IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. LUIS MACIEL, Defendant and Appellant.	Supreme Ct. No. S070536 Los Angeles County No. BA108995

APPELLANT'S REPLY BRIEF

APPEAL FROM A JUDGMENT OF DEATH
FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
THE HONORABLE CHARLES HORAN, JUDGE PRESIDING

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DEATH PENALTY

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INTERNATIONAL TREATIES AND DOCUMENTS

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LAW REVIEW ARTICLES

Blume, Johnson, & Threlkeld, *Symposium: Probing Life Qualification Through Expanded Voir Dire* (2001) 29 Hofstra L.Rev. 1209 218

Bowers & Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing* (1999) 77 Texas L. Rev. 605 188

Freedman, *'The Guiding Hand of Counsel': ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*; Introduction (2003) 31 Hofstra L. Rev. 903, n. 1, n. 5 35

Freedman, *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* (2008) 36 Hofstra L. Rev. 663 36

Groscup & Penrod, *Battle of the Standards for Experts in Criminal Cases: Police vs. Psychologists* (2003) 33 Seton L. Rev. 1141 ..... 82, 90

McDermott, *Note: Substitution of Alternate Jurors During Deliberations and Implications on the Rights of Litigants: The Reginald Denny Trial* (1994) 35 Boston College L. Rev. 847, 881 223

Steiner, Bowers & Sarat, *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness* (1999) 33 Law & Soc. Rev. 461 188

BOOKS AND TREATISES

Fleury-Steiner, *Jurors' Stories of Death: How America's Death Penalty Invests in Inequality* (Ann Arbor: U. Mich. Press 2004) 229

Gaylin, The Killing of Bonnie Garland 191

Linz & Penrod, *The Use of Experts in the Courtroom, Social Psychology* (Prentice-Hall 1982) 82

Shuy, *How a judge's voir dire can teach a jury what to say* (Sage 1995) Discourse and Society, Volume 6(2): 207-222 218

1 Witkin, Cal. Evidence (3d ed. 1986), The Hearsay Rule, § 735 152

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California Commission on the Fair Administration of Justice; Report and Recommendations on the Administration of the Death Penalty in California (June 30, 2008) 56, 232, 233, 234

The Constitution Project, Mandatory Justice: The Death Penalty Revisited (2005 update) 232, 233

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International Court of Justice, Request for Provisional Measures
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	**Supreme Ct.**
Plaintiff and Respondent,	)	**S070536**
	)	
vs.	)	
	)	**Los Angeles**
LUIS MACIEL,	)	**County No.**
	)	**BA108995**
Defendant and Appellant.	)	
	)	
	)	

APPELLANT'S REPLY BRIEF

REPLY TO RESPONDENT'S INTRODUCTION

Respondent's "Introduction" misleadingly characterizes the nature and strength of the evidence allegedly proving appellant's involvement in the brutal murders of Anthony, Maria and Laura Moreno, and Ambrose Padilla. (Respondent's Brief [RB] 1.) The record does not contain evidence showing that appellant is a "self-described 'middle man'" who recruited street gang members Anthony Torres, Richard Valdez, Daniel Logan, Jimmy Palma and Jose Ortiz to murder Anthony Moreno. Appellant denied and continues to deny acting as a "middle man" man for the Mexican Mafia in connection with the murders. In his tape-recorded statement to police, appellant repeatedly denied committing or setting up the murders, and indicated he was busy baptizing his son on the day the murders occurred. (8 Supplemental Clerk's Transcript [SCT] 1:1673, 1675,

1682-1683, 1691, 1696, 1697, 1699, 1700.)[1] Appellant also indicated that someone had asked him to be involved in the murders but he declined to do so because he knew the Moreno family very well. (8 SCT 1:8: 1698, 1700, 1701.)

Respondent also states "appellant expressed fear for his family because of his role in the murders. . . ." (RB 2.) This falsely implies that appellant had admitted having a role in the murders; such an implication is manifestly false. In fact, in the tape-recorded interview, appellant admitted knowing the identity of another person who acted as middle man to commit the murders. He refused to identify this person to detectives, expressing concern for the safety of his children and his wife. (8 SCT 1:1698, 1700, 1702.) In other words, appellant was fearful that someone would harm his family if appellant gave police the name of the person who acted as middle man to arrange the murders. Appellant did not express fear of retaliation due to any alleged role in the murders.

REPLY TO RESPONDENT'S STATEMENT OF FACTS

Respondent repeats the assertion that appellant "eventually admitted, . . . that he was a 'middle man,' who was told '[t]o get a hold of this person to tell them that they know what and that's it.'" (RB 42.) This vague phrase is over-interpreted by respondent. Appellant did not admit that he was a "middle man" with respect to the Maxson Street murders. As previously

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[1] The first number indicates the volume number. The number after SCT indicates that this is the first supplemental transcript filed during proceedings to augment and correct the record. CT 1 will refer to the original Clerk's Transcript. The number before a reference to CT 1 will indicate the volume number.

stated, appellant told police that he was asked to be involved in the murders but refused to be involved because he was friends with members of the Moreno family. (8 SCT 1:1698, 1700, 1701.) Appellant admitted knowing the identity of another person who in fact acted as middle man in the murders. Appellant refused to identify the real "middle man" to detectives out of concern for the safety of his children and his wife. (8 SCT 1:1698, 1700, 1702.)

Respondent's quotation, relied upon to attribute an admission of "middle man" status to appellant, is selectively lifted from page 1696 of Volume 8 of the first Supplemental Clerk's Transcript. The complete page 1696 contains the following dialog, demonstrating the extremely vague and ambiguous character of appellant's statements to police:

"A: Well, I mean what you wanna know?

"Q: Well --

"A: I wasn't involved. I didn't set it up. I didn't – I didn't set it up. I didn't give that order. I mean what do I get if I tell you who set it up and every – and all that?

"Q: What do you get if you – well –

"A: Either way I'll be fucked, right?

"Q: What you get out of it, is perhaps the ability to do time where you don't have to look over your shoulder. You know you're gonna do time.

"A: For what?

"Q: It's just beginning. For all the shit – all the shit you've been involved in.

"A: Man, I ain't involved in none of this shit. People - I didn't even do this. To get a hold of this person to tell them that they know what and

that's it.

"Q: You're a middle man?

"A: Yeah, I'm also a fuck man. They say you shut up – none of my thing. Just ask me to get a hold of these people you, you know and they know you don't gotta do nothing, just tell them that I said that's it, alright, homes, homie told me to tell you this and this and this and that, you know – and that's it.

"Q: so what you're saying is somebody – somebody calls you, tells you to call somebody?

"A: Yeah, but see –

"Q: You don't know what's on either side?

(8 SCT 1:1696.)

The preceding questions and answers are not only ambiguous, they are wholly unintelligible. Appellant's responses do not by any stretch of the imagination constitute admissions to acting as a middle man in the Maxson Street murders. Moreover, on the next page of the transcription, appellant is directly asked whether he acted as the go between and he emphatically denies it.

"A: They already talk about it through – through – through – I mean through their wives and send it to this way and then they sent it to the other way, so they don't know when, so when they decide when, they call me and let me know, they already know.

"Q: *So you're saying that somebody here has already talked to somebody here?* They've already made the plans of what they're gonna do and the whole thing, all they're waiting for is somebody to say, yes, so they call you and tell you to call somebody and you don't say anything except, yes.

"A: That's it.

"Q: And they act on that, because you're the in between?

"A: Yes. I – I'm not gonna fall for this shit, man.

"Q: Were you the in between on Maxson?

"A: No. I can tell who it was.

"Q: Tell me who was the in between, you're saying you're not the in between on Maxson?

"A: Yeah, not the in between, the one on Maxson. I had nothing to do with that one. That – I mean somebody had asked me if I wanted to be part of it, but I said, no."

(8 SCT 1:1697; italics added.)

Investigators' questions are completely ambiguous. In the italicized sentence above, the two references to "somebody here" fail to identify to whom the investigator is even referring. Furthermore, when the entirety of the interview is read, it is clear that at most, appellant arguably admitted that he had acted as an "in between" in the past and was familiar with what such persons did. He emphatically denied that he was involved as an "in between" for purposes of the Maxson Street killings. It is apparent that appellant was pegged as the "in between" solely because he refused to "rat" on the person who actually played that role. Accordingly, respondent's repeated implications or descriptions of "admissions" by appellant are highly misleading and a misrepresentation of the facts.

PART I: GUILT PHASE ISSUES

I

REPLY TO RESPONDENT'S ARGUMENT I: THERE IS INSUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTIONS OF FIVE FIRST DEGREE MURDERS, AS WELL AS THE JURY'S FINDINGS IN SUPPORT OF THE SPECIAL CIRCUMSTANCE OF MULTIPLE MURDER.

A. Insufficiency Of Evidence To Prove That Appellant Aided And Abetted Or Participated In A Conspiracy To Commit Murder:

In Argument I, B, respondent argues that there is sufficient credible evidence of solid value to prove that appellant participated in a conspiracy to commit the murders of Anthony Moreno and Gustavo Aguirre, or that he aided and abetted in their murders. (RB 61.) Respondent's lengthy recitation of circumstantial evidence arguably shows that Raymond Shyrock had a motive to murder either Anthony Moreno, a Mexican Mafia dropout, or Gustavo Aguirre, who was robbing Mafia drug connections and not paying "taxes." Evidence also shows that the murders of Moreno and Aguirre were accomplished by the five codefendants, possibly at the request of someone in the Mexican Mafia. However, respondent fails to address appellant's principal point; there was little or no credible evidence of solid value presented to show that appellant master-minded or aided and abetted the killings, or that he participated in a conspiracy to have Aguirre or Moreno killed, and/or that he did so on the Mexican Mafia's behalf.

As proof of guilt, respondent places great emphasis on appellant's so-called admission to detectives that he was a "'middle man,' who was told '[t]o get a hold of this person to tell them that they know what and that's it.'" (RB 68.) This is the third occasion on which respondent

mischaracterizes appellant's tape-recorded interview. Appellant admitted his relationship with Shyrock, admitted that he had done occasional errands for the Mafia, and arguably even admitted that he had acted as an "in between" – meaning a messenger – on unspecified past occasions. Nonetheless, contrary to respondent's misleading characterization of the facts, appellant emphatically and repeatedly denied that he was involved in any way in the Maxson Street killings. (8 SCT 1:1696-1697.)

To rebut appellant's insufficiency argument, respondent also relies on Raymond Shyrock's statements at a January 4, 1995, meeting of the Mexican Mafia that was surreptitiously videotaped. (RB 62.) At this meeting, Shyrock refers to someone named "Dido" as a Mexican Mafia dropout, and indicates that he wants him killed. Contrary to what respondent seems to imply, the last name of Moreno was not mentioned during this meeting, and the correspondence of identity between the "Dido" who was mentioned and the "Dido" who was killed is not 100 percent certain. (RB 62.) However, even assuming "Dido" Moreno was murdered on orders from Shyrock, appellant was not a member of the Mexican Mafia, or present at the meeting when the order to kill Moreno was ostensibly given.

Of equal importance, Shyrock's hearsay statements about "Dido," should not have been received by the jury, and therefore should not be utilized by this Court to uphold appellant's convictions. These statements were erroneously received for the truth of the matters asserted as declarations against penal interest. (See, Appellant's Opening Brief [hereafter, AOB] 160-163; Evid. Code, § 1230.) As appellant has previously argued, Shyrock's videotaped statements were not specifically disserving to the penal interests of Shyrock at the time they were made – a

well-settled requirement for admissibility under this hearsay exception. (*People v. Lawley* (2002) 27 Cal.4th 102, 152-153; AOB162.) The conspiracy had not yet been conceived, no crimes had yet been committed, and no steps had yet been taken in furtherance of Moreno's murder. Hence, Shyrock's statements could not have subjected him to liability for the Maxson street murders, or even conspiracy to commit murder, at the time they were uttered.

For reasons previously explained, Shyrock's videotaped statements also fail the test of reliability – another requirement for their admission as declarations against penal interest. (*Lilly v. Virginia* (1999) 527 U.S. 116, 130-139 [144 L.Ed.2d 117, 119 S.Ct. 1887]; AOB160-168.) Furthermore, in closing, the prosecutor repeatedly referred to Shyrock's statements as evidence of a conspiracy and intent. (62 RT 9650-9661.) The error was further compounded by the court's failure to instruct the jury that Shyrock was an accomplice to whom the cautionary instructions on accomplice statements applied. (AOB165.)

As circumstantial evidence of guilt, respondent refers to evidence that appellant was admitted to the Mexican Mafia at Shyrock's behest fewer than three weeks before the murders. (RB 63.) Respondent quotes Shyrock as saying, on videotape, that appellant had already done a "lot of business" for the gang, and had "downed a whole bunch of mother fuckers." (RB 63.) Respondent presumes the truth of Shyrock's hearsay statements, and argues, in essence, that appellant's history of doing Mafia "business" and "down[ing] . . . mother fuckers" makes it likely that he also masterminded the Maxson Street murders on Eme's behalf.

Shyrock's statements are intrinsically ambiguous. It is not clear what Shyrock meant when he said that appellant had done a "lot of

business" for Eme. Appellant may well have conducted completely lawful business for the Mexican Mafia.

Assuming, however, that Shyrock meant that appellant had been doing "errands" for Eme, including the collection of "taxes" on drug sales, and/or the commission of acts of violence, including murder (see, 55 RT 8518, 8535 [testimony of Richard Valdemar]), this evidence should never have been heard by the jury. (AOB144.) In pretrial hearings, Judge Sarmiento ruled that Shyrock's videotaped statements claiming appellant had engaged in gang "business" were not admissible as declarations against Shyrock's penal interest. (RT 3532-3533.) The district attorney committed misconduct by playing the videotape for the jury without redacting these highly prejudicial references. (See, AOB146, Argument VII, B [arguing prosecutorial misconduct].) The fact that there was a change of prosecutor before trial furnishes no excuse for the district attorney's misconduct. (*Giglio v. United States* (1972) 405 U.S. 150, 153 [31 L.Ed.2d 104, 92 S.Ct. 763].) Prosecutorial misconduct need not be intentional, or committed in bad faith, to require reversal of a judgment. (*Smith v. Phillips* (1982) 455 U.S. 209, 219 [71 L.Ed.2d 78, 102 S.Ct. 940]; *People v. Hill* (1974) 17 Cal.4th 800, 819.) (AOB 146-147.)

The statements were inherently unreliable. Shyrock had a motive to embellish or distort his claims about appellant to persuade his audience to accept him into the Mexican Mafia. (*People v. Bryden* (1998) 63 Cal.App.4th 159, 175.)

The prejudicial effect of the prosecutor's error was insured by the trial court's failure to instruct the jury that Shyrock's statements about appellant's criminal conduct should not be considered for the truth of the matter asserted, but only for the purpose of demonstrating appellant's

relationship with Shyrock and the Mexican Mafia. In addition, as previously noted, the jury was not instructed that Shyrock was an accomplice whose statements were subject to the rule requiring corroboration. (AOB150-152; *People v. Tobias* (2001) 25 Cal.4th 327, 331.)

Further argument regarding the admissibility of videotaped evidence of Mexican Mafia meetings is reserved for appellant's reply to respondent's Arguments VII and VIII, post. (RB184-216.) It suffices to say that this Court cannot fully adjudicate appellant's insufficiency-of-the-evidence claims without first addressing arguments regarding the inadmissibility and prejudicial impact of the evidence used to obtain appellant's convictions.

Respondent argues that the testimony of witness 15, Anthony Moreno's brother, furnishes evidence of appellant's "involvement in facilitating Shyrock's wishes. . . ." (RB 63.) In reality, witness 15's testimony amounts to little more than cumulative evidence that Anthony Moreno was a Mexican Mafia dropout, and that appellant had a relationship with Shyrock and Eme. However, evidence of appellant's mere membership in a group that may have harbored a motive to kill Anthony Moreno, and his possible awareness of the motive, does not supplant the need for substantial proof that appellant was personally involved in the brutal murders of Moreno and four other people.

Respondent recounts witness 15's testimony regarding appellant's alleged visit to the Moreno family on the day of the murders, and assumes the truth of the witness's statements without addressing any of the troubling credibility problems that arise from viewing Moreno's testimony as a whole. At the time of trial, Moreno was an admitted former gang member, a heroin addict and a career felon who had charges pending which carried a

possible sentence of 25 years to life. (56 RT 8709, 8712-8715, 8722-8723, 8744, 8761, 8765-8766, 8810-8812.) He denied receiving any benefit for his testimony, but then – despite a long prior record – miraculously received credit for time served in his pending felony "Three Strikes" case. (66 RT 10246-10247.) Witness 15 was the only person to testify that appellant went to the Moreno residence on the day of the murders; none of the other percipient witnesses identified or described appellant as among the visitors. (56 RT 8665, 8728, 8735-8738; RT 55:8627, 8686-8644.) Moreover, appellant's family members who did not have criminal histories testified that appellant was at a baptism when this alleged visit to Alex Moreno was supposed to be occurring. (60 RT 9321-9323, 9396-9397, 9418, 9436-9438, 9466.)

Another aspect of witness 15's testimony was substantially impeached. Witness 15 testified that, on the day of the murders, he made three trips with his brother, Alex Moreno, to collect some money from a "fence" to whom they had sold some stolen property and to buy heroin. (56 RT 8725, 8769.) Witness 15 testified that he returned from his third and last excursion to procure drugs at about 2:15 p.m., 15 minutes before appellant allegedly paid a visit to the Moreno residence. (56 RT 8727-8728.)

