to be alone" at home. (36RT 9755.) She asked people to stay with her and used the money Bone had left her to replace the doors and windows in her house to make them more secure. (36RT 9755-9756.) Her fears for herself and her children's safety eventually caused problems between her and her husband. (36RT 9758.)

Carol Williamson, Bone's granddaughter and Barbara's youngest daughter, testified that she had been four-months pregnant when her grandmother was murdered. (36RT 9760.) Carol had seen her grandmother the weekend prior to her death when she went to the house for a visit. (36RT 9761.) Both her mother and grandmother had been excited about her pregnancy. (36RT 9761.) The Saturday morning of her visit, Carol got into her grandmother's bed and snuggled with her like she did when she had been a little girl. (36RT 9761.) They talked about the baby Carol was expecting, and her grandmother told her how excited she was to have a sixth grandchild on the way. (36RT 9761-9762.) It meant a lot to Carol that she had been able to have that time with her grandmother. (36RT 9761-9762.) Carol lost her sense of security after her grandmother's death and no longer felt safe in her daily life. (36RT 9762.)

2. Mitigation case

a. Testimony from appellant's family

Appellant's mother, Patricia Grimes, and his younger half-siblings, Darlene and Bobby Grimes, testified on appellant's behalf. Patricia

Grimes's testimony was presented to the jury on videotape.[12] (40RT 10601-10603.)

Patricia suffered from a variety of medical ailments and was deemed legally blind in 1972. (39RT 10419-10421.) She was 57 years old when she testified at appellant's trial. (39RT 10500.)

Appellant is the oldest of Patricia's three children. He was born August 5, 1962. (39RT 10425, 10429.) Patricia met appellant's father, James Hockenberry, in October 1960 and married him one month later. (39RT 10426.) Hockenberry had been an alcoholic and had physically abused Patricia during the early stages of her pregnancy. (39RT 10426, 10428.) On one occasion, Hockenberry beat Patricia, causing her to fall down a flight of stairs. (39RT 10426-10427, 10465-10466, 10487-10488, 10489-10450.) On another occasion, he severely beat Patricia with his fists. (39RT 10427, 10466, 10488-10490.) The physical abuse continued until Hockenberry left when Patricia was two- to three-months pregnant. (39RT 10428, 10466, 10488.) The marriage was later annulled because Hockenberry had been a bigamist. (39RT 10426, 10498.)

Even though Patricia had been pregnant with appellant for 10 or 11 months, appellant had been a small baby, weighing only five pounds two ounces at birth. (39RT 10429, 10432.) He had been dehydrated and his skin had been real wrinkled and dry. He looked like an "old man." (39RT 10431.) He had a weak cry. (39RT 10431.) Within days of his birth, appellant's weight dropped to a little over three pounds. (39RT 10429-10430.) Doctors expressed concern about whether appellant would live. (39RT 10430.) Appellant had pneumonia twice within the first few months

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[12] Respondent's recitation of Patricia's testimony is taken from the redacted videotape with citations to the unredacted transcript of her testimony. (See Def. Exhs. T, T1; 39RT 10418-10504.)

of his life. (39RT 10431-10432.)

Patricia was hospitalized for post-partum depression when appellant was a few weeks old. (39RT 10432-10433.) She stayed at the hospital for about three months. (39RT 10433.) Patricia's parents, who had been in their sixties at the time, cared for appellant while she was hospitalized. (39RT 10433, 10469, 10491.)

Patricia met Sammy Grimes in the late 1950's and had dated him before marrying Hockenberry. (39RT 10422, 10433, 10470-10471.) Patricia started dating Sammy again when she was six- or seven-months pregnant with appellant. (39RT 10471.) Patricia and Sammy's relationship became serious after she was released from the hospital, and they married in 1963. (39RT 10422, 10433.) Patricia and Sammy had two children. Darlene was born in 1964 and Bobby was born in 1966. (39RT 10421.) Sammy adopted appellant when he was five years old. (39RT 10437; see also 38RT 10024.) Sammy had treated appellant well (39RT 10438) and had been a "loving caring parent" (39RT 10470). (See also 38RT 10024.)

Patricia had wanted to wait to tell appellant that Sammy was not his natural father until he was old enough to accept and understand the circumstances. (39RT 10437-10438.) But when he was eight years old, appellant overheard a family friend talking about Hockenberry. (39RT 10438; see also 38RT 10024-10025.) Appellant took the news "very hard." (39RT 10438; see also 38RT 10025.) Sammy tried to reassure appellant that he was "his" son. (39RT 10438.) It was not until shortly before Sammy's death in 1985 that appellant seemed to accept the adoption. (39RT 10438-10439; see also 39RT 10422.) Appellant took Sammy's death "very hard." (39RT 10439.)

Both Patricia and Sammy had worked at the Ralston-Purina turkey processing plant. Sammy drove a forklift and Patricia worked on the packaging line. (39RT 10422-10423; see also 38RT 10022.) Patricia's

parents and sister took care of the children while Patricia worked. (39RT 10469-10470.) Patricia worked until about 1969 and then went on disability for her blindness. (39RT 10423-10424; see also 38RT 10022.) Sammy stopped working and went on disability in 1971 or 1972 due to his diabetes. (39RT 10422-10423; see also 38RT 10023.) Patricia and Sammy did not have a lot of money, and there was a period of time when they had difficulty, but they managed to provide for their children. (39RT 10424; see also 38RT 10024.)

When he was a young child, appellant often complained of hearing voices that were not there. (39RT 10433-10434.) He had trouble sleeping and "frequently" woke frightened and screaming. (39RT 10434.) He swallowed aspirin, NoDoze tablets, and ant poison when he was preschool age and bit a thermometer in half and swallowed the Mercury when he was in kindergarten. (39RT 10435-10436, 10467-10468.) He was taken to the emergency room as often as necessary for treatment, including having his stomach pumped. (39RT 10436, 10467-10468.)

When he was about four years old, appellant set his clothes on fire after he caught a cereal box on fire from a stove that was used to heat the home. (39RT 10436-10437.) He had also been hit in the head with a baseball bat when he was a boy and had to have stitches. (39RT 10439-10440.)

Appellant soiled his pants until the first grade. (39RT 10434.) One time for punishment, Patricia made appellant stand in the front yard for a few minutes wearing a dress. (39RT 10462-10463.)

Appellant argued with Patricia and his siblings when he was a child the same way all children did. (39RT 10475-10476, 10483.) Patricia disciplined the children by spanking "if necessary," but they were mostly sent to their rooms. (39RT 10468; see also 10476.)

Appellant had difficulties in school from the very beginning. (39RT 10440.) He had learning difficulties and had trouble getting along with other children and teachers. (39RT 10440-10441, 10472.) He had school attendance problems. (39RT 10443.) Appellant was referred to a psychologist when he was in grade school for fighting. (39RT 10443, 10472-10473; see also 39RT 10444-10445.) Appellant was diagnosed as a hyperactive child and prescribed Ritalin and Librium. (39RT 10442, 10443-10445.) Patricia described appellant as an "easily led" child. (39RT 10477-10478.) Appellant was placed in special education classes in the seventh grade. (39RT 10446.) He started getting in trouble with the law when he was in junior high. (39RT 10477.) And he dropped out of school before completing the ninth grade. (39RT 10446-10447.)

Patricia could not remember when it started, but appellant ran away from home "quite frequently" when he was young. (39RT 104776-10447; see also 38RT 10030.) Appellant would go to a friend's house when he ran away. (39RT 10476.) It sometimes took Patricia two to three days to locate appellant. (39RT 10476-10477.) Once when appellant was a teenager, he ran away for a couple of months. (39RT 10490-10491, 10500-10501; see also 38RT 10030.) Eventually, appellant was placed in a foster home and then Juvenile Hall. (39RT 10447-10448; see also 38RT 10039-10040.) Appellant was sent to Napa State Hospital when he was about 17 years old. (39RT 10449-10450, 10479.) The entire family visited appellant at the hospital and went through counseling sessions with him. (38RT 10032, 10050, 10058.) Appellant stayed in the hospital for nine months and was released when he was 18 years old. (39RT 10451, 10479; see also 38RT 10033.)

Appellant visited Patricia at her home shortly before his arrest for Bone's murder. (39RT 10453-10454.) He was crying and expressed sorrow about what had happened to Bone. (39RT 10454-10458.)

Appellant was afraid he was going to be punished for something he did not do. (39RT 10463-10464.) Patricia tried to get appellant to turn himself in, but he refused. (39RT 10464.)

Appellant's half-sister, Darlene, testified that for as long as she could remember, appellant "never had much self-esteem or confidence...." He "never believed that his life had any kind of meaning or that he meant anything as far as his purpose in this world." (38RT 10029.) Appellant strived for attention. (38RT 10029.) "He always said that he felt that [Sammy and Patricia] loved [the other children] more than they loved him, and he always had the need to know who his real father was, and he felt like there was part of something missing from his life." (38RT 10030; see also 38RT 10025.) Darlene believed that Patricia had been more protective of appellant than the other children because she felt guilty about how appellant had found out that Sammy was not his biological father. (38RT 10026; see also 38RT 10038.)

Darlene testified that appellant had been a hyper child and a follower. (38RT 10030, 10032.) He would do whatever his friends wanted to do and not think about the consequences. (38RT 10032.)

Darlene contradicted Patricia's testimony that she had only punished appellant once by making him wear a dress. Darlene explained that when appellant and Bobby were young, appellant had trouble controlling his bowels and Bobby wet his bed. (38RT 10026-10027.) As punishment, Patricia would make the boys wear Darlene's dresses and stand along the fence in the front yard for an hour or two during the daytime. (38RT 10027-10028, 10039.) Darlene estimated that this punishment went on during the period when appellant was between four and eight years old. (38RT 10038-10039, 10046-10047.)

Appellant's half-brother, Bobby, confirmed that he had been forced to wear his sister's dress and stand in the front yard as punishment when he

was a young boy. (38RT 10055.) Both Darlene and Bobby testified that Patricia and Sammy had never been physically abusive to appellant. (38RT 10040-10041, 10056.)

Bobby saw appellant a couple of days before his arrest. Appellant appeared frightened and looked like he had not slept in days. (38RT 10053, 10060.) Patricia tried to get appellant to turn himself in, but he refused. (38RT 10059.) Bobby called appellant's parole agent when he would not turn himself in. (38RT 10059.) Bobby described appellant to the parole officer as "frightened and distraught." (38RT 10054.)

b. Appellant's childhood education

In junior high, appellant was placed in a class for "behavior disordered children." (37RT 9991-9992; see also 37RT 9963.) The students were drawn from all over Stanislaus County and were placed in the class "based on their inability to function in regular classrooms" due to behavior problems and serious learning disabilities. (37RT 9991-9992; see also 37RT 9963-9965.) Appellant was one of 12 boys selected to be placed in the class. (37RT 9964.) When the program began, the guidelines for being placed in the class usually involved evaluation by a clinical psychologist, an evaluation by a school psychologist, observation in a regular classroom setting, and a battery of tests. (37RT 9994-9995.)

Appellant's seventh grade teacher remembered appellant as being "one of the more passive students in that group." (37RT 9962-9963, 9967.) "He was small, quiet, timid, and a follower." (37RT 9967.) The teacher had no recollection of appellant ever arguing or fighting. (37RT 9967, 9972; see also 37RT 9981-9982, 10000.) In retrospect, the teacher thought of appellant as a student who had been "desperately in need of nurturing." (37RT 9972.) The teacher explained, "He was one of those young men who tended to kind of gravitate under the wing, and unless [he] had been pulled out by the peer group to get involved in something was kind of right

by my side I recall." (37RT 9973.) An instructional aide in appellant's junior high school class testified that appellant had been "cooperative" and "one of the better behaved students." (37RT 9981.)

Another of appellant's junior high school teacher's testified that appellant had been "hyper," and she speculated that if appellant had been a student at the time of trial, he would be classified as an attention deficit disorder with hyperactivity (ADHD). (37RT 9992, 9995-9996.) The teacher explained that appellant, like all the other special education students, had been "very needy." (37RT 9993.) He had "wanted to be loved, nurtured, given attention in a positive way." (37RT 9993.) He was "[a]bsolutely not aggressive at all" and was "very quiet and kind of a follower." (37RT 9993.)

c. Death of appellant's fiancée, Shanon Yarnell

A little over one month before Bone's murder, appellant's fiancée, Shanon Yarnell, was killed in an automobile accident. (38RT 10033-10035, 10134; 39RT 10451-10452.) Shanon had been riding in the backseat of a car with her mother and brother when her stepfather crashed his truck into the back of the car killing Shanon. Appellant had been following Shanon's car and had been present at the crash site. (38RT 10134-10144.) Darlene saw appellant after the accident holding Shanon's bloody T-shirt, crying and saying "he didn't want to live anymore." (38RT 10035-10036.)

d. Mental health evaluation

Dr. Albert Globus, a psychiatrist who specialized in forensic psychiatry, conducted a psychiatric evaluation of appellant at the defense's request. (39RT 10224-10229.) Dr. Globus spent four hours with appellant conducting a mental status examination and obtaining historical information from appellant. (39RT 10230-10231.) Dr. Globus also

interviewed appellant's mother and reviewed pertinent records. (39RT 10231.) On Dr. Globus's recommendation, Dr. John Wicks, a clinical neuropsychologist, conducted a battery of neuropsychological tests to assess appellant's brain functions. (37RT 9793, 9803-9804, 9837; 39RT 10236-10237.)

Dr. Wicks conducted his evaluation of appellant over two days at the Shasta County Jail. The evaluation consisted of gathering some basic essential information from appellant and then administering neuropsychological exams. (37RT 9793, 9803-9804, 9837, 9895.) The evaluation was conducted "blind," i.e., without knowledge of detailed information about appellant's personal background, medical and psychological history, in order to reduce the potential for bias. (39RT 10238-10239.)

Dr. Wicks administered to appellant the Wechsler Adult Intelligence Scale III (WAIS-III), Wide Range Achievement Test-Revised (WRAT-R), and Weschler Memory Scale-III. Appellant scored in the borderline retarded or retarded range on all the tests. (37RT 9805-9806, 9813-9836.)

Appellant scored "seriously impaired" on the Halstead-Reitan Neuropsychological Test Battery (37RT 9842-9844), impaired and below normal on both immediate recall and delayed recall on the Bender Visual Motor Gestalt Test (37RT 9844-9845), mildly impaired on the Seashore Rhythm Test (37RT 9845-9847), seriously impaired on the speech/sounds perception test (37RT 9847), and very impaired on the tactual performance test (37RT 9847-9848). Appellant also scored in the impaired or abnormal range on the Executive Functioning series of tests. (37RT 9853-9862, 9904-9905, 9908.)

On the finger tapping test, appellant scored mildly impaired with his dominant hand and was on the borderline for mildly impaired with his nondominant hand. (37RT 9848-9849.) Appellant scored in the

"abnormal" range on the Purdue Pegboard Test, which tests "fine motor coordination," and he was again slower with his dominant hand. (37RT 9849-9850.) Appellant's results on the strength-of-grip test were in the normal range, but his dominant hand was a little weaker than his nondominant hand. (37RT 9850-9851.)

Dr. Wicks also administered to appellant the Memory Malingering test, which showed that appellant was not malingering. (37RT 9837-9839; see also 37RT 9898.)

Based on the results of the neuropsychological evaluation conducted by Dr. Wicks, his review of records, and interviews with appellant and appellant's mother, Dr. Globus opined that appellant suffered from a neuropsychiatric illness from birth, or possibly even before birth, which resulted in organic brain syndrome and was the cause of the "whole variety of psychiatric signs and symptoms" that appellant had presented over the years. (39RT 10239-10240; see also 37RT 9865, 9871 [Dr. Wicks' opinion that appellant suffered from organic brain damage].) Dr. Globus acknowledged that appellant's results on the computerized axial tomography (CAT) scan and electroencephalogram (EEG) were normal, but he explained that normal test results did not necessarily mean there were no brain abnormalities. (39RT 10232-10235; see also 39RT 10337-10340.)

Dr. Globus believed appellant may have suffered brain damage in utero based on information that his mother had been physically abused when she was pregnant and signs of fetal distress at his birth, including appellant's low birth rate, signs of dehydration, weak cry, difficulty with nursing, and weight loss following birth. (39RT 10240-10242, 10244-10245; see also 39RT 10307-10308, 10355.) In addition, appellant had two respiratory infections during the first year of his life that required "extensive treatment." (39RT 10242, 10355.)

Dr. Globus also found relevant to appellant's development Patricia's hospitalization for depression shortly after his birth. (39RT 10242-10243.) Dr. Globus explained that "[a] depressed mother is in essence an absent mother" because the "signs and symptoms of depression interfere with the capacity of a person to nurture and care for and love and stimulate a baby." (39RT 10243-10244; see also 39RT 10354-10355, 10366.) Studies have shown that children of depressed mothers have a "failure to thrive." (39RT 10244.) "They don't grow very well. They don't nurse very well, and their developmental signs are delayed." (39RT 10244.) Appellant's incontinence until the age of eight also suggested "some sort of developmental delay, either based on psychological events or based upon a lack of mental development due to brain damage." (39RT 10245-10246.)

Dr. Globus also discussed events in appellant's background that suggested he suffered from hyperactivity. These factors included appellant's difficulty in school and placement in special education classes (39RT 10246), his accidental overdoses on a number of different substances, including aspirin and rat poison (39RT 10265), and his fascination with fire (39RT 10246). (See also 39RT 10253-10254 [discussing appellant having been prescribed Ritalin].)

Dr. Globus explained that punishing appellant for soiling himself by making him wear a dress and stand in the front yard when he was eight or nine years old is "very damaging to the psychological development or psychosexual development of the child and leads to poor self-image." (39RT 10250-10251.) Dr. Globus explained that "self-esteem is largely derived early in life from the attitude and the way the parents take care of the children because everything that one does is a message...." (39RT 10252.) Poor self-esteem tends to lead to depression, especially if the issue with self-esteem derived from the parents. (39RT 10252.) This causes the child to function even worse and could lead to experimentation with drugs,

and then addiction, in an effort to feel better. (39RT 10252-10253.)

Appellant also had a history of head trauma. When appellant was about 12 years old, he was hit by a bat, was rendered unconscious, and received 32 stitches. (39RT 10260-10261; see also 39RT 10285-10288, 10291-10294.)

Dr. Globus also observed that appellant had had "a number of psychological evaluations" that showed learning disabilities in reading and mathematics. (39RT 10254-10255.) And appellant had been placed in special education classes. (39RT 10255.) There were disciplinary problems at school. (39RT 10256.) And by the age of 15, appellant was running away from home. (39RT 10255-10256.)

At 17, appellant was committed to Napa State Hospital for about one year. (39RT 10256.) At that time, appellant had been given a variety of diagnoses from attention deficit disorder to schizophrenia. (39RT 10256-10257; see also 39RT 10343-10347.) Appellant was also diagnosed at that time as having a conduct disorder, borderline intelligence or mildly mentally retarded, and suffering a psychosis secondary to substance abuse. (39RT 10258.) "He had the signs and symptoms of hyperactivity and attention deficit disorder," and the doctors gave him a "very, very poor prognosis." (39RT 10262.)

But Dr. Globus found no documentation relating to appellant's birth and the first year of his life included in these early records. (39RT 10258-10259.) Dr. Globus believed that its absence from the records made a difference in appellant's diagnoses. (39RT 10259.) Dr. Globus explained that a person with "this kind of difficulty at birth" would "more likely" receive a "diagnosis or some sort of organic disorder of the brain" rather than "a functional diagnosis," which, at the time, included schizophrenia. (39RT 10259-10260; see also 39RT 10343.)

Based on appellant's history, considering everything from the time he was in his mother's womb to his commitment to Napa State Hospital with a diagnosis of schizophrenia, Dr. Globus believed that appellant had been suffering at the age of 18 from organic brain damage, in other words, "extensive damage to the brain particularly in the frontal and temporal areas." (39RT 10261-10262; see also 39RT 10269-10274, 10355-10357.) Appellant also suffered from psychosocial problems, including being involved in minor, but sometimes more serious, illegal activity. (39RT 10262.)

Despite the above, appellant knew when he was 18 years old the difference between right and wrong, but he "wasn't able to apply that to his daily life." (39RT 10263.) Appellant had brain damage. He had been "significantly depressed." He had difficulty in school. As a result, he had difficulty learning social norms and applying them to his daily life. (39RT 10264.) Dr. Globus explained, "[A] common thing with children who have attention deficit disorder or who have brain damage is that they end up associating with other children who have the same thing and/or social problems such that they commit illegal acts. Because of the severity and the extent of the brain damage, which isn't apparent looking at him, because of the severity of it and their inability to incorporate and make part of their personalities the values that society holds, they tend to rely on others to help them make decisions because they're really not quite smart enough to make themselves smart in the larger sense of the word, and so they tend to make very poor decisions or decisions that reflect those that they're with. So if they are with...substantial people or concerned in [*sic*] nurturing, to set good limits, they tend to have fairly decent lives, and if they're not, they don't." (39RT 10264.)

Dr. Globus also diagnosed appellant as ADD with hyperactivity. (39RT 10333.) It is generally accepted that attention deficit disorder is a

disorder resulting from brain damage. (39RT 10267; see also 39RT 10331.) It is more commonly found in children who had some sort of fetal distress or perinatal problems. (39RT 10267.) Doctors do not know the physical defect associated with ADD, but it presents as a neurological deficit rather than a learned behavior. (39RT 10268.) Hyperactivity becomes more controlled with age, but it does not completely go away. (39RT 10333-10334.)

Dr. Globus testified that a person with appellant's mental deficiencies would usually show "considerable improvement" in his behavior while in a structured environment, such as prison. (39RT 10274.) And the medications appellant had received while incarcerated would make it easier for him to conform to the rules. (39RT 10275-10276.)

e. Appellant's positive contributions

Cindy Grimes met and married appellant when he was living in Fayetteville, Arkansas, in 1990. (38RT 10096.) They had been married for only a few months before appellant was returned to California on a parole violation,[13] but she had known him for almost one year. (38RT 10096.) Cindy divorced appellant after he left because she thought he would not be able to come back to her in Fayetteville. (38RT 10100; see also 38RT 10108.) Cindy felt "[r]otten" about divorcing appellant and believed that appellant would not have been in the position he was if they had stayed married. (38RT 10100.)

Cindy had a difficult life. She had been "crippled" in a motorcycle accident and had been in four physically abusive marriages. (38RT 10096-10097.) Appellant, however, had done "everything" for her. (38RT 10097.) He had treated her "like a princess." (38RT 10097; see also 38RT

[13] Appellant's parole was revoked in December 1989 after he absconded from parole supervision. (40RT 10624-10625.)

10115-10016, 10064-10065, 10123-10124.)

Appellant and Cindy first lived with her father, Kenneth Hanshew, but later they moved into their own apartment in the same complex. (38RT 10098, 10100.) Kenneth had debilitating arthritis in his hands, and appellant helped care for him. (38RT 10122, 10127.) Appellant washed dishes, cooked for Kenneth, shaved him, and helped him dress. (38RT 10122, 10067.)

Cindy's son, Michael Tew, was a teenager when appellant lived in Fayetteville. (38RT 10098-10099, 10112-10113.) Michael testified that appellant had treated him "very well" and had been the only male figure in his life who had really cared for him. (38RT 10112.) Appellant had encouraged Michael to get a high school education and had told Michael about his time in prison and advised Michael it was somewhere he never wanted to be. (38RT 10112, 10114-10115; see also 38RT 10099, 10118-10119.) Michael considered appellant's advice valuable. (38RT 10115.) Michael had not been in trouble and had received his high school equivalency diploma. (38RT 10114-10115.)

Cindy's mother, Vergie Hanshew, testified that appellant had been kind and loving to Cindy and Michael and had helped Kenneth. (38RT 10121-10124.) Appellant had also helped Vergie when she moved into her own apartment in the complex. (38RT 10122.)

Sally Furman, who had managed the apartment complex where appellant had lived in Fayetteville, testified that appellant had worked around the apartment complex painting, doing yard work, or other odd jobs. (38RT 10062-10064; see also 38RT 10075-10076.) Appellant had been a "good" employee. (38RT 10064.) Appellant had also helped other elderly tenants by carrying their groceries or other things. (38RT 10068.)

Michael Huntsman also testified about how appellant had assisted him. Huntsman and appellant had both been incarcerated at Mule Creek

Correctional Center in the early 1990's. (38RT 10164.) Appellant had come to Huntsman's aid when he was being assaulted by three or four other inmates in the exercise area. (38RT 10164-10168.) The other inmates fled when appellant approached, and appellant helped Huntsman get ice for his injuries and sneak him back into the pod. (38RT 10166-10168.)

C. Prosecution Rebuttal

Bill Washburn, who had been a parole agent for nine years and had experience in the prison system (40RT 10620-10621, 10626), reviewed appellant's prison records and found that appellant had quit jobs, refused to work, had manipulated staff to get out of work, and had quit an education program. (40RT 10622-10624.) According to Washburn, appellant had "served no function for the institution, as far as trying to benefit himself or the other people in there." (40RT 10623.)

D. Defense Surrebuttal

James Esten, who was retired from the California Department of Corrections and worked as a consultant on death penalty cases, explained to the jury the four levels of inmate classifications and how inmates are classified within California's state prison system. (41RT 10773-10775.) Esten explained that inmates sentenced to life without possibility of parole (LWOP) would always be placed in Level 4, which meant maximum security. (41RT 10775-10777.) Esten explained to the jury the restrictions placed on Level 4 LWOP inmates. (41RT 10776, 10781-10783.)

ARGUMENT

I. JURY SELECTION AND VOIR DIRE ISSUES

A. The Trial Court Did Not Abuse Its Discretion by Granting the Prosecutor's For-Cause Challenge to Prospective Juror A.J.

Appellant claims that the trial court erroneously excused prospective juror A.J. for cause because A.J. repeatedly stated on voir dire that he would follow the law if there was a conflict between his own views and the law given to him by the court. As a result, appellant claims that his conviction must be reversed because the court's granting of the prosecutor's for-cause challenge occurred in connection with A.J.'s views on issues addressing guilt. (AOB 35-42.) Respondent disagrees. The trial court did not abuse its discretion in granting the prosecutor's challenge of A.J. for cause because A.J. equivocated as to whether he could faithfully follow and apply the law as given to him by the court, which gave rise to a determination that his views would prevent or substantially impair the performance of his duties as a juror.

1. Relevant facts and trial court's ruling

Like all the prospective jurors, A.J. completed a jury questionnaire. (12CT 3369-3389; 18RT 5172.) As pertinent here, question 49 asked, "If the judge gives you instructions on how you must evaluate a cause and his instruction of the law differs from your beliefs or opinions, how will you deal with the situation[?]" (12CT 3375.) A.J. wrote, "If it were a morale [*sic*] issue I would opt for my conscience. Otherwise I would do my duty in accordance [with the] law." (12CT 3375.) Question 56 asked, "Do you feel you can be completely unbiased in this case?" and A.J. wrote, "I hope so." (12CT 3376.) A.J. answered in question 66 that he did not know of any reason why he "would not be completely fair and impartial in this case." (12CT 3377.) Question 120 asked, "I always agree with the law,"

and A.J. checked "false" and explained, "The law is a human convention; thus subject to human failings." (12CT 3382.) In the penalty section of the questionnaire, question 142 asked, "In deciding between a penalty of death or life without possibility of parole, you will be instructed in the specific factors that you can consider in reaching this decision. Do you agree to limit your decision to those factors enumerated by the Court and not consider any other factors?" (12CT 3386.) A.J. responded, "If I must, yes." (12CT 3386.)

During voir dire, the court questioned A.J. about his responses to the above questions. (18RT 5199-5205.) The court advised A.J. that if he was sworn as a juror he would "have to agree to faithfully apply the law as I state it to you, even if the law disagrees with your personal views or attitudes." (18RT 5200.) The court explained to A.J. that if he became a juror in this case he did not "have to abandon [his] views," but he would "have to set them aside and follow the law." (18RT 5200.) When asked if he could do that, A.J. stated, "I think so." (18RT 5200.)

The court asked A.J. if "there's any area where you expect that there would be likely a conflict between your attitudes or views and what you think the law would be," and A.J. responded, "Never having been in this situation, I can't totally answer that question. I can only speculate." (18RT 5200.) The court asked A.J. to "speculate" and tell it if he had "a particular concern on a particular moral attitude or belief that...might conflict with the law." (18RT 5200.) A.J. stated there was nothing specific, "So I would have to answer that I do not know what may occur in—in the process that would cause me to deviate from what the law states and what my moral opinions would be." (18RT 5200-5201.)

The court asked A.J. to explain what he meant when he wrote, "I hope so," in response to the question whether he could be "completely unbiased in this case." (18RT 5201.) A.J. stated, "I think for the same reasons,

never having been in the situation, I'm only speculating." (18RT 5201.) In response to a follow-up question, A.J. stated that there was nothing in his "mind or experience or [his] attitude" that would make him think he could not be unbiased. (18RT 5201.)

The court also asked A.J. to explain his answer to the question asking if he could limit his decision to considering only the factors enumerated by the court and no other factors when determining penalty, if a penalty phase were to occur. (18RT 5201-5202.) A.J. explained, "I think, for the same reason that I mentioned earlier when I was filling out this...questionnaire, that if my moral judgment differed from what the law specified that I would opt for my moral judgment. I think I was thinking in the same fashion, that if there was no conflict, that would be assuming that I could." (18RT 5202-5203.) The court advised A.J. that his responses were a "concern" to it, and it was getting "mixed signals" because he had stated on the one hand that he would follow his conscience if there was a conflict between his moral views and the law, but, on the other hand, he had also stated that his religious or moral beliefs would not interfere with his ability to serve as a juror. (18RT 5203.) A.J. responded, "Well, I think the—it's somewhat a philosophical point whether—I think my religion is a religion of conscience as much as a—probably more than a state of dogma. And I think to—to further illustrate that point, would require more in depth, more than we wish to at this particular time. But maybe if you asked me specifics, I could answer more specifically to your—to your concerns." (18RT 5203.)

The court responded that "there's no way we could give you adequate specifics to know for certain whether your personal views are going to conflict with the law.... We try and explore it but then [the jurors are] asked to take an oath that if there is such a conflict, they agree for the purposes of fulfilling their duties as a juror to set aside their views and follow the law. [¶] And I'm not going to asking [*sic*] you, sir, if it's a

matter of conscience to put your conscience aside. But if your state of mind is that should there be such conflict you feel bound to follow your conscience and not follow the law, I need to know that." (18RT 5203-5204.) A.J. answered, "At this time, I don't know whether that situation would arise; therefore I would say, having to answer your question, I would say that I would set aside in order to follow my duty as a juror." (18RT 5204.)

In response to the court's questions, A.J. answered that he could take a juror's oath and swear to follow the law, follow the presumption of innocence, accept that the prosecution bears the burden of proof, he would only consider evidence presented in the courtroom, and he understood that the fact appellant had been arrested, formally accused of several crimes, and pled not guilty was not evidence. (18RT 5204-5205.) A.J. agreed that he could be an "impartial juror" who would "faithfully apply the law in this case." (18RT 5205.)

A.J. was next questioned by the defense. (18RT 5205.) Defense counsel asked A.J. if he was "comfortable with [himself] that [he] can follow the law and be an unbiased, fair juror?" A.J. responded, "Yes." (18RT 5205.) Defense counsel observed that "every time" A.J. had "answered that question, there has been a hesitation." (18RT 5205.) A.J. agreed stating, "Hesitation, yes." (18RT 5205.) The following then took place:

> Q. And obviously some inner thinking going on. And yet, I'm a little bit perplexed because I don't know what the personal feeling that you have that may interfere with your ability to follow the law is. Can you enlighten us about that?
>
> A. Maybe only in very general terms. I just—I have never been in this situation.
>
> Q. Of being a juror?

A. Yes, correct.

Q. Okay. Does it have anything to do with the fact that this is a capital case?

A. No doubt that has something to do with it, also.

Q. Okay.

A. Thusly, I don't know if—I'm a person who is directed by my conscience. Now, if I promise, through an oath, to set that aside, I will certainly do my duty—

Q. Okay.

A. —as I have stated. Otherwise, I would tell you I would never place myself in this situation or those who are going to be responsible for my actions. But, as I said before, never having been in the situation. I don't know if the situation—the specific situation will...arise where I will be in conflict. But as I said, if I—if I make an oath, say I will set that aside, that will be my primary responsibility.

(18RT 5205-5206.)

In response to defense counsel's questions, A.J. stated that he would accept and apply the law as given to him by the court in the first phase of the trial; if he had a reasonable doubt as to appellant's guilt at the end of the first phase he would have no hesitancy in voting not guilty; he could fairly and impartially weigh evidence in aggravation and mitigation in reaching the appropriate penalty if a penalty phase were to occur; he would keep an open mind during the penalty phase; he would consider both death and life without possibility of parole; and he understood that a person sentenced to life without possibility of parole would never be eligible for parole. (18RT 5206-5208.)

The court took a recess after the defense concluded their questioning. (18RT 5208-5209.) Outside A.J.'s presence, the court asked counsel if they had "[a]ny comments on this juror...." (18RT 5209.) After receiving no

response, the court stated, "The reason I ask, counsel, I have an ongoing concern about this juror's potential conflict. Has nothing to do with the substance of any question or answer, but whether or not he can honestly make the commitment to follow the law regardless of a possible conflict. He's obviously struggling with it and because of that, I am, too. [¶] So, [prosecutor], you have every right to question him and I'd like you to do so. But that's an issue that I think if you delve into it, it would not offend me." (18RT 5209.)

During the prosecutor's questioning, A.J. confirmed that he did not have any moral beliefs that would prevent him for voting for the death penalty in a particular case, and he understood and would apply the prosecution's burden of proof beyond a reasonable doubt. (18RT 5211-5219.) A.J. also stated he would follow the court's instructions on the law. (18RT 5219.)

The prosecutor then asked A.J. questions to elicit his opinion about applying the felony murder rule to someone who was not the actual killer. (18RT 5219.) The following took place:

> Q. Okay. We have in California several types of first degree murder, and there is a type of first degree murder called felony murder. Have you ever heard of that?
>
> A. Maybe not stated in that specific way.
>
> Q. Okay. It's basically any killing which occurs during the commission of specific felonies, and if that killing is unintentional or accidental, it can still be first degree murder. Okay?
>
> A. Even if it's accidental?
>
> Q. Right. Okay? Let me give you an example. Okay. It's a really basic example, has nothing to do with the facts of this case. It's simply a hypothetical. Okay?

> Two guys, ex-employees of a grocery store, decide to burn it down. They go at night because the employees go home at night—most employees go home at night. So they're thinking, hoping, praying nobody is working. First guy is the person that buys the gasoline and drives the second man to the store. The second man is the person that gets out of the car, spreads the gasoline, lights the fire. Okay? There's a stock boy in the store and he's working late, and he's killed in the fire.
>
> Under the law in California, both of those men can be held liable for the stock boy's death as a murder, as a first degree murder. Do you think you could follow a law that would hold both of those men liable for the stock boy's death as a first degree murder?
>
> A. Well, what would the penalties—can we talk about penalties here?
>
> Q. No. [¶]...[¶]...And here's the thing. As a juror, when you're deciding guilt or innocence, you cannot consider the penalty.

(18RT 5219-5220.) After clarifying with the prosecutor that under the law both men would be liable for the murder of the stock boy, A.J. repeatedly stated that he could not follow the law as stated by the prosecutor. (18RT 5221.) But A.J. also stated that if he was sworn to follow the law he would do so "regardless of what [his] conscience says[.]" (18RT 5221-5222.) Contrary to his earlier statements, A.J. clarified that he did not agree with the law as stated by the prosecutor, but he would follow the law if sworn to do so. (18RT 5222-5224.) When asked by the prosecutor if he would follow the law "[e]ven though it differs with [his] conscience," A.J. stated, "I guess what I am telling you is I prefer not to be in that situation." (18RT 5223.)

A.J. gave similar responses when the prosecutor asked him if he could find the special circumstance true if the law stated "they weren't the actual killer and they had no intention to kill and they were a major participant in a felony, some other felony, not a murder and acted with a reckless

indifference to human life in this other felony." (18RT 5224-5226.) A.J. stated that he did not agree with the law, but he would follow the law if sworn to do so. (18RT 5224-5226.) A.J. again stated, "Now, I guess what I am saying between the interchange here for the past ten minutes has been that given the hypothetical situation, I would very much prefer not to be in that situation because of the extreme conflict that would occur." (18RT 5226.) At this point, the court interrupted the prosecutor's voir dire questioning and A.J. was asked to take a seat outside. (18RT 5226-5227.)