Witness 15 could not remember the address of the "fence," but said the "fence" operated out of a barber shop at the corner Live Oak Avenue and Peck Road in Arcadia, on the south side of the intersection across from the Edwards Theater. (56 RT 8771- 8773.) Subsequently, appellant called Stefanos Kaparos as a defense witness. Kaparos had been the owner for 19 years of a Shrimp Ahoy restaurant located at the corner of Peck Road and Live Oak Avenue in Arcadia, across from a former Edwards Drive-in

Theater. Kaparos testified that there had never been a barber shop at the corner of Peck Road and Live Oak Avenue. (61 RT 9466-9469.) Kaparos' testimony raises significant doubts regarding the veracity of witness 15's testimony that appellant visited the Moreno residence at approximately 2:15 p.m., at which time appellant's relatives attested he was present at his son's baptismal party. (60 RT 9322-9324, 9396-9397.)

Respondent also emphasizes the testimony of witness 14 as convincing evidence supporting appellant's convictions. (RB 67.) Respondent credits this witness's testimony without addressing severe credibility problems that arise from his motives and bad character, as well as the lack of corroborating evidence and abundance of evidence contradicting his claims.

Witness 14, an admitted heroin user and an El Monte Flores gang member (57 RT 8984, 9000, 9011-9012), was serving prison sentences for kidnaping, robbery and drug offenses at the time of trial. (57 RT 8980-8981.) At the time events were purportedly witnessed, witness 14 was simultaneously using methadone and heroin while he was working for MTA, entrusted with driving the agency's vehicles. (57 RT 8983, 9011-9012.)

This witness claimed he ran into appellant on the day of the murders at about the same time that family members placed appellant in church, at his own son's baptism. (60 RT 9388-9389.) To this extent, the testimony of witness 14 is also inconsistent with the prosecution's theory regarding what occurred during the day on April 22, 1995. Prosecutors theorized, based on the testimony of several of the Morenos' neighbors, that appellant was one of the four men who reportedly visited the victims midday on April 22, 1995, to ply them with heroin. Appellant cannot have been in two places

at once.

Witness 14 also claimed that, late the same evening, appellant left the baptismal party with him to go to appellant's apartment. There, during a supposed one- hour absence from the party (57 RT 8987-8997; 58 RT 9190-9191), appellant purportedly conversed with Jimmy Palma about Mafia business and gave him some heroin. This incident allegedly occurred at a time when appellant's wife and mother-in-law testified they observed appellant opening gifts, helping to clean up after the party, and loading the family's car. (57 RT 8987-8997; 60 RT 9405-9417, 9438-9439, 9466.) Nobody at the party, including appellant's wife and mother-in-law, saw appellant disappear for an hour. (60 RT 9403-9408, 9416-9417, 9436-9439.)

Witness 14's testimony is also inherently incredible considering the number of inconsistent accounts he gave on other occasions regarding his claimed contacts with appellant prior to the trial. On June 21, 1995, he was interviewed by Investigator Davis and never mentioned driving appellant home from a baptismal party on the night of the murders. Rather, on December 6, 1995, witness 14 testified under oath that, on the day in question, he went directly to appellant's house, unaccompanied, to score a gram of heroin. Witness 14 claimed that, while he was there purchasing heroin, Jimmy Palma also stopped by to purchase some heroin. Palma mentioned he was "packing" and told appellant he was going to take care of some business. (58 RT 9196-9197.)

Conveniently for prosecutors, witness 14 changed his testimony prior to trial. It wasn't until March 12,1996, after witness 14 had been taken into custody for kidnaping and robbery that he reported attending the post-baptismal party with "Denise," and driving appellant to his apartment for

the meeting with Palma. Not surprisingly, after changing his story, witness 14 received a comparatively lenient sentence of only 11 years and 8 months in prison. (58 RT 9029, 9200.) It is unknown what other benefits witness 14 received in exchange for testifying. At trial, defense counsel was not permitted to cross-examine witness 14 regarding whether his conditions of confinement in the Pelican Bay State Prison Security Housing Unit (SHU) – about which he had vociferously complained – had improved after he revised his account of what happened on the night of the murders. (58 RT 9027-9028, 9053-9055, 9062.)

Respondent also emphasizes the fact that appellant's pager received numerous calls from the perpetrators of the murders before and after they occurred. (RB 68.) There was no evidence proving that appellant was carrying the pager at the times the calls were made. Furthermore, the telephone records of appellant, his family members, and the hosts of the baptismal party were clearly subject to prosecutorial discovery before trial. Nevertheless, the prosecution failed to produce any evidence at trial that appellant had ever returned calls to the codefendants in response to any of these pages.[2] Evidence that appellant was paged but did not return calls is as consistent with his innocence as it is with his guilt. It tends to corroborate appellant's extrajudicial claim to detectives that he was urged to act as middle man to kill Moreno and/or Aguirre, but refused to become involved because of his friendship with the Moreno family.

Referring to weaknesses in the prosecution's evidence that were exposed to the jury, respondent dismisses appellant's insufficiency

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[2] Only witness 14, whose credibility is questionable, testified that during the baptismal party appellant received a page and left the room. (RT 57:8988-8989.)

arguments as "nothing more than an invitation to reconsider the jury's factual findings and determinations." (RB 69.) In making this argument, respondent completely ignores the devastating impact of inadmissible evidence that very likely swayed jurors to find inherently incredible and uncorroborated witnesses more credible. The erroneously admitted videotape in which Shyrock attributed to appellant vague prior acts of murder[3] on behalf of the Mexican Mafia is but one of many examples of emotionally charged evidence which the jury would have been incapable of ignoring. (*Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1173; *People v. Saling* (1972) 7 Cal.3d 844, 856.) Excluding Shyrock's highly prejudicial statements which clearly implied that appellant had killed before, the evidence is plainly insufficient to establish appellant's culpability for the murders as an aider and abettor or as co-conspirator.

B. Insufficiency Of Evidence To Prove That The Murders Of Maria Moreno And The Children Were The Foreseeable Consequence Of The Conspiracy:

As evidence that the murders of Maria Moreno and the children were a foreseeable consequence of the conspiracy, respondent points to the testimony of witness 15 that appellant visited the residence during the afternoon of April 22, 1995, and saw that children were present. (RB 73.) Witness 15 is the sole source of evidence for this purported fact. For reasons previously stated, this inherently incredible witness's testimony was uncorroborated and should not be believed. (Argument I, A, *ante*.)

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[3] Shyrock informed his companions that appellant had done a "lot of business" for the Mafia and "downed a whole bunch of mother fuckers." (8 SCT 1:1644-1664.)

Witness 15, who was on heroin at the times these events took place, testified that Maciel and three younger men visited the Moreno residence at about 2:30 p.m. This fits nicely with witness 14's claim that he ran into appellant near an El Monte trailer court at about 12:30 p.m. the same day. (57 RT 8983-8985, 9007.) However, the testimony is inconsistent with the testimony of the state's more disinterested witnesses, i.e., neighbors who noticed the four male visitors arriving at the Morenos' residence midday on April 22, 1995. For example, witness 8, a neighbor, testified that she saw the male visitors arrive at the Moreno residence between 12:00 and 1:00 p.m. on April 22, 1995, or possibly between 1:00 and 2:00 p.m., depending on when she arrived home from work. (55 RT 8609, 8622.) Witness 9, who has having a yard sale in the vicinity of the Morenos' residence, recalled that she saw the four men go down the Morenos' driveway at about noon. (56 RT 8660.) Witness 11, another neighbor, recalled that the visitors arrived at about 12:30 p.m. (55 RT 8629.)

When a majority of witnesses observed the four visitors arriving at the Moreno residence, appellant was, according to family members, at his son's baptism, in transit to the home of the Lopez family for a baptismal party, and/or just arriving at the baptismal party with his wife and son. (60 RT 9321-9323, 9391-9397.) At the time witness 15 claims appellant paid a visit to his brother and him – after 2:30 p.m. – the baptismal party was already in progress. Appellant's testifying family members expressed certainty that he was with them at the baptism and party. (60 RT 9321-9323, 9396-9397, 9436-9438.) Viewed as a whole, it cannot be said that substantial evidence of solid value establishes appellant's presence at the victims' residence on the day of the murders.

As evidence that the deaths of Maria Moreno and the children were a

foreseeable, natural and probable consequence of the murders of "Dido" Moreno and Gustavo Aguirre, respondent points to triple hearsay – testimony by (1) codefendant Torres' sister, witness 13, that (2) Torres told her that (3) somebody told the perpetrators that they were not supposed to leave any witnesses. (RB 73.) The identity of the person who supposedly gave the order to kill witnesses is not revealed through witness 13's testimony. Of course, this "declarant" did not testify and could not be cross-examined. Furthermore, there is absolutely no evidence in the record that if such an order was given to Torres, Palma, Logan, Ortiz, and/or Valdez, it was given by appellant, or by someone else in the Mexican Mafia with appellant's knowledge or assent.

The state's own evidence is to the contrary. Assuming Raymond Shyrock was referring to the need to kill Dido Moreno during the Mexican Mafia meeting that was videotaped on January 4, 1995, Shyrock explicitly stated he did not want the children in the residence killed. (8 SCT 1:1642-1643.) According to other evidence, Torres told his sister that they were not supposed to kill the children. (8 SCT 1:1628, 1633.) The prosecution's gang expert, Richard Valdemar, testified, consistently, that the Mexican Mafia has a rule against killing innocent women and children. Violation of the rule is punishable by death. Codefendant Palma was murdered while on death row as punishment for his involvement in the killing of the children in this case. (55 RT 8584-8586, 8603.) Under such circumstances, the fact that some unidentified individual may have directed Torres not to leave any witnesses hardly makes it foreseeable to appellant that the Morenos' children would be slaughtered, particularly since Torres was also instructed not to kill the children.

More importantly, this hearsay evidence was highly unreliable and

inadmissible; it was erroneously admitted over objection. (AOB 181.) Therefore, it should not be considered by this Court in weighing the sufficiency of evidence of foreseeability. Torres' statement about not leaving any witnesses was made after the objectives of the alleged conspiracy had been achieved; it was not properly received as a statement in furtherance of the alleged conspiracy. (AOB185; *People v. Leach* (1975) 15 Cal.3d 419, 431; *Krulewitch v. United States* (1949) 336 U.S. 440, 443 [93 L.Ed. 790, 69 S.Ct. 716].) In addition, Torres' self-serving statement did not qualify as a statement against Torres' penal interest. An accomplice's confession is considered presumptively unreliable when it appears the declarant has a considerable interest in "'confessing and betraying'" his cohorts. (*Lilly v. Virginia, supra*, 527 U.S. at p.131; internal citation omitted.) Clearly, Torres was playing the "blame game" with his sister, implying that he bore no responsibility for the deaths of the children. Hearsay statements must be actually disserving to the individual declarant to be admissible pursuant to Evidence Code section 1230. (*People v. Leach, supra,* 15 Cal.3d at p. 439.) Without this unreliable, inadmissible hearsay, substantial evidence is lacking to support the jury's implied finding that the murders of Maria Moreno and the children were a natural and probable consequence of the plan to kill Aguirre and/or Moreno.

C. Insufficiency Of Evidence To Prove The Multiple Murder Special Circumstance Findings As To Victims Gustavo Aguirre, Maria Moreno, and Laura Moreno.

Respondent argues that the trial court properly denied appellant's motion to dismiss the multiple murder special circumstance finding since there was substantial evidence in the record to prove that appellant intended

the deaths of the victims other than Anthony Moreno. (RB 74-75, 77-78.) Respondent's argument contradicts the district attorney's guilt phase closing argument to the jury. Mr. Manzella conceded in argument that "we have not proven that he did intend the killing of the children." (62 RT 9660.) He repeated, ". . . we haven't shown that this defendant intended the killing of the children." (62 RT 9660.)

Respondent points to two cases as support for the jury's finding that the killings of Gustavo Aguirre, Maria Moreno and five-year-old Laura Moreno were intended by appellant, *People v. Hardy* (1992) 2 Cal.4th 86, 192 and *People v. Maury* (2003) 30 Cal.4th 673. A third case, *People v. Williams* (2003) 16 Cal.4th 635, 689, which reverses the death judgment, is cited as distinguishable.

Neither *Hardy* nor *Maury* "mandate" the rejection of appellant's insufficiency of evidence argument. (RB 75.) In *Hardy*, the jury not only found true a multiple murder special circumstance; it also found true that the defendant had aided and abetted the killing of a witness to a crime. The latter special circumstance required the jury to find that the defendant aided and abetted the codefendant with knowledge of the codefendant's explicit purpose – to kill to prevent the victim from testifying. This Court found the absence of instructions requiring proof of intent to kill harmless because it was clear that the jury must have found under the instructions that the defendant intended to kill. (*People v. Hardy, supra*, 2 Cal.4th at p.192.)

In *Maury*, the defendant was convicted of the first degree murders of three women, assault on one with intent to commit rape, the robbery of another, and the forcible rape of a fourth woman. After each of the crimes, the defendant had called a secret witness operator with information on the crimes in exchange for reward money. With respect to two of the three

murders, this Court found that there was no evidence at all to support conviction on an aiding and abetting theory. As to the third murder, this Court acknowledged that the defendant's extrajudicial statements to the police constituted the sole evidence that appellant aided and abetted, rather than committed the murder.

In *Maury*, it was impossible to determine from the record which murders the jury relied upon to find true the multiple murder special circumstance allegation. This Court declared that there was "no evidence to support a finding that defendant aided Morris in killing [the third victim] without knowing that Morris intended to kill her." (*People v. Maury, supra*, 30 Cal.4th at pp. 431-432.) Even if the jury believed the defendant, who said that the codefendant forced him to strike the victim on the head with a rock to mask the cause of death, the jury could not have found that the defendant aided the killing accidentally or unintentionally. (*Id.*, at p. 432.)

In *People v. Williams, supra*, 16 Cal.4th 635 (RB 75), this Court reversed the death sentence where the trial court failed to instruct jurors that to find the multiple murder circumstances true, they had to find the defendant aided and abetted the murders with the intent to kill. In *Williams*, the perpetrators entered the victims' home mistakenly; they were apparently looking for the intended victim, the subject of a contract to kill. Right after shots were fired, the defendant was seen leaving the victim's residence, in possession of a gun. Shortly after the murders, the defendant also spent a large amount of money. The defendant admitted to police that he was inside the victims' residence, but claimed that he fled when the codefendant started shooting. Finding the instructional error prejudicial, this Court explained that the fact that the "actual perpetrator committed the murders (execution style) did not itself reveal an intent to kill by defendant as an

aider and abettor." (*Id.*, at p. 690.)

In contrast, in this case the prosecution's evidence on the intent to kill issue is even weaker than it was in the *Williams* case. Raymond Shyrock allegedly wanted Anthony Moreno killed because he had dropped out of the Mexican Mafia. Shyrock knew there were women and children in the Moreno household, and, consistent with Mexican Mafia "rules," said he did not want the children killed. At least one of the actual perpetrators, Torres, told his sister they were not supposed to kill innocent children; according to the plan, only one man – presumably Moreno – was supposed to be killed. (8 SCT 1:1626-1633.)

Appellant may have been friendly with Shyrock, and he may even have joined the Mexican Mafia by the time Moreno was murdered. However, he was nowhere near the Moreno family's home at the time of the killings. Even assuming *arguendo* that appellant arranged for the murder of Moreno on the Mafia's behalf, and further, that appellant would have condoned the murder of Moreno's companion, Gustavo Aguirre, who was robbing Mafia connections, the uncontroverted evidence shows that neither appellant nor Shyrock intended to cause the deaths of Maria and the children. Although the issue here is not instructional error, but rather, whether substantial evidence supports the jury's findings of intentional murder as to Aguirre, Maria Moreno, and Laura Moreno, the *Williams* decision nonetheless supports appellant's position.

Respondent also argues in a footnote (RB 78, fn. 39) that the court lacked discretion to strike or dismiss the special circumstance findings in

furtherance of justice. (Pen. Code, § 1385.1.)[4] The trial court did not lack discretion under section 1385.1 to dismiss or strike special circumstances that were found by the jury based on constitutionally insufficient evidence. As has been previously explained in subsection B, above, there was no evidence, much less substantial evidence of solid value, suggesting that appellant, or even Raymond Shyrock – who purportedly ordered the killing – intended to cause the deaths of any victim except the alleged Mexican Mafia dropout, Anthony Moreno. The motion to dismiss the multiple murder special circumstance findings should therefore have been granted.

D. If Any Murder Conviction Is Set Aside, The Death Penalty Should Likewise Be Set Aside.

Respondent cites numerous cases for the proposition that the death penalty should be affirmed even if one or more of the murder convictions is reversed. (RB 78-79.) The cited cases do not present the same situation presented here: where there is only one death penalty eligibility factor – multiple murder – and the evidence is insufficient to support jury's findings that the appellant intended to kill some of the murder victims. (RB 48-49.)

In the first category of cases cited by respondent, prosecutors erroneously charged – and the jury erroneously found true – more than the permissible number of multiple murder special circumstances. (*People v. Bonin* (1989) 47 Cal.3d 808, 856; *People v. Allen* (1986) 42 Cal.3d 1222, 1273.) Even though there were no other special circumstances found true, the duplicative multiple murder special circumstance findings were found

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

harmless because, in essence, the jury could not have been confused about the total number of intentional murders committed by the defendant. (*People v. Sanders* (1995) 11 Cal.4th 475, 562.)

For example, in *People v. Miller* (1990) 50 Cal.3d 954,1001-1002 (RB 79), the jury found true four multiple murder circumstances based on convictions of four murders. The death judgment was affirmed based on the single valid multiple murder special circumstance finding even though three of the multiple murder findings had to be reversed. (Accord: *People v. Hamilton* (1989) 48 Cal.3d 1142, 1180-1181; *People v. Kimble* (1988) 44 Cal.3d 480, 504.)