Outside A.J.'s presence, the prosecutor challenged him for cause. The defense objected stating that A.J. was a "very intelligent juror who has given a great deal of thought to his concern," and the prosecutor's felony murder example was "very misleading." (18RT 5227.) The court granted the prosecutor's for-cause challenge stating:

> My view of it, I have more than a definite impression. It started before I had any sense of his views with regards to this hypothetical, and I expressed that. I have more than a definite impression that this prospective juror would be unable, in spite of his expressed willingness if he took the oath, although he equivocated in my judgment. But I think he would be unable to faithfully and impartially apply the law in this case, and my view is that both parties in this case would be at risk as to what circumstance, in other words, this juror might decide his views conflicted with the law and be unable to follow the law. And although the hypothetical is not our case, I think if we look at the case of People versus Kirkpatrick at 7 Cal. 4th 988, where it discusses what should occur and the law with regards to a juror who would vote either for or against the death penalty because of one or more circumstances which is likely to be present in the case being tried, I think we in a sense have that circumstance here.
>
> Although the hypothetical was not our case and although one could skin it somewhat differently, a key circumstance which could conceivably be before this juror is somebody who is being considered for punishment by the jury who did not preplan and did not intend to murder and who was convicted under the felony murder rule, and I think this juror has an

> extreme conflict in that area, and I also have a definite impression that in spite of what he said, this juror would have difficulty and probably be unable in any case of a serious conflict between his personal views and the law to faithfully follow the law.

(18RT 5228-5229.) Thereafter, A.J. was excused. (18RT 5229.)

2. The trial court did not abuse its discretion in granting the prosecutor's challenge for cause

As appellant states (AOB 40), "A prospective juror may be excused if his views would '"'"prevent or substantially impair"' the performance of his duties as a juror in accordance with his instructions and oath." (*People v. Lewis* (2006) 39 Cal.4th 970, 1006, quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841].) "'Generally, a trial court's rulings on motions to exclude for cause are afforded deference on appeal, for "appellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor), gleans valuable information that simply does not appear on the record." [Citation.]'" (*People v. Bramit* (2009) 46 Cal.4th 1221, 1235, quoting *People v. Avila* (2006) 38 Cal.4th 491, 529.) Thus, "when there is ambiguity in the prospective juror's statements, the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor is entitled to resolve it in favor of the State." (*Bramit*, at p. 1235, internal quotation marks omitted.) However, "'if the statements are consistent, the court's ruling will be upheld if supported by substantial evidence.'" (*People v. Farley* (2009) 46 Cal.4th 1053, 1089, quoting *People v. Horning* (2004) 34 Cal.4th 871, 896-897.)

"[T]he improper excusal for cause of a prospective juror for reasons other than his or her views on the death penalty does not require reversal of either the guilt or penalty judgments unless the defendant can show that the

improper excusal resulted in the seating of a biased juror, or of a sworn jury that was not fair and impartial." (*People v. Tate* (2010) 49 Cal.4th 635, 666-667.)

Appellant argues that prospective juror A.J.'s "voir dire responses were not even equivocal," and "the state did not carry its burden of proving that [A.J.'s] views would 'prevent or substantially impair the performance of his duties as a juror....'" (AOB 41, quoting *Adams v. Texas* (1980) 448 U.S. 38, 45 [100 S.Ct. 2521, 65 L.Ed.2d 581].)[14] In support of his argument, appellant focuses entirely on A.J.'s voir dire statements that he would follow his oath and the law given to him by the court and concludes that A.J.'s statements were unequivocal. (AOB 35-39.) Respondent recognizes that A.J. repeatedly stated under questioning by the court (18RT 5204-5205), trial counsel (18RT 5205-5206-5208), and prosecutor (18RT 5221-5226) that if chosen as a juror he would abide by his oath and follow the law even if it conflicted with his personal opinions. Appellant, however, ignores A.J.'s expressed uncertainty as to whether he could actually apply the law given to him by the court if it conflicted with his own views.

A.J.'s answers in the questionnaire demonstrated that there might be circumstances where he would have difficulty following the law as instructed by the court. (See 12CT 3375, 3376, 3382, 3386.) For example,

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[14] Appellant relies heavily on the Supreme Court's decision in *Adams* to support this claim and, in doing so, discusses the voir dire questioning of several prospective jurors. (AOB 39-41.) Although not explicitly stated, appellant's argument and reliance on *Adams* implies that a prospective juror's bias must be proved with "unmistakable clarity" before he could be excused for cause. (See AOB 39-41.) *Witt*, however, explained that the rule it announced in *Adams* dispensed with the requirement of "unmistakable clarity" discussed in *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776]. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.)

A.J. wrote in his questionnaire that if the law as given to him by the court conflicted with his opinion on a "morale [*sic*]" issue, he would have to go with his opinion. (12CT 3375.) On voir dire, A.J. again stated that he would have difficulty applying the law if he disagreed with it. (See 18RT 5200-5203.) A.J. had difficulty articulating under what circumstances a conflict between the law and his conscience might arise (18RT 5200-5201, 5203, 5205-5206), but he specifically stated that there was "[n]o doubt" his hesitation and possible difficulty in following the law was connected to the fact this was a capital case. (18RT 5205-5206). A.J. also disagreed that a person who was not the actual killer and had no intent to kill could be prosecuted for murder under the felony murder rule (18RT 5219-5226), which was a theory of murder the prosecutor would be asking the jury to consider. Moreover, and as noted by defense counsel, A.J. hesitated when answering questions about whether he could follow the law and be an unbiased juror. (18RT 5205.) And A.J. twice stated near the end of voir dire that he would prefer not to be put in the position where his conscience conflicted with the law. (18RT 5223, 5226.)

As this Court has explained (and which is particularly applicable here), "If there are conflicting answers to the voir dire, the court may assess the juror's state of mind and is not bound by statements which, taken in isolation, are unequivocal. When such a prospective juror has both equivocated and taken (at some point) a clear stand, the wisdom of entrusting the ruling on the challenge for cause to the trial court becomes clear.... 'What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where the bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the

trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.... [T]his is why deference must be paid to the trial judge who sees and hears the juror.'" (*People v. Coleman* (1988) 46 Cal.3d 749, 767, fn. 10, quoting *Wainwright v. Witt*, *supra*, 469 U.S. at pp. 424-426.)

In granting the prosecutor's challenge for cause, the trial court found that A.J. had been equivocal in his responses, and he "would be unable, in spite of his expressed willingness if he took the oath" to faithfully and impartially apply the law in this case. (18RT 5228.) The trial judge's observations of A.J. during voir dire, along with A.J.'s expressed uncertainty and equivocal responses could give rise to a determination that A.J.'s views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." (See *Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; see also *People v. Lewis*, *supra*, 39 Cal.4th at p. 1006.) The trial judge's determination of prospective juror A.J.'s state of mind is binding on this Court. (See *Lewis*, at p. 1007.) Accordingly, this Court must reject appellant's claim that the trial court's excusal of prospective juror A.J. for cause was error.[15]

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[15] Even assuming error, appellant has not demonstrated, or even discussed in his brief, if the excusal of A.J. "resulted in the seating of a biased juror, or of a sworn jury that was not fair and impartial." (*People v. Tate*, *supra*, 49 Cal.4th at pp. 666-667.) Such a showing would be exceptionally difficult here because appellant conceded at trial that he was guilty of burglary, robbery, and first degree murder under the felony-murder rule. (See 25RT 6918-6922; 35RT 9192-9234.) Under the circumstances, appellant is not entitled to reversal of his guilt convictions based on the trial court's excusal of prospective juror A.J.

B. The Trial Court Did Not Abuse Its Discretion by Granting the Prosecutor's For-Cause Challenge to Prospective Juror J.W.

Appellant claims that the trial court erroneously granted the prosecutor's for-cause challenge to prospective juror J.W. and his death sentence must be reversed. (AOB 43-64.) Appellant concedes that a prospective juror "who refuses to consider death as an option for a type of case (such as felony murder) for which the law permits death as a sentence" may properly be excused for cause. (AOB 43.) He argues, however, that the trial court erroneously granted the prosecutor's for-cause challenge to J.W. because he simply refused to consider death for a type of case that the law does not permit death as a sentence. Respondent disagrees. Read as a whole, the voir dire of J.W. supports the trial court's finding that J.W. would be unable to consider the death penalty in a case where the defendant was not the actual perpetrator of the killing. Accordingly, the trial court did not abuse its discretion in granting the prosecutor's for-cause challenge.

1. Relevant facts and trial court's ruling

J.W. completed a jury questionnaire. (16CT 4538-4558.) In response to question 125, "What are your general feelings regarding the death penalty," J.W. wrote, "[D]on't like it but it hase [*sic*] to be." (16CT 4553.) In response to question 126, "What are your feelings about a life sentence without the possibility of parole as an alternative to the death penalty, J.W. wrote, "I like it." (16CT 4553.) J.W. indicated in the questionnaire that he had no religious or moral beliefs about the death penalty, that he did not have very strong feelings concerning the death penalty, he believed life in prison without parole was a more severe punishment than death, he would follow the law as given to him by the court, and his feelings about the death penalty were not such that he would always vote either for or against the death penalty in every case. (16CT 4553-4555.)

Prior to conducting voir dire, counsel stated for the record that they had reached a conditional stipulation to excuse prospective juror J.W. if prospective juror S.T. was also excused. (21RT 5849-5850.) The court did not accept counsel's conditional stipulation. Instead, it stated that both prospective jurors should be questioned. (21RT 5849-5850.) Prior to the court's examination, the prosecutor asked the court to question J.W. about his views on the death penalty. (21RT 5999.)

In response to the court's questions, J.W. stated that he "wouldn't want to convict anybody to the death penalty unless I—the evidence was there, unless it was for sure." (21RT 6003.) J.W. agreed with the court's statement that he did not "like the fact that that kind of punishment might have to be imposed, [but] if the law and the facts justified it, [he'd] be capable of voting for it." (21RT 6003-6004.) J.W. also agreed with the court's statement that if he "felt that the evidence was insufficient under the law to justify the death penalty," he would be "capable of voting for life in prison without possibility of parole." (21RT 6004.) J.W. stated that he would keep an open mind about the two punishments until he had heard the evidence and law on the issue. (21RT 6004-6005.)

Consistent with his answer in the questionnaire, J.W. stated that he believed life in prison without possibility of parole was a more severe punishment than death because it "[g]ive[s] a person a long time to think about what he did." (21RT 6005.) The court explained to J.W. that under the law death is the more severe punishment, and J.W. gave his assurance that he would vote for death if he believed after hearing all the evidence and deliberating that the more severe punishment was appropriate. (21RT 6005-6006.) J.W. stated he would be a fair and impartial juror, he would base his decision only on the evidence presented in court, and if any of his personal views conflicted with the law he would follow the law as given to him by the court. (21RT 6007-6008.)

During defense counsel's voir dire, J.W. repeatedly stated that he would follow the law as given to him by the court. (21RT 6013-6020.) Trial counsel asked J.W. about his understanding of the burden of proof and explained, "[T]he prosecutor doesn't have to prove her case beyond a shadow of a doubt, because that's just a phrase you might hear in a movie or something but has no application in a court of law. Do you understand the burden of proof is beyond a reasonable doubt?" (21RT 6015.) J.W. stated, "Okay, I'll buy that." (21RT 6015.) Later, trial counsel asked J.W. if there was anything "that might affect your ability to be fair and impartial," and J.W. stated, "The only thing I can think of is—is on a case like this, in my own mind I would have to know that a person's guilty." (21RT 6019.) Trial counsel referred back to the prosecution's burden of proof beyond a reasonable doubt and received J.W.'s assurance that he could follow the law. (21RT 6019-6020.)

The prosecutor also asked J.W. about his ability to follow the law on the burden of proof. J.W. stated that he understood the prosecution's burden was proof beyond a reasonable doubt and not beyond all doubt, and he could follow the law. (21RT 6020-6021.) Regarding penalty, J.W. stated that he would "favor life in jail for most people," but he "would go with what the law says." (21RT 6022; see also 21RT 6023-6024.) The prosecutor also questioned J.W. about his ability to apply the felony-murder rule to a person who did not intend to kill and gave the same hypothetical involving the ex-employees setting fire to a grocery store and unintentionally killing a stock clerk that is discussed in the previous argument. (21RT 6024-6025; see Arg. I.A.1, *supra*.)

In response to the hypothetical, J.W. stated that he agreed that both men involved in the crime would be liable for murder, but "[i]n that particular scenario" the appropriate punishment would be life without possibility of parole. (21RT 6025.) J.W. explained that if the two men had

"seen the stock clerk...and killed him...then that would be a different circumstance and that might be a death sentence." (21RT 6026.) On further questioning, J.W. stated that he would follow a law that stated that a person could be found guilty of first degree murder even if he had no intent to kill. (21RT 6026-6027; see also 21RT 6027 [J.W. also stated, "I would follow it and live with it later"].)

The prosecutor next questioned J.W. about applying the death penalty to a person who is not the actual killer and had no intent to kill. The prosecutor explained, "[T]he next question becomes, a person is responsible for special circumstances, okay? Special circumstances are found to be true if a person, even though they're not the actual killer and they had no intention to kill, act as a major participant in an underlying felony and they act with a reckless indifference to human life." (21RT 6028.) The prosecutor told J.W. under those circumstances the person would be eligible for the death penalty. (21RT 6028.) In response to the prosecutor's questions, J.W. acknowledged that he had some "personal beliefs" about the death penalty, but he was "sure [he] could follow the law." (21RT 6028.)

Shortly thereafter the following took place between the prosecutor and J.W.:

> Q. And what I'm asking you is because you favor life without the possibility of parole, do you feel that you're going to have a hard time giving serious consideration to the death penalty in that situation?
>
> A. If a person accidentally killed somebody, it would be hard to give them the death penalty. If a person deliberately killed somebody, then it's a different scenario.
>
> Q. Okay. So are you saying that—Well, even though you would be—you would want to follow the law, we'd be asking you to set aside your moral principles. Do you believe you could really do that?

A. I would do it.

Q. You could do that?

A. I know, that's a hard one. I would do it.

(21RT 6029.) When the prosecutor repeated the same question, the court interrupted and directed her to ask a new question. (21RT 6029.) Thereafter the following took place:

> Q. Okay. Now, going back to the question of serious consideration for the death penalty. In the situation where someone doesn't have any intention to kill, do you feel that you could seriously consider the death penalty?
>
> [DEFENSE COUNSEL]: I object, that's been asked and answered, your Honor.
>
> A. Yeah. Yeah, I—yeah, if a person flat had—
>
> THE COURT: Go ahead, sir.
>
> A. If a person flat had no intention to kill—
>
> [THE PROSECUTOR]: Uh-huh?
>
> A. —it would be hard to give them the death penalty.
>
> Q. Okay. And when you say it would be hard to—
>
> A. I don't know that I would, but I don't know that I wouldn't. I mean, I know, I—I can—I can come up and give you the right answer and when it come right down to if I had to do it, what can I say?

(21RT 6029-6030.) Later, J.W. explained, "And the only thing I can say is, is like I said a little bit ago, if someone was robbing a bank and they had a gun and a guard pulled his gun out and he shot the guard, that's intentionally killing him. If somebody was robbing the bank and somebody had a heart attack...and I believe under the law, he's in for murder there.

No, that—that wasn't an intentional kill[ing].... That would be the life in prison instead of the death penalty." (21RT 6030-6031.)

The prosecutor followed J.W.'s comment by asking him whether a person having an intent to kill was a prerequisite to his consideration of the death penalty. Specifically, the prosecutor asked J.W.:

> Q. Okay. And you—you feel that that would—that would be the punishment, that if—it really is necessary to have an intention to kill in order to receive the death penalty?
>
> A. Yes, I do. I may not have noticed [*sic*] that when I came in here, but yes, now that we've talked.
>
> Q. Okay. Are you—Are you basically of the opinion now that you would be unable to personally vote for the death penalty if there was no intention to kill?
>
> A. It would be hard to do that, yes.
>
> Q. Okay. When you say hard to do it—
>
> A. Okay. If there was no intention the [*sic*] kill, then I don't think that a person should have the death penalty.
>
> Q. Okay.
>
> A. I mean, I don't know what the answer is to—to crime, but I know a person can sure get in trouble before he even knows it.
>
> Q. Uh-huh. In terms of?
>
> A. A kid taking a stop sign down and getting 17 years in jail.
>
> Q. Okay. Okay. And let me just clarify, that—so, even though someone would have been convicted of first degree murder and a special circumstance, you could not impose the death penalty unless, in addition to all that, you were convinced that the defendant intentionally killed the victim?
>
> A. I think if you convicted a person of first degree murder, they would be intentionally killed, wouldn't they?

(21RT 6031-6032.)

At that point, the court interrupted the prosecutor's questioning and explained to J.W. that "there are several forms of murder. And under the law, somebody can be convicted of first degree special circumstance murder even though that person did not personally kill the victim and even though the person did not have an intent to kill." (21RT 6032.) The court then questioned J.W. as follows:

> Q. But the law says that persons can be convicted of a first degree special circumstance murder such that the jury would be called upon to decide which of those two punishments, death or life without parole, was appropriate in a case where the defendant did not have the intent to kill anybody. If a person was killed, for example, in the course of one of the special—specified felonies, it was a felony murder rule, and all the other criteria that the attorneys have mentioned. That's the law.
>
> So, the first question is could you, under such a circumstance, that being the law, follow the law and find someone guilty of a first degree murder?
>
> And then the next question would be, under those circumstances, could you honestly consider the circumstances that you would hear about in aggravation, mitigation, the evidence in the second phase, before you decided the penalty or would you have your mind already made up that if there's no intent the [*sic*] kill, you cannot vote for the death penalty?
>
> A. No, if I thought that some—no, my mind would not be made up that I would not vote for the death penalty.
>
> Q. Okay. Well, you're going to hear from [the prosecutor] next without question that you're answers are somewhat in conflict.... But we're getting mixed signals from you about whether you could or couldn't follow the law.
>
> So, really the question that you have to decide, some people have fixed in their mind that if certain criteria that they have on their own are not met, they could never vote for the death penalty no matter what the law is.

A. Yeah.

Q. Others have a view the other way around. And so, we simply need to know where you are. You're not going to be criticized. And that is, is there some, in your mind, some absolute requirement, factually, regarding an intent to kill before you would ever vote for the death penalty, no matter what the other evidence was?

A. Could I put it this way? If I—I thought that a person never intentionally killed somebody, I would have trouble voting for the death penalty, yes.

Q. So, does that mean you'd have trouble giving any serious consideration to the evidence you received in that second phase of the trial, you kind of have your mind made up already?

A. If I found that he wasn't—didn't deliberately kill somebody—

Q. Right.

A. —you understand—

Q. I think I do.

A. If he didn't deliberately kill somebody or she, then I would have trouble giving the death sentence. If they killed somebody, breaking the law or whatever, you know, and it was an accident or what not, no, then they go to jail for the rest of their life or whatever.

(21RT 6032-6034.)

Outside of J.W.'s presence, the prosecutor challenged J.W. for cause because he "indicated he could not follow the law and could not consider the death penalty for a person who has no intent to kill." (21RT 6035.) The defense objected arguing that the prosecutor had not adequately explained to J.W. that the special circumstance finding that would make a person death-eligible required the prosecution to prove that the person was a major participant in the underlying felony and acted with a reckless

indifference to human life. The defense argued that J.W. was simply "confused" about the law. (21RT 6035-6036.) The court disagreed and excused J.W. for cause. (21RT 6036-6037.) The court ruled:

> First of all, I have the definite impression that this juror would be unable, I think he would like to, but I think he'd be unable to faithfully and impartially apply the law. I think he has a predisposition to favor life without possibility of parole and to reject the death penalty such that he would give—he would basically be precluded or, at the very least, appreciably impeded from engaging in the weighing process that the law requires in the second phase. And I think his views on capital punishment would substantially impair the performance of his duties.
>
> I—I basically think that this—this juror, ultimately, after all examination, understood that under the law, somebody could be convicted of first degree murder and eligible for consideration for the death penalty without an intent to kill, felony murder rule was explained, both sides had the opportunity to do that. And I think this juror made it as clear as he could that if there was not an intent to kill, or a deliberate killing, he wouldn't be able to vote for the death penalty or there was no reasonable possibility of that.

(21RT 6036-6037.)

2. The trial court did not abuse its discretion by granting the prosecutor's challenge for cause

As discussed in the preceding section, both the questionnaire and voir dire of the prospective jurors covered the law on felony murder and the felony murder special circumstances. Appellant does not object to this topic being covered in the questionnaire and during voir dire (AOB 62, 63) nor does he object to the manner in which the prosecutor questioned J.W. on this topic. (AOB 63; but see *id.* at 45-47 [comparing the prosecutor's voir dire of J.W. with the prosecutor's voir dire of other prospective jurors on this topic].) Instead, appellant claims that the prosecutor and court's voir dire of J.W. did not clarify what was required in order for a defendant convicted of murder to be eligible for the death penalty under the felony

murder special circumstance. As a result, appellant claims that J.W. was improperly excused for cause because he "refuse[d] to consider death as an option for a type of case for which the law does *not* permit death as an option." (AOB 43, original italics; see also *id.* at 59, 64.)

As discussed in the previous argument, "A prospective juror in a capital case may be excused for cause on the basis of his or her death penalty views if, but only if, those views would prevent or substantially impair the performance of a juror's duties under the court's instructions and the juror's oath." (*People v. Tate*, *supra*, 49 Cal.4th at p. 665; *Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) "Thus, a prospective juror may be excused if his or her views on capital punishment would cause him or her invariably to vote either for death, or for life, in the case at hand." (*Tate*, at p. 666.)

A trial court's decision to excuse a prospective juror under *Witt* must be upheld "if that decision is fairly supported by the record." (*People v. Tate*, *supra*, 49 Cal.4th at p. 666.) The trial court's determination of the prospective juror's state of mind is binding if the prospective juror's statements are equivocal or conflicting. (*People v. Maury* (2003) 30 Cal.4th 342, 376.) As this Court has observed, "'In many cases, a prospective juror's responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress and anxiety of being a prospective juror in a capital case, such equivocation should be expected. Under such circumstances, we defer to the trial court's evaluation of a prospective juror's state of mind, and such evaluation is binding on appellate courts.'" (*People v. Moon* (2005) 37 Cal.4th 1, 15-16, quoting *People v. Fudge* (1994) 7 Cal.4th 1075, 1094; see also *Tate*, at p. 666.)

"The erroneous granting of the prosecution's *Witt* challenge against a prospective juror requires automatic reversal of the penalty verdict, even if

the prosecutor had remaining peremptory challenges and could have excused the prospective juror." (*People v. Tate*, *supra*, 49 Cal.4th at p. 666.) But error of this kind does not require reversal of the guilt phase verdict. (*Ibid.*)

Read as a whole, the voir dire shows that J.W. was accurately told the elements required for felony murder and the felony-murder special circumstance. As discussed by the prosecutor (21RT 6024-6027), a defendant need not be the actual killer or have the intent to kill in order to be found guilty of murder under the felony-murder rule as long as he has the intent to commit the underlying felony. (*People v. Young* (2005) 34 Cal.4th 1149, 1175.) J.W. understood this concept and expressly stated that he could follow the law on felony murder. (21RT 6025-6027.) The prosecutor also explained that to find the felony-murder special circumstance true, the prosecution must prove that a defendant who is not the actual killer and had no intent to kill was a major participant in the underlying crime and acted with a reckless indifference to human life. (21RT 6028.) Appellant concedes that this is an accurate statement of the law. (AOB 50-51; see *Tison v. Arizona* (1987) 481 U.S. 137, 152-158 [107 S.Ct. 1676, 95 L.Ed.2d 127].) Without objection, the prosecutor also asked J.W. a hypothetical that accurately described a situation in which the felony murder rule and felony-murder special circumstance would apply. (21RT 6025.)

J.W. repeatedly stated that he could apply the law and find a person guilty of murder even though they did not intend to kill. (21RT 6025-6027.) J.W., however, also repeatedly stated the appropriate punishment in that situation would be life without the possibility of parole. (See 21RT 6025-6026, 6029-6031, 6034.) During repeated questioning on this point, the prosecutor and court did not reiterate that to be eligible for the death penalty the jury must find that the defendant was a major participant and

acted with a reckless indifference to human life. Instead, counsel and the court "short-formed" their questions to J.W. on the felony-murder special circumstance. In doing so, the court and counsel focused on J.W.'s specific disagreement with the law, i.e., whether a defendant who was not the actual perpetrator and did not act with an intent to kill could nevertheless be eligible for the death penalty. (See 21RT 6029-6034) Under repeated questioning, J.W. stated that he could not consider death for a defendant who did not have the intent to kill. (21RT 6034.)

Appellant argues that the court and counsel's "short-form" questions inaccurately stated the law and, thus, J.W.'s excusal was based on an incorrect understanding of the law. (See AOB 51-54.) Appellant is incorrect. The prosecutor accurately explained the requirements for the felony murder special circumstance. Without objection, the prosecutor and court "short-formed" their questioning and focused on the element that caused J.W. concern. Indeed, when the prosecutor asked J.W. whether he could "seriously consider the death penalty in a case where the accused had no intent to kill," defense counsel objected on the ground that the question had been asked and answered; he did not object on the ground that the prosecutor's question misstated the law. (21RT 6029-6030)[16] There is nothing in the record to indicate that J.W. misunderstood the applicable law.

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[16] During argument against the prosecution's for-cause challenge, defense counsel stated that J.W. had been "confused" on the law. (21RT 6035-6036.) Defense counsel, however, did not object during the actual voir dire of J.W. nor did he ask to question J.W. on the subject. (See 21RT 6020-6036.) On appeal, appellant states that he is not claiming that "the prosecutor engaged in improper questioning of the prospective juror." (AOB 63.) Accordingly, appellant forfeited any claim on appeal that the court and prosecutor misstated the law when questioning J.W. about his ability to follow the law on the felony-murder special circumstance.

When considered as a whole, J.W.'s express statements that he could not consider death for a defendant who did not intend to kill could give rise to a determination that J.W.'s views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." (See *Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; see also *People v. Lewis*, *supra*, 39 Cal.4th at p. 1006.) Accordingly, the trial judge's determination of prospective juror J.W.'s state of mind is binding on this Court. (See *Lewis*, at p. 1007.) Therefore, this Court must reject appellant's claim that the trial court's excusal of prospective juror J.W. for cause was error.

C. The Trial Court Did Not Abuse Its Discretion or Violate Appellant's Federal Constitutional Rights by Denying His Request for Separate Juries

Appellant claims that his conviction and death sentence must be reversed because the trial court abused its discretion and violated his Fifth, Sixth, and Eighth Amendment rights by refusing to empanel separate juries to decide guilt and penalty. (AOB 65-73.) Respondent disagrees. Appellant has forfeited his federal constitutional claim because his argument does not fairly encompass a separate claim alleging a violation of the federal Constitution. As to the claim he does discuss, appellant has not demonstrated that the trial court abused its discretion by denying his request for separate juries.

1. Relevant background and trial court's ruling

Prior to trial, the defense filed a written motion requesting the empanelment of separate juries to determine guilt and penalty. As pertinent here, appellant requested that "the court grant the selection of two (2) juries to sit simultaneously. One jury which is not death qualified, to determine guilt or innocence, the second jury, which is separately death qualified, to determine penalty if necessary." (4CT 690.) Appellant argued that such a

procedure was necessary to protect appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and "statutory rights." (4CT 690.) Appellant acknowledged that neither the United States Supreme Court nor this Court "had found that precluding otherwise qualified guilt phase jurors because of their opposition to death was prohibited by the constitution." (4CT 691, citing *Lockhart v. McCree* (1986) 476 U.S. 162 [106 S.Ct. 1758, 90 L.Ed.2d 137] and *Hovey v. Superior Court* (1980) 28 Cal.3d 1.) Nevertheless, appellant argued that since *Lockhart* and *Hovey*, "additional studies" had been conducted with "conclusive and overwhelming" results that showed "[d]eath qualified juries give the prosecution a significant advantage over the defendant by excluding those people from the community who may question authority and are defense oriented." (4CT 691-692.) Appellant did not discuss or name these "additional studies" in his motion. (4CT 691-692.) The People opposed the motion. (4CT 772-777.)

To support the motion, appellant offered, and the People stipulated to, the admission of a transcript of Professor Ed Bronson's testimony in *People v. Brewster*.[17] (3RT 390-391, 393; 4RT 2058-2059; 24CT 6852-6922.) The court reviewed the transcript of Bronson's testimony prior to hearing argument on appellant's motion. (5RT 2378.)

Bronson testified in *Brewster* that he was a professor at California State University at Chico and had a law degree from Denver University, a Master's of Law degree from New York University, and a doctoral degree in political science from the University of Colorado. (24CT 6854-6855.) Bronson's research and professional focus was on jury-related issues. (24CT 6857-6864, 6867-6872.) Bronson had testified at hearings

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[17] Testimony in *Brewster* was held on July 24, 1997. (24CT 6852.) The hearing in this case was held on July 30, 1998. (5RT 2355.)

conducted in California and the Arkansas federal district court, which formed the factual predicate for this Court's opinion in *Hovey v. Superior Court*, *supra*, 28 Cal.3d 1 and the United States Supreme Court's opinion in *Lockhart v. McCree*, *supra*, 476 U.S. 162. (24CT 6860-6861.) The court in *Brewster* found Bronson qualified to testify as an expert on whether the process of death qualification makes a jury guilt prone. (24CT 6889.)

Bronson, who personally opposed the death penalty (24CT 6892), opined that death qualification of the jury was prejudicial to both the prosecution and the defendant, but it was "by far" "more prejudicial to the defendant." (24CT 6892, 6895, 6897-6898; see also 24CT 6909-6910.) According to Bronson, death qualification can be prejudicial to the prosecution because a juror could be reluctant to find a defendant guilty, i.e., a "guilt phase nullifier," because he or she did not want to render a penalty verdict. (24CT 6896-6897.)

On the other hand, death qualification can be prejudicial to the defense because a prosecutor will be able to identify potential jurors who have a bias against the death penalty that does not rise to a for-cause challenge and then exercise peremptory challenges against them. This will result in a jury that is "even more conviction prone" because prospective jurors who have feelings against the death penalty have "greater support of due process and the defendant's rights," and the jury will be less representative of minority groups. (24CT 6898-6900, 6904, 6919.) Bronson testified that prospective jurors who go through death qualification are "more likely" to convict in the guilt phase. (24CT 6904-6908; see also 24CT 6913-6914.)

Bronson agreed with the statement that he "firmly believe[d] that *Hovey* voir dire lessens the prejudice that can and does arise from death qualification[.]" (24CT 6911.) And he also believed that the use of questionnaires, attorney-conducted voir dire, and open-ended questioning

also lessened the prejudice arising from death qualification. (24CT 6911-6912.) But Bronson testified that separate juries for guilt and penalty can eliminate the prejudice that results from death qualification. (24CT 6911.)

To support his testimony, Bronson referred to a "death penalty attitudes" study conducted by Craig Haney ("Haney study"), which was completed in 1994 after *Hovey* and *Lockhart* had been decided. (24CT 6872, 6875-6876, 6917.) Bronson explained that there had been a "fair number" of studies conducted after *Lockhart* and *Hovey* had been decided, but "some of the impetus to do this research dissipated, but [*sic*] after *Lockhart*." (24CT 6877.)

Defense counsel acknowledged during argument on his motion that "[c]ase law clearly says the defendant does not have a right to two separate juries" (5RT 2378-2379), but he argued that Bronson's testimony established "good cause" for the empanelment of two juries because the social science studies "clearly indicated" that prospective jurors exposed to death qualification are more prone to convict (5RT 2379). The court denied appellant's motion. (5RT 2381-2383.) The court found that the evidence presented was "insufficient to demonstrate prejudice of the kind [defense counsel] ha[d] described...." (5RT 2381.) The court found that sequestered voir dire of the prospective jurors "goes a long way to eliminate whatever possible prejudice there might be." (5RT 2381.) The court stated that it and counsel should work together during jury selection to "avoid creating an inference that the second phase is a foregone conclusion and creating the inference that our purpose is to get to that stage." (5RT 2382; see also 5RT 2384.)

2. Appellant has not fairly presented a federal constitutional claim

As an initial matter, appellant's argument does not raise a federal constitutional claim despite the heading of the argument. Appellant states

in the heading that the trial court's ruling "violated the Fifth, Sixth and Eighth Amendments" of the federal Constitution. (AOB 65.) In his argument, appellant explains that these constitutional provisions guarantee a criminal defendant the rights to a fair trial, an impartial jury, and a reliable guilt verdict. (AOB 68.) Thereafter, appellant discusses the abuse-of-discretion standard and applies it to the facts of this case in arguing for reversal of his conviction. (AOB 69-73.) Fairly read, appellant's claim involves an alleged violation of a state statute. Accordingly, he has forfeited any separate claim that the trial court's ruling violated the federal Constitution.

Even assuming that appellant has not forfeited his constitutional claim, his claim is meritless. Section 190.4, subdivision (c) provides, "If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider...the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn." This statute "'expresses the Legislature's long-standing preference for a single jury to decide both guilt and penalty, and this preference does not violate a capital defendant's federal or state rights to due process, to an impartial jury, or to a reliable death judgment.'" (*People v. Mills* (2010) 48 Cal.4th 158, 172-173, quoting *People v. Davis* (2009) 46 Cal.4th 539, 626.) Moreover, "'This court and the United States Supreme Court have repeatedly rejected the claim that separate juries are required because jurors who survive the jury selection process in death penalty cases are more likely to convict a defendant. [Citations.]'" (*Mills*, at p. 172, and cases cited therein; see also *Lockhart v. McCree*, *supra*, 476 U.S. at pp. 173, 176-177, 183-184.) Appellant has provided no compelling reason for this Court to revisit its prior rulings on this issue.

3. The trial court did not abuse its discretion by denying appellant's request for separate juries

Appellant has not demonstrated that the trial court abused its discretion by denying his request for separate juries. "In a capital case, the jury that decides guilt is required to decide the penalty 'unless for good cause shown the court discharges that jury in which case a new jury shall be drawn.'" (*People v. Ledesma* (2006) 39 Cal.4th 641, 732, quoting § 190.4, subd. (c).) Good cause "'must be based on facts that appear in the record as a demonstrable reality, showing the jury's inability to perform its function.'" (*People v. Prince* (2007) 40 Cal.4th 1179, 1281, internal quotation marks omitted, quoting *People v. Earp* (1999) 20 Cal.4th 826, 891.) "More than mere speculation or the desire of counsel is needed to establish good cause." (*People v. Kraft* (2000) 23 Cal.4th 978, 1069.) A trial court's decision to deny a defense request to empanel a separate jury for the penalty phase is reviewed for an abuse of discretion. (*Ibid.*; *People v. Lucas* (1995) 12 Cal.4th 415, 482-483.)

Here, appellant provided a transcript of Dr. Bronson's testimony in a different case to support his motion. (24CT 6852-6922.) Dr. Bronson's testimony was general in nature and did not address specifically how appellant would be prejudiced by the empanelment of only one jury. The parties agreed to the use of a jury questionnaire and to conduct individual, sequestered voir dire. (See, e.g., 3RT 420-423; 5RT 2349.) Dr. Bronson agreed with the statement that he "firmly believe[d] that *Hovey* voir dire lessens the prejudice that can and does arise from death qualification[.]" (24CT 6911.) And he testified that questionnaires, attorney-conducted voir dire, and open-ended questioning will lessen the prejudice. (24CT 6911-6912.) The trial court found that sequestered voir dire would go "a long way to eliminate whatever possible prejudice there might be" (5RT 2381), and it asked that counsel work with the court to "avoid creating an

inference that the second phase is a foregone conclusion and creating the inference that our purpose is to get to that stage" (5RT 2382).