In the second category of cases cited by respondent, a multiplicity of multiple murder special circumstances were found true rather than the allowable one and the jury also made one or more other valid special circumstance findings. In these cases, the Court struck any duplicative findings and affirmed the death judgment based on the valid multiple murder special circumstance finding and other special circumstances properly found true by the jury.

For example, in *People v. Sanders*, *supra*, 11 Cal.4th at p.562 (RB 78), the jury found true four multiple murder special circumstances and one felony-murder-robbery special circumstance. This Court struck the superfluous multiple murder findings but affirmed the death judgment based on the jury's consideration of allowable multiple murder and felony-murder special circumstance findings. (Accord: *People v. Beardslee* (1991) 53 Cal.3d 68, 117; *People v. Gallego* (1990) 52 Cal.3d 115, 201; *People v. Hernandez* (1988) 47 Cal.3d 315, 357-358; *People v. Odle* (1988) 45 Cal.3d 386, 409-410; *People v. Williams* (1988) 44 Cal.3d 1127, 1146; *People v. Allen, supra,* 42 Cal.3d at p.1273; *People v. Rodriguez* (1986) 42 Cal.3d

730, 787-788; *People v. Harris* (1984) 36 Cal.3d 36, 66-67.) (RB 79.)

In none of the cases cited by respondent was there a single multiple murder special circumstance finding supported by one or more murder convictions that had to be reversed based on the insufficiency of the evidence to prove the defendant shared the intent to kill the victim. Appellant asserts that, even if this Court finds the evidence sufficient to establish that appellant conspired with gang members to kill Anthony Moreno, the evidence is wholly insufficient to prove that he intended to cause the death of the other four of the victims, including Laura Moreno, Ambrose Padilla,[5] Maria Moreno, and Gustavo Aguirre. If, however, this Court concludes that appellant did not intend to kill Laura Moreno and Maria Moreno, but did intend to kill Gustavo Aguirre, a multiple murder special circumstance finding could still arguably be predicated on the intentional murders of the targeted victim, Moreno, and Aguirre. However, this does not mean the death judgment should necessarily be affirmed. The circumstances presented are not analogous to cases wherein this Court has reversed superfluous multiple murder special circumstance findings, but the total number of intentional killings shown by the evidence remained the same.

The essential holding of *Brown v. Sanders* (2006) 546 U.S. 212 [163 L.Ed.2d 723, 126 S.Ct. 884], is that "constitutional error only arises where the jury could not have given aggravating weight to the same facts and circumstances under some other sentencing factor." (*United States v. Mitchell* (9th Cir. 2007) 502 F.3d 931, 977.) In this case, multiple murder was the only death-eligibility factor. The jury's decision to impose death

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[5] The jury did not count the death of Ambrose Padilla in finding true the multiple murder special circumstance allegation.

based on the commission of multiple murders was based in part on the wrong assumption that appellant not only conspired to kill Anthony Moreno, but also intended to cause the deaths of five-year-old Laura Moreno and her mother, Maria Moreno. If the evidence is insufficient to support one or more of the murder convictions, or the jury's finding that the deaths of Maria and/or Laura were intended by appellant, it cannot be said that the jury could "have given aggravating weight to the same facts and circumstances under some other sentencing factor." (*Ibid.*) The intentional killing of an innocent mother and child would normally be regarded as much more heinous than the intentional killing of grown men – particularly men who are career criminals willingly engaged in provocative criminal conduct known to put them at substantial risk of lethal retaliation. In such circumstances, the reversal of the death judgment is mandated by *Brown v. Sanders, supra,* 546 U.S. 212.

Accordingly, if any of the convictions is reversed, or if the jury's finding that appellant intended to cause the deaths of Maria and Laura Moreno is determined not to be supported by substantial evidence, the matter should be remanded for a new penalty trial to allow the jury to decide whether appellant deserves to die based on the actual number of deaths, if any, intentionally caused by appellant.

II

REPLY TO RESPONDENT'S ARGUMENT II: THE TRIAL COURT ERRED BY DENYING APPELLANT'S TIMELY REQUEST TO DISCHARGE RETAINED COUNSEL.

A. The Trial Court Applied The Wrong Standard.

Respondent asserts that the trial court applied the correct legal standard – that of *People v. Ortiz* (1990) 51 Cal.3d 975 – in denying appellant's motion to discharge retained counsel. Respondent states that the record "plainly shows the court was cognizant of the criteria identified in *Ortiz* and applied those criteria correctly." (RB 91.) The record speaks for itself and supports a contrary conclusion.

Appellant's motion to discharge counsel cited *People v. Marsden* (1970) 2 Cal.3d 1118, as authority. (8 SCT 1:1598.)[6] The express purpose of holding an *in camera* hearing was to afford appellant an opportunity to express the grounds for his dissatisfaction with counsel – an inquiry that *Marsden*, but not *Ortiz,* demands. (*People v. Lara* (2001) 86 Cal.App.4th 139,155.) The court referred to the *in camera* proceeding as a Marsden motion. (50-1 RT 7554.) The court made findings, consistent with the *Marsden* standard, that trial counsel was competent, and that there had not been a breakdown of the attorney-client relationship to the extent that there was an "actual conflict of interest" where appellant and Mr. Esqueda were going to "kill each other." (50-1 RT 7553.) The judge described what he was doing as denying "a *Marsden* motion." (50-1 RT 7554.) The sealed

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[6] Given Guillen's lack of experience, and Mr. Esqueda's lack of involvement in drafting the motion, it cannot be said that either appellant, Guillen, or Mr. Esqueda deliberately mischaracterized the motion as a *Marsden* motion as a matter of trial tactics, and invited the error. (*People v. Lara* (2001) 86 Cal.App.4th 139, 164-165.)

reporter's transcript of the *in camera* proceeding is even entitled "*Marsden* Hearing." The court clearly believed its ruling was governed by *Marsden*. When a trial court utilizes the wrong standard to decide on a motion to discharge retained counsel, and therefore does not adequately address the issue of delay, reversal is automatic. (*People v. Ortiz, supra*, 51 Cal.3d at p. 988; *People v. Hernandez* (2006) 139 Cal.App.4th 101, 109.)

B. The Court Did Not Find That Granting The Motion Would Prejudice Appellant Or Disrupt The Orderly Processes Of Justice.

Respondent also argues that trial court made findings, supported by the record, that the discharge of retained counsel would cause "significant prejudice" to the appellant and/or "disruption of the orderly processes of justice." (RB 92.) No such findings were made. The trial court's reasons for denying the motion included: (1) that the case had been pending for a long period; (2) that substitution of a new attorney would entail a delay of another six months at minimum; and (3) that the motion was "not the most timely request." (50-1 RT 7548-7551.) The court also commented that the witnesses were scared due to the nature of the case, and the longer the case went on, the more difficult it would be to get the case tried. (50-1 RT 7551.)

The trial judge certainly did not find that the delay would cause significant prejudice to appellant. To the contrary, on December 12, 1997, Judge Horan sympathized that appellant's trial lawyer was "spread pretty thin . . . ." (50-1 RT 7543.) At the *in camera* hearing, the court also conceded that appellant had expressed a number of valid concerns about matters that had not yet been investigated. (50-1 RT 7552.) Yet trial

counsel commenced appellant's death penalty trial several weeks later, on January 5, 1998. Assuming Mr. Esqueda became unengaged from his prior trial, as predicted, on December 18, 1997, this would have allowed counsel a total of 19 calendar days or 11 business days, excluding Saturdays, Sundays, Christmas Day and New Year's Day, to "get up to speed" on appellant's death penalty case. (51 RT 7602.) Under the circumstances, further delay would certainly not have prejudiced appellant.

The court did express concern with the potential adverse effects of a six-month or more delay to allow new counsel to prepare. However, the court also indicated that "the timeliness of the whole thing" – referring to the timeliness of the motion to discharge counsel – was "not the first and foremost consideration . . . ." (50-1 RT 7550.) Manifestly, the judge's paramount consideration in denying the motion was his belief – based on what he learned at the *Marsden* hearing – that Mr. Esqueda was furnishing adequate representation and that there did not exist an irreconcilable conflict between appellant and his lawyer. (50-1 RT 7553.) As previously indicated, when an *Ortiz* motion is denied under such circumstances reversal is automatic. (*People v. Hernandez*, *supra*, 139 Cal.App.4th at p.109.)

Nor does the record support even an implied finding that replacing retained counsel would have disrupted the orderly processes of justice. The motion was not made on the eve of trial, but rather, a full month before the scheduled trial date. There was no jury venire waiting to be sworn. Witnesses had already been scheduled to appear or remain available for a trial commencing December 12th. Nothing in the record suggests that it would have been more inconvenient or frightening for particular witnesses to appear for trial in May or June of 1998, rather than on the scheduled trial

date, which had to be continued several times more. "Blanket generalizations about possible delay" do not suffice to show that disruption of the orderly processes of justice would occur. (*People v. Munoz* (2006) 138 Cal.App.4th 860, 870; see also, *In re Marriage of Goellner* (Colo. Ct. App. 1989) 770 P.2d 1387, 1389 ["[A] court's interest in administrative efficiency may not be given precedence over a party's right to due process."].)

C. The Motion Was Timely.

Respondent also argues that the trial court acted properly by denying appellant's motion to discharge retained counsel because the motion was untimely. (RB 92.) Mere untimeliness that does not cause disruption to the orderly processes of justice cannot be relied upon to justify the denial of appellant's *Ortiz* motion. (*People v. Ortiz, supra*, 51 Cal.3d at p. 988; *People v. Hernandez, supra,* 139 Cal.App.4th at p.109.) In addition, however, respondent's lengthy recitation of the facts (RB 80-89) skews the picture by omitting important details which suggest that, considering the circumstances, appellant's request to discharge Mr. Esqueda was as timely as it possibly could have been.

Appellant was indicted in December of 1995. Mr. Esqueda was hired in mid-February of 1996. Thereafter, appellant's case was postponed over and over again. (AOB 65, fn. 22.) Respondent argues that the granting of numerous prior continuances should have no bearing on the correctness of the trial court's determination that the motion was untimely. (RB 94.) Appellant disagrees. The prior delays do have relevance to the timeliness issue. On January 16, 1997, nearly a year before the trial actually began, Mr. Esqueda declared himself ready for a joint trial with codefendant

Torres. (8 RT 895.) However, the prosecutor belatedly decided to seek consolidation of another case against appellant (BA109088) with the capital murder case against Torres and appellant. (CT 1: 494.) Delays ensued to allow appellant's counsel in the second case – Joel Garson – to oppose consolidation. (CT 1: 532;,16 RT 2290-2304; 26 RT 3863-3879.) Consequent to consolidation, the trial of appellant's two unrelated cases was severed from the capital murder trial of codefendant Torres. (26 RT 3884-3891.) This caused further delays because appellant had to be tried separately instead of jointly with Mr. Torres. Continuances were additionally necessary to allow appellant's counsel to seek discovery related to the new charge. (26 RT 3888.) After numerous delays, on May 21, 1997, the prosecutor decided not to proceed against appellant in the unrelated case. (45 RT 7162-7166.) By then, of course, Mr. Torres had already gone to trial. If the trial judge was genuinely concerned about inconveniencing witnesses and the possible deterrent effect of postponing appellant's trial on the willingness of fearful witnesses to testify, the court could have avoided nearly a year of delays by denying the prosecutor's tardy motion to consolidate.

The events leading to the motion to discharge also belie respondent's untimeliness argument. In August of 1997 – shortly before the often rescheduled trail date (CT 1:103-109A; sealed *Marsden* CT 1604), appellant, worried about Esqueda's failure to investigate, finally took it upon himself to hire an inexperienced law graduate, Isaac Guillen,[7] to act as

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[7] Criminal defense attorney Isaac Guillen, 48, of West Covina, was recently charged by federal indictment with regularly transferring thousands of dollars of funds to a Mexican Mafia member imprisoned at the federal "Supermax" facility in Florence, Colorado. According to the indictment, from October 2003 until September 2008, Guillen transferred

an investigator on his behalf. On October 6, 1997, Mr. Esqueda appeared on appellant's behalf and represented to the court that he wanted a court order allowing his "investigator," Isaac Guillen, to visit appellant in jail. The Court signed the order. (RT 7448; 8 SCT 1:1997.)

Guillen's permission to visit appellant was short-lived. On October 8, 1997, Guillen tried to visit appellant pursuant to the court's order and was denied access. When he demanded to speak with a supervisor, he was arrested and charged with a violation of section 148 – charges which were never pressed. (Sealed *Marsden* CT 1606.) A few days after his arrest, Guillen complained about the incident to a jail lieutenant. Guillen then learned that Esqueda had been contacted by jail personnel to verify his authority as Esqueda's investigator to visit appellant, and Esqueda had denied that Guillen was his investigator and said deputies should go ahead and arrest him. (Sealed *Marsden* CT 1606.)

On October 16, 1997, Mr. Esqueda filed a written motion seeking a continuance of appellant's trial because he was engaged in another client's death penalty jury trial. (8 SCT1: 1588-1591.) On October 17, 1997, Mr. Esqueda failed to make a calendared appearance at the hearing of his continuance motion. Appellant was not brought into the courtroom and had no opportunity to address the court. The hearing on the continuance motion was trailed to October 20, 1997. (8 SCT 1:1592.)

On October 20, 1997, attorney Richard Escalera made a special appearance for Mr. Esqueda, who was absent. The court advised appellant

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approximately $27,500 into the Mexican Mafia member's prison account. The indictment also alleges that Guillen and the imprisoned Mexican Mafia Member are partners in several businesses, including a limousine service, a liquor distributor, and a real estate holding corporation.

that his attorney was engaged in a matter in another court, quipping, "nothing we can do about that." (49 RT 7454.) Appellant was then asked to and did waive his right to a speedy trial. (49 RT 7455.) On October 20th – in Mr. Esqueda's absence – the court also rescinded the October 6, 1997, order appointing Guillen to act as appellant's investigator. (49 RT 7459.)

Thereafter, Guillen prepared the written motion to discharge counsel filed by appellant *in propria persona,* file-stamped November 17, 1997. (8 SCT 1:1595 et seq.) The court must have received notice that appellant wanted to discharge counsel prior to November 17th. In open court on November 17, 1997, the judge called the case and immediately announced that "Mr. Maciel made a request last week to discharge counsel and have the court appoint counsel to represent him at the trial." (49 RT 7466; emphasis added.) The court also announced that Mr. Esqueda had filed another motion to continue. (49 RT 7466.) Appellant was asked if he had yet had an opportunity to speak with Mr. Esqueda about his motion to discharge counsel. (49 RT 7466.) Appellant said yes, he had spoken with Mr. Esqueda the previous Friday and still wanted to discharge him. (49 RT 7466.)

The court found good cause to continue the trial to December 12, 1997; Mr. Esqueda was engaged in trial in another extremely serious felony case involving the attempted murder of a police officer. (49 RT 7468, 7470.) The court denied appellant's motion to discharge "without prejudice." (49 RT 7468, 7470.) Appellant was told he could renew his motion to discharge Mr. Esqueda on December 12, 1997, at which time he would be given an opportunity for an *in camera* hearing to present the reasons for his dissatisfaction with counsel. (49 RT 7470.)

Appellant pressed the court for an immediate *in camera* hearing of

his complaints against counsel. (49 RT 7470-7471.) The court reiterated that appellant would be given an opportunity on December 12th for a hearing, not sooner. (49 RT 7471.) When appellant continued to argue for an immediate hearing, the court added that the request to discharge counsel was being denied without prejudice because it was "untimely in the extreme," because witnesses were reluctant to testify and had repeatedly been inconvenienced, and further because it would probably take another competent counsel at least six more months to prepare. (49 RT 7472-7474, 7476, 7549.)

Appellant then requested a hearing regarding why Guillen had been arrested at the county jail. (49 RT 7478-7479.) The court refused to hold a hearing, suggesting that appellant ought to hire a "licensed investigator." (49 RT 7480.) Appellant informed the court that Mr. Esqueda did not have enough money to hire an investigator. (49 RT 7481.) The court asked appellant – not Mr. Esqueda – if he was asking the court to appoint an investigator for him. Appellant said no. (49 RT 7482.)

On December 12, 1997, the case was called for trial, but Mr. Esqueda was still engaged in trial in another courtroom. He expected to complete the other trial by December 18, 1997. (50-1 RT 7488-7489.) During his brief appearance, counsel admitted "in all fairness to Mr. Maciel" that he had not had much contact with his client because he had been engaged in other trials almost continuously since September. (50-1 RT 7490.) Esqueda asked the court for a continuance to December 29, as "zero-of-thirty," so that he could "go back and review things and get up to speed." (50-1 RT 7490.)

A *Marsden*-type hearing was then held during which appellant was allowed to voice his complaints about Mr. Esqueda's handling of the case.

(50-1 RT 7496.) After appellant complained that his attorney was unprepared for his trial due to his engagement in other death penalty trials, Mr. Esqueda assured the court that he was intimately familiar with the facts of the case, and that "a lot of the things that [appellant is] requesting he's entitled to get and he's hired Mr. Isaac Guillen to do a lot of those things." (50-1 RT 7544.) Considering Mr. Esqueda's role in facilitating Guillen's arrest, this glib reference to Guillen's ostensible investigative function seems disingenuous. Even worse, Mr. Esqueda then proceeded to cast doubt on Guillen's competency and credibility; he described him as having "an axe to grind with society," and "a chip on his shoulder," and said Guillen had been misleading appellant about the need for investigation. (50-1 RT 7545-7546.)