As this Court has observed, "The Legislature has clearly articulated its preference for a single jury to decide both guilt and penalty [citation], and, provided the chosen procedures satisfies basic principles of fairness, we are aware of no rule requiring the Legislature to select the process psychologically designed to render jurors most favorably disposed toward a defendant." (*People v. Kraft*, *supra*, 23 Cal.4th at p. 1070.) Based on the evidence presented at trial in support of his motion, and the court and parties agreement to use questionnaires and to conduct individual, sequestered voir dire, appellant has not demonstrated that the trial court abused its discretion in denying his request for separate juries.

II. ISSUES ARISING DURING GUILT PHASE

A. The Trial Court Did Not Abuse Its Discretion or Violate Appellant's Constitutional Rights by Excluding Evidence of Collateral Portions of Morris's Out-of-Court Statements

After Bone's murder and prior to his jailhouse suicide, John Morris allegedly made statements to Misty Abbott and two jail inmates inculpating himself as Bone's actual killer. Morris invoked his constitutional rights and made no statement to law enforcement. On appellant's motion, the court ruled that appellant could present evidence of Morris's out-of-court statements in which he implicated himself as Bone's actual killer, but the court ruled that evidence of Morris's statements that exculpated appellant of any involvement in Bone's murder were inadmissible. On appeal, appellant argues that the court's ruling excluding Morris's statements that "he acted *alone* in killing the victim, that [appellant] was *not* involved in the decision to kill, and in fact, [appellant] was shocked when the killing happened" (AOB 75, original italics) violated state law and his federal

constitutional rights to due process, to present a defense, and to a reliable penalty determination. As a result, appellant claims that the jury's true findings on the special circumstances and penalty verdict must be reversed. (AOB 74-91.) Respondent disagrees. The trial court did not abuse its discretion or violate appellant's federal constitutional rights by excluding evidence of Morris's out-of-court statements that allegedly exculpated appellant of being Bone's actual killer.

1. Relevant background and trial court's ruling

Prior to trial, appellant sought to introduce Morris's confessions to Misty Abbott and two jail inmates. (24RT 6709.) Appellant made an oral offer of proof regarding the three witnesses' proposed testimony to be admitted as declarations against interest pursuant to Evidence Code section 1230. (24RT 6747-6750.)

According to appellant, Albert Lawson would testify that he was an inmate at the Shasta County Jail when Morris was brought to the facility in connection with the instant crimes. (24RT 6747.) Lawson was interviewed by sheriff's deputies on October 22, 1995, in connection with their investigation into Morris's suicide. Lawson told deputies that Morris stated, "'I killed that old lady.'" (24RT 6747.) On March 31, 1998, a defense investigator interviewed Lawson at Pelican Bay State Prison. (24RT 6747.) Lawson told the investigator that he recalled talking to Morris and telling sheriff's deputies about Morris's confession. (24RT 6747.) Lawson elaborated on his prior statement telling the investigator that Morris had told him, "'I stabbed her. Also I grabbed her by the throat.'" (24RT 6747.) Lawson also told the investigator that Morris had told him that appellant and Wilson had been in the house but "took no part in the actual killing." (24RT 6747.)

Vincent Johnson was also interviewed by sheriff's deputies, but defense counsel did not have a copy of the interview. (24RT 6747-6748.)

A defense investigator spoke to Johnson on April 14, 1998, at Santa Ynella State Prison. (24RT 6748.) If called as a witness, Johnson would testify that Morris had "implied that he did the killing by saying,...I'm in here, aren't I?" (24RT 6748.)

Misty Abbott, who was with Morris and appellant after the murder, was interviewed by Detective Highet on November 1, 1995. (24RT 6748-6749.) Misty told Detective Highet that Morris had told her that "he murdered the little old lady." (24RT 6749.) Morris told Misty that Bone did not die from strangulation so he stabbed her. (24RT 6749.) Morris told Misty that appellant did not participate in the killing, and that appellant and Wilson looked at him after he killed Bone "as if they were saying, what in the hell are you doing, dude." (24RT 6749-6750.)

Misty was interviewed by the prosecutor and Detective Clemens on August 18, 1998. (24RT 6750.) Misty told the prosecutor and detective that Morris had confessed that he had killed Bone when Misty accompanied him to the lake to dispose of Bone's truck. (24RT 6750.) Morris asked Misty "if it was wrong not to feel bad," and he told Misty that Bone "wouldn't die choking her, so he had to get a knife from the kitchen...." (24RT 6750.)

The court asked defense counsel if he sought to admit any of the statements that were "exculpatory" as to appellant and Wilson. (24RT 6757.) Defense counsel responded, "[W]e believe we can make an argument that saying he acted alone and the other people that were present with him did not participate is even more of a declaration against penal interest, and that argument can be made." (24RT 6757-6758.) But he added, "there is an issue as to a 352 in that regard, but...we would certainly offer it." (24RT 6758.) Citing *People v. Gatlin* (1989) 209 Cal.App.3d 31 at page 43, the court tentatively ruled that Morris's statements that "attest to the involvement or lack of involvement" of appellant and Wilson did not

qualify as declarations against interest and were inadmissible. (24RT 6758-6759, 6786-6787; see also 24RT 6710 [trial court's prior reference to *Gatlin* and its example of statements that would not be admissible as declarations against Morris's penal interest].)

After further argument (24RT 6759-6766, 6781-6796, 6801-6802), the court ruled that Morris's alleged statements to Lawson, "I killed that old lady" and "I stabbed her. I grabbed her by the throat," were admissible (24RT 6796-6797, 6803). The court further ruled that Morris's alleged statements to Misty that "he murdered the little old lady," "It didn't work... strangling her...so I stabbed her," and that "he killed her...she wouldn't die choking her, so I had to get a knife from the kitchen," were admissible. (24RT 6798-6799, 6803.) But Morris's alleged statement to Johnson was inadmissible because it was not particularly disserving of Morris's penal interest. (24RT 6797-6798, 6803.)

The court also ruled that Morris's alleged statement to Lawson that appellant and Wilson were in the house but took no part in the actual killing (24RT 6797, 6803), and Morris's alleged statements to Misty that appellant and Wilson did not take part in the killing and their alleged reactions to the killing (24RT 6798, 6803), were inadmissible because they were not declarations against Morris's interests.

2. The trial court did not abuse its discretion by excluding evidence of Morris's out-of-court statements that were not "specifically disserving" to his interests

Appellant sought to introduce Morris's out-of-court statements for their truth and, therefore, the statements were hearsay. (Evid. Code, § 1200, subd. (a).) Hearsay is inadmissible unless it falls within an exception to the hearsay rule. (*Id.* at subd. (b).) Evidence Code section 1230 provides, in pertinent part, "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...so far subjected him to the risk of civil or criminal liability... that a reasonable man in his position would not have made the statement unless he believed it to be true."

For a hearsay statement to be admissible as a declaration against penal interest, "[t]he proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character." (*People v. Duarte* (2000) 24 Cal.4th 603, 610-611.) A trial court's ruling as to whether a statement is against a declarant's penal interest is reviewed for an abuse of discretion. (*People v. Lawley* (2002) 27 Cal.4th 102, 153.)

In *Gatlin*, the defendant sought to introduce as a declaration against penal interest a tape recording of his three female codefendants in which they denied their own, as well as the defendant's, involvement in a burglary. (*People v. Gatlin*, *supra*, 209 Cal.App.3d at pp. 37, fn. 2 & 43-44.) On appeal, the appellate court rejected the defendant's argument that "the female codefendants had to have knowledge of or have been involved in the burglaries in order to state he was not responsible for burglary, thus the statements were declarations against interest." (*Id.* at pp. 43-44.) The court noted that the female co-defendants had denied their own culpability, and any statement that the defendant had nothing to do with the burglary was not "specifically disserving to the interests of any of the three codefendant declarants." (*Id.* at p. 44.)

In *People v. Chapman* (1975) 50 Cal.App.3d 872, the defendant argued that the trial court erroneously excluded evidence that another person, Banks, had told other people that he had shot the victim, and the defendant "had tried to break up the fight." (*Id.* at p. 877.) The appellate court affirmed the trial court's ruling that the out-of-court statements were

untrustworthy and their admission would violate Evidence Code section 352. (*Id.* at pp. 877-881.) In doing so, the appellate court observed that Banks' statement that he shot the victim was "ostensibly against Banks' penal interest," but Banks' other statement, that the defendant was trying to break up the fight, was "exculpating of the defendant" but "not distinctly against Banks' penal interest." (*Id.* at p. 880.)

In *People v. Lawley*, *supra*, 27 Cal.4th 102, this Court reiterated the rule that "the hearsay exception should not apply to collateral assertions within declarations against penal interest. [Citation.]...[This Court] ha[s] declared Evidence Code section 1230's exception to the hearsay rule inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant. [Citation.]" (*Id.* at p. 153.) Applying those principles to the facts before it, *Lawley* found that the trial court did not abuse its discretion by admitting evidence of a co-conspirator's statement that he had been hired to kill, and did kill, the victim, nor did it abuse its discretion by excluding evidence that the Aryan Brotherhood had been the party that hired him. (*Id.* at p. 154.) *Lawley* reasoned that evidence regarding the Aryan Brotherhood was properly excluded because "nothing about *who* hired [the co-conspirator] to kill [the victim] made [the co-conspirator] more culpable than did the other portions of his statement." (*Ibid.*, original italics.) This Court made this ruling despite other testimony admitted at trial that identified the defendant as the person who had paid the co-conspirator for the killing. (*Id.* at pp. 116-117, 119-120.)

As the foregoing authorities explain, out-of-court statements that are admissible as declarations against penal interest must be "specifically disserving" to the declarant. (*People v. Lawley*, *supra*, 27 Cal.4th at p. 153.) And a trial court does not abuse its discretion by excluding statements that shift blame or provide extraneous details not disserving to

the declarant. (See *id.* at p. 154; *People v. Gatlin*, *supra*, 209 Cal.App.3d at pp. 43-44; *People v. Chapman*, *supra*, 50 Cal.App.3d at p. 880; see also *People v. Duarte*, *supra*, 24 Cal.4th at p. 612.)

Here, the court ruled that Morris's alleged out-of-court statements that appellant and Wilson were in the house but took no part in the actual killing and their alleged reactions to the killing were inadmissible because the statements were not particularly disserving of Morris's penal interests. Nothing about appellant's or Wilson's alleged lack of participation in the actual killing, or their alleged reactions to the killing, made Morris more culpable than the other portions of his statements. (See *People v. Lawley*, *supra*, 27 Cal.4th at p. 154.) Moreover, Morris's statement regarding appellant's reaction was an opinion, not an assertion of fact, and also was inadmissible on that ground. (See *ibid.*) Accordingly, the trial court did not abuse its discretion by excluding collateral portions of Morris's out-of-court statements that were not "specifically disserving" of his interests.

Appellant argues that whether a statement is "specifically disserving" of the declarant's interests under Evidence Code section 1230 is equivalent to whether the statement is aggravating under section 190.3, subdivision (a) as a circumstance of the crime. (AOB 79-81, citing *People v. Carpenter* (1997) 15 Cal.4th 312 and *People v. Howard* (1992) 1 Cal.4th 1132.) *Carpenter* stands for the unremarkable proposition that "the jury could certainly consider that defendant acted alone as a circumstance of the crime" in determining penalty. (*Carpenter*, at pp. 414-415.) And *Howard* simply observed, "The factor that aggravated defendant's culpability more than any other was his role as the actual killer and the motivating force behind the crimes," when it found that the court's "technical mistakes" in labeling several sentencing factors as "aggravating" was harmless. (*Howard*, at p. 1195.) Neither of the cases cited by appellant compel the conclusion that a factor that may be considered aggravating under section

190.3 equates to a declaration against penal interest under Evidence Code section 1230. This is particularly true when considering that Evidence Code section 1230 is one of a limited number of exceptions that allows an out-of-court statement to be admitted at trial for its truth. Thus, it is not inconsistent that evidence admissible as a declaration against penal interest may be more narrowly circumscribed than evidence a jury may consider as aggravating when determining penalty.

Based on the foregoing, the trial court did not abuse its discretion by excluding portions of Morris's out-of-court statements that were not "specifically disserving" of his interests.

3. The trial court's exclusion of certain evidence did not violate appellant's federal constitutional rights

Appellant further claims that the trial court's partial exclusion of Morris's out-of-court statements violated his federal constitutional rights to due process, to present a defense, and to increased reliability in the guilt and penalty phases of his capital trial. (AOB 82-88.) As this Court has repeatedly recognized, "'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. Courts retain...a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations.]'" (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.) "[T]he mere erroneous exercise of discretion under such 'normal' rules does not implicate the federal Constitution." (*Ibid.*) This principle applies with equal force to capital cases. (*People v. Kraft, supra*, 23 Cal.4th at p. 1035.)

As explained above, the trial court did not abuse its discretion by excluding portions of Morris's out-of-court statements that were not "specifically disserving" of his interests. And appellant's evidentiary arguments present no exception to the general rule that the ordinary rules of

evidence do not impermissibly infringe on a defendant's federal constitutional rights. (See *People v. Kraft*, *supra*, 23 Cal.4th at p. 1035.)

Moreover, the court's ruling did not completely deprive appellant of the ability to present evidence that Morris had acted alone when he killed Bone. Indeed, Morris's statements that were ruled admissible supported appellant's theory that Morris had acted alone. (See 24RT 6796-6797, 6803 ["*I* killed that old lady" and "*I* stabbed her. *I* grabbed her by the throat." (Italics added.)]; 24RT 6798-6799, 6803 [statements to Misty that "*he* murdered the little old lady," "It didn't work...strangling her...so *I* stabbed her," and that "*he* killed her...she wouldn't die choking her, so *I* had to get a knife from the kitchen." (Italics added.)].) Accordingly, appellant has not demonstrated that the trial court's exclusion of evidence under state law violated his federal constitutional rights.

B. The Trial Court's Instruction with CALJIC No. 8.83 Did Not Violate Appellant's Federal Constitutional Rights

Appellant claims that the trial court's instruction with CALJIC No. 8.83, the standard instruction for evaluating the sufficiency of circumstantial evidence to prove special circumstances, violated his federal constitutional rights to due process and the jury's determination of guilt beyond a reasonable doubt by improperly limiting its cautionary principles to only the jury's evaluation of circumstantial evidence. Appellant argues that this limitation was "especially harmful in this case" because the prosecution also relied on direct evidence from jailhouse informant Jonathon Howe, and "it was especially important for this jury to have been correctly told that the reasonable doubt rule and the rule about two reasonable interpretations of evidence applied not only to circumstantial evidence, but to direct evidence as well." (AOB 92-100.) Respondent disagrees. Appellant forfeited this claim on appeal by failing to request that

the court modify CALJIC No. 8.83 to state that its cautionary principles applied to both direct and circumstantial evidence. Even assuming appellant's claim is not forfeited, this Court has rejected similar challenges to the circumstantial evidence instructions and should do the same here.

1. Appellant forfeited his claim on appeal by failing to request that the court modify the standard instruction

Appellant's failure to request modification of the standard jury instruction forfeited his claim on appeal. "'A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.'" (*People v. Jennings* (2010) 50 Cal.4th 616, 671; see also *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

Appellant requested that the court instruct the jury with CALJIC No. 8.83, which explains how to consider circumstantial evidence to prove the special circumstances.[18] (33RT 8988-8991; 34RT 9103; 5CT 932-933, 936.) Appellant prepared the instruction for the court in its unmodified form. (34RT 9103-9104.) As requested, the court instructed the jury with CALJIC No. 8.83 as follows:

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[18] During early discussions on jury instructions, the court and counsel discussed modifying CALJIC No. 2.01 to include its application to the special circumstances. (32RT 8765-8785; 33RT 8804-8806.) CALJIC No. 2.01 instructs the jury generally on how to consider circumstantial evidence. Other modifications to CALJIC No. 2.01 were also proposed by appellant but are not relevant to the claim raised on appeal. (32RT 8765-8785; 33RT 8804-8806.) Later, the parties agreed that CALJIC No. 2.01 did not need to be modified and, instead, the jury should be instructed with CALJIC No. 8.83 as to the special circumstances. (34RT 9098.) The defense prepared both CALJIC No. 2.01 and CALJIC No. 8.83 for the court in their unmodified forms to be given to the jury. (34RT 9103-9104; 6CT 1223, 1262.)

You are not permitted to find a special circumstance alleged in this case to be true based on circumstantial evidence unless the proved circumstance is not only (1) consistent with the theory that a special circumstance is true, but (2) cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the truth of a special circumstance must be proved beyond a reasonable doubt.

In other words, before an inference essential to establish a special circumstance may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which that inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence is susceptible to two reasonable interpretations, one of which points to the truth of a special circumstance and the other to its untruth, you must adopt the interpretation which points to its untruth, and reject the interpretation which points to its truth.

If, on the other hand, one interpretation of that evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(6CT 1262; 35RT 9179-9180.)

On appeal, appellant claims that the standard instruction was improper because it limited its cautionary principles to the jury's evaluation of circumstantial evidence instead of advising the jury that those same cautionary principles applied to direct evidence. (AOB 95-100.) Appellant, however, did not ask the trial court to modify the instruction in this regard. Accordingly, his claim of instructional error is forfeited based on in his failure to request modification to the standard instruction. (See *People v. Jennings*, *supra*, 50 Cal.4th at p. 671.)

2. In any event, appellant's challenge to the circumstantial evidence instruction has been rejected by this Court

Even assuming this Court chooses to review appellant's claim in the event his substantial rights were affected (§ 1259), it is meritless. As this Court has explained, "'A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant. [Citations.]'" (*People v. Solomon* (2010) 49 Cal.4th 792, 822, quoting *People v. Cross* (2008) 45 Cal.4th 58, 67-68.) "'"'[T]he correctness of jury instructions is to be determined from the entire jury charge of the court, not from a consideration of parts of an instruction or from a particular instruction." [Citations.]'" (*Solomon*, at p. 822, quoting *People v. Carrington* (2009) 47 Cal.4th 145, 192.)

Here, appellant claims that the court's instruction with the unmodified version of CALJIC No. 8.83 misled the jury and violated his rights to due process and proof beyond a reasonable doubt by failing to explain that "the reasonable doubt rule and the rule about two reasonable interpretations of evidence applied not only to circumstantial evidence, but to direct evidence as well." (AOB 100.) Appellant continues, "Under these circumstances, the burden of proof beyond a reasonable doubt was undercut in violation of [his] Fifth and Sixth Amendment right to a fair jury trial." (AOB 100.)

Recently, this Court rejected the claim that the cautionary instructions of CALJIC Nos. 2.01 and 2.02, which are nearly identical to CALJIC No. 8.83,[19] would mislead the jurors to believe that "a fact essential to guilt

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[19] CALJIC No. 2.01 provides that "before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt," and "if the circumstantial

(continued...)

that was based on direct, rather than circumstantial, evidence need not be proved beyond a reasonable doubt." (*People v. Solomon*, *supra*, 49 Cal.4th at p. 826.) This Court observed in *Solomon* that the trial court had instructed the jury "that both direct and circumstantial evidence were acceptable means of proof," "that a defendant is presumed innocent until proved to the contrary 'and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty.'" (*Solomon*, at p. 826, quoting CALJIC No. 2.90.) *Solomon* found that "[t]hese instructions, coupled with the directive to 'consider the instructions as a whole and each in light of the others,' fully apprised the jury that the reasonable doubt standard applied to both forms of proof." (*Ibid.*) *Solomon* also found that the circumstantial evidence instructions did not dilute the reasonable doubt standard in violation of the defendant's federal constitutional rights because "the jury was instructed on the presumption of innocence, the burden of proof and reasonable doubt." (*Id.* at pp. 826-827, and cases cited therein.)

Similar to the jurors at Solomon's trial, the jurors in this case were instructed on the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt. (6CT 1248 [CALJIC No. 2.90].) The jurors were further instructed that "[b]oth direct and circumstantial evidence are acceptable as a means of proof" (6CT 1222 [CALJIC No. 2.00]), and "[t]he People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a

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(...continued)
evidence as to any particular count, permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to his guilt." (Compare 6CT 1223 [CALJIC No. 2.01], with 6CT 1262 [CALJIC No. 8.83].)

special circumstance is true, you must find it to be not true" (6CT 1259 [CALJIC No. 8.80.1]). The jurors were advised to "[c]onsider the instructions as a whole and each in light of all the others." (6CT 1218 [CALJIC No. 1.01].) Read together, these instructions "fully apprised the jury that the reasonable doubt standard applied to both forms of proof." (See *People v. Solomon*, *supra*, 49 Cal.4th at p. 826.) In addition, the circumstantial evidence instruction did not dilute the reasonable doubt standard because the jury was instructed with CALJIC No. 2.90 on the presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt. (*Ibid.*)

Appellant relies primarily on *People v. Vann* (1974) 12 Cal.3d 220 and *People v. Crawford* (1997) 58 Cal.App.4th 815 to support his claim that the standard instruction violated his constitutional rights by limiting its cautionary principles to circumstantial evidence. (AOB 97-99.) Specifically, appellant relies on the following language from *Vann* and *Crawford* to support his claim: "An instruction which requires proof beyond a reasonable doubt only as to circumstantial evidence, rather than importing a need for the same degree of proof where the crime is sought to be established by direct evidence, might with equal logic have been interpreted by the jurors as importing the need of a lesser degree of proof where the evidence is direct and thus of a higher quality." (*Vann*, at pp. 226-227; *Crawford*, at p. 824; AOB 97.) Appellant's reliance is misplaced. Both *Vann* and *Crawford* involved cases where the trial court failed to give the jury the standard instruction on reasonable doubt (CALJIC No. 2.90). (*Vann*, at pp. 225-226; *Crawford*, at p. 819.) In both cases, the reviewing court rejected the People's argument that other instructions given the jury, including the circumstantial evidence instruction that refers to reasonable doubt, rendered the error harmless. (*Vann*, at pp. 226-228; *Crawford*, at pp. 824-825.) Thus, the language in

Vann and *Crawford* that appellant relies on is not a comment on the circumstantial evidence instruction, per se. Instead, it is a comment on the sufficiency of that instruction to inform the jurors of the prosecution's burden of proof when the court failed to give the jury the standard instruction on reasonable doubt.

Unlike the jurors in *Vann* and *Crawford*, the jurors in this case were instructed on the presumption of innocence and definition of reasonable doubt contained in CALJIC No. 2.90. (6CT 1248.) The circumstantial evidence instruction contained in CALJIC No. 8.83 supplemented the court's instruction on reasonable doubt. Instead of being harmed by the instruction, appellant "benefitted from the elaboration of the reasonable doubt standard in [CALJIC No. 8.83]." (*People v. Solomon*, *supra*, 49 Cal.4th at p. 826 [discussing CALJIC Nos. 2.01 and 2.02].) There was no error.

C. The Federal Constitution Does Not Require Unanimity on the Overt Acts Committed During the Course of a Conspiracy

Appellant claims that the trial court's failure to instruct the jurors that they must unanimously agree as to which overt acts were committed during the course of the conspiracy violated his federal constitutional rights to due process and a jury determination of every element of the offense beyond a reasonable doubt. (AOB 101-107.) Respondent disagrees.

The People charged appellant with conspiracy to commit robbery (count 4) and alleged five overt acts in furtherance of the conspiracy.[20]

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[20] Appellant was also found guilty of conspiracy to commit burglary (count 5). (2CT 184-186; 6CT 1310.) Appellant, however, does not argue any constitutional error with respect to the court's instruction on conspiracy to commit burglary. (AOB 101-107.) Indeed, appellant states that the overt acts alleged "certainly support the charge of conspiracy to commit burglary." (AOB 107.)

(2CT 184-186; see also 6CT 1251-1252 [jury instruction setting forth overt acts].) During the discussions on jury instructions, defense counsel advised the court that unanimity was not required on the overt acts. (33RT 8883-8885 [citing Forecite instruction].) Thus, the jury was instructed with CALJIC No. 6.10, the standard instruction defining conspiracy. As pertinent here, the jury was told, "In order to find a defendant guilty of conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof of the commission of at least one of the acts alleged in the information to be overt acts and that the act committed was an overt act." (6CT 1270.)

Appellant acknowledges that this Court has rejected the claim that juror unanimity is required on a specific overt act in order to find a defendant guilty of conspiracy. (AOB 104, citing *People v. Russo* (2001) 25 Cal.4th 1124, 1134-1135.) Appellant argues, however, that *Russo* is based on state law and does not answer the federal constitutional issue raised here, which is explicated in the United States Supreme Court's decisions in *Mullaney v. Wilbur* (1975) 421 U.S. 684 [95 S.Ct. 1881, 44 L.Ed.2d 508], *Jones v. United States* (1999) 526 U.S. 227 [119 S.Ct. 1215, 143 L.Ed.2d 311], and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]. (AOB 103-105.)

As appellant recognizes (AOB 103), neither the Sixth Amendment nor Fourteenth Amendment of the federal Constitution requires unanimous verdicts in state criminal trials. (*Johnson v. Louisiana* (1972) 406 U.S. 356, 359 [92 S.Ct. 1620, 32 L.Ed.2d 152]; *People v. Coelho* (2001) 89 Cal.App.4th 861, 875, fn. 7.) Appellant argues, however, that based on *Mullaney* and its progeny he is entitled to "at least a super-majority of jurors agreeing on his guilt." (AOB 103.)

In *Mullaney v. Wilbur*, *supra*, 421 U.S. 684, the Supreme Court held unconstitutional a state statute that required a criminal defendant to

establish by a preponderance of evidence that he acted in heat of passion, when presented in a homicide case, in order to reduce murder to manslaughter. In *Apprendi v. New Jersey*, *supra*, 530 U.S. 466 and *Jones v. United States*, *supra*, 526 U.S. 227, the Supreme Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, at p. 490; see also *Jones*, at p. 243, fn. 6.)

Mullaney does not assist appellant because California's definition of conspiracy does not shift the burden of proving a fact that reduces punishment for a crime to the defendant. *Jones* and *Apprendi* do not assist appellant because he is not challenging his sentence. None of these cases stand for the proposition that a jury must unanimously agree as to the exact way a single discrete crime has been committed.[21] Accordingly, appellant has not demonstrated any federal constitutional error based on the court's instructions. Therefore, appellant's conviction for conspiracy to commit robbery must be affirmed.

D. The Reciprocal Discovery Provisions Do Not Violate Appellant's State and Federal Constitutional Rights

Appellant next argues that the reciprocal discovery provisions enacted by Proposition 115 violate his privilege against self-incrimination and state and federal constitutional rights to due process and the effective assistance of counsel. (AOB 108-110.) Appellant recognizes that this Court rejected these same challenges to the reciprocal discovery provisions in *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, but he makes this claim to preserve it for federal review. (AOB 109-110 & fn. 17.) Appellant presents no

[21] This principle is discussed further in section E., *ante*.

compelling reason for this Court to reconsider *Izazaga*. Accordingly, his claim should be rejected.

E. The Trial Court Properly Denied Appellant's Request for a Unanimity Instruction in Connection with the Special Circumstances

Appellant claims that the trial court violated his Sixth and Eighth Amendment rights to a jury trial and reliable penalty determination by refusing to instruct the jury in connection with the special circumstances that it must unanimously agree whether he (1) aided and abetted the murder with the intent to kill or (2) with reckless indifference to human life and as a major participant aided and abetted the commission of the crime of robbery or the crime of burglary, which resulted in the death of Betty Bone.[22] Appellant argues that a unanimity instruction was required because the prosecution relied on different facts to support each of the theories of aiding and abetting. Appellant further argues that the error was prejudicial and the jury's true findings on the robbery-murder and burglary-murder special circumstances must be reversed. (AOB 111-127.) Respondent disagrees. Neither the federal Constitution nor state law required unanimity on exactly how appellant aided and abetted the murder of Betty Bone. Accordingly, the trial court properly denied appellant's request for a unanimity instruction.

The prosecution alleged two special circumstances, robbery-murder and burglary-murder, thereby making appellant eligible for the death penalty. (2CT 186.) During the discussion on jury instructions, appellant

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[22] Appellant conceded at trial that he was a major participant in the commission of the robbery and burglary. (35RT 9247.) Thus, appellant's claim, and respondent's response, focus on the particular mental state at issue, i.e., aided and abetted the murder with intent to kill or with a reckless indifference to life aided and abetted the commission of the robbery and/or burglary that resulted in Bone's death.

requested that the court instruct the jury in connection with the special circumstances that it must be unanimous on whether he aided and abetted the murder with an intent to kill or harbored a reckless indifference to human life when he committed the robbery and/or burglary that resulted in Bone's death. (33RT 8884-8885, 8894-8895, 8914; 34RT 9036-9037, 9047-9048.) The prosecutor disagreed that unanimity was required. (34RT 9033-9035.) The court agreed with the prosecutor and ruled that unanimity was not required on the theory of liability for the special circumstance, and it would not instruct the jury with a modified version of CALJIC No. 17.01.[23] (34RT 9063; see also 34RT 9049-9050.)

As pertinent here, the jurors were instructed that to find the robbery-murder or burglary-murder special circumstances true it must be proved (1) the murder was committed while appellant was engaged in the commission of a robbery and/or burglary, and (2) the murder was committed in order to carry out or advance the commission of the crime of robbery or burglary or to facilitate the escape or to avoid detection. (6CT 1261; CALJIC No. 8.81.17.) The jurors were further instructed that they must find beyond a reasonable doubt that appellant either (1) aided and abetted Bone's murder with the intent to kill, or (2) with a reckless indifference to life and

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[23] In its unmodified form, CALJIC No. 17.01 states:

> The defendant is accused of having committed the crime of _____ [in Count ___]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count ___] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count _____], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict.

as a major participant aided and abetted in the robbery or burglary that resulted in Bone's death. (6CT 1259; CALJIC No. 8.80.1.) The jurors were also instructed that each special circumstance must be decided separately, and they must agree unanimously to find a special circumstance true. (*Ibid.*)

Appellant recognizes that "[w]hen a defendant is prosecuted for a charge under several different *legal* theories, the trial court need *not* instruct the jury it must unanimously agree on the legal theory upon which it convicts the defendant. [Citations.]" (AOB 115, original italics.) But appellant argues juror unanimity was required in this case because there were two *factual* theories of aiding and abetting liability from which the jury could base its special circumstance findings, and each theory was supported by different evidence. (AOB 116-119.) Specifically, appellant states that the prosecution relied on Howe's testimony that appellant ordered Wilson and Morris to bind and kill Bone, appellant was armed with a gun and Wilson or Morris was armed with a knife when they entered the home, appellant was older than Wilson and Morris, and appellant wore gloves and a bandana during the robbery and later disposed of his shirt, to support its theory that appellant aided and abetted Bone's murder with an intent to kill. (AOB 117.) But appellant states that the prosecution relied on other evidence, i.e., that appellant entered Bone's rural home in broad daylight, with two other people, wearing gloves, knowing that Morris had expressed no concern with killing a person, provided a weapon to Morris, entered the home knowing it was occupied by an elderly woman, saw Bone knocked unconscious before entering, and believed the victim could identify him, to support its theory that appellant harbored a reckless indifference to human life when he committed the robbery and/or burglary that resulted in Bone's death. (AOB 117-118.) Under these circumstances, appellant argues that unanimity was required because individual jurors

could disbelieve and disregard certain evidence that other jurors believed and considered. (AOB 118, 125-127.) Neither the federal Constitution nor state law required that the jurors unanimously agree on exactly how appellant aided and abetted the murder of Betty Bone in order to find the special circumstances true.

As previously discussed, neither the Sixth nor Fourteenth Amendments to the federal Constitution requires unanimous jury verdicts in state criminal trials. (*McDonald v. City of Chicago, Ill.* (2010) ___ U.S. ___ [130 S.Ct. 3020, 3035, fn. 14, 177 L.Ed.2d 894], citing *Apodaca v. Oregon* (1972) 406 U.S. 404 [92 S.Ct. 1628, 32 L.Ed.2d 184] and *Johnson v. Louisiana*, *supra*, 406 U.S. 356.) This Court has also rejected the claim that the absence of a unanimity requirement violates the Eighth Amendment. (*People v. Wilson* (2008) 44 Cal.4th 758, 802.)

Appellant's claim also fails under state law. "As a general rule, when violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relied for the allegation of the information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty." (*People v. Jennings*, *supra*, 50 Cal.4th at p. 679, citing *People v. Diedrich* (1982) 31 Cal.3d 263, 281.) "The requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' [Citation.]" (*People v. Russo*, *supra*, 25 Cal.4th at p. 1132.) But "'[w]here the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place, the instruction is not necessary to the jury's understanding of the case.' [Citations.]" (*People v. Beardslee* (1991) 53 Cal.3d 68, 93.) This Court has not decided whether the unanimity requirement applies to special

circumstance findings. (*Jennings*, at p. 680 & fn. 30.) This Court need not resolve that issue here because no unanimity instruction was required.

Relying on the appellate court's decision in *People v. Dellinger* (1984) 163 Cal.App.3d 284, appellant argues that juror unanimity is required when the prosecution relies on one legal theory, i.e., aiding and abetting, but "two distinct sets of acts upon which the jury could rely in finding [the defendant] culpable on this single theory." (AOB 116-117.) *Dellinger* does not assist appellant.

Dellinger was convicted by jury of first degree murder of his two-year-old stepdaughter. (*People v. Dellinger*, *supra*, 163 Cal.App.3d at p. 289.) Dellinger, who had been home alone with the victim, told the police that his stepdaughter had fallen down the stairs. (*Id.* at pp. 289-290.) An autopsy was conducted. The pathologist determined that the "major cause of death was swelling of the brain due to blunt force trauma to the head, with a skull fracture" and ruled the death accidental. (*Id.* at p. 290.) A few months later, toxicology results were received that showed the presence of cocaine in the victim's blood and "large quantities in her liver and stomach." (*Ibid.*) Based on this evidence, the pathologist revised his report to state that "cocaine was probably a contributing cause" of the victim's death. (*Ibid.*) A further inquiry of the victim's death was conducted by the coroner and a biomedical engineer, who concluded that the force of the fall could not have caused the victim's injuries. (*Ibid.*) The pathologist recharacterized the victim's cause of death as criminal and the coroner concurred. (*Ibid.*)

At trial, the coroner testified that the injuries to the victim could not have been caused by a fall down the stairs. (*People v. Dellinger*, *supra*, 163 Cal.App.3d at p. 290.) A second autopsy, conducted about a year after the victim's death, "showed a contusion of the cervical spinal cord which probably resulted from the same blunt force causing the head injury."

(*Ibid.*) On the other hand, the defense presented testimony from two experts that the victim could have received her injuries from a fall down the stairs. (*Ibid.*) The victim's mother testified that Dellinger had used cocaine before they married but she had no knowledge of his cocaine use at the time of her daughter's death and had assumed he had quit. (*Id.* at p. 291.)

On appeal, the appellate court found that the trial court committed prejudicial error by failing to instruct the jury that it must unanimously agree on which acts constituted murder. (*People v. Dellinger*, *supra*, 163 Cal.App.3d at p. 300.) In doing so, the appellate court noted the "considerable confusion surrounding the causes of death and the alleged criminal acts by Dellinger." (*Id.* at p. 300.) The court found that without a unanimity instruction some jurors may have found, based on the evidence and argument, that Dellinger gave the victim cocaine while others may have found he inflicted a blow to her head. (*Id.* at pp. 300-302.) The court recognized that "there was only one offense and one victim but there were several hypotheses as to which act or acts caused [the victim's] death." (*Id.* at p. 301.) The appellate court concluded, "As long as there are multiple acts presented to the jury which could constitute the charged offense, a defendant is entitled to an instruction on unanimity." (*Ibid.*)

Dellinger does not apply in this case because there was no confusion as to which criminal act, or acts, caused Betty Bone's death, and there was no dispute that appellant had aided and abetted her murder. Bone's murder flowed from a continuous course of conduct that began with the burglary of her home and, during the course of the robbery, she was strangled and then stabbed to death. As this Court has explained, "[W]here the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty." (*People v. Russo*,

supra, 25 Cal.4th at p. 1132.) For example, "to convict a defendant of first degree murder, the jury must unanimously agree on guilt of a specific murder but need not agree on a theory of premeditation or felony murder [citation]" nor must the jury "agree on whether the defendant was guilty as the direct perpetrator or as an aider and abettor as long as it agreed on a specific crime [citation]." (*Id.* at p. 1133.)