In short, appellant's request to discharge counsel was not dilatory at all. He moved for discharge – justifiably – only after his retained attorney had repeatedly and continuously become engaged in trial in several other murder and capital cases for several months, leaving what appeared to be inadequate time to investigate and prepare appellant's death penalty case. Appellant's evolving concern about trial counsel's lack of preparedness is evinced by his attempt to hire an unlicensed "investigator," i.e., Isaac Guillen, in August 1997.[8] The ultimate decision to discharge retained

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[8] Notably, ABA Guidelines provide that a defense team in a death penalty case should consist of no fewer than two qualified attorneys, an investigator and a mitigation specialist. (ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (February 2003) [hereafter ABA Guidelines],Guideline 4.1, p. 28.) The ABA Guidelines were originally adopted in 1989. The Guidelines were revised in February of 2003. They articulate the "official position of the ABA," and are intended to furnish clear benchmarks "for measuring whether ... lawyers are rendering effective assistance in individual cases...."

counsel was made in October, shortly after Mr. Esqueda's counsel's role in the arrest of Guillen became known, and the trial court unilaterally revoked Guillen's investigator status following the incident at the jail. Appellant's "repeated and detailed requests for a new attorney reflect[ed] a 'genuine concern about the adequacy of his defense rather than any intent to delay.'" (*People v. Munoz, supra*, 138 Cal.App.4th at p. 870, quoting *People v. Ortiz, supra,* 51 Cal.3d at p. 987.)

Although these events occurred in October, appellant had no opportunity to request the discharge of counsel until mid-November, when Guillen tendered for filing appellant's written motion to discharge. Then the Court refused to hold a hearing of appellant's motion until December 12th, nearly a month later. A fair reading of the record suggests that the trial court never seriously contemplated granting appellant's motion for substitute counsel. By delaying and then denying the motion, the court myopically insisted on expeditiousness in the face of appellant's justifiable request for new counsel, and rendered his constitutionally guaranteed right to counsel of choice an "empty formality." (*People v. Ortiz, supra*, at p. 984; quoting *People v. Crovedi* (1966) 65 Cal.2d 199, 207.)

D. The Same Standard Applies To Appellant's Paid Attorney As To Attorneys Who Are Not Paid Or Who Serve As Volunteers.

(Freedman, '*The Guiding Hand of Counsel': ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*; Introduction (2003).) 31 Hofstra L. Rev. 903, n. 1, n. 5.) Furthermore, "ABA Guidelines are not aspirational. They embody the current consensus about what is required to provide effective defense representation in capital cases." (Guideline 1.1, 2.)

Respondent seeks to distinguish appellant's case from the circumstances presented in *People v. Ortiz, supra*, 51 Cal.3d at pp. 984-987, and *People v. Stevens* (1984) 156 Cal.App.3d 1119, in part because those cases dealt with motions to discharge unpaid or volunteer attorneys rather than paid counsel. (RB 95) This is a distinction without a difference. Mr. Esqueda was hired in February of 1996 for a flat fee of $35,000. This unrealistically meager fee was supposed to cover his legal fees and the costs of a complex capital case investigation with six defendants and five murder victims. (Sealed *Marsden* CT 1602.) Aside from the fact that fixed fee arrangements are considered improper in death penalty cases because they create "an unacceptable risk that counsel will limit the amount of time invested in the representation in order to maximize the return on the fixed fee" (ABA Guideline 9.1, B (2); Commentary, p. 54), the amount of the retainer in this case was plainly insufficient to cover investigative costs for a capital trial (ABA Guideline 10.7; see also 2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, Guideline 4.1; Freedman, *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* (2008) 36 Hofstra L. Rev. 663) as well as fees for the 2,000 or more attorney hours typically required to competently prepare and try the average death penalty case. (ABA Guideline 6.1, Workload, Commentary, p. 40.) This case, moreover, was not "average."

In this case, the trial court denied appellant's motion to discharge retained counsel, knowing the small fee Mr. Esqueda had received as a retainer, and knowing that appellant was attempting to make up for counsel's evident shortcomings by hiring his own investigator and attempting to manage his own investigation. By November 17, 1997, Mr.

Esqueda was as much "reluctantly serving on a pro bono basis" as were the attorneys in *Ortiz* and *Stevens*, and the court knew, or at least had good reason to know it. (*People v. Ortiz, supra,* 51 Cal.3d at pp. 984-987; RB 95.)

Far from "patently meritless" (RB 95), some of appellant's complaints about Mr. Esqueda's failure to investigate were concededly meritorious. In addition, both Mr. Esqueda and the court acknowledged that appellant's lawyer was overtaxed and had been engaged in back-to-back trials, leaving little time to prepare appellant's multiple defendant and multiple murder case. (50-1 RT 7490, 7506, 7522, 7525, 7543, 7552.)

E. The Denial Of Discovery Made It Impossible For Appellant To Sustain the Burden, Improperly Imposed Upon Him, To Prove Trial Counsel's Deficient Performance.

Respondent argues that the identities of witnesses subject to the court's nondisclosure order "were readily ascertainable *prior to trial.*" (RB 95.) This is simply untrue. Respondent's speculation to the contrary is unsupported. Appellant knew the names of witnesses 14 and 15 prior to trial. However, there is no evidence in the record establishing that appellant knew the names of numerous other unidentified witnesses including witnesses 1, 2, 3, 8, 11, 13, 16, and 17.

Appellant has adequately described the harm caused by the withholding of witness identity information until the time of trial in Argument IV of the AOB (AOB 109) and those arguments are incorporated by reference herein and will not be reiterated at this point.

F. The Exclusion Of Isaac Guillen Deprived Appellant Of A Fair Hearing On His Motion To Discharge Counsel.

Without citing to any legal authority, respondent argues that Isaac Guillen was properly excluded from the *Marsden* hearing because he was not a licensed investigator and statements made in his presence would not have been protected by Evidence Code section 954, subdivision (c). (RB 98.)

Respondent conveniently ignores both the facts and the law. Mr. Esqueda sanctioned appellant's hiring of Guillen to act as an investigator and, during the December 12th hearing, even implied that Guillen was still conducting investigation on appellant's behalf. (50-1 RT 7525 [wherein Esqueda advises the court that he has asked Guillen to look into whether witness 14's car was totaled prior to the date of the murders].) Indeed, it is undisputed that Guillen did do interviews of defense witnesses for Mr. Esqueda. (60 RT 9423, 9445.) Guillen also took some photographs for counsel in preparation for trial. (50-1 RT 7503; 60 RT 9448.) Moreover, the court itself had temporarily authorized Guillen to act as an investigator and visit appellant in jail, although that order was subsequently rescinded. (49 RT 7448-7450, 7452-7462; 8 SCT 1:1606.) Whether or not he was licensed, Guillen was the only investigator appellant ever had. The license is not the controlling factor. It is, rather, it is the role played by Guillen that is paramount.

Attorney-client privilege applies to disclosures made by a defendant to other persons, including investigators, if "disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer was . . . . consulted." (*People v. Meredith* (1981) 29 Cal.3d 682, 685-689; Evid. Code, § 912, subd. (d).) Respondent cites no authority for the proposition

that an investigator must have a particular "license" for this privilege to apply. Manifestly, any statements made by Guillen pertaining to investigation he undertook on appellant's behalf and his conversations with appellant and trial counsel were protected by the attorney-client privilege.

Respondent argues that the court conducted a meaningful inquiry into appellant's conflicts with retained counsel. (RB 97-98.) The transcript of the court's *in camera* inquiry regarding the reasons for appellant's dissatisfaction with trial counsel is 58 pages in length. (Sealed *Marsden* RT 7497-7554.) Assuming a meaningful inquiry was undertaken, it merely supports appellant's Argument II, A, ante, that the trial court applied the incorrect standard – that of *People v. Marsden, supra,* 2 Cal.3d 118 – instead of the rule of *People v. Ortiz, supra,* 1 Cal.3d 975.

More importantly, respondent ignores the fact that the purpose of the *in camera* hearing was to determine whether appellant was possibly being denied the effective assistance of counsel, or whether there had been an irremediable breakdown of the attorney-client relationship. Guillen had furnished a declaration in support of appellant's motion to discharge counsel, detailing his interactions with Mr. Esqueda. (Sealed CT 1604-1607.) He was a material witness on these issues.

The trial court's inquiry did not satisfy the requirements of fairness and due process at all. It was completely one-sided. Mr. Esqueda was permitted to make self-serving statements regarding his "zealous" advocacy on appellant's behalf, to attribute unprofessional conduct to Guillen, and to claim that further investigative steps were being pursued by Guillen at appellant's or counsel's request. Appellant, on the other hand, was denied any opportunity to present Guillen's testimony in rebuttal. (50-1 RT 7545-7546.) The trial court's refusal to hear Guillen violated the settled rule that

a defendant "is entitled to present evidence or argument on the matter of substitute counsel, assuming he has clearly indicated that he wants a substitute." (*People v. Nakahara* (2003) 30 Cal.4th 705, 718; see *People v. Mendoza* (2000) 24 Cal.4th 130, 157; *People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8.) This is because a "judicial decision made without giving a party an opportunity to present argument or evidence in support of his contention 'is lacking in all the attributes of a judicial determination.'" (*People v. Marsden, supra*, 2 Cal.3d at p. 124, citing *Spector v. Superior Court* (1961) 55 Cal.2d 839, 843.)

G. The Trial Court's Finding That There Had Been No Irremediable Breakdown Of The Attorney-Client Relationship Is Unsupported.

Respondent concludes based on trial counsel's promise to "do all the things that [appellant] requested," and to "work with Mr. Guillen and do whatever is necessary to prepare this case for trial," that the record does not show an irremediable breakdown of the attorney-client relationship. (RB 99.)

The mere fact that the trial court held such a lengthy hearing focused on trial counsel's conduct of the case and made *Marsden*-required findings supports appellant's Argument II, A, ante, that appellant is entitled to automatic reversal. (*People v. Ortiz, supra,* 51 Cal.3d at p. 988; *People v. Hernandez, supra,* 139 Cal.App.4th at p.109.) Even if, however, the quality of appellant's relationship to counsel is somehow relevant, the record strongly suggests that Judge Horan never intended to appoint new counsel regardless of what appellant said. When the trial court finally held a belated hearing on the motion to discharge, on the date previously set for trial,

appellant's complaints were for the most part given short shrift. (AOB 73-89.)

Appellant has adequately discussed the trial court's handling of each of appellant's specific complaints against counsel in the AOB. (AOB 73-89) Because this case so clearly falls within the parameters of the *Ortiz* case rather than the *Marsden* case, it would not be fruitful to reiterate each of those arguments here. Appellant had no burden to show that his attorney was furnishing inadequate representation or that he and his attorney were embroiled in irreconcilable conflict. (*People v. Ortiz, supra,* 51 Cal.3d at p. 984.) To the extent appellant's complaints raise the specter of ineffective assistance of counsel, those issues are more appropriately addressed in the context of a petition for writ of habeas corpus, if and when habeas corpus counsel is appointed. (*People v. Pope* (1979) 23 Cal.3d 412, 426.)

For purposes of appeal, it suffices to say that it would be difficult to find a more compelling example of a complete breakdown in the attorney-client relationship, particularly considering fact that appellant was on trial for his life.

> "[T]he attorney client relationship . . . involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust between the client and his attorney. This particularly essential, of course, when the attorney is defending the client's life or liberty."

(*People v. Ortiz, supra,* 51 Cal.3d at p. 983; internal citation omitted.)

Mr. Esqueda seldom visited appellant, seldom stayed more than 15 minutes when he did, did not send any investigators or mental health experts to visit appellant, and was often too busy with other cases to accept his phone calls, or phone calls from appellant's family members. (50-1 RT

7529, 7531, 7541; sealed CT 1600, 1602, 1603.) Counsel dismissed appellant's requests for more communication with counsel as unnecessary hand-holding. (50-1 RT 7531 ["I have flat out told him myself, I don't have to go down to the jail and hold your hand once a week."].

ABA Guideline 10.5 recognizes that

> Client contact must be ongoing. An occasional hurried interview with the client will not reveal to counsel all the facts needed to prepare for trial . . . .Similarly, a client will not – with good reason – trust a lawyer who visits only a few times before trial, does not send or reply to correspondence in a timely manner, or refuses to take telephone calls.

(ABA Guideline 10.5, Commentary, p. 70.)

As the time for trial drew near, counsel became engaged for months in back-to-back trials, including another death penalty case, and a case involving the shooting of a police officer. (50-1 RT 7490, 7543 [10/16/97]; 8 SCT 1:1588-1591 [10/17/97]; 8 SCT 1:1592-1593 [10/20/97]; 49 RT 7453 [11/17/97]; 8 SCT 1:1594 A-D,1609; 49 RT 7466-7468.) From October 3 to November 7, 1997, counsel was engaged in another death penalty trial. (50-1 RT 7490.) On November 12, 1997, he was trying a case involving the kidnap, rape, and attempted murder of a police officer. (50-1 RT 7468.) On December 12, the date of Maciel's hearing, Esqueda was <u>still</u> engaged in the attempted murder-kidnap-rape trial, and hoping to be free by December 18, 1997. (50-1 RT 7489.) Judge Horan agreed that counsel was possibly overtaxed. (50-1 RT 7543; see, ABA Guideline 10.3, p. 61 ["Counsel representing clients in death penalty cases should limit their caseloads to the level needed to provide each client with high quality legal representation in accordance with these Guidelines."].)

Meanwhile, counsel had breached his promise to appellant to use

part of his $35,000 fee to hire an investigator. When confronted by appellant, counsel offered vague assurances that he would complete any necessary investigation in the 30 days prior to appellant's trial. (50-1 RT 7541.) Because Mr. Esqueda appeared disinterested in investigation, appellant felt it necessary to hire an investigator on his own. (50-1 RT 7541.) Instead of hiring an experienced death penalty case investigator, he hired Guillen, a law school graduate awaiting bar results who had done a little investigation in a federal case for appellant's counsel. (49 RT 7449.) Counsel abdicated any real responsibility for Guillen's investigation, leaving appellant to direct him. Appellant sent Guillen to interview witnesses and take photographs, and had him draft some motions. (50-1 RT 7546; sealed CT 1604-1607.) Appellant apparently felt it necessary to have Guillen interview defense witnesses because Esqueda had been unable to comply with court's order to provide discovery of defense witness statements to prosecutors, having failed to have such interviews done. (8 RT 895-898; 47 RT 7426; 49 RT 7474; 50-1 RT 7542; see, ABA Guideline 10.7, Commentary, p. 78 [Counsel in a death penalty case has a "duty to take seriously the possibility of the client's innocence, to scrutinize carefully the quality of the state's case, and to investigate and re-investigate all possible defense."].)

Counsel feigned cooperation with Guillen's investigation, even asking for a court order to allow Mr. Guillen to visit appellant in jail. (50-1 RT 7544.) But when contacted by jail personnel to verify Mr. Guillen's status, counsel denied any relationship and encouraged deputies to arrest Guillen. (49 RT 7479-7480; sealed CT 1606.)

At the hearing on appellant's motion to discharge counsel, Mr. Esqueda vilified Guillen, accusing him of being "extremely difficult to

work with," as having "an axe to grind," and of misinforming and misleading appellant about Mr. Esqueda's level of preparedness. (50-1 RT 7544-7546.) Esqueda accused Guillen of causing problems in his relationship with appellant. (50-1 RT 7544-7546.) At the same time, when confronted with appellant's specific complaints, counsel hypocritically asserted that it was Guillen who was conducting any necessary investigation. (50-1 RT 7503, 7544.) Mr. Esqueda even tried to take credit for the success of a motion that Mr. Guillen had drafted on his own initiative. (50-1 RT 7512, 7547; sealed CT 1605.) It was overwhelmingly obvious that counsel's statements were contradictory and unreliable.

To compel a defendant to go to trial with an attorney that he mistrusts results is tantamount to forcing him to trial without competent counsel. (*Brown v. Craven* (9th Cir. 1970) 424 F.2d 1166, 1170; *Hudson v. Rushen* (9th Cir. 1982) 686 F.2d 826, 829.) When the relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates the Sixth Amendment right to effective assistance of counsel. (*United States v. Moore* (9th Cir. 1998) 159 F.2d 1154, 1158; *Brown v. Craven, supra*, 424 F.2d at 1170.) The record belies any possibility that there existed "an intimate process of consultation and planning" which had "culminat[ed] in a state of trust" between appellant and Mr. Esqueda. (*People v. Ortiz, supra,* 51 Cal.3d at p. 983.) Contrary to the court's finding, Maciel's trust in counsel had been completely undermined by counsel's failure to hire an investigator, as promised, and his cavalier inattention to appellant's legitimate concerns about the lack of a comprehensive investigation appropriate to the gravity of capital charges. (See, ABA Guidelines, *supra,* Guidelines 10.3 [Obligations of Counsel Respecting Workload], 10.4 [The Defense Team]; 10.5 [Relationship with

the Client], 10.6 [Additional Obligations of Counsel Representing a Foreign National], 10.7 [Investigation], 10.8 [Duty to Assert Legal Claims], 10.10.1 [Trial Preparation Overall], 10.10.2 [Voir Dire and Jury Selection], 10.11 [The Defense Case Concerning Penalty].)

III

REPLY TO RESPONDENT'S ARGUMENT III: APPELLANT'S CONSULAR RIGHTS CLAIM IS COGNIZABLE ON APPEAL AND THERE ARE EXCEPTIONAL CIRCUMSTANCES THAT WARRANT AN EVIDENTIARY HEARING.

A. Appellant's Right To Assert His Consular Rights Was Not Waived By The Failure Of Appellant To Raise The Issue In The Trial Court.

Respondent argues that appellant's Vienna Convention on Consular Relations [VCCR] claim is not cognizable on appeal because he failed to voice an objection in the court below. (RB 110.) This argument should be rejected.

After both the AOB and RB were filed in this case, the United States Supreme Court decided *Medellin v. Texas* (2008) ___ U.S. ___ [128 S.Ct. 1346, 170 L.Ed.2d 190]. Importantly, *Medellin* affirms that the ICJ's decision in *Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.)* 2004 I.C.J. 12 (Judg. Of Mar. 31) [hereafter, *Avena*] "constitutes an international law obligation on the part of the United States." (*Medellin v. Texas, supra* 128 S.Ct. at p.1356.) *Medellin* further assumes without deciding that Article 36 of the VCCR grants foreign nationals "'an individually enforceable right to request that their consular officers be notified of their detention, and an accompanying right to be informed by authorities of the availability of consular notification.'" (*Id.,* at p. 1357, fn. 4, quoting *Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 342-343 [165 L.Ed.2d 557, 126 S.Ct. 2669].)

A detailed recitation of very complex procedural facts of *Medellin* is

unnecessary to address respondent's assertion of waiver in this case.[9] It suffices to say that, in *Medellin*, the defendant "first raised his Vienna Convention claim in his first application for state postconviction relief." (*Medellin v. Texas, supra,* 128 S.Ct. at p.1354.) The Texas court held that

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[9] In *Medellin*, the Texas court held that Medellin's VCCR claim was procedurally defaulted according to Texas law because Medellin had failed to raise the claim "at trial or on direct review." (*Id.,* at p.1354.) The federal district court denied relief, holding that the VCCR claim was procedurally defaulted, and that Medellin failed to show any prejudice arising from the denial of consular rights. (*Medellin v. Texas, supra,* 128 S.Ct. at p.1355.) While Medellin's application for a certificate of appealability was pending in the Fifth Circuit Court of Appeals, the International Court of Justice [ICJ] issued its decision in *Avena*. The Fifth Circuit Court of Appeals denied a certificate of appealability, finding that the Vienna Convention did not confer individually enforceable rights. In addition, the federal court ruled that it was bound by the United States Supreme Court's decision in *Breard v. Greene* (1998) 523 U.S. 371, 375 [118 S.Ct. 1352, 140 L.Ed.2d 259], which held that VCCR claims were subject to state procedural default rules. (*Medellin, supra*, 128 S.Ct. at p.1355.)

The United States Supreme Court granted certiorari, but before oral argument was held, former President George W. Bush issued a Memorandum to the United States Attorney General, directing state courts to give effect to the *Avena* judgment in the cases filed by the 51 Mexican Nationals – including appellant – addressed in the decision. (*Ibid.*) Medellin, relying on the President's Memorandum and the ICJ decision, filed a second application for habeas corpus relief in state court. The United States Supreme Court then dismissed the pending petition for certiorari as improvidently granted because of the possibility Texas would provide Medellin with the review and reconsideration requested. (*Id.*, at p. 1356.)

The Texas Court of Criminal Appeals dismissed Medellin's second state habeas corpus application, and held that neither the President's Memorandum nor the *Avena* decision could overcome Texas' statutory limits on the filing of successive habeas corpus applications. The United States Supreme Court granted certiorari again, and affirmed the Texas court's judgment. (*Medellin* at p.135.)

the claim was procedurally defaulted according to Texas law because Medellin had failed to raise his VCCR claim "at trial or on direct review." (*Id.,* at p.1354.) The Supreme Court held that the ICJ's decision *Avena* did not have the force of federal law, and was not therefore sufficient to overcome the state procedural bar of Texas. The Court further held that, absent Congressional action, former President Bush's proclamation directing states to give effect to the *Avena* decision did not independently require the states to provide review and reconsideration of the claims of the 51 Mexican Nationals named in *Avena* without regard to state procedural default rules.

The *Medellin* decision furnishes no support for respondent's waiver argument. Unlike Medellin (see footnote 9), appellant raised his VCCR claim in his first appeal of right under state law. Furthermore, in California, any arguable procedural bar is subject to a well-settled exceptions. (*In re Martinez* (2009) 46 Cal.4th 945 [hereafter, *Martinez*].) "For example, 'where the factual basis for a claim was unknown to the [defendant] and he had no reason to believe that the claim might be made, or where the [defendant] was unable to present his claim, the court will consider the merits of the claim if asserted as promptly as reasonably possible.'" (*In re Martinez, supra,* 46 Cal.4th at p. 956, quoting *In re Clark* (1993) 5 Cal.4th 750, 775.)

In this case, appellant presented his VCCR claim "'as promptly as reasonably possible.'" (*Ibid.*) Appellant has requested that this Court take judicial notice of all records in *Avena*, in which appellant was one of the 51 named prevailing plaintiffs. The records of the ICJ establish that (1) appellant was unaware of his right to the assistance of the Mexican Consulate, and (2) Mexico was unaware that appellant was in custody on

capital charges until after the conviction and death verdicts in this case. Under such circumstances, neither appellant nor the government of Mexico can be deemed to have waived their rights under the VCCR by not raising the issue at trial.

In *Medellin*, the ICJ's fact-finding underlying the *Avena* decision was not challenged. In the absence of any indication that the ICJ's findings of fact were tainted by fraud or an absence of procedural fairness, "the judgment is *prima facie* evidence, at least, of the truth of the matter adjudged." (*Hilton v. Guyot* (1985) 159 U.S. 113, 206 [16 S.Ct. 139, 40 L.Ed. 95].) In other words, it has been adjudged that appellant had no knowledge of his consular rights at the time of trial. "One can waive only that of which he is aware and cannot waive that of which he is ignorant." (*People v. Connor* (1969) 270 Cal.App.2d 630, 634.) "[A] defendant cannot waive, by failing to object, an unknown right . . . ." (*United States v. Mitchell* (1st Cir. 1970) 432 F.2d 354, 356; accord: *Gladden v. Unsworth* (9th Cir. 1968) 396 F.2d 373, 377.) A defendant "cannot waive what has been concealed." (*People v. Green* (1995) 31 Cal.App.4th 1001,1017.) hence, he cannot be deemed to have waived the issue.

Cases cited by respondent in support of finding a waiver do not involve the waiver of rights conferred by the VCCR. *People v. Williams* (1999) 20 Cal.4th 119, 130 (RB 111) involves an attorney's failure to raise specific grounds for suppressing evidence pursuant to section 1538.5. *People v. Michaels* (2002) 28 Cal.4th 486, 511 (RB 111) involves defense counsel's failure to challenge an alleged involuntary confession. *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 118 (RB 111), involves the failure to object to prosecutorial comment on a defendant's post-arrest silence. All of these instances involve a trial attorney's arguably strategic

decision not to raise known legal or constitutional challenges to evidence or arguments during a trial.

Article 36 of the VCCR imposes three separate obligations on detaining authorities to: "(1) inform the consulate of a foreign national's arrest or detention without delay, (2) forward communications from a detained national to the consulate without delay, and (3) inform a detained foreign national of 'his rights' under Article 36 without delay." (*Osagiede v. United States* (7th Cir. 2008) 543 F.3d 399, 402; see also, *Medellin v. Texas, supra,* 128 S.Ct. at p.1357, fn. 4.) A foreign national's attorney has no authority to waive a foreign country's rights conferred by the VCCR. Even assuming a defendant could voluntarily relinquish known consular rights, a defendant's attorney should have no unilateral right to forfeit his client's important right to consular assistance without informing the client and obtaining his knowing consent.

> The consulate can do more than simply process passports, transfer currency and help contact friends and family back home. The consulate can provide critical resources for legal representation and case investigation. Indeed, the consulate can conduct its own investigations, file amicus briefs and even intervene directly in a proceeding if it deems that necessary. LEE, CONSULAR LAW AND PRACTICE, 125-88. Importantly, the consular officer may help a defendant in "obtaining evidence or witnesses from the home country that the detainee's attorney may not know about or be able to obtain."

(*Osagiede v. United States, supra,* 543 F.3d at p. 403.)

In a criminal case, it is for the accused to decide certain fundamental matters, such as whether to plead guilty, whether to waive trial by jury, whether to waive counsel, and whether to waive the right to testify, or to be free from self-incrimination. (*In re Horton II* (1991) 54 Cal.3d 82, 95.)

Rights guaranteed by the VCCR should be treated accordingly.[10] In this case, the undisputed ICJ record establishes appellant's lack of knowledge of his consular rights until after the death judgment was imposed. Appellant did not personally waive his right to consular assistance. Under California's procedural default rules, he should not be deemed to have waived the right merely because his attorney failed to object on this ground in the trial court.

One recent decision of this Court undermines respondent's argument that appellant has waived his right to assert the violation of VCCR rights by the failure to assert the right in the trial court. In *People v. Mendoza, supra,* 42 Cal.4th 686, the defendant did not raise the issue of denial of consular assistance at trial, or even in a motion for new trial filed one day following imposition of the death judgment. (*Id.,* at pp. 710-711.) After trial, the Mexican Coordinator General of Protection and Consular Matters wrote a letter on behalf of the Mexican Consul, asking the trial court for "clemency," based on the fact that the defendant had not been informed of his right to consular assistance. (*Ibid.*) Addressing the merits of the VCCR issue on direct appeal, this Court found that the record on appeal did not reveal any prejudice as the result of the denial of consular assistance. Accordingly, the Court concluded that whether Mendoza could establish prejudice based on facts outside the record was a matter for a habeas corpus

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[10] If counsel's failure to object to the denial of appellant's consular rights is deemed a waiver of the right to raise the issue on appeal, then the issue would be cognizable on habeas corpus as a claim of ineffective assistance of counsel. (See, *People v. Mendoza* (2007) 42 Cal.4th 686, 711; *Osagiede v. United States, supra,* 543 F.3d at pp. 406-413; *Breard v. Pruett* (4th Cir. 1998) 134 F.3d 615, 619-620; *Murphy v. Netherland* (4th Cir. 1997) 116 F.3d 97, 100-101.)

petition. (*People v. Mendoza, supra,* 42 Cal.4th at p. 711.)[11]

Medellin urges states to interpret procedural default rules in a manner which affords full effect and consideration to Article 36 VCCR claims, whenever possible. (*Medellin v. Texas, supra,* 128 S.Ct. at p. 1374.) In California, appellate courts may exercise discretion to disregard procedural bars and address the merits to avoid a fundamental miscarriage of justice. (*In re Clark, supra,* 5 Cal.4th at p.759; see also, *People v. Michael* (1984) 160 Cal.App.3d 1087, 1095.) Even if appellant failed to assert the denial of his right to consular assistance in the trial court, this Court should abide by the *Medellin* decision and disregard any arguably applicable state procedural bars in this case in order to give full effect to the nation's international treaty obligations.

B. Even If The Claim Was Waived, This Court Should Address The VCCR Issue On The Merits For Policy And Diplomatic Reasons.

In *Avena*, the ICJ held that domestic courts should not rely on procedural default rules as a basis for declining to consider defendants' VCCR claims, and refusing to grant review and reconsideration of state court judgments. President Bush proclaimed that the United States would discharge its international obligations under the *Avena* judgment by "'having State courts give effect to the [ICJ] decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals

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[11] Appellant asserts that, given his unique circumstances, this Court should provide an opportunity for investigation, discovery and an evidentiary hearing to adjudicate prejudice on direct appeal, without waiting for the filing of a petition for writ of habeas corpus. (See, Argument III, C.)

addressed in that decision.'" (*Medellin v. Dretke* (2005) 544 U.S. 660, 663 [125 S.Ct. 2088, 161 L.Ed.2d 982]; quoting from *George W. Bush, Memorandum for the Attorney General (February 28, 2005), App. 2 to Brief for United States as Amicus Curiae 9a.*)[12] Even if California cannot be compelled to relinquish procedural waiver rules in order to comply with the *Avena* ruling or the presidential proclamation, this does not mean that our domestic courts, in their wisdom, cannot choose to address the merits of consular rights claims for public policy and diplomatic reasons.

After *Medellin v. Texas, supra,* 128 S.Ct. 1346, this Court clearly retains authority to grant review and reconsideration pursuant to the *Avena* decision. As Justice Stevens observed in his concurring opinion:

> The cost to Texas of complying with *Avena* would be minimal . . . . It is a cost that the State of Oklahoma unhesitatingly assumed . . . . The Court's judgment does not foreclose further appropriate action by the State of Texas.

(*Medellin v. Texas, supra,* 128 S.Ct. At p.1375, referring to *Avena* plaintiff Osbaldo Torres; see, *Torres v. Oklahoma* (Oklahoma 2005) 120 P.3d 1184, 1187.)

Sound policy reasons favor affording review and reconsideration of the judgment in this case. As Justice Stevens aptly stated:

> [T]he costs of refusing to respect the ICJ's judgment are significant. The entire Court and the President agree that breach will jeopardize the United States' "plainly compelling" interests in "ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law". . . . When the honor of the Nation is balanced against

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[12] The Amicus Curiae Brief and appendices for the U.S. in the *Medellin* case are published online at 2004 U.S. Briefs 5928, 2005 U.S. S.Ct. Briefs LEXIS 231 (February 28, 2005).

> the modest cost of compliance, Texas would do well to recognize that there is more at stake than whether judgments of the ICJ, and the principled admonitions of the President of the United States, trump state procedural rules in the absence of implementing legislation.

(*Medellin* at p.1375.)

Since the decision in *Medellin*, efforts to effect compliance with *Avena* have continued at the highest levels of the state and federal government. During a recent hearing at the ICJ regarding Mexico's emergency request for an interpretation of *Avena*, the United States assured the Court that, having "fallen short" in its initial efforts to ensure implementation of the decision in the case, it was now "urgently considering alternatives."[13]

Moreover, On July 14 2008, legislation was introduced in the House of Representatives to implement the *Avena* decision by granting the petitioners the right to judicial review and reconsideration of their convictions and sentences in light of the VCCR violations. (See, Avena Case Implementation Act of 2008, H.R. 6481 110th Congress (2d Sess. 2008); Http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.6481.) The bill was referred to the House Committee on the Judiciary, but was never voted upon during the legislative session. Given the high national and international importance of the subject matter and a new presidential administration, it is probable that the bill will be reintroduced under a new number sometime in the near future.

Most importantly, however, California is Mexico's next door

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[13] See, ICJ, Request for Provisional Measures (Order of July 18, 2008) ¶ 36, available at <http://www.icj-cji.org/docket/files/139/14639.pdf>.

neighbor. Many California residents travel to Mexico for business, pleasure, or to visit family members who are Mexican residents and citizens. California college students travel in droves across the border to relax, or take advantage of Mexico's more lax drinking rules and warm weather, during spring and summer vacations. It is in California's best interest for Mexico to afford reciprocal consular rights to Californians who have the misfortune to be arrested while traveling in Mexico. Accordingly, even if the waiver doctrine were to apply, this Court would do well to avoid jeopardizing its own citizens and international relations by refusing to address the merits of appellant's VCCR claim on procedural grounds.

C. This Case Does Involve Exceptional Circumstances That Warrant Remanding For An Evidentiary Hearing On Appeal.

Appellant has requested a remand for an evidentiary hearing on appeal. (AOB 95-108.) Respondent argues that this case does not involve the kind of "extraordinary circumstances" that would justify remanding for an evidentiary hearing on direct appeal. (RB 120.)

Appellant does not disagree with the general legal principles stated by respondent. The taking of evidence by an appellate court pursuant to Code of Civil Procedure section 909 and rule 8.252 of the Rules of Court was not intended to "transform reviewing courts into trial courts." (*De Angeles v. Roos Bros., Inc.* (1966) 244 Cal.App.2d 434, 443.) Authority to make findings of fact on appeal should be "used sparingly" or exercised only in "exceptional circumstances." (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) The courts will, however, take evidence and make factual determinations on appeal when required by the "interests of justice," (*In re*

Elise K. (1982) 33 Cal.3d 138, 149), or when the interests of a party "clearly outweigh the competing interests served by the general rule limiting appellate review to matters before the trial court." (*Id.*, at p. 150.)

Appellant respectfully submits that his interest in timely review and reconsideration of his VCCR claim is supported by exceptional circumstances. Appellant was indicted for the instant murders in December of 1995. His case did not go to trial until January of 1998. Counsel on direct appeal was appointed on February 3, 2004, nearly six years after the May 8, 1998, death judgment. The ICJ filed its decision in the *Avena* case shortly thereafter, on March 31, 2004.

Appellant is one of approximately 300 inmates on California's death row who still have no attorney appointed to handle their habeas corpus proceedings in state court. (*California Commission on the Fair Administration of Justice; Report and Recommendations on the Administration of the Death Penalty in California* (June 30, 2008), p. 23 [hereafter, *Commission Report*].) Once habeas corpus counsel is appointed, it is very likely that it will be at least 36 months – 3 years – before a petition for habeas corpus is even filed. (*Supreme Court Policies Regarding Cases Arising From Judgments of Death*; Policy 3; 1-1.1 [as amended effective November 30, 2005].) As of June 2008, there was an average delay of 22 months between the filing of a habeas corpus petition and this Court's decision on habeas corpus. (*Commission Report,* p. 24.) Even if habeas counsel were appointed tomorrow, there would very likely be no substantive review and reconsideration of appellant's VCCR claim for many years.

Justice delayed is justice denied. In *Thompson v. McNeil* (2009) ___U.S. ____ [173 L.Ed.2d 693, 129 S.Ct. 1299], the United States

Supreme Court recently denied a petition for writ of certiorari seeking review of a death sentence after a 32-year delay in the execution of the sentence. The defendant asserted that the Eighth Amendment's prohibition against cruel and unusual punishments was violated by the delays, for which the State was significantly responsible. While certiorari was denied in an eight to one decision, Justice Stevens, in a concurring opinion, noted that imposing the punishment of death after such a significant delay was so totally without penological justification that it resulted in the gratuitous infliction of suffering and unconstitutional cruelty. (*Thompson v. McNeil, supra,* 129 S.Ct. at p. 1300.)