To find the special circumstances true, the jury was required to unanimously agree whether appellant aided and abetted Bone's murder in the course of a robbery and/or aided and abetted Bone's murder in the course of a burglary. (See 6CT 1261.) The jury was not required to unanimously agree exactly how appellant aided and abetted the murder even if different pieces of evidence supported the different theories. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1024-1026 [rejecting defendant's claim that juror unanimity is required when different theories of murder are supported by different evidence and facts].) In other words, juror unanimity was not required because the evidence cited by appellant involves only the "exact way" he encouraged and facilitated the murder of Betty Bone (see AOB 117-118), not whether he encouraged and facilitated the murder at all. (See *People v. Taylor* (2010) 48 Cal.4th 574, 628; see also *People v. Russo*, *supra*, 25 Cal.4th at pp. 1132-1133; *People v. Beardslee*, *supra*, 53 Cal.3d at pp. 93-94.) In any event, even if some jurors believed that appellant aided and abetted Bone's murder with the intent to kill, those same jurors necessarily would have believed that if he did not have the intent to kill he, at the very least, acted with reckless indifference to human life when he aided and abetted Wilson and Morris in the commission of the robbery or burglary that resulted in Bone's death. (See *Beardslee*, at pp. 93-94.)

In sum, the trial court's refusal to instruct the jury that it must unanimously agree on exactly how appellant aided and abetted Betty

Bone's murder in order to find the special circumstances true did not violate state law or the federal Constitution.

F. Appellant Was Not Prejudiced by the Court's Misreading of the Definition of Reckless Indifference to Human Life

Appellant next claims that the two special circumstance findings and death verdict must be reversed because the court's oral reading of the definition of reckless indifference to human life as contained in CALJIC No. 8.80.1 was a misstatement of the law and violated his rights under the Fifth and Sixth Amendments of the federal Constitution. (AOB 128-138.) Appellant recognizes that the jury was given a proper instruction in its written form (AOB 133-134; see also 6CT 1259), but he argues that the court's misreading of the instruction was prejudicial under both the state and federal harmless-error standards and the findings on the special circumstances and death judgment must be reversed. (AOB 129, 134-138, citing *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Respondent disagrees. The court's obvious misreading of the instruction was harmless under any standard.

The reporter's transcript indicates that the trial court misspoke when it read to the jury the definition of reckless indifference to human life contained in CALJIC No. 8.80.1. The court stated, "A defendant acts with reckless indifference to human life *whether* that defendant knows or is aware that his acts involve a grave risk of death to an innocent human being."[24] (35RT 9178, italics added.) The correct instruction reads, "A

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[24] Appellant states that the court misspoke in two places when reading CALJIC No. 8.80.1 to the jury: "A defendant acts with reckless indifference to human life *whether* that defendant knows or is aware that his acts involve a *great* risk of death to an innocent human being." (AOB (continued...)

defendant acts with reckless indifference to human life *when* the defendant knows or is aware that his acts involve a grave risk of death to an innocent human being." (6CT 1259; CALJIC No. 8.80.1.) No objection was made to the court's misreading of the instruction. (35RT 9178; see also 34RT 9084 [court advising counsel to interrupt during reading of instructions if it "misread one significantly"].) A copy of the written instruction correctly defining the meaning of reckless indifference to human life was provided to the jury during deliberations. (4SCT[25] 93, 136.)

As this Court recently reiterated, "The risk of a discrepancy between the orally delivered and the written instructions exists in every trial, and verdicts are not undermined by the mere fact the trial court misspoke. 'We of course presume "that jurors understand and follow the court's instructions." [Citation.] This presumption includes the written instructions. [Citation.] To the extent a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control.' [Citation.]" (*People v. Mills*, *supra*, 48 Cal.4th at pp. 200, 201; see also *People v. Wilson*, *supra*, 44 Cal.4th at p. 803; *People v. Osband* (1996) 13 Cal.4th 622, 687-688.) This Court has found no reversible error based on the court's misreading of the instructions when the jury has been provided a correctly worded written instruction and has been instructed that "'[y]ou are to be governed only by the instruction in its final wording'[fn.]...." (*Mills*, at p. 201.)

(...continued)
129, citing 35RT 9178.) Respondent's copy of the cited page of the reporter's transcript includes the first italicized error but not the second italicized error.

[25] "4SCT" stands for volume four of the clerk's supplemental transcript on appeal.

Applying the foregoing principles, appellant has not demonstrated any prejudice. Here, the written instruction provided to the jury correctly defined reckless indifference to human life as contained in CALJIC No. 8.80.1 (4SCT 136), and the court instructed the jury orally (35RT 9304) and in written form (4SCT 165) that "[y]ou are to be governed only by the instruction in its final wording" (CALJIC No. 17.45). As this Court has observed, "This direction reminded the jurors that it is difficult to recite complicated and lengthy written material verbatim and that the carefully prepared and reworked written text should guide them." (*People v. Osband*, *supra*, 13 Cal.4th at p. 687.)

Moreover, appellant conceded at trial that he was guilty of murder and a major participant in the robbery and burglary. But he argued vigorously that he did not act with a reckless indifference to human life and, thus, the prosecution had not proved the special circumstances. (See AOB 131-136.) Given the posture of the case, both the prosecutor (35RT 9208-9209, 9211, 9283, 9287) and defense counsel (35RT 9248, 9270, 9279) repeatedly told the jury the correct definition of reckless indifference to human life during their closing arguments and focused their arguments on whether appellant knew or was aware that his actions posed a grave risk of death. Under the circumstances, it would have been obvious to the jury that the court had misread the instruction when it stated, "A defendant acts with reckless indifference to human life *whether* that defendant knows or is aware that his acts involve a grave risk of death to an innocent human being." (35RT 9178, italics added.)

In sum, appellant has not demonstrated that the court's misreading of the instruction was prejudicial under any standard because the written instructions take precedence over the court's oral instructions and counsel's closing arguments thoroughly addressed the correct definition of reckless indifference to human life. (See *People v. Mills*, *supra*, 48 Cal.4th at

p. 201.)

G. The Court's Instruction with CALJIC No. 2.15 Does Not Require Reversal of the Robbery-Murder Special Circumstance

Appellant claims the jury's true finding on the robbery-murder special circumstance must be reversed because the court's instruction with CALJIC No. 2.15 created an unconstitutional presumption and lightened the prosecution's burden of proof in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the federal Constitution by instructing the jury that it could find the robbery-murder special circumstance true if it found that (1) appellant had been in possession of recently stolen property and (2) there was slight corroborating evidence. Appellant argues the error is structural and reversal is automatic. (AOB 139-148.) Respondent disagrees. As given, CALJIC No. 2.15 applied only to the theft-related crimes and, thus, there is no reasonable likelihood the jury would have understood it to apply to the robbery-murder special circumstance. Moreover, this Court has repeatedly rejected claims that the instruction creates an unconstitutional inference or lessens the prosecution's burden of proof.

"'When an appellate court addresses a claim of jury misinstruction, it must assess the instructions as a whole, viewing the challenged instruction in context with other instructions, in order to determine if there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner. [Citations.]'" (*People v. Jennings*, *supra*, 50 Cal.4th at p. 677; see also *Estelle v. McGuire* (1991) 502 U.S. 62, 72 & fn. 4 [112 S.Ct. 475, 116 L.Ed.2d 385].) Without objection (33RT 9000-9004 [court and counsel's discussion regarding the instruction]), the court instructed the jury with CALJIC No. 2.15 as follows:

> If you find that defendant was in conscious possession of recently stolen property, the fact of that possession is not by

itself sufficient to permit an inference that the defendant is guilty of the *crime of robbery or burglary or unlawful taking of a motor vehicle*. Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt.

As corroboration, you may consider the attributes of possession—time, place and manner, that the defendant had an opportunity to commit the crime charged, the defendant's conduct, any statements he may have made with reference to the property, or any other evidence which tends to connect the defendant with the crime charged.

(6CT 1279, italics added.)

This Court has repeatedly upheld the giving of CALJIC No. 2.15 in theft-related cases. (*People v. Gamache* (2010) 48 Cal.4th 347, 375, and cases cited therein.) This Court has explained, "CALJIC No. 2.15 is an instruction generally favorable to defendants; its purpose is to emphasize that possession of stolen property, alone, is insufficient to sustain a conviction for a theft-related crime. [Citations.] In the presence of at least some corroborating evidence, it permits—but does not require—jurors to infer from possession of stolen property guilt of a related offense such as robbery or burglary." (*Ibid.*) As such, "the instruction satisfies the due process requirement for permissive inferences, at least for theft-related offenses: the conclusion it suggests is '"one that reason and common sense justify in light of the proven facts before the jury."'" (*Ibid.*) This Court has also repeatedly rejected claims that CALJIC No. 2.15 impermissibly alters the burden or proof: "The instruction does not establish an unconstitutional mandatory presumption in favor of guilt [citation] or otherwise shift or lower the prosecution's burden of establishing guilt beyond a reasonable doubt [citations]." (*Id.* at p. 376; see also *People v. Prieto* (2003) 30 Cal.4th 226, 248.)

But this Court has "cautioned that the instruction is inappropriate for non-theft-related crimes, and instructing that possession of stolen property may create an inference that a defendant is guilty of murder...is error. [Citations.]" (*People v. Gamache*, *supra*, 48 Cal.4th at p. 375; see also *People v. Coffman* (2004) 34 Cal.4th 1, 101; *People v. Prieto*, *supra*, 30 Cal.4th at pp. 248-249.) Here, however, the instruction itself limited its application to the "crime of robbery or burglary or unlawful taking of a motor vehicle." (6CT 1279.) The jury was not instructed that it could infer that appellant was guilty of murder or that the robbery-murder special circumstance was true based on his possession of stolen property. Accordingly, the court's instruction was proper, and there was no error in connection with the jury's finding on the robbery-murder special circumstance. (*People v. Gamache*, *supra*, 48 Cal.4th at p. 375, fn. 14 [rejecting claim that court's instruction with CALJIC No. 2.15 required reversal of the true finding on the special circumstance when the instruction did not extend inference to special circumstance findings].)

Moreover, as appellant states, the jury was instructed that to find the special circumstances true it must find that appellant committed murder in the course of a robbery and/or burglary and "with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of the murder in the first degree, or with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested or assisted any actor in the commission of the crime of robbery or burglary which resulted in the death of a human being...." (6CT 1259; CALJIC No. 8.80.1; see also 6CT 1254; CALJIC No. 3.31 [setting forth mental state for special circumstances].) The jury was further instructed that to find that the murder was committed during the course of a robbery or burglary it must be proved that (1) "The murder was committed while the defendant

was engaged in the commission of a robbery or burglary"; and (2) "The murder was committed in order to carry out or advance the commission of the crime of robbery or burglary or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the robbery or burglary was merely incidental to the commission of the murder." (6CT 1261; CALJIC No. 8.81.17.) The jury was also instructed that to find appellant committed the crime of robbery the following elements must be proved: (1) "A person had possession of property of some value however slight"; (2) The property was taken from that person or from her immediate presence"; (3) "The property was taken against the will of that person"; (4) "The taking was accomplished either by force or fear"; and (5) "The property was taken with the specific intent permanently to deprive that person of the property." (6CT 1265; CALJIC No. 9.40.) The jury was instructed on the prosecution's burden of proof beyond a reasonable doubt generally (6CT 1248; CALJIC No. 2.90) and, more specifically, that the prosecution was required to prove the special circumstances true beyond a reasonable doubt (6CT 1259; CALJIC No. 8.80.1).

To accept appellant's argument, the jury would have had to ignore instructions that specifically addressed the requirements for a true finding on the special circumstances and, instead, apply an instruction that, on its face, did not apply to the special circumstance findings. There is no reasonable likelihood that the jury applied the instructions in the manner urged on appeal. This Court should reject appellant's claim of instructional error.

H. Trial Counsel Was Not Ineffective for Failing to Argue That Jonathon Howe's Testimony Should Be Excluded on the Ground That His Plea Agreement Effectively Required Him to Testify Consistently with His Prior Statements

Appellant claims that his trial counsel rendered constitutionally ineffective assistance by failing to argue that Jonathon Howe's testimony should have been excluded on the ground that his plea agreement with the prosecution placed him under a "strong compulsion" to testify in accord with his prior statements to law enforcement. (AOB 149-161.) Appellant acknowledges that trial counsel unsuccessfully moved to exclude Howe's testimony on other grounds (AOB 154-155), but he argues that counsel would have prevailed on this ground because the written plea agreement between Howe and the prosecution effectively told Howe he was required to testify in accord with his pretrial statements or he could lose the benefit of his deal and be prosecuted for perjury (AOB 157-158). Appellant further argues that he was prejudiced by counsel's failure because there is a reasonable probability the jury would have come to a different outcome on the special circumstance findings and penalty decision had Howe's testimony been excluded. (AOB 159-161.) Respondent disagrees. The court repeatedly explained to Howe that his plea agreement did not require that his testimony at appellant's trial be consistent with his previous statements to law enforcement. Instead, the only condition placed on Howe was that he testify truthfully. Based on the court's explicit instructions to Howe, any motion to exclude Howe's testimony based on his plea agreement would have been meritless. Accordingly, appellant has not demonstrated that trial counsel rendered constitutionally ineffective assistance.

The United States and California Constitutions guarantee criminal defendants a right to the assistance of counsel. (U.S. Const., 6th Amend.;

Cal. Const., art. 1, § 15.) "'[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.'" (*United States v. Cronic* (1984) 466 U.S. 648, 654 [104 S.Ct. 2039, 80 L.Ed.2d 657], quoting *McMann v. Richardson* (1970) 397 U.S. 759, 771, fn. 14 [90 S.Ct. 1441, 25 L.Ed.2d 763].) To succeed on a claim of ineffective assistance of counsel, a defendant must establish both: (1) deficient performance by his attorney, i.e., representation that "fell below an objective standard of reasonableness...under prevailing professional norms" (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [104 S.Ct. 2052, 80 L.Ed.2d 674]); and (2) prejudice, i.e., that the result of the proceeding was rendered unreliable or fundamentally unfair (*id.* at pp. 692-694).

As to the first prong, counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 690.) Reviewing courts must "consider counsel's performance from his perspective, analyzing counsel's decisions based on what he knew or should have known at the time." (*In re Thomas* (2006) 37 Cal.4th 1249, 1257.) As to the second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, at p. 694.)

Prior to trial, appellant moved to exclude Howe's testimony on the grounds that its admission would violate Evidence Code section 352 and his federal constitutional right to due process. (5CT 1013-1026.) Specifically, appellant argued that the evidence's probative value was substantially outweighed by its prejudicial effect; the defense did not have notice that the prosecution had intended to call Howe as a witness; Howe's testimony was untrustworthy; and the defense did not have the opportunity

to voir dire the jury on assessing the credibility of testimony from jailhouse informants. (5CT 1015-1017.) Appellant requested that the court hold an evidentiary hearing to assess Howe's credibility, the relevance of his proposed testimony, and whether it should be excluded for the reasons argued in the motion. (5CT 1016-1017.) The People filed a written opposition. (5CT 1047-1057.) After a hearing on the motion, the trial court ruled that Howe's testimony would be admissible if certain discovery conditions were met by the prosecution and the defense was unable to demonstrate that Howe's proposed testimony was inherently unreliable. (24RT 6647, 6668-6681, 6686-6708; see also 24RT 6830-6839; 30RT 8224-8241, 8294.)

About a month after appellant filed his motion to exclude Howe's testimony, Howe entered into an "Agreement to Cooperate" with the prosecution. (5CT 1154-1158.) The agreement specified that Howe would "cooperate, fully and voluntarily, by providing true, full and accurate information to law enforcement by testifying truthfully and accurately in all court proceedings regarding his complete knowledge of the facts and circumstances surrounding the death of Betty Bone." (5CT 1154.) The agreement stated that Howe "shall receive the benefits described in this agreement subject to his compliance with all of the terms and conditions contained in this document." (5CT 1155.) The agreement emphasized, "**OVERRIDING ALL ELSE**, it is understood that this agreement extracts from Jonathon Calvin Howe an obligation to do nothing other than to tell the truth, fully and accurately. At all times he shall tell the truth and nothing other than the truth. It is understood between all the parties to this agreement that Jonathon Calvin Howe will provide truthful and accurate testimony regarding his complete knowledge of the facts and circumstances surrounding the death of Betty Bone. Mr. Howe shall tell the truth, no matter who asks the questions, including, but not limited to, investigators,

prosecutors, judges, or defense attorneys. It is further understood that Mr. Howe shall be subject to prosecution for perjury for any intentional deviation from the truth. Any intentional false statement may be the predicate of criminal charges." (5CT 1155, original emphasis.) The agreement also specified that by entering the agreement Howe waived his appellate rights in three Shasta County criminal cases. (5CT 1155.)

In exchange for Howe's cooperation, truthful testimony, and waiver of appellate rights, the prosecution agreed to the disposition of Howe's three pending criminal cases: Howe would plead guilty to a violation of section 422 and two violations of Vehicle Code section 10851, all other counts and allegations would be dismissed, and the maximum term that could be imposed would be 24 months in prison, which would run consecutive to the term he was currently serving in another case. (5CT 1155-1156.) The agreement stated that the judge presiding over appellant's trial would determine Howe's sentence based on his determination as to whether Howe had testified truthfully. (5CT 1156.) But the agreement also provided that neither the prosecution nor defense was precluded from arguing for a sentence less than 24 months should the "circumstances warrant." (5CT 1156.)

The agreement specified that no other promises, representations, or offers of leniency had been made to Howe, and no additional agreements would be made unless reduced to writing and signed by all parties. (5CT 1156-1157.) The agreement was signed by the prosecutor who tried appellant's case, Howe, and Howe's attorney. (5CT 1157-1158.) Appellant relies on the contents of the written plea agreement and circumstances relating to Howe's credibility to support his claim. (See AOB 150-158.)

However, on the same date the agreement was signed by the parties, a change-of-plea hearing was held before Judge Boeckman, the same judge

who presided over appellant's trial. (27CT 8093-8126; Ct. Exh. 28.) One of appellant's trial attorney's was present at the hearing. (27CT 8126; see also 30RT 8211 [prosecutor and trial counsel given copies of transcript of Howe's change-of-plea hearing].) Appellant does not discuss the change-of-plea hearing or the admonitions given by Judge Boeckman to Howe anywhere in his brief. The absence of these facts is startling. The substance of Judge Boeckman's admonitions to Howe completely undermines appellant's claim.

Prior to taking Howe's plea, Judge Boeckman asked Howe about his understanding of the agreement and explained some of its terms. (See 27CT 8101-8117.) Of particular pertinence here, Judge Boeckman explained to Howe how he would determine if Howe had given truthful testimony at appellant's trial. (27CT 8105.) In doing so, the following took place:

> [THE COURT]: Has anyone told you how I'm going to determine whether you've testified truthfully?
>
> [HOWE]: No, sir.
>
> [THE COURT]: Has anyone suggested to you that your testimony needs to be consistent with anything else you've ever said about your knowledge in order for me to conclude that it's truthful?
>
> [HOWE]: It's my knowledge that I have to testify truthfully and consistent with any report I've—I've made so far in this case, with the information I've had.
>
> [THE COURT]: Let me tell you that that may not be accurate. Okay? You are to testify truthfully whether or not it's consistent with any other statement. In other words, if the truth happens to be consistent with something you've previously said, then testifying to the truth will end up being consistent. Okay? But if telling the truth here, the actual truth, would be inconsistent with something you've previously said, the fact that it's inconsistent will not cause me to conclude that you're not being truthful. Do you understand?

[HOWE]: Yes.

[THE COURT]: Is that too complicated?

[HOWE]: No, sir.

[THE COURT]: Okay. In other words, I don't want you to think in any way, Mr. Howe, that for me to believe you're telling the truth that what you say here in this courtroom has to be consistent with something you've said before.

[HOWE]: Yes, sir.

[THE COURT]: Whether it's to law enforcement or to anyone else. Do you understand that?

[HOWE]: Yes, sir.

(27CT 8105-8106.)

Judge Boeckman emphasized that he would not necessarily conclude that Howe had given truthful testimony simply because his trial testimony was consistent with any prior statements to law enforcement. (27CT 8106.) Judge Boeckman continued:

[THE COURT]: I don't know what the truth is right now, Mr. Howe, and I want you to be aware of that. Okay? I'm not concluding that because you said something previously to law enforcement officers and it was on tape, I'm not concluding that what you said is true and I'm not assuming or concluding that what you said is untrue. I can tell you right now that I don't know. So, you will not necessarily be complying with this agreement in my mind if you say something consistent with what you said to law enforcement on that tape or otherwise, if I decide that what you're saying here is not true. Do you understand?

[HOWE]: Yes.

[THE COURT]: In other words, do not say something that isn't true because it's consistent with what you said previously to law enforcement, in hopes that I will therefore conclude you're telling the truth here. Do you understand?

[HOWE]: Yes, sir.

[THE COURT]: I may conclude that you are not telling the truth even though what you say here in the court is consistent with what you told law enforcement before. Do you understand?

[HOWE]: Yes, sir.

[THE COURT]: I may also conclude that what you say here in this courtroom is truthful, though it is or even though or in spite of the fact that it's consistent. Do you understand?

[HOWE]: Yes.

[THE COURT]: In other words, there's no relationship. I'm going to independently determine whether you're telling the truth in this courtroom. Do you understand?

[HOWE]: Yes, sir.

(27CT 8106-8107.) Judge Boeckman further explained to Howe that he was the sole person to determine whether his testimony was truthful, and that his determination did not depend in any way on the verdict rendered by the jury. (27CT 8107-8110.)

Judge Boeckman told Howe that he would assess his credibility in the same way any witness's credibility is assessed, and he read Howe a portion of CALJIC No. 2.20. (27CT 8111-8112.) Judge Boeckman told Howe that whether a witness gave prior consistent or inconsistent statements was a factor that may be considered to assess a witness's credibility, but Judge Boeckman explained, "That's one of [the] criteria, but in your case I want you to be especially aware that although that's a factor that relates to the jury's analysis of your testimony in terms of whether they want to believe it or not, in my analysis you do not have [to] make your testimony consistent with prior statements for me to believe you. Okay?" (27CT 8112.) Howe stated, "Yes, sir." (27CT 8112.)

As the foregoing demonstrates, Howe was made aware through his plea agreement (5CT 1154-1155) and colloquy with Judge Boeckman (27CT 8105-8112) that he was to testify truthfully at appellant's trial as a condition of his plea. Judge Boeckman specifically, and repeatedly, told Howe that his testimony at trial did not have to be consistent with his prior statements in order to be considered truthful. (27CT 8105-8107, 8111-8112.) As an example, Judge Boeckman told Howe, "[Y]ou will not necessarily be complying with this agreement in my mind if you say something consistent with what you said to law enforcement on that tape or otherwise, if I decide what you're saying here is not true." (27CT 8106.) Both the plea agreement (5CT 1156) and Judge Boeckman (27CT 8107-8110) made clear to Howe that Judge Boeckman, not the prosecutor, was solely responsible for determining whether Howe's testimony was truthful. Judge Boeckman further explained that his determination did not depend in any way on the jury's verdict. (See 27CT 8108-8109.)

Appellant's trial counsel was present at Howe's change-of-plea hearing and presumably heard Judge Boeckman's admonitions to Howe. (27CT 8126.) Any motion by trial counsel to exclude Howe's testimony on the ground that his plea agreement effectively compelled him to testify consistently with his prior statements would have been denied as meritless given the manner in which Judge Boeckman emphasized to Howe that his plea agreement did not require that he testify consistently with his prior statements only that he testify truthfully. Trial counsel is not ineffective for failing to make a meritless motion. (See *People v. Allen* (1986) 42 Cal.3d 1222, 1248-1253 [rejecting claim that terms of plea bargain compelled witness to testify in accord with prior statement]; *People v. Fields* (1983) 35 Cal.3d 329, 359-361 [same].) Based on the record as a whole, appellant has not demonstrated that his trial counsel rendered constitutionally ineffective assistance. Accordingly, this claim should be rejected.

III. ISSUES AFFECTING PENALTY VERDICT

A. Trial Counsel Did Not Render Ineffective Assistance in Advising Appellant Regarding the Prosecution's Pre-Trial Offer

Appellant claims that his trial counsel rendered ineffective assistance by failing to adequately prepare himself and to advise appellant to accept the prosecution's pre-trial offer and plead guilty as charged in exchange for a sentence of life without possibility of parole. (AOB 162-176.) Respondent disagrees. On this record, appellant has not demonstrated that trial counsel did not act as a reasonably competent attorney when advising appellant about the prosecution's offer, and that it is reasonably probable that, but for counsel's deficiency, appellant would have accepted the offer at that time.

"The pleading—and plea bargaining—stage of a criminal proceeding is a critical stage in the criminal process at which a defendant is entitled to the effective assistance of counsel guaranteed by the federal and California Constitutions." (*In re Alvernaz* (1992) 2 Cal.4th 924, 933.) When a claim of ineffective assistance of counsel is made in the context of a defendant's rejection to enter a guilty plea, a defendant must demonstrate that (1) counsel's representation was deficient, i.e., counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) counsel's deficient performance resulted in prejudice to the defendant, i.e., "there is a reasonable probability that, but for counsel's deficient performance, the defendant would have accepted the proffered plea bargain and that in turn it would have been approved by the trial court." (*Id.* at p. 937.) "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.... If it is easier to dispose of an ineffective assistance claim on the ground of lack of

sufficient prejudice,...that course should be followed." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697.)

Further, "'When...the record sheds no light on why counsel acted or failed to act in the manner challenged, the reviewing court should not speculate as to counsel's reasons.... Because the appellate record ordinarily does not show the reasons for defense counsel's actions or omissions, a claim of ineffective assistance of counsel should generally be made in a petition for writ of habeas corpus, not on appeal.' [Citation.]" (*People v. Lucero* (2000) 23 Cal.4th 692, 728-729.)

This Court has recognized the difficulty in resolving claims of this nature on appeal and in a petition for writ of habeas corpus. This Court explained in *Alvernaz*:

> We note the ease with which a defendant, after trial, may claim that he or she received inaccurate information from counsel concerning the consequences of rejecting an offered plea bargain. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence...." [Citation.] Furthermore, such a claim may be difficult or impossible to refute directly. The attorney-client privilege may protect against disclosure of the precise information given a defendant by counsel during the plea negotiation process until the defendant decides to waive that privilege, possibly years later, when claiming he or she was incompetently counseled. At that time, defense counsel's recollection of the communications and advice given the client and the client's response to that advice, if unrecorded, may well have faded or disappeared entirely. Thus, in reviewing such a claim, a court should scrutinize closely whether a defendant has established a reasonable probability that, with effective representation, he or she would have accepted the proffered plea bargain.[footnote]

(*In re Alvernaz*, *supra*, 2 Cal.4th at p. 938.)

To assist courts in determining whether a defendant, with the effective assistance of counsel, would have accepted the offer, this Court articulated the following "pertinent factors to be considered": "whether counsel

actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she was amenable to negotiating a plea bargain." (*In re Alvernaz*, *supra*, 2 Cal.4th at p. 938.) With regards to the last factor, this Court cautioned that "a defendant's self-serving statement—after trial, conviction, and sentence—that with competent advice he or she *would* have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence. A contrary holding would lead to an unchecked flow of easily fabricated claims." (*Ibid.*, original italics.)

In ruling on a claim of ineffective assistance of counsel, a reviewing court independently reviews the record "to determine whether [the defendant] has established by a preponderance of substantial, credible evidence [citation] that his counsel's performance was deficient and, if so, that [the defendant] suffered prejudice." (*In re Alvernaz*, *supra*, 2 Cal.4th at pp. 944-945.) Applying the foregoing legal authorities to the facts of this case, appellant has not satisfied his burden that trial counsel rendered ineffective assistance.

1. Relevant facts

Based on the appellate record, the following facts appear:

One, James Pearce was appointed to represent appellant on October 25, 1995 (1CT 20), and he represented appellant until May 23, 1997, when substitute counsel was appointed (3RT 250-255).

Two, on February 15, 1996, the District Attorney of Shasta County filed a six-count information charging appellant and co-defendant Wilson with special-circumstance murder and other crimes related to the

robbery/burglary-murder of Betty Bone. (2CT 183-189.) On June 14, 1996, appellant waived formal arraignment on the charges, plead not guilty, and denied the allegations. (2CT 254.)

Three, on April 12, 1996, the prosecutor announced that District Attorney Dennis Sheehy had not decided whether his office would be seeking the death penalty against appellant and Wilson. (2RT 43; see also 2RT 57-58 [no decision on June 14, 1996].) On June 28, 1996, the court was informed that the District Attorney had tentatively decided to seek the death penalty, and appellant and Wilson had been invited to present evidence or argument to try and persuade the District Attorney to not seek death. (2RT 71-72; see also 2RT 74-75 [case referred to as "potential death penalty case" on July 17, 1996].) On August 14, 1996, the prosecutor advised the court that his office planned to make a final announcement regarding penalty in late September. (2RT 77.) In a letter dated August 28, 1996, the prosecutor invited counsel for appellant and Wilson to schedule a meeting with the death penalty review team to discuss mitigating information prior to the court date scheduled on September 23, 1996. (4CT 666; but see 2RT 200 [prosecutor refers to case as a "capital case" at hearing on December 30, 1996].)

Four, in December 1996, the court received two pro se motions from appellant—a motion for a change of venue (3CT 302-302B(1)) and an order for pretrial discovery (3CT 302C-302L).

Five, on January 16, 1997, Sheehy notified counsel by letter that his office would not be seeking the death penalty against appellant or Wilson. (4CT 667.)

Six, Sheehy retired as District Attorney in April 1997 (5RT 2431), and on April 14, 1997, McGregor Scott took the oath of office as the District Attorney for Shasta County. (3CT 322; 5RT 2388.)

Seven, on May 22, 1997, the parties stipulated to a continuance of the trial date due to, among other things, Scott reviewing the case to determine whether the death penalty should be sought. (3RT 212.) Wilson's attorney stated for the record that the defendants were "being allowed to give some input" on the issue. (3RT 213.) On that same date, appellant requested a *Marsden* hearing to remove Pearce as his attorney. (3RT 213; see also 3CT 307-310 [appellant's written request for *Marsden* hearing stating, "I do not feel comfortable or confidant [*sic*] in his ability to represent me to his fullest!"].)

Eight, on May 23, 1997, the court granted appellant's motion for new counsel and Richard Maxion was appointed. (3RT 250-255.) At the time of the appointment, Maxion was aware that Scott was evaluating the case to determine whether to seek the death penalty. (3RT 251.) Maxion advised the court of two concerns he had about accepting the appointment: (1) he was scheduled to begin another death penalty case on September 9, 1997, and (2) he would need time to review the discovery and become familiar with the facts of the case in order to make "a legitimate presentation" to Scott on the penalty determination. (2RT 251-255.) As to the second point, Maxion stated, "I want the opportunity to be prepared to make the presentation to the DA's Office. I'm wondering if I can get a commitment from the prosecutor that I will have time to do that." (2RT 254-255.) The court suggested that he make a request to the District Attorney, but "if it becomes an issue that needs to be litigated, that's what the court's for." (2RT 255.) A trial date was tentatively set for January 13, 1998. (2RT 254.)

Nine, Maxion was provided in excess of 2,500 pages of discovery at the time of his appointment. (3CT 358 [declaration attached to October 28, 1997, motion to continue the trial date]; see also 3CT 393 [Maxion stating

in support of motion to continue that he had received "about nine volumes of police reports," totaling a "few thousand pages"].)

Ten, Scott testified at a hearing in connection with appellant's motion to prohibit the People from seeking the death penalty that he met with Maxion on June 4, 1997, to discuss Scott's decision to seek the death penalty in appellant's case. (5RT 2395-2396; see also 4CT 662 [motion filed by defense alleges that Maxion was advised in May or early June 1997 that the People were considering seeking the death penalty, and defense was given opportunity to present information to the DA for consideration].) This meeting occurred 12 days after Maxion's appointment.

Eleven, Scott testified that Maxion had asked during the June 4, 1997, meeting that he be given "a certain amount of time to become familiar with the case so that he could properly advise his client." (5RT 2395-2396.) According to Scott, "all the parties involved" agreed that an announcement regarding penalty be postponed until June 27, 1997, "[w]ith the thought being that that would provide him with sufficient time" to advise appellant. (5RT 2396.) Scott further testified that he would have given Maxion more time had he requested it. (5RT 2396-2397.)

Twelve, on June 6, 1997, 14 days after Maxion was appointed to represent appellant, Scott announced in a closed hearing that his office would be seeking the death penalty against appellant and Wilson for Bone's murder. (3CT 323; 3RT 260-261.) Scott stated that before arriving at his decision he had meet with, among other people, appellant's former and current attorneys, Pearce and Maxion. (3RT 260-261.) Scott further advised the court that his office would delay a formal announcement of their intent until June 27, 1997, "out of fairness to the defendants" so they could consult with their attorneys and decide whether they wished to plead guilty and receive life without the possibility of parole, the maximum sentence offered by the former District Attorney. (3RT 260-261.) Scott

further explained that the delay of the announcement would "provide Mr. Maxion with an opportunity to become sufficiently acquainted with the case so that he can properly advise his client." (3RT 261.)

Thirteen, appellant was present in the closed hearing when Scott made the announcement. (3RT 258-261.) Therefore, appellant was aware no later than June 6, 1997, that he had until June 27, 1997, to discuss his case with Maxion and decide whether he wished to plead guilty as charged in exchange for a sentence of life without possibility of parole or proceed to trial and face a possible sentence of death.

Fourteen, on June 27, 1997, both appellant and Wilson rejected the People's offer to plead guilty in exchange for a sentence of life without possibility of parole. (3CT 329, 333-335; 3RT 267-268.) Trial counsel stated on appellant's behalf, "I have discussed it with my client, and he's not willing, repeat, not willing, to plead to the charges." (3CT 335; 3RT 268.) Thereafter, the prosecutor formally announced that the People would be seeking the death penalty against appellant and Wilson. (3CT 335-336; 3RT 268-269.)

Fifteen, over one year later, on July 10, 1998, the defense filed a motion seeking to prohibit the People from seeking the death penalty on the grounds that the manner in which the Shasta County District Attorney decided to seek the death penalty in this case violated the state and federal prohibitions against cruel and/or unusual punishment and seeking the death penalty in this case constituted "invidious discrimination and vindictive prosecution." (4CT 659-669.) The motion did not allege that trial counsel rendered ineffective assistance in connection with the People's plea offer. (See 4CT 659-665.) Further proceedings on appellant's motion to prohibit the People from seeking the death penalty based on vindictive prosecution is discussed in the next argument. (See Arg. III, B., *ante*.)

Sixteen, on July 28, 1998, the court heard argument on the defense's motion to prohibit the People from seeking the death penalty. (4RT 2000, 2027-2033.) During argument, appellant's *Keenan* counsel, Rolland Papendick, argued as an additional ground for prohibiting the People from seeking the death penalty that Maxion had been denied the opportunity to adequately familiarize himself with the record in order to present meaningful information to Scott in connection with his decision to seek the death penalty, thereby rendering ineffective assistance. (4RT 2031-2033.)

Seventeen, on August 4, 1998, the court heard further argument on appellant's motion to prohibit the People from seeking the death penalty. (6RT 2561-2570.) As to appellant's claim of ineffective assistance of counsel, Papendick conceded that "in June of 1997, I am not sure there is anything that could have changed Mr. Scott's mind, but it seems to me an impossible task...to expect an attorney who has been on the case since May 23rd, and we're talking sometime before June 6th, a period of some 13 days, less than two weeks, to be able to give to the prosecution any meaningful information regarding mitigating factors...." (6RT 2567.)

Papendick further argued that whether appellant should have accepted the offer to plead guilty in exchange for a sentence of life without possibility of parole was "certainly hampered by the fact that Mr. Maxion or any attorney at that point did not have the ability to fully understand the prosecution's evidence, couldn't fully investigate and look at what factors in mitigation could be presented." (6RT 2568.) Papendick referred to the large volume of discovery in the case and the "substantial" number of witnesses, and he stated that it "bother[ed]" him that "the district attorney gave [appellant] 21 days to make this decision." (6RT 2568.) Papendick argued that Maxion had been appointed only 30 days before the June 6th announcement, and he questioned "how could [appellant] get the benefit of someone that had researched, studied, investigated, gone over everything

with him, to make that decision." (6RT 2568.)