> While the length of petitioner's confinement under sentence of death is extraordinary, the concerns this case raises are not unique. Clarence Allen Lackey had spent 17 years on death row when this Court reviewed his petition for certiorari. Today, condemned inmates await execution for an average of nearly 13 years. See Dept. Of Justice, Bureau of Justice Statistics, Capital Punishment, 2007 (Table 11) (2008), online at http://www.ojp.usdoj.gov/bjs/pub/html/cp/2007/tables/cp07st11.htm . . . To my mind, this figure underscores the fundamental inhumanity and unworkability of the death penalty as it is administered in the United States. . . . . Judicial process takes time, but the error rate in capital cases illustrates its necessity. . . .

(*Ibid.,* referring to the defendant in *Lackey v. Texas* (1995) 514 U.S. 1045 [115 S.Ct. 1421, 131 L.Ed.2d 304] (see, Stevens, J., respecting denial of certiorari).) If this Court denies appellant's request for a fact-finding hearing on direct appeal, appellant will have no opportunity to even raise, much less adjudicate, the denial of VCCR rights until more than fourteen years have elapsed since the imposition of the death judgment.

Appellant's interests and the interests of the State of California as

well as the United States are – as previously stated – are "'plainly compelling.'" (*Medellin v. Texas, supra,* 128 S.Ct. at p.1375, concur. op., Stevens, J.) The reciprocal observance of the Vienna Convention is not advanced by deferring compliance by the United States for many more years. (*Ibid.*) Moreover, appellant should not have to wait five or more years for an opportunity to show that he was prejudiced by the denial of consular rights under the VCCR. Yet that is clearly how long it will take before the issue is addressed on habeas corpus.

D. Review And Reconsideration Should Not Be Deferred Until The Filing Of A Petition For Writ Of Habeas Corpus.

Respondent argues that review and reconsideration should be deferred and conducted on habeas corpus. Respondent compares appellant's case to *In re Martinez, supra,* 46 Cal.4th 945. (RB 122.) At the time the RB was filed, the *Martinez* case was still pending before this Court.

In *Martinez*, in briefing to address the possible effect of United States Supreme Court's decision in *Medellin v. Texas, supra,* 128 S.Ct. 1346, the Attorney General asked that the defendant's second state habeas corpus petition raising the denial of consular rights (1) be procedurally barred, and/or (2) be denied on the merits due to the failure of the defendant to state a *prima facie* basis for relief. (See, *In re Omar Fuentes Martinez*, Supreme Court Case No. S141480; July 16, 2008, letter of Edmund G. Brown, Jr., California Attorney General, addressing the impact of *Medellin v. Texas, supra,* 128 S.Ct. 1346 on Martinez's VCCR claim.) This Court held that, in light of *Medellin, supra,* Martinez was precluded

from renewing his Vienna Convention claim because he had previously raised the issue and the Court had denied relief on the merits. (*In re Martinez, supra,* 46 Cal.4th at p. 950.) This Court also found that Martinez had failed to demonstrate any change of circumstance or the applicability of any exception to the procedural bar of successiveness that would warrant reconsideration of his claim. (*Ibid.*)

The *Martinez* decision does not lend any support to respondent's argument that adjudication of appellant's VCCR claim should be deferred for state habeas corpus proceedings. Appellant's plight is much different from that of Martinez. This Court's docket for the *Martinez* case shows that counsel was appointed to represent Mr. Martinez on appeal and habeas corpus on March 18, 1998. Martinez had his VCCR claim addressed on the merits in a state habeas corpus petition filed in 2002. (*In re Martinez, supra,* 46 Cal.4th at p. 952.) In contrast, appellant still has no habeas corpus counsel appointed despite the passage of more than 11 years since his conviction and death judgment.

People v. Mendoza, supra, 42 Cal.4th 686, was decided approximately one month after the RB was filed in this case. Appellant presumes that respondent might argue that *Mendoza* supports the assertion that adjudication of appellant's VCCR claim should occur in habeas corpus proceedings. In *Mendoza,* the trial court gave the Mexican Consulate an opportunity to address the court on the VCCR issue in support of a post-trial motion for modification of the judgment. The Consulate requested clemency, without identifying any benefit the defendant would have received had the consulate been properly notified. (*Id.*, at p. 711.) This Court rejected the defendant's VCCR claim on direct appeal, finding a lack of any evidence of prejudice. The Court indicated that whether "defendant

can establish prejudice based on facts outside of the record is a matter for a habeas corpus petition." (*Ibid.*) In *Mendoza*, however, this Court was not faced with a request to take evidence pursuant to Code of Civil Procedure section 909 and rule 8.252 because of extraordinary delays in the appointment of habeas corpus counsel and the likelihood that review and reconsideration of appellant's VCCR claim would not occur for many years.

Furthermore, as was previously argued in the AOB, appellant's habeas corpus petition will undoubtedly raise a multiplicity of claims apart from the violation of VCCR rights. There is no guarantee that this Court will grant an evidentiary hearing on any claims. (*People v. Romero* (1994) 8 Cal.4th 728, 737-741; *In re Clark*, *supra*, 5 Cal.4th at pp.763-797.) Rather, on habeas corpus this Court will presume the trial proceedings were fair and accurate unless appellant can prove otherwise. (*In re Clark, supra*, at p. 766.)

When reviewing alleged VCCR violations in the context of deportation proceedings, the Ninth Circuit finds "prejudice" when a foreign national can show (1) he did not know of his right to contact consular officials: (2) he would have requested consular assistance had he known; and (3) such consultation would have led to the appointment of counsel and/or assistance in developing a more favorable record to present to the court. It is not necessary for the foreign national to prove that consular assistance would have produced a different outcome. (*United States v. Rangel-Gonzales* (9th Cir. 1980) 617 F.2d 529, 532-533, cited as authority at RB 127; accord: *Torres v. Oklahoma, supra,* 120 P.3d at pp.1186-1187; see, AOB 102-106.) This Court's decision in *People v. Mendoza, supra,* 42 Cal.4th 686, is generally in accord. It implies that to be entitled to relief, a defendant must show that the alleged violation "denied defendant any

benefit he would have otherwise received had the consulate been properly notified," and that he "did not obtain that assistance from other sources." (*Id.*, at p. 711.) Because the standards for showing prejudice are different, there is no reason to await a habeas corpus proceeding to adjudicate appellant's VCCR claim.

E. Appellant's VCCR Claim Should Not Be Rejected On The Merits; Appellant Has Had No Opportunity To Develop A Factual Basis To Support His Claim That The Denial Of Consular Rights Caused Prejudice.

Respondent, addressing the merits of appellant's VCCR claim, asserts that the claim of prejudice should be rejected on the merits. (RB 123.) First, respondent argues that appellant has no personal right to enforce the ICJ's order to provide review and reconsideration in state court. The decisions of the United States Supreme Court in *Medellin v. Texas, supra,* 128 S.Ct. 1346, and this Court's decision in *In re Martinez, supra,* 46 Cal.4th 945, are *contra. Medellin v. Texas, supra,* 128 S.Ct. 1346, and *In re Martinez, supra,* assume without deciding that Article 36 of the Vienna Convention does confer individually enforceable rights. (*Medellin* at p. 1357, fn. 4; *In re Martinez* at p. 957.)

Furthermore, *Medellin* does not preclude this Court from granting review and reconsideration to appellant and other *Avena* plaintiffs who are on California's death row. *Medellin* only holds that the President, absent congressional action, cannot not force a state to forego application of state procedural default rules and grant review and reconsideration, particularly where, as in Texas, the rules are codified by state statute. However, the high court also suggests that Texas' decision not to grant review and reconsideration on the merits is harmful and risky to the bests interest of the

United States. (*Medellin* at p. 1375, concurring opinion, Stevens, J.) To unreasonably delay meaningful consideration of VCCR claims is equally harmful to the country's diplomatic and political interests.

Respondent also invites this Court to speculate that no prejudice could possibly be shown even if appellant were afforded an evidentiary hearing of his VCCR claim, after an opportunity for discovery, investigation and presentation of evidence. (RB 127.) Respondent argues, *inter alia*, that it is "entirely speculative" whether consular assistance would have resulted in discovery of significant exculpatory or mitigating evidence. (RB 127, fn. 127.) It is similarly asserted that, no matter what the consulate might have done, evidence of appellant's guilt was "compelling." (RB 127.) Respondent also suggests that, even if appellant had refused to talk to investigators in reliance on the advice of the Mexican consulate, this was but a small piece of an "evidentiary puzzle." (RB 127.)

Respondent misunderstands the burden of proving "prejudice" resulting from the violation of VCCR rights. As previously stated, it is not necessary to show that consular assistance would have produced a different outcome. (*United States v. Rangel-Gonzales, supra,* 617 F.2d at pp.532-533; *Torres v. Oklahoma, supra,* 120 P.3d at pp.1186-1187.) A foreign national is prejudiced by the denial of consular assistance if (1) he or she did not know of his right to contact consular officials: (2) he or she would have requested consular assistance had he known; and (3) such consultation would have led to the appointment of counsel and/or assistance in developing a more favorable record to present to the court. (*Ibid.*; accord: *People v. Mendoza, supra,* 42 Cal.4th at p. 711.)

Appellant has adequately addressed the important role that the consulate could have played in his case in his AOB. (AOB 96-99.)

Furthermore, contrary to respondent's assertion, appellant was not present at the time of the killings and the admissible evidence of his knowing complicity in the murders was far from compelling. (AOB 37-56.) Appellant does not claim to have the evidence he needs to support his VCCR prejudice claim at his fingertips. Rather, he asks this Court for the a meaningful opportunity for review and reconsideration as conceived by the ICJ, which means he must be afforded the necessary tools to investigate and present his showing of prejudice to the fact finder. He also urges this court not to wait for the filing of a petition for writ of habeas corpus because it is unlikely a habeas corpus petition will be filed on his behalf for years. Extreme delays in the administration of justice violate due process. (*United States v. Antoine* (9th Cir. 1990) 906 F.2d 1379, 1382.)

F. Respondent's Argument That Suppression Of Appellant's Statements To Investigators Is Not Required Under The VCCR Bespeaks A Misunderstanding Of Appellant's Arguments On Appeal.

Respondent devotes nearly five pages to arguing that suppression of appellant's statements to investigators is not required under the VCCR in response to an argument appellant did not make Appellant did not argue for suppression of his statements as a remedy for violation of the VCCR. (AOB 99, citing *Sanchez-Llamas v. Oregon, supra,* 584 U.S. 331.) He argued that many features of appellant's case, including but not limited to the fact that he waived his rights and spoke with investigators, suggest that the Mexican Consulate's involvement could have had a material effect on the outcome of his proceedings. (AOB 97.) However, to show prejudice resulting from the denial of consular assistance, one need not show a material effect on the outcome of criminal proceedings – only that

consultation with the Mexican consulate would have resulted in a more favorable record to present to the court. (*United States v. Rangel-Gonzales, supra,* 617 F.2d at pp. 529--533; *Torres v. Oklahoma, supra,* 120 P.3d at p. 1186; *People v. Mendoza, supra,* 42 Cal.4th at p. 711.) Appellant continues to maintain, as he did in the AOB, that, if he were given an opportunity for discovery and investigation followed by an evidentiary hearing, he could readily show that consultation with the Mexican consulate prior to trial would have allowed him to present a much more effective and favorable case to the jury, both at the guilt and penalty phases of the trial. For this reason, and reasons previously stated, the request for review and reconsideration at a hearing pursuant to Code of Civil Procedure section 909 and rule 8.252 should be granted.

IV.

REPLY TO RESPONDENT'S ARGUMENT IV: THE TRIAL COURT'S NONDISCLOSURE ORDERS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO COUNSEL, CONFRONTATION, DUE PROCESS AND A RELIABLE DEATH JUDGMENT.

A. Respondent's Statement Of Proceedings Below:

Respondent asserts that "identities of those witnesses – many of whom were fellow gang members referred to by their gang monikers in police reports and grand jury transcripts – would have been readily apparent to appellant and his counsel *prior* to trial, despite the nondisclosure orders." (RB 129; underlined emphasis added; see also, RB 155-156.) This is completely speculative and without support in the appellate record. Furthermore, respondent overlooks one salient point. Even assuming appellant's counsel was aware of the identities of witnesses, appellant was not. Counsel was barred from disclosing any information to appellant that could lead to appellant's discovery of the identity of any of the unidentified witnesses. (1 RT 144-153, 149; 26 RT 3893-3896; 1 CT 130.) The issue is not just the overbroad withholding of witnesses' identities from counsel, but the permanent withholding of nearly all discovery from appellant over his objection. (7 SCT 1:1379-1381; 2 CT 473-475; 3 RT 481, 495.)

Additionally, it is simply not true that the anonymous witnesses were mostly "fellow gang members" whose identities would have been readily apparent to appellant prior to trial. At least four witnesses, 1, 2, 3 and 9, were so-called "stranger" witnesses to events surrounding the crimes. Witness 16, the driver of the perpetrators' lookout vehicle, was a member of the Sangra gang; he did not know appellant and appellant would have had no means of knowing this witness's identifying information prior to trial.

(57 RT 8888-8889, 8928.) Witnesses 8, 11 and 13 were also complete strangers to appellant. (55 RT 8610-8616, 8625; 57 RT 8955.) All gave damaging testimony which helped to associate appellant with ruthless gang members who were predisposed to kill. (55 RT 8610-8625; 57 RT 8957-8966.) Appellant would have had no means of discovering the names, addresses and other identifying information for these witnesses prior to trial. Furthermore, addresses and all identifying information were kept from the defense permanently, not just until trial. (1 CT 185-189; 2 RT 278-322; 3 RT 481.)

As justification for the nondisclosure orders, respondent provides a long recitation of evidence adduced at an *in camera* proceeding before Judge Dukes, pursuant to section 1054.7, at which neither appellant or his counsel were present or represented. The hearing took place on November 7, 1995, before appellant was ever indicted. (RB 130-134; Augmented Reporter's Transcript [ART] November 7, 1995: 54-91.) Respondent also recites evidence taken at another *in camera* hearing on March 18, 1996, as support for the permanent and sweeping nondisclosure orders in this case. (ART March 18, 1996: 186-277; RB 137-142.) By this time, appellant had been charged and was represented by counsel; however, both he and his attorney were excluded. Consequently, there was no opportunity to respond to, rebut or explain the allegations made by the officers who testified at those hearings. (*Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1149-1150.) Depriving appellant of his right to confront the witnesses against him constituted a denial of the Fourteenth Amendment's guarantee of due process. (*Pointer v. Texas* (1965) 380 U.S. 400, 405 [13 L.Ed.2d 923, 85 S.Ct. 1065]; accord: *Alvarado v. Superior Court, supra*, 23 Cal.4th at p. 1137.)

Furthermore, in the AOB, appellant conceded for the sake of argument that there was sufficient evidence adduced at these hearings to justify the taking of some measures to prevent harm to some of the material witnesses in the case. (AOB 112.) But appellant vigorously challenges the expansive scope and duration of the trial court's nondisclosure orders, not the legitimacy of the court's concerns about witness safety. (AOB 112.)

B. Appellant's Claim Of Error Regarding The Operative Nondisclosure Order Is Not Forfeited.

In a footnote, respondent suggests that appellant's right to challenge the nondisclosure orders was forfeited by counsel's failure to file a pretrial petition for writ of mandamus to compel disclosure. (RB 150, fn. 75.) The law is to the contrary. The filing of a pretrial writ is not a prerequisite to obtaining review on direct appeal of an order denying discovery. (*People v. Memro* (1985) 38 Cal.3d 658, 675.)

Respondent argues that appellant forfeited the right to appeal this issue because he failed to file a written joinder of the codefendants' discovery motions. (RB 149.) Defense counsel orally joined the motions and objections advanced by codefendants at the March 29, 1996, hearing. (2 RT 281.) It is true that Judge Stephen Czulegar told defense counsel that a written joinder would be necessary. (2 RT 282.) A written joinder was never filed, however.

Appellant can find no state or local rule or statute mandating that a defendant in a criminal case file a written joinder of a discovery motion and/or written objections to nondisclosure advanced by codefendants who

are joined for trial.[14] A trial court may not impose rules for a particular courtroom or jurisdiction without complying with the procedures prescribed for the enactment of local court rules. (Code of Civ. Proc., § 575.1; *Hall v. Superior Court* (2005) 133 Cal.App.4th 908, 915.) Furthermore, even properly adopted local court rules are only valid to the extent they do not conflict with existing law, the Rules of Court, and the constitutional rights of the defendant. (*Hall v. Superior Court, supra,* 133 Cal.App.4th at p. 917.) In this case, finding that appellant has forfeited the right to appeal the nondisclosure orders because his attorney failed to obey the court's directive to file a written joinder of the motion would elevate form over substance, and contravene the fundamental constitutional rights – the right to due process, a fair trial, to confront and cross-examine witnesses, and to the effective assistance of counsel – that are supposed to be advanced by pretrial discovery. The failure to file a formal written joinder is therefore not fatal to appellant's right to review of the merits. (See, e.g., *People v. Jackson* (1996) 13 Cal.4th 1164, 1220; see also, *People v. Cummings* (1993) 4 Cal.4th 1233, 1285; *People v. Vance* (2006) 141 Cal.App.4th 1104, 1112.)

Respondent also argues that the right to challenge the nondisclosure orders was forfeited by virtue of defense counsel's failure to press for a ruling on his own discovery motion, filed June 28, 1996 (2 CT 311-356), or to seek modification of the operative scope of the March 29, 1996, nondisclosure order. (RB 149.) In essence, respondent argues that the order was tentative, not final, and subject to change, and counsel never requested any change. (RT 149-150.) The facts belie this notion; the

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[14] Los Angeles County criminal procedure rules require motions to continue to be in writing. (L.A. Super. Ct. Rules, rule 6.6(a).)

original nondisclosure order was not merely tentative, nor would any action on defense counsel's part have convinced the trial court to modify its initial rulings.