In response, the prosecutor argued that Maxion could have asked for additional time based on Scott's testimony that Maxion would have been given additional time had he requested it. (6RT 2570.) The court agreed with the prosecutor and denied appellant's claim of ineffective assistance of counsel based on an insufficient time to prepare. (6RT 2570-2572.)

Eighteen, some time prior to August 4, 1998, trial counsel had determined that it would be conceding that appellant was guilty of first degree murder under the felony murder rule, and the issue for the jury would be the truth of the special circumstances. (6RT 2561, 2582.)

Nineteen, jury selection began on September 1, 1998. (5CT 964.) On October 6, 1998, near the end of jury selection, Papendick stated for the record that appellant was prepared to plead guilty in exchange for a sentence of life without possibility of parole, but the People had rejected the offer. (22RT 6148-6149.) Papendick stated,

> As you know, we made a motion to prohibit the Prosecution from seeking the death penalty and in the course of that motion, became apparent that McGregor Scott had made an offer to the defendant that he could still accept LWOP because of the predecessor's status. One of our oppositions was that he didn't have ample time to consult regarding—prepared counsel, I think, because Mr. Maxion had had the case a very short period of time.
>
> In any event, the thing I want to put on the record is we have been having ongoing negotiations. [Appellant] made a decision that he was willing to plead guilty and accept a sentence of life without the possibility of parole. We presented that information to the District Attorney last Friday. This morning, approximately 8:30, we received their decision that they wanted to pursue the death penalty. But I think it's important that the record reflect that [appellant] is prepared to accept an offer of life without the possibility of parole.

(22RT 6149.)

And twenty, the parties made opening statements on October 20, 1998. (25RT 6899.) During his opening statement, Papendick conceded that appellant was guilty of first degree murder under the felony murder rule. (25RT 6918-6919.) But he explained to the jury that Morris was the actual killer and appellant had no intent to kill and did not act with reckless indifference to human life during the robbery and burglary that resulted in Bone's death. (25RT 6919-6922.)

2. Appellant has not demonstrated that Maxion rendered ineffective assistance

The preceding facts do not demonstrate that Maxion was ineffective. Appellant argues, "On the facts of this case no reasonable lawyer would advise his client to turn down such an offer" (AOB 170; see also AOB 172-174), and appellant's willingness to plead guilty over 15 months after he rejected the People's offer, when trial counsel was more fully informed about the case, demonstrates that it is reasonably probable he would have plead guilty but for counsel's earlier inadequate advice (AOB 175-176).

The appellate record, however, does not elucidate what advice Maxion gave appellant in connection with the prosecution's offer. Nor does the record show what Maxion knew about the strength of appellant's case at the time he advised appellant about the People's offer, what more Maxion could have learned that might have affected the way in which he advised appellant, and whether anything would have changed appellant's mind and caused him to accept the People's offer at that time. Moreover, prejudice is not shown simply because appellant was willing to plead guilty shortly before the jury was sworn and 14 days prior to opening statements to the jury. (See AOB 175-176; 22RT 6149; 25RT 6899.) More than just trial counsel's knowledge of the case changed in the 15 months between appellant's rejection of the People's offer and his later decision to plead guilty. Appellant was willing to plead guilty after his case had been

severed from Wilson's trial (3RT 342-344, 348), after the court had made various evidentiary rulings adverse to the defense (see, e.g., 4RT 2000-2005, 2085-2089, 2096-2174; 5RT 2181-2193, 2201-2264, 2287-2312, 2403-2429; 6RT 2460-2549, 2606-2610, 2620-2648), and after jury selection had begun and a panel was about to be sworn (22RT 6149; 23RT 6557-6558; 25RT 6903.) It is unlikely that appellant's "eve of trial" change in attitude was based solely on his trial counsel's knowledge of the case.

Perhaps most telling, neither appellant *nor Wilson* accepted the People's offer on June 27, 1997. (3RT 267-268.) At the time of the refusal, Wilson had been represented by the same attorney for at least 16 months. (2RT 40 [Osborne appeared on Wilson's behalf on February 23, 1996]; 3RT 266-268 [Osborne appearing at hearing on June 27, 1997].) And it would seem that both appellant and Wilson would have had similar defenses, i.e., concede guilt of first degree murder under felony-murder rule, but argue that Morris was Bone's actual killer and attack the special circumstances.

Based on the appellate record, appellant has not demonstrated that his trial counsel rendered ineffective assistance. Instead, appellant's claim may more appropriately be raised on habeas corpus. (See *People v. Lucero*, *supra*, 23 Cal.4th at pp. 728-729.)

B. Appellant Has Not Demonstrated Invidious or Vindictive Prosecution Relating to District Attorney Scott's Decision to Seek the Death Penalty

Appellant claims that District Attorney's Scott decision to give appellant 21 days to decide whether to plead guilty as charged and receive life without possibility of parole or his office would seek the death penalty violated his federal constitutional right to due process. (AOB 177-184.) More specifically, appellant claims that because Scott admitted that he did

not consider any different information than what had been available to his predecessor, Scott's decision to seek the death penalty effectively "threaten[ed]" appellant "with death unless he waived all his constitutional rights and pled guilty to special circumstance murder." (AOB 178.) Appellant's claim fails because he has not proven that Scott's decision to seek the death penalty was motivated by a desire to punish appellant for doing something the law allowed him to do.

"[T]he district attorney has broad prosecutorial discretion in deciding whether to seek the death penalty." (*People v. Maury*, *supra*, 30 Cal.4th at p. 438.) "'Absent proof of invidious or vindictive prosecution, as a general matter a defendant who has been duly convicted of a capital crime under a constitutional death penalty statute may not be heard to complain on appeal of the prosecutor's exercise of discretion in charging him with special circumstances and seeking the death penalty.'" (*People v. Jurado* (2006) 38 Cal.4th 72, 98.) In other words, this Court does "not review the prosecutor's standards for seeking the death penalty to assure that they are fair and nonarbitrary. [Citation.] Rather, [this Court has] determined that the 'requisite "standards" are those minimum standards set forth in a constitutional death penalty statute.'" (*People v. Lucas*, *supra*, 12 Cal.4th at p. 478.)

Prosecutors, however, are forbidden under the due process clauses of the federal and state Constitutions "from taking certain actions against a criminal defendant, such as increasing the charges, in retaliation for the defendant's exercise of constitutional rights." (*People v. Jurado*, *supra*, 38 Cal.4th at p. 98; see also *United States v. Goodwin* (1982) 457 U.S. 368, 373-374 [102 S.Ct. 2485, 73 L.Ed.2d 74].) But it is not a constitutional violation "for a prosecutor to offer benefits, in the form of reduced charges, in exchange for a defendant's guilty pleas, or to threaten to increase the charges if the defendant does not plead guilty." (*Jurado*, at p. 98.) As the

high court has explained, "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, [citation], and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.' [Citations.] But in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." (*Bordenkircher v. Hayes* (1978) 434 U.S. 357, 363 [98 S.Ct. 663, 54 L.Ed.2d 604].)

"In the pretrial setting, there is no presumption of vindictiveness when the prosecution increases the charges or...the potential penalty." (*People v. Jurado*, *supra*, 38 Cal.4th at p. 98.) "Rather, the defendant must 'prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something the law plainly allowed him to do.'" (*Ibid.*)

1. Relevant facts

As discussed in the preceding argument, District Attorney Sheehy originally decided not to seek the death penalty against appellant or Wilson. (4CT 667.) Prior to trial, Sheehy retired and McGregor Scott became the new District Attorney. (3CT 322; 5RT 2388, 2431.) After reevaluating the case, Scott decided to seek the death penalty against appellant and Wilson. (3CT 323; 3RT 260-261.) Scott, however, gave appellant and Wilson 21 days prior to his office formally announcing its intent to seek the death penalty to discuss the matter with their attorneys and decide whether they wished to plead guilty to the charges and receive life without the possibility of parole—the maximum sentence that had been offered by Sheehy. (3RT 260-261.) At the end of the 21 days, appellant and Wilson declined the

opportunity to plead guilty and the prosecutor formally announced that the People were seeking the death penalty. (3CT 333-336; 3RT 268-269.)

Over one year later, the defense filed a motion to prohibit the People from seeking the death penalty on the grounds that the manner in which Scott made the decision to seek the death penalty violated the state and federal prohibitions against cruel and/or unusual punishment and seeking the death penalty in this case constituted invidious discrimination and vindictive prosecution. (4CT 659-669.) The People filed an opposition. (4CT 779-783.) After receiving evidence and hearing argument, the trial court denied appellant's motion on all grounds. (See 6RT 2574-2577.)

The following evidence was elicited in connection with appellant's motion.

Scott testified that he officially became the District Attorney of Shasta County on April 14, 1997. (5RT 2388.) Scott acknowledged that he had read a newspaper article about Bone's murder prior to becoming the district attorney, and he was aware that Sheehy had decided not to seek the death penalty against the defendants. (5RT 2388-2389.) Scott did not discuss appellant's case with anyone or form or express any opinion about whether the death penalty was appropriate prior to becoming the district attorney. (5RT 2389.)

Scott first discussed appellant's case with Cara Beatty, who was the assigned prosecutor at the time, and Gerald Benito, another deputy district attorney who was later promoted to assistant district attorney. (5RT 2390.) Beatty told Scott that she believed the case warranted the death penalty, and she asked Scott to reevaluate the case. (5RT 2390-2391.) Scott testified that to the best of his knowledge he did not have any "new information" that had not been available to Sheehy when he made his evaluation. (5RT 2393-2394.)

Scott explained that his decision to seek the death penalty had not been made "quickly or arbitrarily." (5RT 2397.) He spoke to Beatty about the case on "several occasions," and Benito had been present at some, if not all, of those meetings. (5RT 2397.) Scott met with the lead detective on the case, Bone's daughter, Barbara Christensen, appellant's current and former attorneys, Maxion and Pearce, and co-defendant Wilson's attorney. (5RT 2397.) He reviewed police reports and photographs from the case. (5RT 2397.) He considered the factors in aggravation and mitigation set forth in section 190.3. (5RT 2393, 2397.) Based on his review of the case, Scott came to the conclusion that the case warranted the death penalty. (5RT 2398.) Scott cited the following factors as relevant to his decision: (1) the case involved "the brutal stabbing murder of a 98 year old woman in her own home," which was "a particularly egregious murder"; (2) appellant had "previously been convicted of a residential robbery in which the victim was a[n] elderly man" who had been bound; (3) appellant had seven felony convictions, including convictions for residential robbery, possession of a sawed-off shotgun, felon in possession of a firearm, and, according to appellant's rap sheet, a conviction for escape by force or violence; (4) he had served three separate prison terms; (5) he had either been in prison or on parole for the 12 years prior to Bone's murder; and (6) appellant was 33 years old at the time of the murder. (5RT 2398-2399.)

Scott testified that he was "unaware...of any evidence...which would cause [him] to believe that any of the factors in mitigation under 190.3 apply." (5RT 2399.) But he did invite Pearce and Maxion to provide him evidence in mitigation. (5RT 2400-2401.)

On June 6, 1997, Scott announced his decision to seek the death penalty in a closed hearing. (5RT 2392.) Scott testified that he gave the defendants a "three-week window," to June 27, 1997, to decide whether they wished to plead guilty and avoid the death penalty. (5RT 2394-2395.)

Scott explained that he gave the defendants this extra time "out of fairness." (5RT 2395.) Scott stated:

> Because my predecessor had adopted the position that the case would be pursued as a life without possibility of parole as the maximum penalty case, I did not believe that I, as a matter of fairness and equity to the two charged defendants, could simply walk into court and announce we're pursuing the death penalty. I believe I was compelled and required, due process and matters of fairness and equity, to provide them with the opportunity to come forward and accept the position which had been previously offered to them by my predecessor before we formalized the office position that it was a death penalty case.

(5RT 2395; see also 5RT 2401 [Scott reiterated, "I felt bound as a matter of due process and fairness and equity to provide them with the opportunity, after becoming aware of my intention to seek the death penalty to, if they chose to do so, to plead guilty and—and my office would be bound by the earlier decision which had been made by my predecessor, up until June 27th. And at that time, we would reverse that decision."].)

Subsequent to Scott's decision in appellant's case, the Shasta County District Attorney's Office adopted a protocol regarding the decision-making process on special circumstance cases. (5RT 2391-2392, 2452; 28CT 8410-8415.) Scott's decision-making process in appellant's case followed the protocol with one exception—there had been no post-preliminary hearing memorandum prepared by the assigned deputy as to whether the death penalty should be sought. (5RT 2399-2400.)

Benito testified that in late April 1997, the district attorney's office had been researching whether they could seek the death penalty after Sheehy had already announced that the office would not be seeking the death penalty. (5RT 2447.) Benito testified that he had been part of the team considering whether to seek the death penalty in the case, and he had believed that the death penalty should be sought. (5RT 2448, 2450.)

Benito testified that he had believed that death was the appropriate penalty after visiting the crime scene, and he had encouraged both Sheehy and Scott to seek the death penalty in the case. (5RT 2450.) Benito testified that Scott may have made the decision to seek the death penalty "as much as a week" prior to the closed hearing on June 6, 1997, "but it was very close in time to the time it was announced in court." (5RT 2449.) Benito believed that Scott had had more information regarding "victim impact" than Sheehy had when making his decision. (5RT 2450-2452.)

Beatty testified that she did not believe there had been any change in the evidence presented to Scott that had not been presented to Sheehy. (6RT 2458.) Beatty testified that "from the very moment" she was "privy to the facts of the case," she believed that the death penalty should be sought against appellant and Wilson. (6RT 2458-2459.) Beatty recommended to Sheehy that the office seek the death penalty. (6RT 2459.)

Sheehy testified about his decision to not seek the death penalty in appellant's case. (See 5RT 2432.) At the relevant time in 1995 and 1996, a written policy for reviewing cases to determine whether the death penalty should be sought was in place at the district attorney's office. (28CT 8416-8417.) In making his decision whether to seek the death penalty in appellant's case, Sheehy reviewed "all the information that was available at the time," including "investigative reports of the agency," the preliminary hearing transcript, and "background information." (5RT 2432-2433.) Although he was not certain, he "probably read all the police reports." (5RT 2433.) He also spoke to Barbara Christensen. (5RT 2433-2434.) Sheehy did not recall whether the defense had submitted any information to consider (5RT 2433), but he did not recall any factors in mitigation that had made any "impression" on him (5RT 2436).

Sheehy testified that there had been three or four meetings about whether to seek the death penalty, which might have been "more than in any other death penalty case" he had been involved in. (5RT 2435.) Sheehy agreed with the statements that whether to seek the death penalty in appellant's case had been a "difficult decision" and a "very close call." (5RT 2436.) Sheehy testified that in deciding whether to seek the death penalty in a particular case there were two "threshold issues." (5RT 2435.) First, did the facts of the case warrant the death penalty. (5RT 2435.) Sheehy testified that it was a "relatively easy issue" in this case because the facts of the case warranted the death penalty. (5RT 2435, 2437.) Second, whether there was a "strong likelihood" that the jury would return a death verdict. (5RT 2435.) Sheehy did not believe "it was likely at all" that the jury would return a death verdict because of certain evidentiary issues relating to the identity of the actual killer. (5RT 2435-2436.)

2. Appellant has not demonstrated any vindictiveness in Scott's decision to seek the death penalty

Appellant does not argue that Scott lacked the authority to reevaluate whether to seek the death penalty prior to trial. Instead, appellant argues that because Scott did not consider any "new" information when deciding to seek the death penalty, Scott's decision must have been motivated by a desire to punish appellant for exercising his constitutional rights to a jury trial, to confrontation, to present a defense, and privilege against self-incrimination. As the foregoing testimony demonstrates, however, there was no improper motive involved in Scott's decision to seek the death penalty.

Scott reevaluated whether to seek the death penalty in appellant's case at the behest of the assigned prosecutor (Beatty). (5RT 2390-2391.) Scott had meetings with both Beatty and Benito (5RT 2397, 2448, 2450), he met

with the lead detective in the case, spoke to Bone's daughter, and the defense attorneys involved in the case (5RT 2397). He reviewed police reports and photographs related to the crime (5RT 2397) and considered the factors in aggravation and mitigation set forth in section 190.3 (5RT 2393, 2399) before concluding that the case warranted the death penalty.

Out of "fairness" to appellant and Wilson (5RT 2395), Scott gave appellant and Wilson 21 days before he formally announced his office's intent to seek the death penalty to decide if they wanted to plead guilty and receive the maximum sentence offered by Sheehy or proceed to trial with the knowledge that the death penalty would be sought. (5RT 2395, 2401.)

Scott's decision to seek the death penalty was based on a thoughtful consideration of the aggravating and mitigating factors set forth in section 190.3. (See 5RT 2397-2399.) Appellant has failed to prove objectively that Scott's decision to seek the death penalty was motivated by a desire to punish appellant for exercising his constitutional rights to a jury trial, to confrontation, to present a defense, and privilege against self-incrimination. (See *People v. Jurado*, *supra*, 38 Cal.4th at p. 98.)

Appellant's reliance on *United States v. Jackson* (1968) 390 U.S. 570 [88 S.Ct. 1209, 20 L.Ed.2d 138] and *In re Lewallen* (1979) 23 Cal.3d 274 to support his claim is misplaced. (See AOB 179-184.) In *Jackson*, the Supreme Court considered a portion of the Federal Kidnaping Act, 18 U.S.C. § 1201(a), which provided, "Whoever knowingly transports in interstate...commerce, any person who has been unlawfully...kidnaped... and held for ransom...or otherwise...shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed." (*Jackson*, at p. 570.) Based on the plain language of the statute, the high court observed that "the defendant who abandons the right to contest his guilt before a jury is

assured he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die." (*Id.* at p. 581.) The Supreme Court recognized that the "selective death penalty procedure" established by the Federal Kidnaping Act may have the legitimate goal of mitigating the severity of capital punishment by limiting its application to cases in which a jury recommends death. (*Id.* at p. 582.) But the court observed that such an objective "cannot be pursued by means that needlessly chill the exercise of basic constitutional rights." (*Ibid.*)

In *Lewallen*, this Court granted the petitioner's writ of habeas corpus after it found that the trial court's sentencing discretion had been improperly influenced by the petitioner's decision to proceed to trial rather than to accept the prosecution's plea offer. (*In re Lewallen*, *supra*, 23 Cal.3d at pp. 276-282.) In doing so, this Court recognized that plea bargaining is "an accepted practice in American criminal courts which, if administered properly, contributes to the expeditious administration of justice.... The legislative scheme contemplates a district attorney negotiating with the accused and the trial judge approving or disapproving the ultimate agreement." (*Id.* at pp. 280-281.) This Court continued, "Just as a trial judge is precluded from offering an accused in return for a guilty plea a more lenient sentence than he would impose after trial [citations], so he is precluded from imposing a more severe sentence because the accused elects to proceed to trial. Trial courts may not thus chill the exercise of the constitutional right to trial by jury." (*Id.* at p. 281.)

Jackson involved a statute enacted by Congress that had the unilateral effect of potentially penalizing defendants who exercised their right to trial. (See *United States v. Jackson*, *supra*, 390 U.S. at pp. 570, 581-582.) *Lewallen* involved a trial court's improper exercise of its sentencing discretion following the defendant's exercise of his constitutional right to a

trial. (*In re Lewallen*, *supra*, 23 Cal.3d at pp. 276-282.) This case, however, involves a district attorney's broad prosecutorial discretion to seek the death penalty prior to trial at a time when appellant was free to accept or reject the People's offer. (See *People v. Maury*, *supra*, 30 Cal.4th at p. 438; *People v. Jurado*, *supra*, 38 Cal.4th at p. 98; see also *United States v. Goodwin*, *supra*, 457 U.S. at pp. 377-378.) Thus, appellant's reliance is misplaced because neither *Jackson* nor *Lewallen* involve the situation present in this case.

Instead, this Court's decision in *People v. Jurado*, *supra*, 38 Cal.4th 72, which appellant relegates to a footnote (AOB 181, fn. 23), is instructive. In *Jurado*, the district attorney charged the defendant with murder with special circumstances. (*Jurado*, at p. 93.) At the arraignment, the prosecutor announced that his office did not intend to seek the death penalty. (*Id.* at p. 98.) After the People filed an amended information, the defendant filed a motion to set aside, among other charges, the special circumstance allegation based on insufficiency of the evidence. (*Id.* at p. 93.) The superior court granted the defendant's motion and, immediately after, the defendant announced his intention to plead guilty to the charges. (*Ibid.*) The prosecutor announced that his office might seek appellate review and refused to sign a change of plea form. (*Ibid.*) Defendant withdrew his previous not guilty plea and plead guilty. (*Ibid.*) The prosecution filed a petition for writ of mandate in the appellate court challenging the trial court's dismissal of the special circumstance. (*Id.* at pp. 93-94.) The appellate court stayed the defendant's sentence while the writ was pending. (*Id.* at p. 94.) The appellate court granted the writ of mandate finding that the trial court erred by dismissing the special circumstance and held that there was no double jeopardy bar to reinstatement and prosecution of the special circumstance. (*Ibid.*)

After the appellate court granted the writ but before its decision became final, the prosecutor told trial counsel that he would talk to the district attorney about whether to seek the death penalty if defendant withdrew his guilty plea, but it was likely the death penalty would not be sought if defendant did not withdraw his guilty plea. (*People v. Jurado*, *supra*, 38 Cal.4th at pp. 98-99.) A few weeks later, the prosecutor advised trial counsel that he intended to discuss the death penalty with the district attorney whether or not the defendant withdrew his guilt plea, but he "implied" the death penalty might not be sought if he admitted the special circumstance. (*Id.* at p. 99.) Later, at a status conference where trial counsel announced that this Court had denied his petition for review, the prosecutor stated that he had met with the district attorney, and the district attorney had decided to seek the death penalty against defendant. (*Ibid.*)

On appeal, Jurado claimed that the district attorney's decision to seek the death penalty was vindictive. (*People v. Jurado*, *supra*, 38 Cal.4th at pp. 97-100.) This Court disagreed holding that the above sequence of events provided "no evidence that the prosecution's decision to seek the death penalty against defendant was motivated by a desire to punish defendant for making the motion to dismiss the special circumstance allegation under section 995, for pleading guilty and attempting to assert a double jeopardy bar, for opposing the prosecution's writ petition in the Court of Appeal, or for petitioning this court to review the Court of Appeal's decision." (*Id.* at p. 99.) In doing so, this Court stated, "Although the discussion between [the prosecutor] and defense counsel suggest that the decision to seek the death penalty may have been influenced to some extent by defendant's decision to deny the special circumstance allegation, this was not an impermissible consideration." (*Ibid.*, citing *Bordenkircher v. Hayes*, *supra*, 434 U.S. at p. 365 and *People v. Collins* (2001) 26 Cal.4th 297, 309, fn. 4.)

Appellant argues that Jurado is distinguishable from this case because the district attorney in Jurado's case had interviewed a witness and assessed his credibility and had been able to preview the strength of its case at the trial of one of defendant's coparticipants prior to reversing his decision and deciding to seek the death penalty. (*People v. Jurado*, *supra*, 38 Cal.4th at pp. 98-100.) *Jurado*, however, does not stand for the proposition that a prosecutor's reversal of his decision not to seek the death penalty is improper in the absence of a change in the strength of the prosecution's case. *Jurado*'s discussion of the witness's credibility and the prosecution's ability to preview the strength of its case was simply a response to Jurado's claim that nothing significant had occurred between the time when the district attorney announced that he was not seeking the death penalty and the reversal of his decision thereby demonstrating that the district attorney's decision to seek the death penalty must have been motivated by a desire to punish him. (*Id.* at pp. 99-100.)

Here, even assuming that Scott did not consider any "new" evidence that had not been considered by Sheehy (see 5RT 2393-2394, 2450, 2452; 6RT 2458), appellant has presented no evidence that Scott's decision to seek the death penalty was solely in retaliation for appellant's exercise of his constitutional rights. Instead, as Scott testified, his decision to seek the death penalty was based on a thorough and careful consideration of the case. As the high court has observed, prior to trial "the prosecutor may uncover additional information that suggests a basis for further prosecution *or* he simply may come to realize the information possessed by the State has a broader significance." (*United States v. Goodwin*, *supra*, 457 U.S. at p. 381, italics added.) "A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. *An initial decision should not freeze future conduct.*" (*Id.* at p. 382, italics added.)

Scott's offer to allow appellant to plead guilty and avoid a potential sentence of death prior to making a formal announcement of his decision was a gesture of "fairness and equity" (5RT 2395, 2401), not a punishment for appellant exercising his constitutional rights. (See *United States v. Goodwin*, *supra*, 457 U.S. at pp. 380-381.) Appellant was free to accept or reject the People's offer. Based on the foregoing, appellant's claim must be rejected.

C. The Trial Court Did Not Violate Appellant's Constitutional Rights by Rejecting the Defense's Proposed Instruction As Duplicative

Appellant claims that the trial court's refusal to instruct the jury upon request that it "may decide even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death" violated his rights to due process and to a reliable penalty determination as guaranteed by the Fifth and Eighth Amendments to the federal Constitution. (AOB 185-194 & fn. 25.) Respondent disagrees. The jury was instructed on how to weigh the aggravating and mitigating circumstances to determine the appropriate penalty. The defense's proposed instruction was merely duplicative of the standard instruction already provided to the jury. The trial court's refusal to instruct the jury with the proposed instruction did not violate appellant's federal constitutional rights.

Prior to the jury commencing its penalty phase deliberations, the court instructed the jury with CALJIC No. 8.88, which provides in pertinent part, "In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death each of you must be persuaded that the aggravating circumstances are so substantial in

comparison with the mitigating circumstances that it warrants death instead of life without parole." (41RT 10889.) Appellant has no complaint with the standard instruction but argues that the trial court violated his constitutional rights by refusing to instruct the jury that it "may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death." (23CT 6445.)

This Court has explained that "the standard CALJIC penalty phase instructions 'are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards.' [Citation.] Moreover the general rule is that a trial court may refuse a proffered instruction if it is an incorrect statement of law, is argumentative, or is duplicative. [Citation.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 659.) Here, the trial court did not violate appellant's federal constitutional rights by refusing the proposed instruction as "covered elsewhere." (40RT 10701; 23CT 6445.)

In rejecting a similar claim, this Court observed, "By stating that death *can* be imposed in only one circumstance—where aggravation substantially outweighs mitigation—the instruction clearly implies that a sentence less than death *may* be imposed in all other circumstances. 'No reasonable juror would assume he or she was required to impose death despite insubstantial aggravating circumstances, merely because no mitigating circumstances were found to exit.' [Citations.]" (*People v. Ray* (1996) 13 Cal.4th 313, 356.) This principle has been oft-repeated by this Court. (See, e.g., *People v. Letner* (2010) 50 Cal.4th 99, 208 ["There is no need to instruct the jury at the penalty phase...that the jury is not required to impose the death penalty even if it finds the aggravating evidence outweighs the mitigating evidence."]; *People v. Tate*, *supra*, 49 Cal.4th at p. 712 ["CALJIC No. 8.88 specifies that the jury may return a sentence of death only if each juror is persuaded the aggravating circumstances are 'so

substantial' in comparison to the mitigating circumstances that death is warranted. Jurors so instructed need not further expressly be told...that life without parole is permissible even if aggravation outweighs mitigation. [Citations.]"]; *People v. Moon*, *supra*, 37 Cal.4th at p. 43 [CALJIC No. 8.88 "[i]s not unconstitutional for failing to inform the jury that it has discretion to return a verdict of life even in the absence of mitigating circumstances"].)

Appellant provides no persuasive reason why this Court should reexamine the holdings of these cases. Accordingly, appellant's claim should be rejected.

D. The Trial Court Did Not Err by Failing to Instruct The Jury That Accomplice Cline's Extrajudicial Statements Needed to Be Corroborated and Viewed With Caution

Appellant claims that the trial court erred and violated his federal constitutional rights to due process, to present a defense, to a jury trial, and to a reliable penalty determination by denying his request to give accomplice instructions in light of Anna Cline's testimony and the admission of evidence of her prior statements to law enforcement that related to the 1985 residential robbery she committed with appellant. Specifically, appellant claims that the jury should have been advised that Cline's *extrajudicial* statements to law enforcement could not be relied upon unless corroborated and should be viewed with caution.[26] Appellant claims that the court's failure to give such instructions, and his trial counsel's failure to prepare a cautionary instruction consistent with the

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[26] Appellant does not argue that the trial court erred by failing to instruct the jury that Cline's *testimony* required corroboration. Instead, appellant states that appellant's guilty plea and admissions to the probation officer corroborated Cline's testimony and, thus, "[t]here was simply no harm in failing to instruct the jury that Cline's *testimony* must be corroborated." (AOB 207-208, original italics.)

court's ruling, was prejudicial and the penalty verdict must be reversed. (AOB 195-209.) Respondent disagrees.

No accomplice instructions were required because Cline's testimony related to a robbery in which appellant had already been convicted, and there is no requirement that every fact that an accomplice testifies to must be corroborated. In any event, even assuming the court's instructions were incomplete, appellant has not demonstrated any prejudice.

1. Relevant background and trial court's ruling

Prior to trial, the prosecutor filed a notice of aggravating evidence to be presented at the penalty phase pursuant to section 190.3. (4CT 612-614.) Among other things, the notice indicated that the prosecution intended to introduce evidence of appellant's 1985 residential robbery. (4CT 613.) During the penalty phase, Cline testified that on September 3, 1985, she and appellant had been injecting cocaine and decided to commit a robbery in order to get money for more drugs. (36RT 9583-9584, 9599.) Cline suggested they rob James Leonard. (36RT 9594-9585, 9600.) Cline had worked at Leonard's house assisting his wife, and she had also prostituted herself to Leonard in the past. (36RT 9585, 9600.) At the time of the robbery, Cline knew that Leonard had recently sold a car and had $300 in cash. (36RT 9584.)

Appellant and Cline entered Leonard's house. (36RT 9585.) One of them carried a pipe wrapped in a towel to simulate a gun. (36RT 9585-9587, 9590.) They tied Leonard's hands and feet and took $300. (36RT 9585, 9587-9588, 9596.) Leonard was not physically hurt during the robbery. (36RT 9593-9595.) Cline and appellant had discussed prior to the robbery that they would not hurt anyone. (36RT 9600-9601, 9602-9603.) After leaving the house, appellant and Cline bought cocaine. (36RT 9588.)

A detective with the San Joaquin County Sheriff's Department interviewed Cline the day after the robbery and testified about Cline's prior

statements. (38RT 10013-10014.) Cline told the detective that she met appellant the night before the robbery. (38RT 10013-10014.) She and appellant went to Leonard's house so she could perform an act of prostitution and get money to buy drugs. (38RT 10014.) Cline entered the house alone, but then appellant came in and robbed Leonard. (38RT 10014.) Cline told the detective that appellant had "forced" her to help rob Leonard. (38RT 10014.)

Over 10 years after the robbery, on May 21, 1996, Officers Ashmun and O'Connor interviewed Cline about the residential robbery. Ashmun testified about statements Cline had made about her and appellant's conduct during the robbery. (36RT 9705-9706, 9714-9718.) Cline stated several times during the interview that appellant had wanted to hurt Leonard and take his money, but Cline had told appellant not to hurt him. (36RT 9705, 9714.) Cline stated several times that Leonard had resisted giving them the money and a struggle had ensued. (36RT 9705-9706.) Cline stated that appellant had tied up Leonard, and it had been appellant's idea to wrap a towel over a pipe to simulate a gun. (36RT 9705-9706.)

Cline told the officers that she was angry with appellant for "roll[ing] over" on her when they were arrested for the robbery, and her interview with them was "pay back." (36RT 9711-9712.) Cline equivocated during the interview as to whether appellant had acted violently during the robbery. (36RT 9712-9713.) Cline repeatedly stated during the interview that she wanted to be honest with the officers. (36RT 9718.) But she testified at the penalty phase that she "may not have" told the officers the truth about the residential robbery when she spoke to them on May 21, 1996. (36RT 9589, 9602; see also 36RT 9591-9595, 9598, 9604-9606 [she also did not remember things she might have told the officers in 1996 or after her arrest].)

In addition to Cline's prior statements, the prosecution also introduced evidence of appellant's prior statements about the robbery. The day after the robbery, appellant told a detective that he had met Cline the night before the robbery. Appellant and Cline went to various locations where Cline committed acts of prostitution so they could buy drugs. (38RT 10017.) During the early morning hours of September 3, 1985, Cline told appellant that she knew "one more place" where she could make "an easy $20." (38RT 10017.) Cline directed appellant to a house, and the two of them went up to the door. (38RT 10017.) Leonard let them inside, and appellant watched as Cline committed an act of prostitution on Leonard. (38RT 10017-10018.) When Leonard went into the bathroom, Cline removed Leonard's wallet from his pants and started to take the money. (38RT 10018.) Leonard came out of the bathroom and was angry that Cline was going through his wallet. (38RT 10018.) Appellant removed a ratchet from his pocket, held it in a threatening manner, and ordered Leonard to lie on the bed. (38RT 10018.) Appellant suggested to Cline that they tie up Leonard so he did not call the police after they left. They tied up Leonard and took about $140 from his wallet. (38RT 10018-10019.) Cline and appellant used the money to buy heroin. (38RT 10019.)

A San Joaquin County probation officer testified that she interviewed appellant about a month after the robbery. (36RT 9609.) Appellant told the probation officer that he had met Cline the day before the robbery. (36RT 9609.) Cline had selected the victim, and they had committed the robbery to get money to buy heroin. (36RT 9609.) At the house, Cline got Leonard to open the door, and then appellant entered. (36RT 9609.) Appellant carried a piece of pipe wrapped in a towel to simulate a gun. He placed three shotgun shells in his belt to further the impression that he was armed. (36RT 9609.) Appellant entered the house with pieces of rope in order to tie up the victim. (36RT 9609.) Appellant took about $130 to

$140 from Leonard's wallet. (36RT 9610.) Appellant and Cline used the money to purchase heroin and then went to a motel where they injected it. (36RT 9610.) During the interview, appellant expressed remorse for the robbery, and he told the probation officer that he had apologized to Leonard before leaving. (36RT 9612-9613.)

The prosecution also admitted evidence that appellant had been convicted of residential robbery in violation of section 213.5 for his part in the September 3, 1985, robbery. (36RT 9764.)

During the discussion on jury instructions, the defense requested that the court instruct the jury with CALJIC No. 2.72 and accomplice instructions (CALJIC Nos. 3.10, 3.11, 3.12, 3.16, 3.18) in light of appellant's prior statements and Cline's testimony and prior statements regarding the 1985 residential robbery. (39RT 10393-10397, 10401; 23CT 6398, 6401-6405.) The court denied appellant's request to instruct the jury with CALJIC No. 2.72, and the court's failure to give this instruction is not an issue on appeal. (39RT 10404.) As to the accomplice instructions, the court tentatively ruled that CALJIC No. 3.10 (definition of accomplice), CALJIC No. 3.11 (testimony of accomplice must be corroborated),[27] and CALJIC No. 3.12 (sufficiency of evidence to corroborate an accomplice) would not be given. (39RT 10401, 10404; 23CT 6401-6403.) But it ruled that CALJIC No. 3.16 (witness accomplice as matter of law) would be given as modified to apply to Cline (39RT 10401-10402, 10404; 23CT 6404), and CALJIC No. 3.18 (testimony of accomplice to be viewed with

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[27] As requested, CALJIC No. 3.11 provided, "You cannot find the defendant guilty based upon the testimony of an accomplice unless that testimony is corroborated by other evidence that tends to connect such defendant with the commission of the offense. [¶] [Testimony of an accomplice includes any out-of-court statement purportedly made by an accomplice received for the purpose that what the accomplice stated out-of-court was true]." (23CT 6402.)

caution) would be given consistent with the 1999 revision (39RT 10402; 24CT 6405-6406).

The court explained that Cline was "without question" an accomplice in the 1985 robbery. (39RT 10402.) However, relying on *People v. Williams* (1997) 16 Cal.4th 153 at pages 275 to 276 and *People v. Easley* (1988) 46 Cal.3d 712 at pages 733 to 734, the court explained that an instruction on corroboration was unnecessary because appellant's "criminal liability or responsibility" had already been adjudicated, but it would instruct the jury that accomplice testimony should be viewed with caution because the testimony related to "the circumstances of the offense." (39RT 10402-10403, 10404.) The court elaborated that the jury should be instructed that Cline's testimony should be viewed with caution because Cline's prior inconsistent statements "were introduced for the truth and those statements related not to the liability of Mr. Grimes for that '85 burglary robbery, specifically, but they were introduced for the purpose of showing the extent and nature of his involvement," which had "not been adjudicated." (39RT 10403; see also 39RT 10404.)

The court proposed that trial counsel modify CALJIC No. 3.16 to state, "The witness, Anna Cline, was an accomplice as a matter of law as to the 1985 [robbery]." (39RT 10404.) Trial counsel reiterated the court's modification and volunteered to prepare the instruction. (39RT 10405.) The court also instructed trial counsel to replace CALJIC No. 3.18, that an accomplice's testimony should be viewed with caution, with the 1999 revision. (39RT 10406.) Trial counsel prepared the instructions as stated by the court. (40RT 10681.)

The jurors were instructed, "In the crime of residential robbery committed in 1985, the witness Anna Cline was an accomplice as a matter of law." (41RT 10800; 4SCT 69; CALJIC No. 3.16 [mod.].) "To the extent that an accomplice gives testimony that tends to incriminate the

defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily...disregard that testimony. You should give that testimony the weight you think it deserves, after examining it with care and caution and in the light of all the evidence in this case." (41RT 10800; 4SCT 70; CALJIC No. 3.18.) The jurors were further instructed, "Evidence that at some other time a witness made a statement or statements that are inconsistent or consistent with his or her testimony in this trial, may be considered by you not only for the purpose of testing the credibility of the witness but also as evidence of the truth of the facts as stated by the witness on that former occasion." (41RT 10796; 4SCT 50; CALJIC No. 2.13.)

2. The trial court did not err by failing to give additional accomplice instructions

Notwithstanding the court's instructions, appellant seeks more. Appellant argues that a corroboration instruction was required because Cline's extrajudicial statements related to appellant's level of involvement in the robbery, not simply the fact of his conviction. (AOB 200-205.) Specifically, appellant claims that the jury should have been instructed that Cline's extrajudicial statements made during her 1985 interview and her 1996 "pay back" interview with law enforcement that (1) it was appellant's idea to use a pipe to simulate a gun, (2) appellant struggled with Leonard after he refused to give them money, (3) appellant had wanted to hurt Leonard and take his money, (4) Cline had told appellant not to hurt Leonard, and (5) the whole thing had been appellant's idea, could not be relied upon unless corroborated. (AOB 197, citing 36RT 9705-9706; see also AOB 208, citing 36RT 9705-9706, 9714; 38RT 10014.) Respondent disagrees.

Section 1111 states, "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall

tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or circumstances thereof." Although section 1111 refers only to an accomplice's "testimony," this Court has interpreted section 1111 to apply to "an accomplice's out-of-court statements when such statements are used as substantive evidence of guilt." (*People v. Andrews* (1989) 49 Cal.3d 200, 214, citing *People v. Belton* (1979) 23 Cal.3d 516, 524-526; see also *People v. Carrington*, *supra*, 47 Cal.4th at p. 190.) This Court has observed, "In enacting section 1111, the Legislature intended to eliminate the danger of a defendant being convicted solely upon the suspect, untrustworthy and unreliable evidence coming from an accomplice, who is likely to have self-serving motives that affect his credibility. If an accomplice's testimony under oath is suspect, unreliable and untrustworthy, evidence of his prior inconsistent statements, not made under oath or in the presence of the trier of fact, must be deemed even more suspect, untrustworthy and unreliable." (*Belton*, at p. 526.) T]he general rules requiring accomplice instructions apply at the penalty phase...of a capital trial." (*People v. Williams*, *supra*, 16 Cal.4th at p. 275.)

Consistent with the above, it is well-settled that when the prosecution seeks to introduce evidence of a defendant's *unadjudicated* criminal conduct at the penalty phase, the jury should be instructed that accomplice testimony must be corroborated and viewed with caution. (*People v. Hernandez* (2003) 30 Cal.4th 835, 874.) However, this Court has recognized an exception to the statutory requirement of corroboration when the accomplice testimony relates to previously *adjudicated* criminal conduct. (*Ibid.*; *People v. Carter* (2003) 30 Cal.4th 1166, 1223.) This exception even applies when the prosecution uses accomplice testimony at the penalty phase to show that the defendant has engaged in violent conduct. (*Hernandez*, at p. 874.) The reason for this exception is obvious;

once the criminal conduct has been adjudicated, the danger of a defendant being convicted solely upon the potentially self-serving testimony of an accomplice has been eliminated.

Here, Cline's testimony and extrajudicial statements related to appellant's previously adjudicated 1985 residential robbery. This evidence was presented by the prosecution during the penalty phase to demonstrate his use or attempted use of force or violence (§ 190.3, subd. (b)), not simply the fact of his conviction. (See 4CT 612-613; 41RT 10819-10820.) Despite the purpose of its introduction, this evidence falls into the exception to the statutory requirement of corroboration, and the trial court was not required to instruct that Cline's testimony and extrajudicial statements must be corroborated and viewed with caution. (See *People v. Hernandez*, *supra*, 30 Cal.4th at p. 874.)

Even assuming, arguendo, that some corroboration was required, appellant's own statements that were introduced into evidence amply connected appellant with the 1985 residential robbery and corroborated Cline's testimony describing the "nature and extent" of his involvement. This Court has never held that every incriminating fact that an accomplice testifies to must be corroborated. (See, e.g., *People v. Davis* (2005) 36 Cal.4th 510, 543.) As this Court has explained, "It is sufficient when the evidence offered as corroborative tends to connect a defendant with the commission of the crime in such a way as reasonably may satisfy a jury that the accomplice is telling the truth. It is not necessary that the accomplice be corroborated as to every fact to which he testifies. If his testimony could be completely proven by other evidence there would be no occasion to offer him as a witness." (*People v. Trujillo* (1948) 32 Cal.2d 105, 111.) The trial court did not err by refusing to instruct the jury that Cline's extrajudicial statements incriminating appellant must be corroborated.

Next, appellant makes a cursory argument that his trial counsel was ineffective for failing to provide a revised version of CALJIC No. 3.18 that conformed with the court's ruling and advised the jury that Cline's extrajudicial statements, not just her testimony, should be viewed with caution. (AOB 200; see also AOB 199.) Even assuming, arguendo, trial counsel's preparation of the instruction was deficient, his claim should be summarily denied for failing to explain how he was prejudiced by any alleged deficiency in the preparation of the instruction. (See *Sanchez v. California* (2009) 179 Cal.App.4th 467, 490.)

In any event, even assuming the court's accomplice instructions were incomplete, appellant cannot demonstrate any prejudice. The trial court instructed the jury that Cline was an accomplice in the 1985 robbery, and accomplice testimony should be viewed with caution. (41RT 10800; 4SCT 69-70; CALJIC Nos. 3.16 & 3.18.) Neither the trial court nor parties suggested to the jury that it should treat Cline's extrajudicial statements and in-court testimony differently. (See 41RT 10820, 10870-10871, 10877-10878, 10883.) In fact, trial counsel argued to the jury that neither Cline's testimony, nor her prior statements, were credible. (41RT 10871.)

Based on the evidence presented, the jury was fully aware of the inconsistencies throughout Cline's testimony and out-of-court statements, and her motivation to minimize the extent of her involvement and shift the blame to appellant when speaking to law enforcement. For instance, when Cline was confronted with her prior statements, she testified that she did not remember telling officers that it had been appellant's idea to use a pipe to simulate gun (36RT 9590-9591, 9603-9606) or if she had told appellant not to hurt Leonard (36RT 9594). When asked if she had lied during the 1996 interview, Cline responded, "Maybe," and explained that her testimony was "the truth from what I can remember[.]" Cline stated "There was no violence, physical violence, whatsoever in the robbery that we did.

There was none proven in court and there was none when I was in the house with him. Okay? ...We went in there, I think it's for money. It was my idea, it was my date, my trick, okay? And the little details about the pipe wrapped in a towel, those little things, I know there was one, we went in there with one. The intention was to get the money. There was no rough-housing going on whatsoever. Maybe if I lied to them cops, I lied because I didn't want to be drug in here on a murder trial and I hadn't seen [appellant] in a very long time and I didn't know what kind of crap he had gotten hisself into, okay? I still don't know him, okay? I haven't seen him in 16 years, I only knew him for a couple days and I probably was scared. But I know there was no violence in that case." (36RT 9594-9595; see also 36RT 9602-9604.) On cross-examination, Cline testified that it had been her idea to rob Leonard (36RT 9600), and that she and appellant had agreed prior to committing the robbery that Leonard would not be harmed (36RT 9600-9603). Indeed, Cline described her 1996 statement to law enforcement as "pay back" for appellant rolling over on her on the robbery. (36RT 9711-9712.)

Moreover, appellant's own statements to law enforcement not only corroborated Cline's testimony that he had participated in the crime, but corroborated much of Cline's testimony and prior statements as to the "nature and extent of his involvement." Appellant told law enforcement after the robbery that Cline knew Leonard and selected him as a victim. (36RT 9609; 38RT 10017.) But appellant admitted that he had carried a piece of pipe wrapped in a towel to simulate a gun, and he had placed three shotgun shells in his belt to further the impression that he had been armed. (36RT 9609.) Appellant stated that he had entered the house with pieces of rope in order to tie up the victim. (36RT 9609.) And that he had held a ratchet in a threatening manner and ordered Leonard to lie on the bed. (38RT 10018.) He also stated that he had suggested to Cline that they tie

up Leonard so he could not call the police after they left. (38RT 10018-10019.) And he told law enforcement that he had taken money from Leonard's wallet. (36RT 9610.) Appellant's own statements demonstrate appellant's use or attempted use of force during the robbery. (See § 190.3, subd. (b).)

Appellant argues that the prosecutor "exacerbated the error" during closing argument by relying on Cline's extrajudicial statements to rebut the defense theory that appellant was a follower and a hyperactive, impulsive person with a borderline IQ. (AOB 208-209, citing 41RT 10812, 10813, 10814, 10877-10878.) The prosecutor did rely on evidence about the 1985 robbery to rebut the defense's portrayal of appellant. However, the evidence the prosecutor relied on was primarily *appellant*'s, not Cline's, statements to law enforcement.

The prosecutor relied on appellant's statements to rebut Dr. Globus's opinion that appellant was impulsive and hyperactive and urged the jury to "look at the defendant's behavior to determine his mental condition." (41RT 10812.) By way of example, the prosecutor referred to the 1985 residential robbery and argued, "The defendant chose to intimidate Mr. Leonard, the man that was referred to as the older man, over 60, because that's someone he could intimidate." (41RT 10813.) The prosecutor argued that appellant was able to plan and that he had made a "plan to wrap a pipe in a towel and to bring rope into the apartment with him." (41RT 10813.) The prosecutor stated, "[T]he defendant went there with Anna Cline, that he disguised a pipe to look like a gun. That he brought rope with him. That Mr. Leonard was tied up, that Mr. Leonard was threatened and that money was taken from Mr. Leonard. And that money was taken to go and buy drugs." (41RT 10820.) The prosecutor's argument was based on a fair and reasonable interpretation of appellant's own statements to law enforcement. (See 36RT 9609-9610; 38RT 10018-

10019.)

During rebuttal, the prosecutor again relied on appellant's own statements describing the 1985 residential robbery to show he was not a follower. The prosecutor argued, "[T]he defendant himself admitted that he wrapped a towel around a pipe to make it look like a gun. That he had placed three shotgun shells in his belt to give the impression of a gun.... That he had taken pieces of rope with himself to tie the victim up. That the defendant got money." (Compare 41RT 10877-10878, with 36RT 9609.) The only reference the prosecutor made to one of Cline's extrajudicial statements was when she argued that "the defendant threatened the victim and told her to tie the victim up." (41RT 10878.) However, the jury heard evidence that appellant had also stated that he had threatened Leonard with a ratchet and suggested they tie him up. (38RT 10018-10019.)

Based on the foregoing, there is no reasonable probability the jury would have reached a different outcome had additional accomplice instructions been given. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1131-1132 [applying *Watson* harmless-error standard in evaluating prejudice for failing to give allegedly incomplete accomplice instructions], accord *People v. Carter*, *supra*, 30 Cal.4th at p. 1223.) This is especially true here because Cline's testimony and extrajudicial statements regarding appellant's involvement in a 1985 residential robbery were only a small part of the evidence the prosecutor presented in aggravation. The jury also heard that appellant had been convicted of 10 felonies, two of which involved firearms. (36RT 9764-9765; see also 36RT 9619-9625, 9698-9700.) The jury heard Marie McCosker's testimony describing how appellant physically assaulted, threatened, and held her captive in a car while he drove approximately 35 miles. (36RT 9632-9648.) The jury heard emotional testimony from Bone's daughter and granddaughters describing how they had been affected by Bone's violent and senseless

death. (36RT 9734-9745, 9752-9758, 9760-9762.) And the prosecutor asked the jury to consider evidence presented in the guilt phase establishing appellant's involvement in Bone's murder and the nature of the brutal killing itself. (See 41RT 10809, 10817-10818.) It is inconceivable that the jury would have rendered a different penalty verdict had it been instructed that Cline's extrajudicial statements regarding this one particular crime required corroboration and should be viewed with caution.

E. The Trial Court Did Not Abuse Its Discretion or Violate Appellant's Federal Constitutional Rights by Refusing to Hold a *Phillips* Hearing Prior to Voir Dire

Appellant claims that the trial court committed prejudicial error and violated his constitutional rights to an impartial jury and the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the federal Constitution by refusing to hold an evidentiary hearing prior to voir dire on the sufficiency of the evidence to prove the unadjudicated criminal activity the prosecution was seeking to introduce in aggravation at the penalty phase pursuant to section 190.3, subdivision (b). (AOB 210-223.) Respondent disagrees. The trial court did not abuse its discretion or violate appellant's federal constitutional rights by refusing to hold an evidentiary hearing prior to voir dire on evidence the prosecutor was seeking to introduce at the penalty phase. In any event, even assuming the trial court erred, appellant has not demonstrated any prejudice.

1. Relevant facts and trial court's ruling

Prior to trial, the People filed a section 190.3 notice of aggravating evidence, which included six incidents of appellant's use or attempted use of force or violence or the express or implied threat to use force or violence within the meaning of section 190.3, subdivision (b). Five of the incidents involved unadjudicated criminal conduct. (4CT 612-614.) These incidents involved an assault and battery on Marie DeJesus Sousa (aka, Marie

McCosker) occurring on December 29, 1993, and four incidents involving the threat or implied threat to use force or violence occurring on December 22, 1995, March 7, 1996, December 30, 1996, and January 22, 1998. (4CT 613-614; 35RT 9419.)

The defense filed a motion pursuant to *People v. Phillips* (1985) 41 Cal.3d 29 for a pretrial evidentiary hearing to determine whether each of the elements of the unadjudicated criminal conduct alleged in the notice of aggravation was supported by the evidence. (4CT 704-717.) In support of his motion, the defense provided a summary of the unadjudicated criminal conduct as follows:

1. *December 29, 1993 incident:* A physical fight between Marie DeJesus Sousa [McCosker] and the defendant in front of a K-MART store. When the police officer arrived he noted a small abrasion on Sousa's [McCosker's] chin. Sousa [McCosker] stated she was struck and choked by the defendant but she wanted no action.

2. *December 22, 1995 incident:* This allegedly occurred in the Shasta County jail. The defendant and another inmate, John Parker, went into a cell together. Grunting and slapping sounds were heard. Both parties emerged from the cell with minor injuries. When questioned, Parker said, "I slipped and hit my sink."

3. *March 7, 1996 incident:* This also allegedly occurred in the Shasta County jail. A Shasta County Service Officer heard the defendant threaten some unidentified inmate, calling him a snitch and he was going to kill him when he got to his pod.

4. *December 30, 1996 incident:* This also allegedly occurred in the Shasta County jail. Another inmate, John Gavin, threatened the defendant by saying "I'm going to get you...." The defendant told a deputy that if he could he would jam a pencil into Gavin's eye. The defendant requested that this incident be reported.

5. *January 22, 1998 incident:* This also allegedly occurred in the Shasta County jail. Another inmate named J. Anderson, and the defendant made a deal to trade dinner for

> commissary. After a couple of months Anderson wanted to cancel this deal, and the defendant threatened to beat him up. Another inmate, L. McKinney, said that the defendant told several unidentified inmates that if he (Grimes) did not get out of the pod he was going to hurt someone.

(4CT 708.) The People filed a motion opposing appellant's request for a pretrial hearing on the unadjudicated criminal conduct. (4CT 784-788.)

During a hearing on motions in limine, trial counsel stated, "We also feel we're entitled to a hearing on the *Phillips* motion, the motion for a pretrial hearing regarding the unadjudicated priors that the People want to use in the second phase of the case. [¶] Now, I think our position—our position on that is that we don't care when that hearing is, except that it's before the beginning of the penalty phase, on the *Phillips* motion, your Honor." (3RT 389.) Later, trial counsel reiterated, "[W]hat I call the *Phillips* motion, the motion for request for pretrial hearing on unadjudicated crimes that may take some time. But, as I said, our request is that we have these hearings prior to any opening statement by the prosecution in the penalty phase. So whether we have this next week, the week after, or after the first phase of the trial, whatever the Court determines, is fine with us." (3RT 402.)

The trial court advised counsel that it was its "preference" to resolve all the pretrial motions, including the *Phillips* motion, prior to jury selection. (3RT 404.) Trial counsel indicated there "[m]ight be some problems on the *Phillips* motion." (3RT 404.) The court asked trial counsel to confer with the prosecutor so it could avoid litigating "lengthy motions" outside of the presence of the jury once jury selection began. The court stated, "I think it will better enable you to...pick a jury, make opening statements, et cetera, if you know as much as you can about how I have ruled, or going to rule on these things. But I understand you may have logistical problems and witness problems." (3RT 405.)

Later, during argument on whether appellant was entitled to an evidentiary hearing on the unadjudicated criminal conduct (4RT 2062-2071), the court stated it would consider the prosecution's offer of proof on the unadjudicated conduct and then determine whether an evidentiary hearing was required (4RT 2089). The court changed course from its prior announcement and stated that appellant was entitled to a determination on the issue prior to the commencement of the penalty phase because no evidence would be introduced on the unadjudicated conduct during the guilt phase. (4RT 2090.)

In response, trial counsel stated, "The only issue I want to bring up, your Honor, I can't recall the case but there was a suggestion perhaps having a ruling prior to voir dire would be appropriate because there might be some issue in voir dire that we want to address that may have some relationship to what evidence is going to be admitted." (4RT 2090.) The trial court denied trial counsel's request explaining that it did not "want to be constrained to rule on every significant piece of evidence that might come in in the second phase of the trial in order to better enable everyone to handle voir dire." (4RT 2090.) The court explained that the prosecutor's ability to prove the conduct might change between the guilt and penalty phases, and it did not want to constrain itself, or either of the parties, by ruling on the admissibility of the evidence at such an early stage of the proceedings. (4RT 2090-2091.) The court reiterated that if appellant were so moving after the conclusion of the guilt phase, it would hear an offer of proof from the prosecutor prior to opening statement in the penalty phase and then decide whether an evidentiary hearing was necessary. (4RT 2091-2092.)

Prior to filling out hardship requests and the questionnaires, the court addressed the panel of prospective jurors and, among other things, read the charges to the jury and provided a brief synopsis of the facts. (9RT 3155,

3159-3163; see also 15RT 4603-4606.) The court stated, "This case involves the death of 98-year-old Betty Bone on October 18, 1995. Ms. Bone was found by her daughter, Barbara Christensen, in their home located on Deacon Trail Road, Redding, California. The home had been ransacked and numerous items of personal property were missing, including a GMC pickup which was recovered in Shasta Lake." (9RT 3162-3163.)

As appellant states (AOB 211-212), the jurors who actually decided appellant's penalty were not asked during oral voir dire about their experience or feeling about violent crimes. (42RT 11107-11109; see also 10RT 3495-3510 [juror 27244]; 12RT 3809-3831 [juror 26909]; 13RT 4073-4091 [juror 26529]; 13RT 4112-4129 [juror 26921]; 13RT 4130-4154 [juror 27315]; 17RT 5026-5047 [juror 24777]; 17RT 5112-5131 [juror 28638]; 18RT 5299-5328 [juror 27963]; 19CT 5441-5459 [juror 27551]; 19RT 5462-5481 [juror 27541]; 19RT 5508-5528 [juror 26550]; 22RT 6163-6183 [juror 29748].) However, the juror questionnaire that was completed by all the prospective jurors included a section entitled "Crime/Violence." (See, e.g., 8CT 2296-2299.)

In this section, the prospective jurors were asked for their opinions about crime in general and the criminal justice system. (8CT 2296.) The questionnaire also included questions about whether the prospective juror or someone close to them had been affected by crime. Specifically, the questionnaire asked if the prospective juror, a family member, or close friend had been investigated, accused of, or arrested for a crime, and if so how has that affected his or her feelings about the criminal justice system. (8CT 2296-2297.) It also asked if the prospective juror, a family member, or close friend had been a victim of a violent crime, "such as assault, murder, rape, domestic violence," whether there had been a conviction, and if the experience had affected the juror's opinion about the criminal justice

system. (8CT 2297.) The questionnaire asked if the prospective juror, a family member, or close friend had been a witness in a criminal case, whether there had been a conviction, did the juror believe the outcome had been fair, and if the experience had affected the juror's opinion about the criminal justice system. (8CT 2297.) Other questions included whether the prospective juror had ever given a statement to the police about a crime, or if his experience as a witness, victim or other involvement in a criminal case had caused him to fear for his safety or the safety of his family. (8CT 2297.)

In response to this series of questions, eight jurors responded no, not applicable, or left the questions blank. (7CT 2065-2066 [juror 27244]; 7CT 2086-2087 [juror 26921]; 8CT 2107-2108 [juror 26529]; 8CT 2128-2129 [juror 28638]; 8CT 2149-2150 [juror 24777]; 8CT 2296-2297 [juror 26909]; 9CT 2403-2404 [juror 27551]; 9CT 2424-2425 [juror 27315].) Juror 29748 answered yes to only one question in the series, and she wrote that her son had been arrested on a misdemeanor charge. (8CT 2191-2192.) Juror 276550 answered no to all the questions except for the questions related to being a witness. Juror 276550 stated that she had given a statement to the police after witnessing a hit and run but she never went to court. (8CT 2361-2362.) Juror 27541 wrote that he had been arrested for possession of a controlled substance but had not been convicted. (8CT 2382-2383.) Juror 27541 was asked about his arrest on voir dire. (19RT 5477-5478.) Juror 27541 answered no to the other questions. (8CT 2382-2383.) Juror 27963 answered no to all the questions except for revealing that an uncle had been murdered about 12 years earlier in Mexico. Juror 27963 wrote that he did not know if there had been a conviction, but the crime had not affected his feelings about the criminal justice system. (8CT 2340-2341.) Juror 27963 was not asked questions about this crime during oral voir dire. (See 18RT 5299-5328.)

Prior to the close of the guilt phase, the prosecutor filed a notice of additional aggravating evidence pursuant to section 190.3. As pertinent here, the prosecutor gave notice of two additional instances of criminal activity that involved appellant's use or attempted use of force or violence. The first incident was described as occurring on May 14, 1993, in Stanislaus County. The second instance was described as occurring on or about January 21, 1991. (6CT 1213-1214.) The prosecutor later clarified that the January 21, 1991, incident had been adjudicated. (35RT 9413-9414.) The defense objected to the admission of the two incidents on the ground that they did not come within the meaning of section 190.3, subdivision (b). (35RT 9394-9397; see also 35RT 9361-9362.)

After the jury returned its verdict in the guilt phase, but prior to opening statements in the penalty phase, the prosecutor filed an offer of proof on the unadjudicated criminal conduct she was seeking to introduce in aggravation at the penalty phase. (35RT 9412; 27CT 8200-8243 [Court Exh. XXXV].) Based on the offer of proof and arguments of counsel, the court ruled that the March 7, 1996, purported threat to an unidentified inmate (35RT 9422-9432, 9451-9452; 36RT 9478-9479), the December 30, 1996, jail incident involving inmate John Gavin (35RT 9432-9435, 9452; 36RT 9527-9529), the January 22, 1998, jail incident involving inmate Lynn McKinney (35RT 9435-9448, 9465; 36RT 9469-9471, 9479-9482), and the May 14, 1993, incident involving appellant driving a car with a knife with a three-and-half inch blade under his seat (36RT 9482-9484) were inadmissible as factors in aggravation within the meaning of section 190.3, subdivision (b).

The court, however, ruled that the December 29, 1993, assault involving McCosker (35RT 9419-9420, 9465; 36RT 9471), the December 22, 1995, jail incident involving inmate John Parker (36RT 9420-9422, 9448-9451, 9471-9478, 9517-9518), the January 22, 1998, jail

incident involving inmate James Anderson (35RT 9435-9448, 9465; 36RT 9469-9471, 9479-9482), and the January 21, 1991, adjudicated offense involving appellant's suspicious behavior while in possession of a loaded firearm (35RT 9459-9465; 36RT 9484-9494, 9521-9522) were admissible within the meaning of section 190.3, subdivision (b).

Despite these ruling, the prosecutor only introduced evidence about the December 29, 1993, assault, kidnaping, and threats to Marie McCosker (see 36RT 9632-9648) and the January 21, 1991, incident involving appellant's suspicious behavior and possession of a loaded firearm (see 36RT 9698-9700).

2. The trial court did not abuse its discretion by waiting to hold a *Phillips* hearing until prior to the commencement of the penalty phase

Appellant claims that the trial court's failure to hold a *Phillips* hearing and rule on the admissibility of the prosecutor's aggravating evidence prior to jury selection unconstitutionally limited his ability to effectively exercise both cause and peremptory challenges. (See AOB 213-223.) Appellant's claim is without merit.

At the time of appellant's trial, as it does today, section 190.3, subdivision (b) provides that in determining penalty the trier of fact shall taken into account, if relevant, "The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." In *People v. Phillips*, *supra*, 41 Cal.3d 29, a plurality of this Court held "the evidence of other criminal activity introduced in the penalty phase pursuant to former section 190.3, subdivision (b), must be limited to evidence of conduct that demonstrates the commission of an actual crime, specifically the violation of a penal statute." (*Id.* at p. 72.) This Court observed "that in many cases it may be advisable for the trial court to conduct a preliminary

inquiry before the penalty phase to determine whether there is substantial evidence to prove each element of the other criminal activity [the prosecution intends to introduce in aggravation under section 190.3, subdivision (b)]. This determination, which can be routinely made based on the pretrial notice by the prosecution of the evidence it intends to introduce in aggravation (§ 190.3), should be made out of the presence and hearing of the jury. (Evid. Code, § 402.)" (*Id.* at p. 72, fn. 25; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 225.) This Court has since clarified that *Phillips* "did not *require* trial courts to conduct the hearings described in our opinion." (*People v. Boyer* (2006) 38 Cal.4th 412, 477, fn. 51, original italics.) Accordingly, "[s]uch a procedure is strictly a matter of trial court discretion." (*People v. Fauber* (1992) 2 Cal.4th 792, 849.)

For the sake of argument, even assuming appellant actually requested that the court hold a *Phillips* hearing prior to jury selection (3RT 389, 402; but see 4CT 711-712; 4RT 2090), the trial court did not abuse its discretion by waiting to hold the hearing until shortly before the penalty phase commenced. The only suggestion this Court has made is, if an evidentiary hearing is held, it should be held "*before the penalty phase*," including before the prosecutor's opening statement commences. (*People v. Phillips*, *supra*, 41 Cal.3d at p. 72, fn. 25, italics added; *People v. Frank* (1990) 51 Cal.3d 718, 727.) Consistent with these decisions, the trial court held an evidentiary hearing prior to commencement of the penalty phase. If a trial court is not even required to hold a hearing, the trial court in this case cannot be said to have abused its discretion by waiting to conduct the inquiry until later in the proceedings. Accordingly, the trial court did not abuse its discretion by holding the hearing at a time consistent with this Court's decisions. (*Phillips*, at p. 72, fn. 25; *Frank*, at p. 727.)

But even assuming, arguendo, the trial court erred, appellant cannot demonstrate any prejudice. As discussed above, the prosecutor initially

filed a notice of aggravating evidence describing five incidents of unadjudicated criminal activity that she would be seeking to admit at the penalty phase within the meaning of section 190.3, subdivision (b). (4CT 613-614.) The defense had notice of the prosecutor's intent and the facts surrounding the incidents prior to jury selection. (4CT 708.) Thus, even without a ruling by the trial court, trial counsel had knowledge prior to jury selection of evidence the prosecutor was seeking to introduce at the penalty phase that could assist him in the exercise of his cause and peremptory challenges. In addition, the defense had notice of the prosecutor's intent to introduce evidence of appellant's five felony convictions, including convictions for possession of a firearm and escape. (4CT 614.)

Moreover, the prosecutor introduced evidence of only one of the incidents that was the subject of appellant's pretrial request for a *Phillips* hearing, namely, the assault, kidnaping, and threats on Marie McCosker. (See 36RT 9632-9648.)[28] McCosker had been in a dating relationship with appellant at the time he assaulted, kidnapped, and threatened her. (36RT 9632-9633, 9644.) The question on the juror questionnaire relating to whether the prospective juror, a friend, or family member had ever been a victim of a violent crime, such as assault or domestic violence, whether there had been a conviction, and if the experience had affected the juror's opinion about the criminal justice system, was particularly relevant to

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[28] As discussed above, the prosecutor filed a notice of additional aggravating evidence prior to the commencement of the penalty phase in which she sought to introduce two additional incidents pursuant to section 190.3, subdivision (b). (6CT 1213-1214.) The court ruled that evidence regarding appellant's possession of a loaded firearm and the circumstances surrounding his possession met the criteria for admission within the meaning of section 190.3, subdivision (b). (35RT 9459-9465; 36RT 9484-9494, 9521-9522.) The prosecutor presented evidence related to appellant's possession of a loaded firearm at the penalty phase. (36RT 9698-9700.)

assessing how a prospective juror might react to McCosker's testimony. (See 8CT 2297.)

Appellant does not state what additional information he would have sought from the jurors had the court ruled on the aggravating evidence prior to jury selection, and it is unlikely he would have been permitted to make any specific inquiries. As one of appellant's trial attorney's stated in response to the prosecutor's request for a ruling on the admissibility of appellant's drug usage prior to jury selection (5RT 2338-2340), "Well, we do not voir dire on the specifics and every possible specific piece of evidence that may be presented in such a case, and I think case law is real clear about getting specific with jurors about potential penalty phase evidence to get them predisposed to thinking one way or another...." (5RT 2341.) Trial counsel's sound observation is consistent with decisions by this Court. This Court has "'said on many occasions, "[d]efendant ha[s] no right to ask specific questions that invite[] prospective jurors to prejudge the penalty issue based on a summary of the aggravating and mitigating evidence [citation], to educate the jury as to the facts of the case [citation], or to instruct the jury in matters of law [citation]." [Citations.]'" (*People v. Butler* (2009) 46 Cal.4th 847, 859, and cases cited therein; but see *People v. Solomon*, *supra*, 49 Cal.4th at p. 840 & fn. 21 [courts should not "categorically bar questions other than those appearing on the face of the charging document," and, in some instances, it may be proper to question prospective jurors about a defendant's perpetration of other "sensational" crimes].)

Finally, the relevance of the prosecutor's aggravating evidence in exercising cause and peremptory challenges is overshadowed by the facts of appellant's crimes. It is hard to believe that trial counsel's process of evaluating jurors for cause and peremptory challenges during death-qualification would somehow be changed had he known definitively

whether appellant's assault on McCosker or his threatening behavior toward other inmates would be admissible at the penalty phase. (See *People v. Solomon*, *supra*, 49 Cal.4th at p. 840 ["[G]iven what the prospective jurors knew about the case, we cannot say that evidence of defendant's prior, nonfatal sexual assaults...would cause an otherwise death-qualified juror to automatically vote for death, regardless of the mitigating evidence].)

Based on the foregoing, appellant has not demonstrated that it is reasonably probable he would have received a more favorable penalty verdict had the trial court ruled on the admissibility of the aggravating evidence prior to jury selection. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) For these same reasons, any error was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

F. Appellant Forfeited His Claim of Prosecutorial Misconduct by Failing to Make a Timely Objection At Trial; in Any Event, There Was No Misconduct

Appellant claims that the prosecutor committed prejudicial misconduct when she commented on the defense's failure to present any evidence to rebut Jonathon Howe's testimony during closing argument to the jury. (AOB 224-232.) Specifically, appellant claims that the prosecutor's comment, "They've never given you a reason to doubt his testimony" (41RT 10879-10880), was "patent misconduct" because the "only reason" the jury did not hear evidence regarding Morris's out-of-court statements that allegedly exculpated appellant and contradicted Howe's testimony was because the prosecutor successfully had it excluded. (AOB 226-227.) Respondent disagrees with appellant's complaint. Appellant forfeited his claim of prosecutorial misconduct by failing to make a timely objection and to request an admonition. Appellant's cursory assertion that his trial counsel rendered ineffective assistance for failing to

object does not revive his forfeited claim. In any event, even assuming appellant's claim is not forfeited, the prosecutor's brief remark in response to the defense's attack on Howe's credibility and its connection to lingering doubt does not constitute misconduct.

1. Relevant background

During the guilt phase, appellant sought to introduce Morris's out-of-court statements in which he identified himself as Bone's killer and exculpated appellant and Wilson in any direct involvement in her killing. As discussed in Argument II.A.1, *supra*, the trial court ruled that evidence of Morris's alleged statements to Albert Lawson, "I killed that old lady" and "I stabbed her. I grabbed her by the throat" (24RT 6796-6797, 6803), and his alleged statements to Misty that "he murdered the little old lady," "It didn't work...strangling her...so I stabbed her," and that "he killed her...she wouldn't die choking her, so I had to get a knife from the kitchen" (24RT 6798-6799, 6803) were admissible as declarations against interest. However, the court ruled that evidence of Morris's alleged statement to Lawson that appellant and Wilson had been in the house but took no part in the actual killing (24RT 6747, 6797, 6803), and his alleged statement to Misty that appellant and Wilson did not take part in the killing and his description of their reactions to the killing (24RT 6749-6750, 6798, 6803), were inadmissible because they were not specifically disserving of Morris's interests.

During the guilt phase, Howe testified[29] that he had known appellant for almost 16 years, and, at one time, they had been friends. (31RT 8379,

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[29] In connection with Howe's testimony, the jury also heard evidence about Howe's prior convictions, aliases, and his pending criminal charges and the conditions of his plea agreement, which included testifying truthfully at appellant's trial. (31RT 8383-8392, 8395-8397, 8401-8405, 8421-8427, 8438-8446, 8449-8455, 8457-8459, 8462.)

8392, 8428-8429.) Howe testified that while he and appellant were housed in the same pod at the Shasta County Jail, appellant told Howe that he had never touched Bone, his DNA could not be linked to her killing, and he had ordered Wilson and Morris to tie Bone up and kill her. (31RT 8379-8381, 8383, 8504-8508.) Howe testified that appellant had "bragged several times" about his case, and appellant had stated that he did not care he was "getting the death penalty." (31RT 8381.) Howe could not remember if appellant told him that he had "enjoyed watching" Bone killed, but appellant told him he had "enjoyed" the fact that she had died. (31RT 8382-8383.)

During the penalty phase closing argument, trial counsel discussed the credibility of Howe's testimony in the guilt phase and how it related to the concept of lingering doubt. (41RT 10865-10868.) Trial counsel did not dispute the jury's finding that appellant had acted with a reckless indifference to human life when he committed the robbery and burglary that resulted in Bone's death. (41RT 10866.) Trial counsel did, however, "take issue with Jonathan Howe." (41RT 10866.) Trial counsel explained to the jurors that if they had "lingering doubt as to some of the facts in this case or to the degree of [appellant's] participation in the crime, you can use that doubt as a mitigating factor." (41RT 10865.) Trial counsel urged the jurors to consider Howe's numerous aliases and multiple felony convictions when evaluating his guilt phase testimony. (41RT 10865-10868.)