On June 30, 1996, codefendant Logan's counsel filed a motion objecting to and seeking reconsideration of Judge Czulegar's nondisclosure orders, and other defense counsel joined in the motion. (8 SCT 1:1379-1381.) Judge Sarmiento, at a discovery hearing held on September 3, 1996, deferred ruling on the motion, leaving it for determination by the judge who had originally made the orders. (3 RT 481.)

Subsequently, appellant's case was severed from the cases of the other codefendants. The record on appeal does not reveal subsequent discovery proceedings, if any, in codefendant Logan's case.[15] In any event, there is nothing in the record to suggest that Judge Czulegar's nondisclosure orders were intended to be tentative, not final, as to appellant.

Furthermore, on March 6, 1997, the nondisclosure order as to appellant was expanded by Judge Horan. At the district attorney's request, the court ordered that appellant not be given any transcripts, police reports, or anything generated in discovery, whether redacted or unredacted. Additionally, the court ordered appellant to return transcripts in his possession from which the names of witnesses had been redacted consistent with earlier orders. (26 RT 3893-3895.) This puts to rest any suggestion that the nondisclosure orders would have been modified to increase the amount of identifying information that could be disclosed, had defense counsel asked the court to reconsider.

Respondent, in arguing forfeiture, also disregards entirely the fact

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[15] During record correction, appellant's request for a copy of the transcript of all of the codefendants' proceedings was denied.

that appellant personally objected to the restrictions on disclosure at a hearing before Judge Horan, on November 17, 1997. On this date, appellant expressed dissatisfaction with his retained attorney and demanded to discharge him. (AOB, Argument II; Reply, Argument II, *ante*; 8 SCT 1: 1595-1608; 49 RT 7466.) One of the reasons appellant became dissatisfied with counsel was the lack of ongoing consultation and communication about his case. (8 SCT 1:1600.) Trial counsel explained to the court that he stopped visiting appellant as frequently as he did in the beginning because of the court's nondisclosure order. (50-1 RT 7529; 8 SCT 1:1600.) Appellant specifically objected to the nondisclosure orders and insisted that he would need to see transcripts and witness statements in order to explain to the court the shortcomings in trial counsel's preparation and investigation. (49 RT 7477.) The court denied appellant's request to see any of the requested material and indicated that defense counsel – whom appellant wanted to fire – could do this for appellant. (49 RT 7477-7478.)

None of the cases cited in respondent's brief support a finding that appellant has forfeited his right to challenge the constitutionality of nondisclosure order. *People v. Prince* (2007) 40 Cal.4th 1179 1234 (RB 149), involves a defendant's complaint of denial access to information in an FBI database. This Court declined to consider the discovery issue on appeal, finding that the defendant's claim was dependent on evidence and matters not reflected in the record on appeal.

In contrast to the situation presented in the *Prince* case, appellant's claim is not dependant on proving that material or exculpatory evidence was withheld. (*Ibid.*) As the United States Supreme Court explained in *Smith v. Illinois* (1968) 390 U.S.129, 132 [19 L.Ed.2d 956, 88 S.Ct. 748], a defendant in appellant's position is not required to show that, had disclosure

of witness information been permitted, cross-examination would have brought out facts tending to discredit the witness' testimony in chief. Rather, prejudice automatically ensues from the fact that the withholding of witness information denies the defendant the opportunity to test the credibility of witnesses by placing them in their proper settings. (Accord: *Alford v. United States* (1931) 282 U.S. 687, 689 [75 L.Ed. 624, 51 S.Ct. 218]; *Alvarado v. Superior Court, supra,* 23 Cal.4th 1121.)

People v. Holloway (2004) 33 Cal.4th 96, 133, and *People v. Morris* (1991) 53 Cal.3d 152, 190, are cited by respondent for the general proposition that a tentative pretrial evidentiary ruling on an *in limine* motion, made before a court knows what the evidence will show, will not preserve the issue for appeal if the defendant could have, but did not, renew his objections in the context of the trial evidence itself. (RB 150.) The issue at bench does not involve an evidentiary issue upon which the trial judge made a preliminary pretrial ruling. Rather, appellant challenges a multiplicity of pretrial orders denying appellant and his attorney access to identifying information, including names and addresses, of material witnesses, and denying appellant any opportunity to review redacted or unredacted discovery documents furnished to counsel, such as police reports and grand jury or trial transcripts. Some of the information, including the prison assignment of witness 14, was withheld permanently from appellant and/or his counsel. (58 RT 9055.) For other witnesses, names were ordered withheld until they testified at trial. (2 RT 289; 1 CT 185-187.) Under the circumstances of such a broad prohibition, it would have been a meaningless exercise to ask the trial court to reconsider its pretrial nondisclosure orders in the middle of trial.

In short, there was no forfeiture of the issue for purposes of this

appeal.

C. The Nondisclosure Orders Violated Appellant's Sixth and Fourteenth Amendment rights.

Respondent argues that *Alvarado v. Superior Court*, *supra*, 23 Cal.4th at pp.1128-1130, grants trial courts discretion to deny, restrict, or defer disclosure of witness information for good cause. (RB 151.) Appellant does not dispute that courts have discretion in appropriate cases to restrict disclosure for good cause. Rather, appellant asserts that the breadth and scope of the nondisclosure orders were not supported by good cause. He asserts – as he did in the AOB – that the orders violated appellant's Fourteenth Amendment due process rights, rights to effective counsel and confrontation guaranteed by the Sixth Amendment, and the right to reliability in the death judgment guaranteed by the Eighth Amendment. (AOB 122-125.)

Counsel was denied identifying information regarding material prosecution witnesses until the witnesses actually testified at trial. The credibility of many of the unidentified witnesses, including witnesses 8, 11, 13, 16, and 17, was crucial, not inconsequential, to the defense. (See, e.g., *Miller v. Superior Court* (1979) 99 Cal.App.3d 381, 386; see, AOB 116-120 [discussing the significance of the testimony of witnesses at trial].) The trial court's order in this case went farther than the trial court's order in *Alvarado*, which sanctioned withholding information regarding the names and addresses of material witnesses until shortly before the witnesses were called to testify at trial. (*Alvarado v. Superior Court, supra*, 23 Cal.4th at p. 1136, citing *People v. Lopez* (1963) 60 Cal.2d 223, 246.) The ability of defense counsel to investigate was hindered right up until many of the

witnesses testified, and announced their identities for the record. Counsel was additionally prevented from cross-examining witness 14 regarding his present place of confinement, information with obvious relevance and probative value to prove that the witness had received a quid pro quo for testifying – i.e., a transfer to a better prison. (58 RT 9055; cf. *Montez v. Superior Court* (1992) 5 Cal.App.4th 763, 771 [nondisclosure of witnesses' addresses was inconsequential where the facts raised no issue of their reputation in the community for veracity].)

Furthermore, it was not a sufficient remedy for the violation that, once crucial witnesses appeared in court, appellant could theoretically inform his attorney of his contacts with the witnesses and provide any other information he might have. (*Alvarado v. Superior Court, supra*, 23 Cal.4th at pp. 1148-1149.) Without advance access to witnesses' names, a defense attorney

> "'will have difficulty obtaining complete information about the witnesses' location and ability to observe and testify about the crime[,]. . . [and] will be unable to [obtain] complete impeaching information, such as the witnesses' reputation for truthfulness or dishonesty, previous history and accuracy of providing information to law enforcement, and other motives to fabricate, such as revenge or reduction or dismissal of their own charges.'"

(*Alvarado v. Superior Court, supra*, 23 Cal.4th at p. 1149; internal citations omitted.) As the United States observed in *Smith v. Illinois, supra*, 390 U.S. at p.131, to forbid out-of-court investigation of a material witness "is effectively to emasculate the right of cross-examination itself."

Of equal or greater importance, appellant was deprived by virtue of Judge Horan's order of any opportunity to have meaningful input into the investigation and preparation of his own defense in a capital case. Initially,

Mr. Esqueda was restricted from sharing information with appellant that might result in appellant's discovery of the identities of prosecution witnesses. (2 RT 287.) Subsequently, counsel was enjoined from allowing appellant to read any discovery materials, even those documents redacted to conceal witnesses' identities. (26 RT 3893-3895.) Appellant lost confidence in counsel and tried to fire him due in part to counsel's reluctance to communicate, which resulted from the stringent nondisclosure order. (See, AOB, Argument II; Reply, Argument II, ante; 8 SCT 1:1595-1608; 49 RT 7466; 50-1 RT 7529.) As previously argued (see, AOB 122-125), the orders not to communicate essentially stripped appellant of the crucial ability to assist in his own defense – much as if he were rendered incompetent. This effectively destroyed appellant's confidence in his attorney and functionally denied him the assistance of counsel at critical stages of the proceedings. (AOB 122-124; *United States v. Amlani* (9th Cir. 1997) 111 F.3d 705, 711.)

In *Alvarado*, the prosecution could have employed other less intrusive means of affording protection to witnesses about whom they had safety concerns, including the provision of protective surveillance and safe housing, relocation if necessary, or transfer or protective custody of witnesses in prison. (*Alvarado v. Superior Court, supra*, 23 Cal.4th at pp. 1150-1151.) In *Alvarado*, this Court concluded that the Confrontation and Due Process Clauses were violated by orders permanently withholding witness information from the defense. (*Id.*, at pp. 1136-1149.) It should do so in this case, too.

D. Appellant's Right To Assert An Eighth Amendment Violation Should Not Be Deemed Forfeited.

Respondent asserts that appellant's right to assert an Eighth Amendment violation was forfeited by the failure to argue that specific ground of error in the trial court. (RB 159.) This Court should reject this argument and address the Eighth Amendment argument on the merits. Talismanic invocation of "magic words" is not necessary to preserve an objection. (*United States v. McCullah* (10th Cir. 1996) 87 F.3d 1136, 1139.) In a capital case, the "failure to say the 'magic words' should not result in the affirmance of a death sentence which might otherwise not have been imposed." (*Ibid.*)

In *People v. Partida* (2005) 37 Cal.4th 428, this Court addressed whether an objection advanced under Evidence Code section 352 was adequate to preserve error asserted on appeal as a due process violation. This Court answered this question in the affirmative. (*Id.,* at pp. 433-434.) A specifically grounded objection in the trial court "serves to prevent error." (*Id.,* at p. 434.) "It allows the proponent of the evidence to lay additional foundation, modify the offer of proof, or take other steps designed to minimize the prospect of reversal." (*Ibid.*) The requirement of a specific objection "must be interpreted reasonably, not formalistically;" nor should it "'exalt form over substance.'" (*People v. Partida, supra,* 37 Cal.4th at p. 434; internal citation omitted.)

In this case, the defendants, including appellant, challenged the nondisclosure order as violative of the Fourteenth Amendment's Due Process Clause, and Sixth Amendment's guarantees of the right to effective counsel and confrontation. (7 SCT 1:1375-1381; 2 RT 284-299.) The purpose of the Confrontation Clause is to "ensure reliability of evidence," . .

. "by testing in the crucible of cross-examination." (*Crawford v. Washington* (2004) 541 U.S. 36, 61 [124 S.Ct. 1354, 158 L.Ed.2d 177].) The objections made were sufficient to alert the court of the essential nature of the defendants' objection: that the adversarial process would be rendered unreliable by counsels' inability to investigate material witnesses prior to trial. Defense counsel was forced by the court's order to litigate in the dark as to crucial points for cross-examination. No useful purpose would be served by declining to consider appellant's Eighth Amendment challenge, which merely restates under alternative legal principles the identical claim that the judgment has been rendered unreliable. (*People v. Partida, supra,* 37 Cal.4th at p. 436.)

Accordingly, for the foregoing reasons, and reasons previously articulated in the AOB, Argument IV, the nondisclosure orders resulted in the violation of appellant's federal constitutional rights to due process, to confrontation and to the effective assistance of counsel, and deprived the death judgment of the heightened reliability that is demanded by the Eighth Amendment.

V

REPLY TO RESPONDENT'S ARGUMENT V: THE TRIAL COURT ERRED BY ADMITTING THE REDACTED AUDIOTAPE OF APPELLANT'S INTERVIEW WITH INVESTIGATORS.

Respondent contends that the audiotape of appellant's interview with investigators (People's Exhibit 132) was properly received in evidence. (RB 161.) Appellant disagrees.

A. Respondent's Summary Of The Proceedings Below:

The RB includes selective and potentially misleading quotations from the transcription of the tape-recorded interviews of appellant, which take certain statements out of context. Equally selective excerpts of the proceedings are drawn from the motion to exclude or redact. This Court should read both transcripts in their entirety, of course, since the transcripts themselves furnish the most accurate record of what was heard by the jury. (See, Exhibit 132A; 8 SCT 1: 712-743; 59 RT 9265-9278; 60 RT 9311-9313.)

B. The Audiotape Was Not Sufficiently Redacted To Avoid Violation Of Appellant's Constitutional Rights.

Respondent discusses two cases that purportedly support the argument that the accusatory statements of investigators during their interview of appellant were properly in evidence before the jury. (RB 167-169.) Each of these cases is distinguishable from the facts of appellant's case.

In *Dubria v. Smith* (9th Cir. 2000) 224 F.3d 995, the defendant admittedly knew the victim – a coworker at an Ohio hospital – and was with

the victim when she died. The defendant told police that the victim had collapsed in the bathroom and died shortly after he had consensual sex with her. Based on toxicological test results that showed the victim died of chloroform intoxication, the police theorized that the defendant accidentally killed the victim when he administered chloroform in order to rape her. (*Id.,* at p. 999.) When the defendant was confronted with the test results, he stuck to his original story; he insisted he did not rape the victim and had nothing to do with her death. (*Ibid.*)

At the trial, an unredacted tape-recording of the defendant's statements to police was introduced to show that, when confronted with the toxicological test results, the defendant had failed to explain how a woman he was continuously alone with for 24 hours suddenly turned up dead from chloroform intoxication. On appeal, the defendant argued that the recording should have been redacted to exclude comments and questions by officers expressing disbelief in the defendant's story, officers' opinions regarding his guilt, and elaborations of the investigators' theory of the crime. (*Dubria v. Smith, supra,* 224 F.3d at p. 1001.) The Ninth Circuit Court of Appeals agreed with the state appellate court that the interview was "'unremarkable,'" and that officers' questioning suggested no facts beyond what the People intended to prove at trial. (*Ibid.*) In fact, in *Dubria,* the state did present evidence that the defendant worked in a hospital, where he had access to chloroform, and expert testimony that the victim had died from sudden inhalation of a small dose of chloroform. (*Id.*, at p. 999.)

In this case, in contrast, unredacted material included statements suggesting that unnamed persons had informed investigators of appellant's role in setting up the murders. (8 SCT 1:1682 ["Your name is up there."]; 8

SCT 1:1683 ["Well You're [sic] name is up there."]; 8 SCT 1:1685 ["People are saying that you set it up."]; 8 SCT 1: 1691 ["I'm not trying to put anything on you that doesn't fit."].) Not a single witness at the trial testified that appellant set up the murders. Furthermore, during the interview, the investigators admonished appellant that his life was at risk because other "people on the street" who knew what appellant had "been up to" were "pissed off." (8 SCT 1:1694-1696.) In other words, appellant might be killed by the Mafia because of his involvement in a crime that resulted in the deaths of two children. (59 RT 9286-9292.) Yet there was no testimony by any witness that appellant was being threatened by members of the Mexican Mafia or any other gang due to his role in the murders.

The second case discussed by respondent is *People v. Maury*, *supra*, 30 Cal.4th 342. (RB 169.) *Maury* does not even involve accusatory statements by police during questioning. In *Maury*, the issue was whether trial counsel was incompetent for failing to object to the introduction of statements the defendant had made to various people, including a doctor and the police. (*Id.*, at p. 419.) This Court found that counsel could reasonably have chosen not to object to the evidence because the "statements were parts of interviews or conversations in which defendant made admissions establishing consciousness of guilt or made false statements as part of his attempt to evade detection and deceive police." (*Ibid.*) Appellant fails to see what this case's holding has to do with the situation at bench, which presents entirely different circumstances.

Respondent argues that the trial court properly found that the entire interview was relevant and admissible to prove appellant's membership in the Mexican Mafia. (RB 169.) During the interview, appellant admitted

that Raymond Shyrock [aka Huero Shy] was a good friend. (8 SCT 1: 1679.) He denied being an actual member of Eme, but acknowledged doing occasional favors for the group, such as arranging for the payment of lawyers. (8 SCT 1:1675-1678.) However, the portions of the interview that contain arguable admissions pertaining to the Mafia do not include the accusatory statements by investigators suggesting that the existence of other witnesses to appellant's involvement in the murders. These accusatory statements could easily have been redacted without impairing the probative value of other portions of the interview.

In this case, the trial court also reasoned that the tape and transcripts were relevant and admissible because appellant had denied knowing "Scar," but there was evidence that "Scar" phone calls had been made from his house to appellant's pager. (59 RT 9271-9272.) However, those portions of the interview that were ostensibly relevant to show appellant's denial of any association with Sangra gang members could easily have been redacted to eliminate the harmful statements by investigators that others had told them appellant set up the murders. (See, 8 SCT 1:1682-1687 [Appellant denied in-person acquaintance with "Scar," "Character," Jose Ortiz, Danny Logan, "Mateo," "Creeper," and "Primo."]; 8 SCT 1:1687-1689 [Appellant admitted knowing of "Primo" and "Scar," and having spoken by telephone with "Scar" once "a long time ago."].)