In rebuttal, the prosecutor responded to trial counsel's attack on Howe's credibility stating,

> In looking at Mr. Howe's statement, the Defense has never been able to give you a reason that [*sic*] Mr. Howe would lie. They've never been able to give you any reason that [*sic*] he would simply make this up about the defendant. In fact, the evidence was Mr. Howe had been friends with the defendant. He never gave you any indication as to how Mr. Howe would have even known there was any kind of DNA testing going on

> for the defendant to have made these statements. When the Defense talks about lingering doubt, Jonathan Howe is not a factor in it. *They've never given you a reason to doubt his testimony.*

(41RT 10879-10880, italics added.) Trial counsel did not object to the prosecutor's comment. (41RT 10879-10880.)

2. Appellant forfeited his claim on appeal by failing to make a timely objection and to request an admonition; trial counsel did not render ineffective assistance

Appellant forfeited his claim by failing to make a timely objection and to request an admonition following the prosecutor's allegedly improper remark. "'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant [requested] an assignment of misconduct and [also] requested that the jury be admonished to disregard the impropriety.'" (*People v. Ayala* (2000) 23 Cal.4th 225, 284, quoting *People v. Ochoa* (1998) 19 Cal.4th 353, 427.) "'[O]therwise the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 753.)

Here, appellant neither objected to the prosecutor's remark nor did he request an admonition from the trial court. (41RT 10879-10880.) Instead, appellant states generally that comments by prosecutors have great influence over a jury and an admonition would not have cured the harm. (AOB 230-231.) Respondent disagrees. In most instances a jury will be presumed to have followed an admonition to disregard improper comment because "'[i]t is only in the exceptional case that "the improper subject matter is of such a character that its effect...cannot be removed by the court's admonition." [Citation.]'" (*People v. Pitts* (1990) 223 Cal.App.3d 606, 692.) Appellant has not demonstrated that the prosecutor's brief

remark was that "exceptional case" in which the jury would have been unable to follow the court's admonition and disregard the prosecutor's comment. Accordingly, appellant's failure to make a timely and specific objection and to request an admonition forfeits his claim on appeal.

To avoid forfeiture, appellant claims that his trial counsel rendered ineffective assistance for failing to object. (AOB 231-232.) As previously discussed, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes both that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to the defendant would have resulted. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 668, 687-688, 692-694.) On appeal, appellant argues, "If an admonition could somehow have cured the harm in this case, there could have been no tactical reason not to object and request an admonition." (AOB 232.)

Appellant's summarily asserted claim of ineffective assistance of counsel does not revive his forfeited claim. As this Court has observed, "a defendant cannot automatically transform a forfeited claim into a cognizable one merely by asserting ineffective assistance of counsel." (*People v. Thompson* (2010) 49 Cal.4th 79, 126, fn. 16.)

In any event, a trial counsel's failure to object "'rarely constitutes constitutionally ineffective legal representation.'" (*People v. Huggins* (2006) 38 Cal.4th 175, 252.) This is "because the record before [the reviewing court] does not eliminate the possibility that counsel's decision not to object 'resulted from an informed tactical choice within the range of reasonable competence.'" (*People v. Jones* (1997) 15 Cal.4th 119, 182, quoting *People v. Pope* (1979) 23 Cal.3d 412, 425.)

Appellant has not eliminated the possibility that trial counsel's decision not to object was within the range of reasonable competence. (See

People v. Jones, *supra*, 15 Cal.4th at p. 182; see also *People v. Lewis* (2001) 25 Cal.4th 610, 661.) Howe was a controversial witness from the defense's perspective, and the prosecutor's allegedly improper remark was brief and made in an otherwise unobjectionable part of her argument. (See 41RT 10879-10880.) Based on this record, trial counsel could have reasonably decided not to highlight the prosecutor's comment, and Howe's prior testimony, by interposing an objection.

Appellant also cannot demonstrate any prejudice. The trial court instructed the jury that it must base its verdict on the evidence presented at trial (4SCT 6, 9; CALJIC Nos. 1.03, 8.84.1), that statements made by the attorneys are not evidence (4SCT 8; CALJIC No. 1.02), and the parties are not required to call as witnesses "all persons...who may appear to have some knowledge of these events" (4SCT 13; CALJIC No. 2.11). Juries are presumed to understand and follow the court's instructions. (*People v. Mills*, *supra*, 48 Cal.4th at p. 200.) Moreover, it is unlikely the jurors would have focused on this remark when deliberating penalty given that they would have already assessed and considered Howe's testimony during the guilt phase deliberations. Based on the foregoing, it is not reasonably probable that appellant would have received a more favorable outcome had trial counsel objected and requested an admonition.

In sum, appellant forfeited his claim on appeal because he failed to object at trial and to request an admonition, and he has failed to show that his trial counsel was ineffective.

3. In any event, there was no misconduct

Even assuming, arguendo, that appellant did not forfeit his claim of misconduct, it is meritless. This Court has explained:

> "The applicable federal and state standards regarding prosecutorial misconduct are well established. '"A prosecutor's ...intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the

> trial with such unfairness as to make the conviction a denial of due process.'"' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury'"' [Citation.] ... Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion."

(*People v. Ochoa*, *supra*, 19 Cal.4th at p. 427, quoting *People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Prosecutors may comment on the defense's failure to call logical witnesses or present evidence to rebut the People's case. (*People v. Stevens* (2007) 41 Cal.4th 182, 210; *People v. Lewis*, *supra*, 25 Cal.4th at p. 670.) But a prosecutor "may not assume or state facts not in evidence [citation] or mischaracterize the evidence. [Citation.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 133.) Nor may a prosecutor "under the guise of argument, assert as factual matters excluded from evidence because inadmissible." (*People v. Davenport* (1985) 41 Cal.3d 247, 288.) However, "[p]rosecutors have wide latitude to discuss and draw inferences from the evidence at trial," and "[w]hether the inferences the prosecutor draws are reasonable is for the jury to decide." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

On appeal, appellant argues that the prosecutor's comment, "They've never given you a reason to doubt his testimony" (41RT 10879-10880), was an improper comment on evidence that had been excluded by the court. Specifically, appellant argues that the prosecutor's remark was improper because the court had excluded evidence that would have rebutted Howe's testimony, namely, Morris's alleged out-of-court statements to Lawson and Misty regarding appellant and Wilson's lack of involvement in the actual killing of Bone and their reactions to Morris's conduct. (AOB 224-227.)

The prosecutor's challenged remark was made in response to the defense's attack on Howe's credibility based on his aliases and criminal record, and counsel's plea to the jury to consider lingering doubt as a mitigating factor when deciding penalty. (41RT 10865-10868.) The prosecutor's comment did not explicitly or implicitly refer to the absence of evidence to contradict the content of Howe's testimony. Instead, the prosecutor's allegedly improper remark was part of her focused response to trial counsel's attack on Howe's credibility and the lack of evidence demonstrating a motivation for Howe to lie. The jury would have understood the prosecutor to be commenting on the defense's failure to explain why Howe, a person who at one time was appellant's friend, would fabricate statements made by appellant and then testify about them in court. The prosecutor's argument was based on appropriate evidentiary rulings by the trial court, and was not misconduct. (*People v. Lawley*, *supra*, 27 Cal.4th at p. 156.) Given the context in which the remark was made, there is no reasonable likelihood the jurors would have interpreted the prosecutor's remark to be a reference to a lack of evidence to contradict the content of Howe's testimony.

Consequently, appellant has not demonstrated that the prosecutor's brief remark during argument to the jury was "so egregious" as to render the trial fundamentally unfair, or that the prosecutor used "deceptive or reprehensible methods to attempt to persuade" the jury. (See *People v. Ochoa*, *supra*, 19 Cal.4th at p. 427.) Accordingly, appellant has not established that any misconduct occurred under either the federal or state standard.

4. Even assuming the prosecutor's comment was misconduct, appellant has not demonstrated any prejudice

Even assuming, arguendo, that the prosecutor's comment was misconduct based on an improper reference to excluded evidence, appellant has not demonstrated any prejudice under either the federal or state harmless-error standards. (See *Chapman v. California*, *supra*, 386 U.S. at p. 25; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) As discussed above, the comment was brief, and the jury was instructed that it must base its verdict on the evidence presented at trial (4SCT 6, 9; CALJIC Nos. 1.03, 8.84.1), that statements made by the attorneys are not evidence (4SCT 8; CALJIC No. 1.02), and the parties are not required to call as witnesses "all persons...who may appear to have some knowledge of these events" (4SCT 13; CALJIC No. 2.11).

Furthermore, the jury had already found appellant guilty of murder with special circumstances prior to the prosecutor making the remark. In doing so, the jurors necessarily found that appellant either aided and abetted Bone's murder with the intent to kill or acted with reckless indifference to life when he aided and abetted Wilson and Morris in the commission of the robbery or burglary that resulted in Bone's death. (See 6CT 1259.) Howe's guilt-phase testimony supported the prosecution's theory that appellant acted with an intent to kill, and the jurors would have necessarily determined during the guilt phase whether to credit Howe's testimony and what role appellant played in Bone's murder. Lingering doubt was only a very small part of the defense's mitigation case. And its application to this case was even more limited given that appellant had admitted his participation in the robbery/burglary that resulted in Bone's murder (see 27CT 8129-8134, 8141-8158), the defense had conceded appellant was guilty of first degree murder under the theory of felony murder (25RT

6918-6919; 35RT 9237-9239), and trial counsel told the jury during his penalty phase closing argument that he did not "dispute" the jury's finding that appellant had acted with a reckless indifference to human life when he aided and abetted in the robbery/burglary that resulted in Bone's death (41RT 10866). Instead, the defense's mitigation evidence focused largely on factors relating to appellant's mental and emotional development, his diagnosis of organic brain damage, and his positive contributions to others. (See Statement of Facts, *supra*.)

Given the brief and innocuous nature of the remark, the context in which it was made, appellant's admissions and the defense's concessions, the focus of the mitigation case, and the strength of the aggravating case, appellant has not demonstrated any prejudice under either the state or federal harmless-error standards even if this Court were to find that the prosecutor committed misconduct.

G. The Trial Court Did Not Abuse Its Discretion by Discharging Juror 27417 for Misconduct or by Finding That Juror 24777 Did Not Commit Misconduct

Appellant claims that two jurors, juror 27417 and juror 24777, committed "almost identical conduct" by speaking to nonjurors (AOB 23), but the trial court came to opposite and erroneous findings as to each juror. Specifically, juror 27417, whose conduct was discovered near the beginning of the penalty phase deliberations, was found to have committed misconduct and was discharged from the jury. (See AOB 234-244.) But juror 24777, whose conduct was discovered after the penalty verdict, was found not to have committed misconduct and the court denied appellant's motion for new trial. (See AOB 235, 244-247.) Appellant claims that the trial court abused its discretion and violated his federal constitutional rights to a fair jury trial by discharging juror 27417 and for denying his motion for a mistrial. (AOB 248-255.) Appellant further claims that the trial court

violated state law and his federal constitutional rights by finding that juror 24777 did not commit misconduct and denying his motion for a new penalty trial. (AOB 256-259.) Respondent disagrees.

1. Applicable law

At the time of appellant's trial, section 1089 stated in pertinent part, "If at any time, whether before or after the final submission of the case to the jury, a juror...upon other good cause shown to the court is found to be unable to perform his duty,...the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors." "The substitution of a juror for good cause pursuant to section 1089, even after deliberations have commenced, '"does not offend constitutional proscriptions."'" (*People v. Wilson*, *supra*, 44 Cal.4th at pp. 820-821.)

"Jurors are prohibited by law from discussing the case until all the evidence has been presented, the trial court instructs the jury, and the jury has retired to deliberate." (*People v. Wilson*, *supra*, 44 Cal.4th at p. 838; see also *People v. Polk* (2010) 190 Cal.App.4th 1183, 1201.) By statute, trial courts are required to instruct jurors generally about their basic functions, including "admonitions that the jurors shall not converse among themselves, or with anyone else, on any subject connected with the trial.'" (§ 1122, subd. (a); see also *Wilson*, at p. 838.) Appellant's jury was so instructed. (See, e.g., 23RT 6562; 25RT 6909; 26RT 7167; 27RT 7419, 7495; 28RT 7779; 29RT 8054; 35RT 9161; 5CT 1096-1098 [CALJIC No. 0.50]; 6CT 1220 [CALJIC No. 1.03].) "Violation of this duty, in the form of discussing the case with a *nonjuror*, is serious misconduct." (*Wilson*, at p. 838, original italics.) "'[A] judge may reasonably conclude that a juror who was violated instructions to refrain from discussing the case or reading newspaper accounts of the trial cannot be counted on to

follow instructions in the future.'" (*People v. Williams* (2001) 25 Cal.4th 441, 449, quoting *People v. Daniels* (1991) 52 Cal.3d 815, 865.)

"The disapproval of juror conversations with nonjurors derives largely from the risk the juror will gain information about the case that was not presented at trial." (*People v. Polk*, *supra*, 190 Cal.App.4th at p. 1201.) "Prohibited juror conversations that result in the communication of extrinsic information are...regarded as presumptively prejudicial." (*Ibid.*) But "where the juror conversations involve peripheral matters, rather than the issues to be resolved at trial, they are generally regarded as non-prejudicial." (*Id.* at pp. 1201-1202.) "When determining whether communications are prejudicial, the court must consider the '"'nature and seriousness'"' of the misconduct, particularly its connection with evidence extrinsic to the trial." (*Id.* at p. 1202.) Whether the issue of juror misconduct arises before or after a verdict has been rendered, the same rule applies: "Trivial violations that do not prejudice the parties do not require removal of a sitting juror" or reversal of the judgment. (*People v. Wilson*, *supra*, 44 Cal.4th at p. 839.)

This Court has "previously indicated that a trial court's decision to remove a juror pursuant to section 1089 is reviewed on appeal for abuse of discretion [citation]," but this Court has since made clear that "'the more stringent demonstrable reality standard is to be applied in review of juror removal cases. That heightened standard more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury.'" (*People v. Wilson*, *supra*, 44 Cal.4th at p. 821.) "This standard involves 'a more comprehensive and less deferential review' than simply determining whether any substantial evidence in the record supports the trial court's decision. [Citation.] It must appear 'that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was established.'

[Citation.] However, in applying the demonstrable reality test, [a reviewing court] do[es] not reweigh the evidence. [Citation.] The inquiry is whether 'the trial court's conclusion is manifestly supported by the evidence on which the court actually relied.' [Citation.]" (*People v. Lomax* (2010) 49 Cal.4th 530, 589-590, original italics.)

This Court has recognized that trial courts are "frequently confronted" with conflicting evidence when addressing allegations of juror misconduct. (*People v. Lomax*, *supra*, 49 Cal.4th at p. 590.) This Court has explained, "'Often, the identified juror will deny it and other [percipient witnesses] will testify to examples of how he or she has revealed it.' [Citation.] In such circumstances, the trial court must weigh the credibility of those testifying and draw upon its own observations of the [juror and witnesses]...." (*Ibid.*) On appeal, a reviewing court must "defer to factual determinations based on these assessments. [Citation.]" (*Ibid.*)

When reviewing the trial court's denial of a motion for new trial based on juror misconduct, this Court makes an independent review on the issue of prejudice but must """accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence."""" (*People v. Gamache*, *supra*, 48 Cal.4th at p. 396; *People v. Polk*, *supra*, 190 Cal.App.4th at p. 1202.) "[W]hether an individual verdict must be overturned for jury misconduct or irregularity is resolved by reference to the substantial likelihood test, an objective standard. [Citations.] Any presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant. [Citations.]" (*People v. Harris* (2008) 43 Cal.4th 1269, 1303, original italics, internal citations omitted.)

2. Discharge of juror 27417 for misconduct

a. Relevant facts and trial court's rulings

At the close of the first day of penalty deliberations, the court received a note from juror 27417. (6CT 1427; 41RT 10900.) The note stated, "I have a disturbing issue I need to talk to you about before I can continue with deliberations." (28CT 8266 [Ct. Exh. LII]; 41RT 10900.) The court estimated that at the time the note was received, the jurors had only deliberated for about 20 or 30 minutes. (41RT 10901.)

The next morning, juror 27417 returned to court and gave the court and counsel a letter he had written at home the night before. (6CT 1427 [Ct. Exh. LIII; 41RT 10903, 10940-10941.) The letter listed "a few concerns" the juror wanted to discuss before continuing deliberations. (28CT 8267.) The letter stated, "In the deliberations for the first phase of the trial I had reasonable doubt that the special circumstance of Gary having an intent to kill was true." (28CT 8267.) Juror 27417 stated that he did not consider the potential sentencing options when he "reluctantly agreed" that appellant had acted with a reckless indifference to human life, and the special circumstance was true. (28CT 8267.) Juror 27417 wrote that he had been uncertain as to the meaning of "reckless indifference," and he thought it was "very unfair" that the "lightest" penalty option available to him was life without possibility of parole based on such a "subjectively defined phrase." (28CT 8267.) Juror 27417 wrote, "[A]s the penalty phase unfolded" and he learned more about appellant's "character," he became "more convinced" that the special circumstance may not be true. (28CT 8267.) Juror 27417 wrote that he "accept[s]" that appellant is guilty of first degree murder, but he is "finding it very difficult to accept, with good conscience, either sentence set before [him]." (28CT 8267.) The letter closed, "I do not believe the crime he committed is deserving of such a

severe punishment." (28CT 8267.)

After the court and counsel had reviewed and discussed juror 27417's letter (41RT 10903-10919), the court called the jurors into court and advised them that they were not to continue with deliberations until they were instructed further (41RT 10919-10920). Outside of the presence of the other jurors, the court questioned juror 27417 regarding his letter. (See 41RT 10940.) The court asked juror 27417 to read two jury instructions, CALJIC Nos. 17.40[30] and 8.88, which related to the concerns the juror had expressed in his letter. (41RT 10941-10942; see also 41RT 10934-10935.)

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[30] As given, CALJIC No. 17.40, provided: "The People and the defendant are entitled to the individual opinion of each juror. [¶] Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with other jurors. [¶] Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision. [¶] Do not decide any issue in this case by the flip of a coin, or by any other chance determination." (4SCT 45.)

As given, CALJIC No. 8.88, provided: "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant. [¶] After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [¶] An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty. [¶] The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or

(continued...)

After the juror read the instructions, he indicated in response to the court's questions that he understood the two instructions to mean that it was his duty as a juror to deliberate and determine whether appellant should receive death or life without possibility of parole, and he stated that he was willing and able to deliberate with his fellow jurors to make that decision despite the concerns raised in his letter. (41RT 10943.) Juror 27417 also answered affirmatively that he believed he would be able to follow the law and all the instructions given to him. (41RT 10943-10944.)

After a discussion between the court and counsel, and over the defense's objection, the court conducted a further inquiry of juror 27417 regarding the specific concerns he had expressed in his letter. (41RT 10944-10949.) Juror 27417 explained that he had written the letter because he "wanted the chance to express what I was thinking in case there was anything the defense could use it for, but apparently there's not, so I am willing to go along." (41RT 10950.) Juror 27417 continued, "I just felt like I couldn't proceed until I had expressed to you all that—I hate to say this, but the whole process seemed unfair to Gary." (41RT 10950.) Juror

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(...continued)
sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. [¶] You shall now retire to deliberate on the penalty. The foreperson previously selected may preside over your deliberations or you may choose a new foreperson. In order to make a determination as to penalty, all twelve jurors must agree. [¶] Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom." (4SCT 46-47.)

27417 explained that he realized there were probably "good reasons" why the trial was divided into two phases, but he felt like he had not "seen the whole picture." (41RT 10950.) He also stated that he did not think he had had a "good definition" of "reckless indifference." (41RT 10950.) Juror 27417 reiterated, "[T]hose two things just are extremely disturbing to me that I am being forced now to make a decision that I don't feel is fair. I am willing to do that, but I just felt like I needed to express that." (41RT 10950-10951.)

Outside the presence of juror 27417, the court discussed the juror's answers with counsel and concluded that juror 27417 should continue to deliberate with the other jurors. (41RT 10951.)

At the next court session, which was held on a Monday, the prosecutor announced that she had been told by an employee of the district attorney's office that juror 27417 "had been discussing [with nonjurors] his unwillingness to impose certain penalties and that he was having trouble deliberating with members of the jury." (42RT 10954; see also 42RT 10953-10955.) The prosecutor asked the court to allow the district attorney's office to contact juror 27417's co-workers to investigate the matter. (42RT 10955.)

After discussing how an investigation would proceed, the court ordered that a hearing be held where juror 27417's co-workers could be questioned about the circumstances and content of any of juror 27417's communications about the case and, if necessary, juror 27417 would also be questioned. (42RT 10955-10974.) In so ruling, the court noted its concern that juror 27417 had stated that he was able and willing to follow the court's instructions, but the court observed that it could no longer rely on juror 27417's assurances if the allegations were proven true. (42RT 10972; see also 42RT 10968-10969.) At the defense's request, the prosecutor provided the names of the two deputy district attorneys, Molly

Bigelow and Tim Kam, who had received information about juror 27417. (42RT 10979-10980.)

After a break in the proceedings, trial counsel advised the court that he had spoken to Bigelow and Kam and he believed they had information relevant to the court's inquiry and asked that they be called as witnesses. (42RT 10985-10986.) Thereafter, both Bigelow and Kam testified.

Bigelow testified that at about 2:30 p.m., the previous Friday, she had heard from a co-worker, Howard Welch, that the prosecutor on appellant's case, Donna Daly, was "having a problem with one of her jurors" who was an "engineer" at CH-2M Hill. (42RT 10988; see also 42RT 10993-10994.) Bigelow's brother-in-law, Mike Urkov ("Urkov"), was an employee at CH-2M Hill. (42RT 10987-10988.) Bigelow called her sister, Kelly Urkov, to see if she knew the name of the juror who worked at CH-2M Hill, but Kelly did not know. (42RT 10989, 10994-10995.) In response to a question, Bigelow "briefly" told Kelly what she knew about the "problem" with a juror on appellant's case. (42RT 10989; see also 42RT 10995-10996.) Either later that day or the following day, Kelly told Bigelow that her husband "knew that there was a problem" with a juror. (42RT 10989; see also 42RT 10996-10997.) Bigelow thought this was "odd" because Urkov had been out of town when the issue about the juror in appellant's case had been brought to the court's attention. (42RT 10989-10990.)

On Saturday, Bigelow attended the office Christmas party. (42RT 10998.) Tim Kam mentioned that he had attended a dinner at the house of Joel Kimmelshue, who also worked at CH-2M Hill. (42RT 10998.) Comments that Kam told Bigelow that Kimmelshue had made strengthened Bigelow's opinion that a juror in appellant's case had been talking to his co-workers. (42RT 10998; see also 42RT 11004-11005.) Bigelow told her concerns to Jerry Benito. (42RT 10998.)

On Monday morning, Bigelow told District Attorney Scott that she thought a juror on appellant's case who worked at CH-2M Hill might be talking to co-workers. (42RT 10990; see also 42RT 10997-10998.) Scott asked Bigelow to call her brother-in-law to confirm her understanding of what was going on. (42RT 10990; see also 42RT 10988.) Bigelow called Urkov and asked him if he had heard anything about the deliberations in appellant's case. (42RT 10990.) Initially, Urkov sounded "a little defensive" and denied he had heard anything. (42RT 10990.) When Bigelow told Urkov what Kelly had told her, Urkov stated that he had heard from "Dan" that a juror was having "some problems in the deliberations." (42RT 10990-10991.) It was clear to Bigelow, however, that Urkov did not want to discuss the matter. (42RT 10991-10992.)

Kam testified that his neighbor, Joel Kimmelshue worked at CH-2M Hill, and he had been at Kimmelshue's apartment the previous week having dinner. (42RT 11000-11001.) Bigelow's sister, Kelly, was also at the dinner. (42RT 11001.) Kimmelshue asked Kam how appellant's trial was going, and Kam told him that the jury was in deliberations. (42RT 11000-11001, 11003.) Kimmelshue stated that one of his co-workers was a juror on appellant's case, and that the juror had told him that he had "held up" the other jurors during the guilt phase deliberations. (42RT 11002; see also 42RT 11003-11004, 11007.) Kam responded generally that given the guilty verdict, the district attorney's office was hopeful that the jurors would return a death sentence. (42RT 11002.)

After hearing the testimony from Bigelow and Kam, the court announced, over the defense's objection, that it would go forward with a hearing into the matter, and the jury would continue to deliberate pending the outcome of the hearing. (42RT 11009-11021.)

After a break in the proceedings, the court heard testimony from Joel Kimmelshue and Mike Urkov. (See 42RT 11022-11023.) Kimmelshue

testified that he and juror 27417 worked in the same department at CH-2M Hill, and Kimmelshue had known the juror for about two years. (42RT 11024-11025.) Kimmelshue estimated that he had talked to juror 27417 two or three times about the case. (42RT 11025.) The first instance occurred about a month-and-a-half or two months earlier while they were at work. (42RT 11025.) Kimmelshue had received a jury summons and had been "curious" about the process. (42RT 11027.) The content of the conversation with juror 27417 was "very general in form," and focused on juror 27417's general experience as a juror. (42RT 11026.) To the best of Kimmelshue's recollection, juror 27417 did not talk about his views about the case, the evidence presented, or the nature of the charges and penalty. (42RT 11027-11028.)

The next conversation occurred at work within the last month. (42RT 11028.) Kimmelshue and juror 27417 had a "general discussion" about the trial. (42RT 11029.) Kimmelshue recalled juror 27417 telling him that the trial was at the stage where "they were going to decide about...some wording determining how the conviction would go," and juror 27417 had mentioned "two options." (42RT 11029.) Kimmelshue could not recall the "exact words," but there was some "interesting language...like four words...." (42RT 11029.) The court asked Kimmelshue if the words they had discussed were "reckless indifference to human life," and Kimmelshue said they were. (42RT 11030.) Juror 27417 told Kimmelshue that "he felt he needed to research what those words meant more," and he mentioned looking it up in the dictionary. (42RT 11030; see also 42RT 11030-11031, 11035-11036, 11041.) Juror 27417 told Kimmelshue that he was "one of the last people to come around to those terms." (42RT 11036, 11038-11041.) Juror 27417 did not ask Kimmelshue, and Kimmelshue did not offer, his opinion as to what the phrase meant. (42RT 11031.)

The final conversation between juror 27417 and Kimmelshue occurred at work within the previous week. (42RT 11031-11032.) Kimmelshue asked juror 27417 how the trial was going, and juror 27417 stated that they were deliberating whether the defendant would receive death or life without possibility of parole, and he was undecided at that time. (42RT 11032, 11036-11037.)

Kimmelshue confirmed that he had had dinner with Kam and some other people the previous week, and he had told Kam that he worked with a person on appellant's jury. (42RT 11042.) Kimmelshue thought he had told Kam that the juror might have been having some difficulty deciding penalty. (42RT 11042-11044.) Kimmelshue knew juror 27417 had discussed the trial with Mike Urkov, but he did not know if the juror had discussed it with anyone else. (42RT 11034.)

Mike Urkov testified that he and juror 27417 worked together at CH-2M Hill. (42RT 11045-11046.) Urkov knew that juror 27417 was on appellant's jury. (42RT 11046.) Urkov had talked to juror 27417 during jury selection and then "three or so times" after he was selected as a juror. (42RT 11048.)

Juror 27417 told Urkov that the "first phase" of the trial was over and it was going into a "second phase." (42RT 11048.) Juror 27417 stated that he was "concerned about the...second phase and what that would entail." (42RT 11048.) Juror 27417 told Urkov that he "didn't fully understand the consequences of the first phase and how they related to the second phase." (42RT 11048-11049.) Juror 27417 said "something to the effect of not being able to revisit the first decision and somehow the first decision put them on a path that there was only a couple of decisions that could be made from there." (42RT 11052.) Juror 27417 told Urkov that the term "reckless indifference to life" had been the "key component" from "phase one to phase two." (42RT 11057.) Juror 27417 told Urkov that "it was a

term he wasn't familiar with," and Urkov thought the juror had said that he had asked the court for clarification. (42RT 11057-11058.) Juror 27417 "express[ed] some regret that he didn't fully understand the implications of the first phase as they related to the second phase." (42RT 11052.) Urkov explained that the "substance" of juror 27417's comments to him was that "he was concerned and that it was difficult and that he was really actively reviewing the case, conscientiously." (42RT 11049; see also 42RT 11050.)

Juror 27417 described the facts of the case to Urkov as, "A woman, elderly woman, was beaten and killed by two other people and the defendant was present." (42RT 11053.) Urkov did not recall when juror 27417 had told him this description. (42RT 11053-11054.)

After the evidence had been received, trial counsel acknowledged that juror 27417 had committed "at least a technical violation" of the court's admonition not to discuss the case, but he argued that the violation did not constitute "serious misconduct" to warrant his removal as a juror. In the alternative, trial counsel asked the court to question juror 27417 before making its final decision. (42RT 11061-11063.) The court agreed that he would talk to juror 27417 before making its final ruling, but it was "not even a close call" as to whether the juror had committed misconduct based on the testimony from Kimmelshue and Urkov. (42RT 11064.) The court stated, "[T]his is very clear and it is serious and it is willful misconduct. It's not inadvertent,...and it's not speculation. We have very specifics, that he told two people. It's very—a demonstrable reality, as the cases discuss it." (42RT 11065; see also 42RT 11067.)

Thereafter, the court questioned juror 27417 outside the presence of the other jurors. (42RT 11071.) Juror 27417 admitted that he had had more than one conversation with Kimmelshue about appellant's trial, but he could not recall if Kimmelshue had given him any information in return. (42RT 11073.) Juror 27417 recalled talking to Urkov about the case two

times. (42RT 11074.) Juror 27417 told the court that Kimmelshue and Urkov were two of a "handful of people in the office" he had told "what's going on." (42RT 11074.)

Juror 27417 remembered telling someone that "the phrase, 'reckless indifference,' seemed to be the pivotal phrase that we were focusing in on. And that the meaning of it was going to determine whether this special circumstances were true or not." (42RT 11076.) Juror 27417 seemed surprised to learn from the court that such a conversation qualified as "discussing" the case, which the jurors had been admonished not to do. (41RT 11076.) Juror 27417 did remember telling Kimmelshue or Urkov, or both, that he had wished he had had a better understanding of the phrase "reckless indifference to life," and it might be a good question to ask the court. (42RT 11082-11083.)

Juror 27417 denied that any conversation he had with Kimmelshue or Urkov had affected his ability to continue as a juror in appellant's case. (42RT 11077.) When asked if he had discussed his thoughts about the deliberation process with Kimmelshue or Urkov, juror 27417 stated that he could not remember "what I told specifically to who," and it may have been "someone else besides those two," but he remembered expressing his feeling that some of the jurors were not giving "Gary the benefit of the doubt" and they had "taken the story painted by the prosecution and believed it without giving a fair chance to the defense's story." (42RT 11077-11078.) Juror 27417 stated that he had shared his "frustrations" about his belief that "some people sort of had made up their mind, that they believed a certain story and weren't willing to look at the whole picture." (42RT 11078.) Juror 27417 told the court that he had expressed those feelings to his wife, but "[b]eyond that, I don't remember who." (42RT 11078.)

Juror 27417 did not recall if he had talked to Kimmelshue or Urkov about the guilt phase deliberations or the jury's guilty verdict, but he "could have." (42RT 11079.) Juror 27417 also did not recall if he had spoken to Kimmelshue or Urkov about the implications of the guilty verdict to the penalty phase, but he "could have." (42RT 11079-11080.)

Juror 27417 denied that any conversation he had had with anyone about the case had influenced his way of thinking about the case because if anyone had even started to respond in a substantive way he would have stopped them. (42RT 11080-11081; see also 42RT 11074.)

Outside juror 27417's presence, trial counsel argued that there was no evidence that juror 27417's conversations with nonjurors had had any effect on his ability to deliberate and he should not be disqualified from the jury. In the alternative, trial counsel argued that to the extent juror 27417 had committed prejudicial misconduct, a mistrial should be granted. (42RT 11083-11084.) The court disagreed stating, "[T]his is not a close case." (42RT 11084.) The court found that juror 27417 had "repeatedly and admittedly discussed this case with outsiders and that he was aware of the court's admonition when he did it." (42RT 11084.) The court observed that juror 27417 had discussed the facts of the case, the applicable law, and the deliberative process with nonjurors in violation of its admonition. (42RT 11085-11086.) The court ruled that there was "good cause" to discharge juror 27417 pursuant to section 1089 based on his "serious and willful misconduct" (42RT 11084-11085), and "no admonition and assurances from this juror of compliance could cure the problem" (42RT 11086).

The court also denied appellant's motion for mistrial because the juror's communications upon which it based its finding of misconduct occurred after the verdict in the guilt phase. (42RT 11087-11088.) Thereafter, the court discharged juror 27417 (42RT 11088), an alternate

was selected (42RT 11095, 11101), and the court instructed the jury to begin deliberations anew (42RT 11101-11103).

After the penalty verdict, the defense filed a motion for new trial based on, among other things, the discharge of juror 27417 for misconduct. Appellant acknowledged that juror 27417's conversations with his co-workers may have been "indiscreet," but it was arguable whether his actions amounted to misconduct. (6CT 1483.) Appellant further argued that even if juror 27417 actions constituted misconduct, it was "innocuous and of a trivial nature" and "there could not possibly have been any undue influence on him" because his coworkers did not respond to his comments. (6CT 1483.) Citing *In re Carpenter* (1995) 9 Cal.4th 634, 650, the defense argued that the court had failed to make a finding of prejudice before discharging juror 27417. (6CT 1483-1484.) In the alternative, appellant argued if juror 27417 had committed prejudicial misconduct, he was entitled to a new trial on both the guilt and penalty phases. (6CT 1484-1485; see also 42RT 11125.)

After hearing argument (42RT 11127-11139, 11146-11150), the court denied appellant's motion (42RT 11139-11145, 11150-11152). The court expressly found that it did not abuse its discretion by discharging juror 27417. The court noted that juror 27417 had spoken to Kimmelshue two or three time about the case. The juror had discussed, among other things, his confusion regarding the meaning of "reckless indifference to life" and that he had been one of the last jurors to make up his mind about the phrase, which showed that he had been "actively involved" in talking to nonjurors about the deliberative process. (42RT 11141.) Juror 27417 had also spoken to Urkov three or more times about the case. (42RT 11142.) The juror had discussed his role as a juror, the meaning of "reckless indifference to life," and the facts of the case. (42RT 11142.) Juror 27417 also admitted that he had talked to others about the case besides Kimmelshue

and Urkov. (42RT 11142.)

The court declined to speculate as to any motivation by the prosecution in raising the issue or the defense's motivation in opposing the juror's discharge, but it reiterated that juror 27417 had committed serious and willful misconduct by failing to follow the court's instructions, and he had been unable to perform his duties as a juror. (42RT 11142-11145.)

The court also denied appellant's motion for new trial based on the discharge of juror 27417. (42RT 11150-11152.) The court found that appellant had not met his burden of demonstrating prejudice by a preponderance of the evidence. (42RT 11151.) The trial court noted that there was no evidence that the juror had been influenced by any information he had received from a nonjuror or had been biased against appellant. Instead, the evidence affirmatively showed that juror 27417 was not biased against appellant and that he was "concerned that other jurors were not giving [appellant] the benefit of the doubt." (42RT 11151-11152.)

b. The trial court's reasons for discharging juror 27417 for misconduct are supported by the record to a demonstrable reality; the trial court properly denied appellant's motion for a new trial

The trial court's finding that juror 27417 had committed "serious and willful misconduct" by disregarding the court's repeated admonitions not to discuss the case, and that "no admonition and assurances from the juror of compliance could cure the problem" is supported by the evidence in which the court did rely to a demonstrable reality. (See 42RT 11084-11086.) As the trial court found (42RT 11084), the jurors were repeatedly admonished that they were not to discuss the case with anyone outside of deliberations. (See, e.g., 23RT 6562; 25RT 6909; 26RT 7167; 27RT 7419; 29RT 8054; 35RT 9161; 5CT 1096-1098; 6CT 1220.) As the trial court found (42RT 11084), despite these admonitions, Juror 27417 had repeatedly talked to

multiple people about appellant's trial, including Kimmelshue, Urkov, and his wife. (42RT 11073-11074, 11076-11078, 11082-11083.) As the trial court found (42RT 11085-11086), juror 27417 had had multiple discussions with nonjurors during which he had summarized the facts of the crime, discussed the stage of the proceedings, the law relevant to appellant's case and that he had been "one of the last people to come around to those terms," i.e., "reckless indifference to life," his concern about how his verdict in the guilt phase affected the sentencing options available in the penalty phase, and his "frustration" that other jurors were not keeping an open mind about the case. (42RT 11029-11032, 11035-11037, 11038-11041, 11048-11050, 11054, 11057-11058, 11073-11074, 11076-11080, 11082-10083.) The trial court's conclusion that juror 27417 had committed serious misconduct by discussing the case with nonjurors and that he could not be counted on to follow the court's instructions in the future is "'manifestly supported by the evidence on which the court actually relied.'" (See *People v. Lomax*, *supra*, 49 Cal.4th at p. 590.) Moreover, because juror 27417 was discharged for good cause, his excusal during deliberations did not violate the federal Constitution. (See *People v. Wilson*, *supra*, 44 Cal.4th at pp. 820-821.)

Appellant attempts to undermine the trial court's finding of prejudicial misconduct by arguing that juror 27417's failure to obey the court's admonition not to discuss the case was not deliberate or willful and any discussions he had were merely a "trivial violation." (AOB 250-253.) Juror 27417 did not accidentally mention appellant's trial to a nonjuror. He did not respond generally to questions asked to him by nonjurors. He did not simply make a single remark. He did not make comments that had no bearing on the issues to be decided at appellant's trial. (See *People v. Polk*, *supra*, 190 Cal.App.4th at p. 1202, and cases cited therein.) Instead, he repeatedly and intentionally discussed issues relevant to guilt and penalty.

The fact that juror 27417 had been surprised to learn that his comments to nonjurors qualified as "discussing" the case does not undermine the court's finding of prejudicial misconduct. (See 42RT 11076.) It was not unreasonable for the court to have taken little, or no, comfort in juror 27417's misunderstanding of what qualified as "discussing" the case when it concluded that the juror could no longer be counted on to follow the court's instructions in the future.

This does not mean, however, that the trial court erred by denying appellant's motion for a mistrial. Juror 27417 testified that he had not been influenced in any way by the communications he had had with nonjurors. (42RT 11074, 110077, 11080-11081; see also 41RT 11031.) And it is clear that juror 27417 was not biased against appellant. Instead, juror 27417 had struggled with the meaning of reckless indifference to life and its application to the facts of the case (42RT 11029-11031, 11035-11036, 11041, 11076, 11082-11083), and he had been "frustrated" by other jurors whom he believed had not "given a fair chance to the defense's story" (42RT 11077-11078). (See also 28CT 8267; 41RT 10950.) Based on the foregoing, any presumption of prejudice has been rebutted because there is no substantial likelihood that juror 27417 was actually biased against appellant. (See *People v. Harris*, *supra*, 43 Cal.4th at p. 1303.)

3. Denial of motion for new trial as to juror 24777

a. Relevant facts and trial court's ruling

After the penalty verdict, appellant moved for a new trial based on, among other grounds, juror 24777's allegedly improper conversations with nonjurors, which included stating her belief that appellant was "going to receive the death penalty." (6CT 1485-1486.) To support his claim, appellant provided affidavits from Kathleen Hash, Tina Ferreria, and Susan Mayberry. (6CT 1486.)

Kathleen Hash declared in an affidavit dated January 7, 1999, that she had attended Trinity House alcohol and drug rehabilitation program where juror 24777 was a counselor. (6CT 1488.) Hash alleged that on or about December 1, 1998, she overheard juror 24777 talking to other members of the program about appellant's trial. (6CT 1488.) According to Hash, juror 24777 "made a statement to the effect, that in her opinion, [appellant] would most likely receive the death penalty." (6CT 1488.) Juror 24777 also stated that the trial involved a three-year old murder of an elderly woman, and the defendant had stolen a truck and driven it into the lake. (6CT 1488.)

Tina Ferreria declared in an affidavit dated January 7, 1999, that she had attended Trinity House alcohol and drug rehabilitation program where juror 24777 was an instructor. (6CT 1489.) Ferreria stated that in late November 1998, she had attended a morning program during which juror 24777 had made statements about appellant's trial. (6CT 1489.) Ferreria could not remember what juror 24777 had said other than that she was a juror on a murder case. (6CT 1489.) Ferreria asked juror 24777 if the case involved a can of chili that had been used as a weapon. 24777 said, "No," and explained that the trial in which she was a juror involved the murder of an elderly lady and the defendant had driven a truck into the lake. (6CT 1489.) According to Ferreria, juror 24777 had made the statements to four or five program members who had been present in a classroom. (6CT 1489.)

Susan Mayberry declared in an affidavit dated January 8, 1999, that she had attended Trinity House alcohol and drug rehabilitation program where juror 24777 was a counselor. (6CT 1491.) Mayberry was one of four of five members who were present in a classroom when someone brought up the death penalty. (6CT 1491.) Juror 24777 told the others that she was a juror at appellant's trial. (6CT 1491.) Mayberry stated that she

had been standing in the doorway of the classroom and was not paying attention to what juror 24777 had been saying, but she remembered a "discussion going on between juror 24777 and other members of the class." (6CT 1491.)

In its opposition, the People argued that appellant had not demonstrated that juror 24777 had committed any misconduct. (7CT 1501-1503.) In support, the People submitted a declaration from juror 24777 dated January 20, 1999. (7CT 1505-1506.) Juror 24777 stated in her declaration that she was the coordinator of the Child Care Co-op/Parent Lab for the Department of Mental Health Services Division of Alcohol and Drug Program's Perinatal Project. (7CT 1505.) Juror 24777 stated it was "common knowledge" among the clients and counselors that she was a juror at appellant's trial, and the counselors had informed the clients not to discuss the case or to ask her questions about the case. (7CT 1505.)

In response to Hash's affidavit, juror 24777 denied speaking in a classroom to members about appellant's trial. She denied that she had said that appellant would most likely receive the death penalty, and she did not state that the case involved the three-year old murder of an elderly woman or that the defendant had stolen a truck and driven it into the lake. (7CT 1505.)

In response to Ferreria's affidavit, juror 24777 denied that she had told Ferreria that she was a juror on a murder case. (7CT 1505.) Juror 24777 did not recall being asked if the murder involved the use of a can of chili. (7CT 1505.) Juror 24777 denied saying that the case involved the murder of an elderly lady or that the defendant had driven a truck into the lake. (7CT 1505.)

In response to Mayberry's affidavit, juror 24777 denied that she had said that she was a juror on appellant's trial. (7CT 1505.) Juror 24777 did recall some clients discussing the death penalty and asking her opinion, but

she told the clients that she "had to do what the judge says and the law says and listen to the facts." (7CT 1505.)

At the hearing on appellant's motion, the court granted appellant's request to present live testimony at an evidentiary hearing. (See 42RT 11152-11166.) Thereafter, Kathleen Hash testified that on December 1, 1998, she had heard juror 24777 say in response to a question that she was a juror on a case that involved "three men and an elder lady, and she was on the trial for the one gentleman." (43RT 11195-11196, 11203-11204.) In response to another question, Juror 24777 said that "the jury had not made a decision yet on what was going to happen, but...he was looking at life or death, and more likely he was going to get the death penalty." (43RT 11196, 11204-11205; see also 43RT 11213-11214, 11220-11221.) Hash testified that when she overheard juror 24777 say that she was on a jury, her ears perked up, and she and some of the clients who were present asked juror 24777 questions and she answered. (43RT 11196; see also 43RT 11201.)

Juror 24777 said that three men had been involved in the crime and a truck had been driven into the lake. (43RT 11201-11203.) Juror 24777 said that the man who had done the actual killing had hung himself in jail, and she was a juror in the case of one of the men and the other man was scheduled for trial in April. (43RT 11201-11202.) One of the clients stated that she did not believe in the death penalty, and another asked if it was the case involving the "chili thing." (43RT 11217, 11222.) After that, juror 24777 explained that the case involved an elderly lady. (43RT 11217-11218.)

Hash testified that she was "good friends" with Theresa Skates and Neil Miller, who were also "good friends" of appellant. (43RT 11208.) Skates had also been a client at Trinity House. (43RT 11208-11210.) Hash testified that she did not know until recently that Skates and Miller were

friends of appellant's. (43RT 11208, 11210.) But she was aware that they had been visiting appellant in jail. (43RT 11208; see also 43RT 11295-11298 [discussing jail visits].) The only time she discussed appellant's case with Skates and Miller is when they told her on Christmas day that appellant had gotten the death penalty. (43RT 11208-11209, 11223-11224.)

Tina Ferreria testified that it was "common knowledge" at Trinity House that juror 24777 had been a juror in a trial because she was never at work. (43RT 11229-11230.) Ferreria talked to juror 24777 about the trial one time. (43RT 11230.) Hash and Susan Mayberry had also been present during the conversation. (43RT 11232, 11234, 11239, 11242.) At the very end of November or early December 1998, Ferreria asked juror 24777 if the case where she was a juror involved a woman being killed with a can of chili beans. Juror 24777 told her, "'No, it was an old lady.'" Ferreria asked if it was the case where the perpetrators had stolen the victim's car and left in the lake, and the juror said, "'Yes.'" (43RT 11230-11231; see also 43RT 11238.) Ferreria went back to her duties after that and did not pay any more attention to what was being said. (43RT 11231, 11235-11236.)

Susan Mayberry testified that clients at the Trinity House knew juror 24777 was a sitting juror because she was never at work. (43RT 11250-11251.) One or two weeks prior to Christmas, some women had been talking amongst themselves and then one of them asked juror 24777 what trial she had been sitting on. (43RT 11245-11247, 11249.) Ferreria, among others, had also been present. (43RT 11247-11248.) Juror 24777 stated she was a juror on appellant's trial. (43RT 11249, 11252.) Mayberry and another client were talking about the case, and Mayberry stated, "[Y]ou don't want my views on the death penalty because that usually causes a lot of conflict." (43RT 11249.) Juror 24777 was present when Mayberry

made the comment, but she did not respond. (43RT 11249.) Juror 24777 did not say that the case involved a murder of an elderly lady or that a truck had been driven into the lake. (43RT 11250.) Juror 24777 did not say that she thought appellant would get the death penalty. (43RT 11250.)

Juror 24777 testified that the clients at Trinity House had been advised that she was on jury duty, and they were not to discuss appellant's case around her. (43RT 11257-11259.) If anyone asked, juror 24777 would only say she was on jury duty. (43RT 11262.) Juror 24777 saw a client, Theresa Skates, in court one day. Juror 24777 informed the other counselors at Trinity House and asked them to tell Skates that she could not discuss the case. (43RT 11258.)

Juror 24777 denied that she had ever discussed appellant's trial with Hash. (43RT 11259.) She never discussed the penalties appellant might receive, and she never said that appellant would most likely receive the death penalty. (43RT 11259.) She never said the case involved the three-year-old murder of an elderly lady or that the defendant had stolen a truck and driven it into the lake. (43RT 11259-11260.) She never said that three men had been accused of killing the elderly lady, that one of the men had killed himself, or that the trial for the remaining man was scheduled to start in April. (43RT 11261-11262.)

Juror 24777 denied that she had ever told Ferreria that she was a juror on a murder case. (43RT 11260-11261.) She was never asked if the murder weapon was a can of chili. (43RT 11261; see also 43RT 11273.) She never told Ferreria that the case involved the murder of an old lady or that the defendant had driven a truck into the lake. (43RT 11261.)

Juror 24777 never told Mayberry that she was a juror on appellant's trial in response to a question. (43RT 11262-11263, 11274.) Around the first week in December 1998, juror 24777 overheard clients talking about the death penalty and she asked them to stop because it was not an

appropriate conversation inside the parent lab. (43RT 11263, 11275, 11278.) The clients asked the juror, in general, if it would be difficult for her to make a decision about the death penalty, and juror 24777 told them if she were placed in that position she would "have to listen to the judge, listen to the law and the facts that were presented." (43RT 11264; see also 43RT 11271-11272.)

Juror 24777 recalled overhearing clients talking in the parent lab about a murder involving a can of chili after she had completed her jury service in this case. (43RT 11276-11278.) Juror 24777 did not participate in the conversation. (43RT 11278.)

Following argument (43RT 11300-11308), the court ruled that appellant had failed to satisfy his burden of proving that juror 24777 had committed misconduct and denied his motion for new trial (43RT 11308-11312). In doing so, the court determined that Hash was "less than credible" based on her demeanor while testifying and her "apparent motive" to be untruthful. (43RT 11309.) The court also noted that Hash had felony convictions that had been offered as impeachment. (43RT 11309.) On the other hand, the court found juror 24777 to be a "very credible witness" even though her affidavit and testimony conflicted with the other witnesses. (43RT 11309-11310.) Based on his determination of the witnesses' credibility, he found that juror 24777 had not discussed appellant's case with the clients at Trinity House. (43RT 11310.) The court further found that even if juror 24777 had made the comments attributed to her by Ferreria and Mayberry, the comments did not suggest any prejudgment or the receipt of any improper information. (43RT 11310.) Juror 24777 had merely identified herself as a juror on a particular case. (43RT 11311.) The court found that the comments juror 24777 did make about the death penalty were "generic" and consistent with her duties as a juror in appellant's case. (43RT 11311.)

b. The trial court properly denied appellant's motion for a new trial

The trial court's finding that juror 24777 did not speak to nonjurors about appellant's trial is supported by substantial evidence and, therefore, this Court must accept the trial court's determinations and findings on credibility. (See *People v. Lomax*, *supra*, 49 Cal.4th at p. 590; *People v. Gamache*, *supra*, 48 Cal.4th at p. 396.) The trial court found juror 24777 credible based on its observations of her throughout appellant's trial and while testifying even though her testimony and declaration conflicted with the other witnesses. (43RT 11308-11310.) The trial court did not make an explicit finding on the credibility of Ferreria and Mayberry, but he did make an explicit finding as to Hash's credibility. The court found Hash "less than credible" based on his observations of her demeanor while testifying, and her "apparent motive" for being untruthful given her friendship with two of appellant's friends. (43RT 11309; see also 43RT 11208-11209.) The trial court also observed that Hash had suffered two felony convictions, which he could consider for impeachment purposes. (43RT 11309; see also 43RT 11207.) In addition, neither Ferreria nor Mayberry corroborated Hash's allegations that juror 24777 had said that appellant was facing either a sentence of life without possibility of parole or death or that it was "more likely he was going to get the death penalty" (compare 11196, 11204-11205, with 43RT 11229-11242, 11250) or that the actual killer had hung himself in jail and the other defendant had a trial scheduled to begin in April (compare 43RT 11201-11202, with 43RT 11229-11242, 11245-11251). Based on the foregoing, substantial evidence supports the trial court's finding that juror 24777 did not talk to any nonjurors about appellant's trial.

In any event, even assuming juror 24777 made the statements attributable to her, there was no prejudice. All of juror 24777's alleged

statements occurred during a single episode. She merely identified herself as a juror on a particular case. (See 43RT 11249, 11252; see also 43RT 11311) The summary of the facts she allegedly made was factually correct and not inflammatory. (See 43RT 11195-11196, 11201-11204, 11230-11231, 11238.) Indeed, appellant's own statement to law enforcement corroborated her summary that three men had been involved, an elderly woman had been killed, defendant had driven a truck into the lake, and the man who had done the actual killing had hung himself in jail. (See Statement of Fact, *supra*.) The comments juror 24777 did make about deciding how to impose the death penalty were "generic" and consistent with her duties as a juror. (See 43RT 11264, 11271-11272; see also 43RT 11311.) Juror 24777 did not receive any improper information from Hash, Ferreria, or Mayberry that may have influenced her deliberations. And, based on the record, the single statement that appellant was facing a sentence of death or life without possibility of parole, and he was "more likely" going to receive death (see 43RT 11196, 11204-11205), does not demonstrate a substantial likelihood that juror 24777 was actually biased against appellant. (See *People v. Harris*, *supra*, 43 Cal.4th at p. 1303.) Accordingly, the trial court properly denied appellant's motion for a new trial.

H. There Was No Cumulative Error

Appellant claims that the cumulative effect of errors committed during the guilt and penalty phases requires reversal of his conviction and death sentence. Respondent disagrees. "[A] defendant is entitled to a fair trial but not a perfect one." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1278.) The constitutional rules governing the conduct of criminal trials exist to "ensure that those trials lead to fair and correct judgments." (*People v. Avila* (1995) 35 Cal.App.4th 642, 656.)

As discussed in the preceding sections, appellant's claims either fail on their merits, are unsupported by the record, or are harmless. To the extent any error or errors occurred in this case "the whole of them did not outweigh the sum of their parts" (*People v. Roberts* (1992) 2 Cal.4th 271, 326) and deprive appellant of a fair trial (*People v. Booker* (2011) 51 Cal.4th 141, 186). Thus, reversal is simply not warranted on the basis of any "cumulative" error. (See generally *People v. Bradford* (1997) 15 Cal.4th 1229, 1344; *People v. Hawthorne* (1992) 4 Cal.4th 43, 79.)

IV. ISSUES AFFECTING SENTENCING ALLEGATIONS

A. Appellant Forfeited His Claim Challenging the Waiver of His Right to Jury Trial on the Sentencing Allegations; in Any Event, His Waiver Was Valid

Appellant claims that the trial court's true findings on the Three Strikes and prior prison term allegations must be vacated and his sentences on those allegations stricken because the waiver of his right to a jury trial on the sentencing allegations was based on a misstatement of his rights by the court and/or trial counsel. (AOB 261-265.) Appellant forfeited his statutory claim by failing to object at trial. In any event, the record demonstrates that appellant was properly advised of his statutory right to a jury trial and validly waived that right.

1. Relevant proceedings

As pertinent here, the information alleged that appellant had been previously convicted of one serious and/or violent felony within the meaning of the Three Strikes law (§ 1170.12) and had served four prior prison terms within the meaning of section 667.5, subdivision (b). (2CT 187-188.) During motions in limine, trial counsel made an oral request for bifurcation of the sentencing enhancements from the trial on the substantive offenses pursuant to *People v. Calderon* (1994) 9 Cal.4th 69. (7RT 2863-2867.) Specifically, trial counsel stated, "Our request is going to be that we

bifurcate the special enhancements, special allegations. We're willing to waive jury on those questions of fact and have the matter heard after the jury verdict, if it's relevant." (7RT 2866-2867.) After the court confirmed which allegations trial counsel was referring to, it stated, "So, basically all those special allegations that relate in some fashion to prior convictions, you're indicating your client's willing to waive his right to a jury trial and wants the determination of the truth or non-truth of those allegations to be determined by the court?" (7RT 2868.) Trial counsel affirmed the court's understanding of his request. (7RT 2868.) After the court ascertained that the prosecutor had no objection to the defense's request (7RT 2868), it took a break in the proceedings so that trial counsel could discuss the matter with appellant (7RT 2869).

After the break, trial counsel announced that he had had "adequate time" to talk to appellant, and appellant was prepared to waive his right to a jury trial on the special allegations. (7RT 2869.) Prior to taking appellant's waiver, the trial court advised appellant of what the defense had proposed and asked appellant if he understood the right he was waiving. (7RT 2870-2871.) Specifically, the following took place:

> THE COURT: Okay. Mr. Grimes, first of all, I want to go over with you what's proposed. What's proposed is, your attorneys have indicated they want this jury, when this jury is deciding the issue of whether or not the People have proven the charges against you beyond a reasonable doubt, to be influenced in any way by also considering the allegations of these prior felony convictions and related matters. Do you understand that?
>
> THE DEFENDANT: Yes, I do.
>
> THE COURT: In order to avoid having the jury deal with that issue, your attorneys are recommending to you, apparently, that you waive your right to have the jury decide that issue. And that you have those issues, as to each one of these prior special allegations be decided solely by the court. In other words, you wouldn't have jury trial on those allegations, the truth of those

allegations or lack of truth would be decided by me. Do you understand that's the proposal?

THE DEFENDANT: Yes, sir.

THE COURT: Part of your right to a jury trial is your right to have a unanimous jury verdict. In other words, unless the Prosecution can prove the truth of each one of these allegations and each one of them separately beyond a reasonable doubt, and have all twelve jurors unanimously agree to that truth, then there wouldn't be a finding against you on the special allegations. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: If you need to confer with your lawyer at any time, do that. When you have a court trial, that is when I'm going to decide the issue instead of the jury, you know [*sic*] longer have this, in effect, a right to a jury trial and having all twelve jurors convinced before you can be found to have the allegations true. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: In other words, all the DA has to do, if you agree to this procedure, is convince me. Do you understand?

THE DEFENDANT: Yes, I do.

THE COURT: That's one person, as opposed to twelve people having to be convinced. Do you understand that?

THE DEFENDANT: Yes.

(7RT 2870-2871.) The court explained to appellant the specific allegations alleged against him, and appellant waived his right to a jury trial on each of the allegations. (7RT 2872-2873.) Trial counsel joined in appellant's waiver, and both appellant and trial counsel confirmed that trial on the special allegations would be held at a bifurcated hearing after the guilt phase trial. (7RT 2873.)

While the jury deliberated appellant's guilt, the court and counsel discussed the adequacy of appellant's prior waiver. (35RT 9340.) The court recalled that appellant had previously waived his right to a jury trial on the prior conviction and prior prison term allegations, but it stated that it intended to "go through that waiver again" because appellant had "a more complete understanding of our procedures and where we could potentially stand." (35RT 9340; see also 35RT 9342.) After a break in the proceedings, the trial court stated it had reviewed a transcript of the advisements and appellant's waiver, and it found that "a rather thorough waiver" had been taken. (35RT 9351.) Trial counsel indicated that he had also reviewed the transcript and concurred that the waiver had been thorough and no further advisements needed to be given. (35RT 9351, 9353.) Appellant, who was personally present at these discussions, did not object. (35RT 9330, 9350.)

After the jury returned its guilt phase verdicts, the prior conviction and prison term allegations were tried to the court. (35RT 9362-9372.) Appellant did not object to the commencement of the trial, he presented no evidence, and made no argument. (35RT 9361-9362, 9372, 9375.) The court found that appellant had been previously convicted of one serious and/or violent felony within the meaning of the Three Strikes law and had served four prior prison terms as alleged in the information. (35RT 9375-9376.) Based on these findings, the court sentenced appellant to three years, doubled under the Three Strikes law for a total of six years, for unlawful driving or taking of a vehicle (count 6), plus four one-year terms for the four prior prison term enhancements, for a total unstayed determinate term of 10 years.[31] (43RT 11377-11378)

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[31] The court doubled appellant's sentences for robbery, burglary, conspiracy to commit robbery, and conspiracy to commit burglary under (continued...)

2. Appellant forfeited his claim by failing to object at trial that the waiver of his statutory right to a jury trial was invalid

As an initial matter, appellant claims that his right to a jury trial on the prior conviction allegations stems from article 1, section 16, of the California Constitution. (AOB 264.) Appellant is mistaken. "The right to have a jury determine the truth of a prior conviction allegation does not flow from the jury trial provision of article I, section 16 of the California Constitution or the Sixth Amendment of the United States Constitution. It is derived from statute." (*People v. Vera* (1997) 15 Cal.4th 269, 277; §§ 1025, 1158; see also *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490 ["Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."]; *People v. French* (2008) 43 Cal.4th 36, 46-47.) This Court recently reaffirmed that "the federal constitutional right to a jury trial and proof beyond a reasonable doubt on aggravating circumstances does not extend to the circumstance that a defendant...has served a prior prison term." (*People v. Towne* (2008) 44 Cal.4th 63, 79.) Therefore, appellant's claim is subject to forfeiture because it involves an alleged violation of his state-created right to have a jury determine the truth of the prior conviction allegations. (See *Vera*, at pp. 277-278.) This Court's decision in *Vera* is instructive on this point.

In *Vera*, the trial court granted the defendant's request to bifurcate trial on the prior prison terms from his trial on the substantive offenses. (*People v. Vera*, *supra*, 15 Cal.4th at p. 273.) At the time of the motion,

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(...continued)
the Three Strikes law, but stayed the sentences pursuant to section 654. (43RT 11376-11377; counts 2-5.)

defense counsel informed the court that he had discussed the matter with the defendant, and the defendant intended to waive his right to a jury trial on the sentencing allegations if found guilty by the jury. No waiver was taken at that time. (*Ibid.*) After the jury returned its guilty verdict, the court discharged the jury without taking the defendant's waiver of his right to a jury trial on the sentencing allegations. With defendant's agreement, the matter was continued for a trial on the prior prison terms and sentencing. (*Ibid.*) The court trial on the prior prison terms was held without objection by the defendant, and the court found the allegations true. (*Ibid.*) On appeal, the defendant claimed that the court's finding that he suffered two prior prison terms must be stricken because he did not make an express, personal waiver of his right to a jury trial on the record. (*Ibid.*)

This Court found that Vera had forfeited his claim based on his failure to object in the trial court. *Vera* held, "[T]he deprivation of the statutory right to jury trial on the prior prison term allegations does not implicate the state or federal constitutional right to jury trial. Absent an objection to the discharge of the jury or commencement of court trial, defendant is precluded from asserting on appeal a claim of ineffectual waiver of the statutory right to jury trial of prior prison term allegations." (*People v. Vera*, *supra*, 15 Cal.4th at p. 278; see also *People v. Saunders* (1993) 5 Cal.4th 580, 589-592 [trial court's discharge of jury prior to determining truth of prior conviction allegations violated state statute, but defendant forfeited claim on appeal based on his failure to timely object].)

Like *Vera*, this case involves an alleged violation of appellant's statutory right to a jury trial under section 1025. Specifically, appellant claims that the waiver of his right to jury trial was "either involuntary or improperly counseled" because he was erroneously told by counsel and/or the court that bifurcation of the trial on his prior convictions from the trial on his substantive crimes was dependent on his waiver of his right to a jury

trial on the prior conviction allegations. (AOB 265.) Appellant did not object to the thoroughness of the advisements at the time of his waiver or when the completeness of his waiver was discussed while the jury was deliberating his guilt. (See 7RT 2869-2873; 35RT 9330, 9350.) Appellant did not object at the commencement of the court trial, even though the jury was still available to hear evidence on the sentencing allegations. (35RT 9361-9363, 9372, 9375.) Had appellant thought that his request for bifurcation had been contingent upon his waiver of his right to a jury trial, it was incumbent upon him to object when any misunderstanding could have been corrected.

As this Court stated in *Vera*, "If defendant wished jury trial rather than court trial of the sentencing allegations, he could have pointed out the trial court's misunderstanding before the court rendered its findings on the truth of the prior conviction allegations. The prior conviction allegations could have been properly tried to a jury impaneled for that purpose. [Citation.] As *Saunders* observes, the Legislature did not intend, in enacting section 1025, to create a 'procedural trap' for an unwary trial court and prosecutor." (*People v. Vera*, *supra*, 15 Cal.4th at p. 276, quoting *People v. Saunders*, *supra*, 5 Cal.4th at pp. 590-591.)

In sum, appellant's claim that he was denied his statutory right to a jury trial on the prior conviction allegations does not implicate the state or federal Constitution. Accordingly, he forfeited his claim on appeal for failing to object at trial to the court, rather than a jury, determining his prior conviction allegations.

3. In any event, the record demonstrates that appellant validly waived his statutory right to jury trial

In any event, even assuming this Court finds that appellant's claim was not forfeited, it is meritless. "Whether a particular right is waivable;

whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake. [Citations.]" (*United States v. Olano* (1993) 507 U.S. 725, 733 [113 S.Ct. 1770, 123 L.Ed.2d 508].) "'While a waiver of statutory...rights need not comport with the standards applicable to a waiver of basic constitutional rights—that is, an intentional relinquishment or abandonment of a right or privilege adequately understood by the defendant [citation]—a waiver of statutory rights must still be voluntary.... Voluntariness in this context requires a showing of record that the defendant or his attorney freely acquiesced [in the waiver]. [Citations.]' [Citation.]" (*People v. Turner* (1998) 67 Cal.App.4th 1258, 1264-1265 [analyzing waiver of "asserted statutory right" to a certified court reporter]; see also *Drescher v. Superior Court* (1990) 218 Cal.App.3d 1140, 1148 [applying reduced standard to waiver of statutory right to speedy trial].)

Appellant takes excerpts of the exchange between trial counsel and the court concerning the defense's request for bifurcation and concludes that appellant was misadvised that he was *required* to waive his right to jury trial on the prior conviction allegations if he wanted to bifurcate the trial on the prior conviction allegations from the trial on the substantive offense. (AOB 261-263.) But read as a whole, the exchanges between the court, counsel, and appellant show that there was no misadvisement regarding appellant's statutory right to a jury trial on the prior conviction allegations.

The transcript shows that appellant's waiver of his right to jury trial was not dependent on bifurcation, but that appellant requested bifurcation *and* was willing to waive his right to jury trial on the prior conviction allegations. (See 7RT 2867-2868.) Trial counsel advised the court that he had had "adequate time" to talk to appellant regarding the issue. (7RT

2869.) The court explained to appellant the consequence of the right he was waiving, and appellant affirmed that he understood. (7RT 2869-2871.) The record affirmatively shows that appellant's waiver was voluntary, and he "'freely acquiesced [in the waiver].'" (*People v. Turner*, *supra*, 67 Cal.App.4th at pp. 1264-1265.) Accordingly, appellant's claim must be rejected.

In any event, even assuming appellant was deprived of his statutory right to a jury trial on the prior conviction allegations any error was harmless. Applying the harmless-error test of *Watson* to this case, it is not reasonably probably appellant would have received a more favorable outcome had a jury, instead of the court, determined if he had suffered his prior convictions. (See *People v. Epps* (2001) 25 Cal.4th 19, 29.) The prosecution presented evidence from a fingerprint expert and the abstract of judgments for each of appellant's prior convictions at the hearing (35RT 9362-9372; 28CT 8362-8393) that conclusively established that appellant had committed the offenses. The defense presented no evidence and made no argument. (35RT 9372, 9375.) Under the circumstances, appellant has not shown that any error committed by the trial court and/or counsel in advising him about his right to a jury trial on the sentencing allegations affected the result.

B. It Appears That the True Finding and Sentence on One Prior Prison Term Allegation Should Be Stricken

Appellant claims that the trial court improperly imposed four one-year enhancements pursuant to section 667.5, subdivision (b) when the evidence showed he had only served three separate prison terms. Thus, appellant argues, this Court should vacate the trial court's finding on one of the allegations and strike the additional one-year sentence. (AOB 266-267.) It appears appellant is correct.

As pertinent here, the information alleged that appellant had been previously convicted of four prior prison terms within the meaning of section 667.5, subdivision (b). These allegations were based on appellant's 1983 conviction for a violation of Vehicle Code section 10851 in Stanislaus County case number 194227, 1986 conviction for a violation of section 213.5 in San Joaquin County case number 37318, 1991 conviction for a violation of section 12021 in Stanislaus County case number 265702, and 1991 conviction for a violation of section 4532, subdivision (b), in Stanislaus County case number 265697. (2CT 187-188.)

At a bifurcated hearing, the prosecution presented evidence from a fingerprint expert and introduced appellant's prison packet (§ 969). (35RT 9362-9372; 28CT 8362-8393 [Peo. Exhs. 47 & 48-A].) The abstract of judgment for Stanislaus County case number 194227 indicates that appellant was convicted on October 18, 1983, for vehicle theft (Veh. Code, § 10851), and he was sentenced to two years in state prison. (28CT 8378.) The abstract of judgment for San Joaquin County case number 37318 indicates that appellant was convicted on September 23, 1985, for residential robbery (§ 213.5), and he was sentenced to four years in state prison. (28CT 8374.) The combined abstract of judgment for Stanislaus County case numbers 265702 and 265697 indicates that appellant was convicted on April 23, 1991, for being a felon in possession of a firearm (§ 12021) and escape (§ 4532, subd. (b)), and he was sentenced to two years for possession of a firearm plus a consecutive term of eight years for escape. (28CT 8372.)

The defense presented no evidence and made no argument. (35RT 9372, 9375.) The court found that appellant had "committed each of the alleged offenses as alleged" in the information (35RT 9375) and imposed four one-year state prison terms pursuant to section 667.5, subdivision (b) (43RT 11377-11378).

The relevant portions of section 667.5 are the same today as they were in 1995 when appellant committed his current offenses. As pertinent here, section 667.5, subdivision (b) provides, "Enhancement of prison terms for new offenses because of prior prison terms shall be imposed as follows: [¶]...[¶] (b) Except where subdivision (a) applies, where the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison terms therefor, the court shall impose a one-year term for *each prior separate prison term* served for any felony; provided that no additional term shall be imposed under this subdivision for any prison term served prior to a period of five years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction. (Italics added.) The limitation on the enhancement to prior separate prison terms is reiterated in subdivision (e), which states, "The additional penalties provided for *prior prison terms* shall not be imposed for any felony for which the defendant did not serve a prior separate term in state prison." (Italics added; see *People v. Jones* (1998) 63 Cal.App.4th 744, 747.) Subdivision (g) defines a "prior separate prison term" as "a continuous completed period of prison incarceration imposed for the particular offense alone or in combination with concurrent or consecutive sentences for other crimes, including any reimprisonment on revocation of parole which is not accompanied by a new commitment to prison, and including any reimprisonment after an escape from incarceration."

"'The plain meaning of section 667.5, subdivision (g) is to prevent multiple one-year enhancements under section 667.5 itself where the offender has served one period of prison confinement, or block of time, for multiple offenses or convictions." (*People v. Perez* (1992) 4 Cal.App.4th 893, 911.) "The Legislature intended that section 667.5, subdivision (b) 'provide for additional punishment of a felon whose service of a prior

prison term failed to deter future criminality.'" (*People v. Jones*, *supra*, 63 Cal.App.4th at p. 749.) In other words, the "recidivist effect of...section 667.5, subdivision (b) is [not] based on the underlying conviction," but the prison commitment. (*Ibid.*)

Consistent with this understanding, courts have recognized that section 667.5, subdivision (g) means "that as long as there is 'a continuous completed period of prison incarceration,' a defendant who has served concurrent or consecutive prison sentences on various commitments is deemed to have served only one prior prison term for the purpose of the enhancement provisions of...section 667.5." (*People v. James* (1980) 102 Cal.App.3d 728, 733; see also *People v. Jones*, *supra*, 63 Cal.App.4th at p. 747, and cases cited therein; *People v. Cardenas* (1987) 192 Cal.App.3d 51, 56.)

Appellant acknowledges that the trial court properly found that he served separate prison terms for Stanislaus County case number 194227 and San Joaquin County case number 37318. (AOB 266.) Accordingly, the trial court's imposition of two one-year enhancements on those cases pursuant to section 667.5, subdivision (b) was proper. But appellant argues that the trial court improperly imposed two one-year enhancements based on his convictions in Stanislaus County case numbers 265702 and 265697 because he served only one prior prison term. (AOB 266.) It appears appellant is correct.

Although appellant suffered two separate convictions in Stanislaus County case numbers 265702 and 265697, he was ordered to serve his sentences consecutively, which resulted in only one continuous completed period of incarceration for the two offenses. (See *People v. James*, *supra*, 102 Cal.App.3d at p. 733.) Accordingly, this Court should modify appellant's sentence to strike one of the enhancements imposed pursuant to section 667.5, subdivision (b), leaving the imposition of three one-year

prison terms pursuant to section 667.5, subdivision (b) intact.

CONCLUSION

Based on the arguments presented in Argument IV.B, *supra*, it appears that this Court should vacate the trial court's true finding on one of the section 667.5, subdivision (b) allegations and modify appellant's sentence by striking the additional one-year sentence but leaving the imposition of three one-year prison terms intact. In all other respects, respondent respectfully requests that this Court affirm appellant's judgment and sentence of death.

Dated: March 16, 2011

Respectfully submitted,

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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 64,648 words.

Dated: March 16, 2011

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Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Grimes** No.: **S076339**

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 March 17, 2011, I served the attached **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 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Cliff Gardner
Attorney at Law
1448 San Pablo Avenue
Berkeley, CA 94702
(Representing appellant Grimes – 2 copies)

The Honorable Stephen Carlton
Shasta County District Attorney
1525 Court Street, Third Floor
Redding, CA 96001-1632

California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105-3672

County of Shasta
Superior Court of California
1500 Court Street, Room 219
Redding, CA 96001-1686

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 March 17, 2011, at Sacramento, California.

_____
Declarant

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