The trial court also found the interview relevant because, in the court's opinion, appellant had come close to naming the real killers. (59 RT 9271.) Appellant did indicate that a "lot of people" . . . "in the streets" knew who acted as middle man for the murders, but he refused to talk to the investigators about why the victims had been killed, citing concern for the safety of his children and his wife. (8 SCT 1:1698, 1700, 1702.)

Respondent argues, without really explaining how, that the accusatory statements of investigators were necessary to explain, or place appellant's answers in context. (RB 170.) This makes no sense. Even assuming for the sake of argument that parts of the interview were relevant to show (1) that appellant was friendly with Raymond Shyrock and admitted doing occasional errands for him (8 SCT 1:1679); (2) that he told police that he was asked to be involved in the murders but refused to be involved because he was friends with members of the Moreno family (RT 8 SCT 1: 1698, 1700, 1701); (3) that he knew but would not disclose the identity of the person who acted as middle man to commit the murders (8 SCT 1:1698, 1700, 1702); and (4) that he was deceptive about his acquaintanceship with certain Sangra gang members (8 SCT 1:1685-1689), respondent has failed to explain how officers' repeated accusations that unidentified persons had told them appellant set up the murders were necessary to place appellant's other statements in context. (RB 170.) Furthermore, respondent does not articulate why it was necessary to expose the jury to the investigators' warnings to appellant that he might not "come out of this thing alive" because he has angered "people on the street" who "know what you've been up to." (8 SCT 1:1695.) These accusatory statements had no purpose but to suggest to the jury that appellant's life was in danger because he did set up the murders.

Respondent also argues that the statements were admitted for nonhearsay purpose, not for the truth of the matters asserted, and that the jury was so instructed, ameliorating any possible harm. (RB 170-171.) The court gave a curative admonition only once, when the evidence was first admitted. (60 RT 9312.) It is unrealistic to expect a lay jury to ignore the highly inflammatory information that was imparted by investigators'

accusations during questioning. (*Hardnett v. Marshall* (9th Cir. 1994) 25 F.3d 875, 878-879; *United States v. Gillespie* (9th Cir. 1988) 852 F.2d 475, 479.) Long ago, in *People v. Gibson* (1976) 56 Cal.App.3d 119, California courts acknowledged:

> It is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect. It is time that we face the realism of jury trials and recognize that jurors are mere mortals.

(*Id.*, at p. 130.) This is particularly true of gang-related evidence. Even vague references to appellant's violent activities on behalf of the Mexican Mafia was so extraordinarily inflammatory that it could not have been ignored by the jury. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 227-228, 230.)

It is likewise the "essence of sophistry and lack of realism" to presume (1) that appellant's jurors assessed the credibility of Detectives Davis and Laurie by the same yardstick they applied to other lay witnesses, and (2) that detectives' assessment of the evidence – revealed in accusatory questions – would <u>not</u> be given undue weight in assessing insidious and ambiguous evidence of alleged gang activity in appellant's trial. (*People v. Gibson, supra*, 56 Cal.App.3rd at p. 130; see also, Groscup & Penrod, *Battle of the Standards for Experts in Criminal Cases: Police vs. Psychologists* (2003) 33 Seton L. Rev. 1141, 1148, fn. 32 [jurors rating different witnesses from 50 trials ranked police as "most likeable, understandable, believable and confident."]; see also, Linz & Penrod, *The Use of Experts in the Courtroom, Social Psychology* (Prentice-Hall 1982).)

The harm was compounded in this case because the jury was

furnished a copy of the transcription of the interview, containing conspicuously redacted lines and pages in heavy black marker that would have invited speculation regarding the nature of the information that was redacted, regardless of the court's admonition not to speculate. (8 SCT 1: 1673-1704; see also, 60 RT 9308-9309, 9312.) It is well known that juries may put undue emphasis on evidence when they are provided with transcripts. (*United States v. Hernandez* (9th Cir. 1994) 27 F.3d 1403, 1408.) In addition, the tape-recorded interview was played again during the penalty phase, without any limiting instruction. In fact, since a tape recorder was sent into the jury room, it is impossible to know how many times the recording of the interview was played without any guidance in the form of a limiting instruction. (62 RT 9763.)

Respondent seeks to minimize the potential adverse impact of investigators' tape-recorded statements of opinion regarding appellant's guilt of the murders and other crimes, pointing out that investigators testified and did not render any opinions regarding appellant's guilt. (RB172; but see, 8 SCT 1:1696 [opining that appellant would serve time in prison for "all the shit" he had done]; 8 SCT 1:1684-1685 [denying that they were accusing appellant of doing anything he did not do]; 8 SCT 1: 1695 [intimating appellant would be killed by the Mafia for his role in the killings].) An officer's statement of opinion regarding the guilt of an accused is no less damaging because it is presented in written or recorded form. (*United States v. Harber* (9th Cir. 1995) 53 F.3d 236 [copy of an agent's report containing opinions was left in the jury room]; *United States v. Hernandez, supra*, 27 F.3d at p.1408 [transcripts of an interview].)

Respondent further argues that no harm was done because the trial prosecutor did <u>not</u> infer the existence of extrajudicial evidence supporting

appellant's guilt, nor did he rely on investigators' statements for the truth of the matter asserted at any point during the trial. (RB 171-172.) This argument is utterly disingenuous. Far from de-emphasizing the detective's accusatory questions, as respondent claims, the prosecutor, in closing argument, replayed appellant's interview for the jury (62 RT 9753), and underscored appellant's allegedly guilty pauses when he was confronted with the accusatory statements of Detective Laurie referring to "people on the street" who knew what appellant was "up to." (62 RT 9756, 9760.)

C. Appellant Did Not Forfeit The Right To Assert A Violation Of Otherwise Meritorious Federal Constitutional Rights.

Respondent predictably argues that appellant forfeited the right to press violations of his confrontation rights and the rights to due process of law and a reliable death judgment by failing to argue these particular constitutional violations in the trial court. (RB173; referring to claims of error in violation of United States Constitution, Amendments VI, XIV and VIII.) Instead, counsel argued for exclusion under Evidence Code section 352, on the ground that the evidence was more prejudicial than probative.

Objections advanced pursuant to Evidence Code section 352 generally suffice to preserve error predicated on the denial of due process. (*People v. Partida, supra*, 37 Cal.4th at pp. 433-434.) Furthermore, the purpose of the Confrontation Clause is to "ensure reliability of evidence," . . . "by testing in the crucible of cross-examination." (*Crawford v. Washington, supra,* 541 U.S. at p. 61) and to "preclude a class of evidence considered to be generally less reliable than in-person testimony of events observed by a testifying witness." (*United States v. Hernandez* (10th Cir.

2003) 333 Fed.3d 1168, 1179.) In appellant's case, in violation of this principle, unsworn, uncross-examined testimony was presented as substantive evidence. (Cf. *United States v. Carmichael* (6th Cir. 2000) 232 F.3d 510, 521.) Hence, defense counsel's specific requests to redact harmful accusatory statements that were clearly based on testimonial hearsay collected from other persons allegedly interviewed by investigators[16] should be deemed adequate to have given the court and prosecutor an opportunity to "prevent error" or to "take . . . steps designed to minimize the prospect of reversal." (*People v. Partida, supra,* 37 Cal.4th at p. 434.) No useful purpose would be served were this Court to refuse to consider appellant's Sixth and Eighth Amendment challenges. (*People v. Partida, supra,* 37 Cal.4th at p. 436.)

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[16] See, *People v. Cage* (2007) 40 Cal.4th 965, 984 [defining "testimonial" hearsay to include statements given or taken primarily for the purpose of establishing facts for possible use in a criminal trial].

VI

REPLY TO RESPONDENT'S ARGUMENT VI: THE TRIAL COURT ERRED BY OVERRULING OBJECTIONS TO TESTIMONY BY THE PROSECUTION'S GANG EXPERT.

A. Proceedings Below:

Respondent apparently does not dispute that appellant made objections to the particular gang expert testimony discussed in appellant's Argument VI. (RB 177.)

B. The Trial Court Erred By Overruling Appellant's Objection When The Prosecutor Asked If Even The Son Of A Murder Victim Would Lie To Aid The Mexican Mafia.

The gang expert was allowed to testify that even the son of a murder victim would lie to aid the Mexican Mafia. The gist of appellant's objection was that commenting on the credibility of a witness was not a proper subject for gang expert testimony. (AOB 140.) The objection was well taken. (*United States v. Schriver* (2nd Cir. 2001) 255 F.3d 45, 50; *People v. Smith* (2003) 30 Cal.4th 581, 627.)

Respondent asserts that this claim of error is "moot" because no son of a victim testified on appellant's behalf at the trial. (RB 178.) Whether a victim's son testified begs the question. Appellant called numerous witnesses, including relatives, to testify in his defense. Having Valdemar testify that even the son of a murder victim would commit perjury for the benefit of the Mexican Mafia was the same, for all intents and purposes, as having the expert testify that the testimony of all defense witnesses – even relatives – should be viewed with distrust because of appellant's alleged Mexican Mafia connection. The testimony was no less prejudicial merely

because no son or daughter of a victim testified in appellant's defense at the trial. Valdemar was allowed, under the guise of expert testimony, to brand all defense witnesses as liars.

When "expert" testimony amounts to improper opinion testimony on witness credibility, federal courts have held that the trial process is constitutionally flawed. *Mach v. Stewart* (9th Cir. 1998) 137 F.3d 630, for example, is a child abuse case in which a prospective juror relayed, based on her "experience," that she had never known a child to lie about sexual abuse. These "expert-like" statements, the Court held, violated the rights of the defendant by tainting the jury pool. It was equally error to admit Valdemar's opinion testimony that almost anyone, even a victim's family member, would lie to protect the Mexican Mafia.

Respondent cites numerous cases, purportedly for the proposition that experts may testify regarding matters that affect a witness' credibility. (RB 178-179.) In *People v. Brown* (2004) 33 Cal.4th 892, 906 (RB 178), for example, expert testimony was admitted to explain why a victim of domestic violence gave trial testimony inconsistent with statements she had earlier given to police. Here, there was no recantation of testimony that required explaining by the expert witness. Similarly, in *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551 (RB 179), expert gang testimony was received to help explain why certain witnesses had repudiated their original statements. Valdemar was not needed to help the jury decide whether or not to credit a witness' trial testimony, or conversely, a prior inconsistent statement. In *United States v. Mejia* (2nd Cir. 2008) 545 F.3d 179, the Circuit Court appropriately observed that, although gang expert testimony is useful, "its use must be limited to those issues where sociological knowledge is appropriate." (*Id.*, at p. 190.)

Respondent also refers to cases which stand for the proposition that evidence of threats or fear is relevant to the assessment of a witness' credibility. (RB 178-179, referring to *People v. Sapp* (2003) 31 Cal.4th 240, 301; *People v. Olguin* (1994) 31 Cal.4th 1355, 1368-1369; *People v. Guerra* (2006) 37 Cal.4th 1067, 1141.) Valdemar did not testify that threats or fear had caused any particular witness to commit perjury on appellant's behalf, however. Whether or not appellant's family members or other defense witnesses would perjure themselves to protect appellant or the Mexican Mafia was something the average juror was well equipped to assess; hence, expert testimony was improper and unnecessary. (*Snowden v. Singletary* (11th Cir. 1998) 135 F.3d 732, 738 [error to admit expert to opine that all child sex abuse victims tell the truth].)

C. The Trial Court Erred By Overruling Appellant's Objection To The Prosecutor's Question Regarding Whether Newly-Indicted Mexican Mafia Members Would Honor The Wishes Of A Sponsor.

Over objection, the court allowed Sgt. Valdemar to answer the question, "What effect would that have on the way the new member would view, in your opinion, would view the wishes of his mentor and his sponsor into Eme?" Valdemar answered that the new member would "pay great attention" to the sponsor. (55 RT 8526-8527.) In other words, appellant, the new member, would do whatever Shyrock asked – even commit murder.

Citing *People v. Gonzalez* (2006) 38 Cal.4th 932, 945, respondent asserts that this is just the type of opinion that a court has discretion to admit. Appellant begs to disagree. In *Gonzalez*, there were eyewitnesses who changed their testimony. The expert's testimony was deemed admissible to explain how gang intimidation was likely to have caused the

witnesses to recant.

Respondent's argument conveniently ignores crucial principles which both California and federal courts recognize in evaluating expert testimony. Gang experts are not allowed to usurp the role of the jury by, in effect, telling jurors how to decide a case, particularly where liability rests on proof of the intent of the alleged perpetrator. (*People v. Killebrew* (2002) 103 Cal.App.4th 644; *Mitchell v. Prunty* (9th Cir. 1997) 107 F.3d. 1337.)

> An increasingly thinning line separates the legitimate use of an officer expert to translate esoteric terminology or to explicate an organization's hierarchical structure from the illegitimate and impermissible substitution of expert opinion for factual evidence. If the officer expert strays beyond the bounds of appropriately "expert" matters, that officer becomes, rather than a sociologist describing the inner workings of a closed community, a chronicler of the recent past whose pronouncements on elements of the charged offense serve as shortcuts to proving guilt.

(*United States v. Mejia, supra,* 545 F.3d at p. 191.)

Valdemar's "opinion" testimony regarding appellant's alleged behavior following induction by a sponsor improperly invited jurors to find appellant guilty of a capital crime on the basis of his relationship to Shyrock. In effect, Valdemar informed the jury that appellant must have been the person who set up the murders of Moreno and/or Aguirre because had been inducted into the Mexican Mafia by Shyrock, who wanted Moreno and Aguirre killed. When experts come to court to simply "disgorge their factual knowledge to the jury, the experts are no longer aiding the jury in its factfinding; they are instructing the jury on the existence of the facts needed to satisfy the elements of the charged offense." (See, *United States v. Mejia, supra,* 545 F.3d at p.191; accord: *People v. Killebrew, supra,* 103

Cal.App.4th at p. 658 [conviction reversed where gang expert effectively testified, through the use of hypothetical questions, that defendants had knowledge of the presence of guns found in gang members' cars].) This type of gang expert opinion testimony is particularly prejudicial in light of the enhanced credibility of law enforcement witnesses before jurors. (Groscup & Penrod, *supra*, *Battle of the Standards for Experts in Criminal Cases: Police vs. Psychologists*, (2003) 33 Seton L. Rev. at p.1148, fn. 32 [of different types of witnesses, jurors rated police as "most likeable, understandable, believable and confident."].)

Moreover, the appellate record contains no clue as to the basis for Valdemar's sweeping opinion regarding the conduct of Mexican Mafia inductees and/or the proclivity of defense witnesses to lie on the Mafia's behalf. Expert opinion based on hearsay and speculation is not rendered admissible merely because it is delivered by a member of law enforcement. (*In re Jose T.* (1991) 230 Cal.App.3d 1455, 1462; *In re Leland D.* (1990) 223 Cal.App.3d 251, 259.) For example, in *United States v. Lombordozzi* (2nd Cir. 2007) 491 F.3d 61, a defendant was charged with loan sharking, and the government called an investigator to testify that the defendant was "'a soldier in the Gambino crime family.'" (*Id.,* at p. 72.) The investigator testified that his knowledge of the defendant's status within the Gambino family was based on conversations with cooperating witnesses and confidential informants. (*Ibid.*) The federal circuit court held that the testimony was erroneously admitted. (*Id.,* at p. 74.)

Similarly, Valdemar's testimony that Mexican Mafia inductees would execute the wishes of their "sponsors" was inadmissible because it was based on speculation and inadmissible hearsay. Allowing an officer expert to repeat information derived from hearsay without applying any expertise

whatsoever simply allows the government to circumvent the constitutional prohibitions and rules against testimonial hearsay. (*United States v. Mejia, supra,* 545 F.3d at p. 197.)

D. Appellant's Constitutionally-Based Assignments Of Error Should Not Be Deemed Forfeited By The Failure To Object; Additionally, The Error Was Not Harmless.

Respondent asserts forfeiture of the right to challenge the improper admission of the expert testimony on federal constitutional grounds. (RB 182.) There is no possibility that the trial judge would have ruled differently had Mr. Esqueda articulated a string of constitutional objections along with his objections to improper and speculative opinion testimony by a gang expert. (*People v. Partida, supra,* 37 Cal.4th at p. 436.) Furthermore, defense counsel's enumeration of numerous grounds for each objection would have been futile and counterproductive to his client. (*People v. Hill, supra,* 17 Cal.4th at p.821.) It would elevate form over substance to refuse to address constitutional arguments on the merits due to the failure to object. (*People v. Partida, supra,* at p. 434.)

Respondent also asserts that any error in admitting improper expert testimony was harmless. (RB 182.) To the contrary, Valdemar's completely improper "opinion" testimony – to the effect that appellant must have arranged the murders because he was Shyrock's recruit and that any witness testifying to the contrary was probably lying to protect the Mexican Mafia – went to the heart of the prosecution's theory of the case. In such circumstances, "it is a little too convenient that the Government has found an individual who is expert on precisely those facts that the Government must prove to secure a guilty verdict . . . ." (*United States v. Mejia, supra,*

545 F.3d at p. 191.) Valdemar did not just aid the jury's factfinding; he instructed the jury on the existence of facts needed to satisfy the elements of the charged offenses and special circumstance allegations. (*Ibid.*) For reasons previously articulated, this was error of constitutional dimension. (AOB 142.)

Furthermore, cumulative error requires reversal of the judgment. Individual errors that may not be so prejudicial as to deprive the defendant of a fair trial when considered alone may cumulatively produce a trial that is fundamentally unfair. (*Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614 622; *People v. Hill, supra*, 17 Cal.4th at pp. 844-845.) When considered in light of all the other evidentiary errors in appellant's trial, admission of Valdemar's opinions constituted prejudicial error.

VII

REPLY TO RESPONDENT'S ARGUMENT VII: THE PROSECUTOR COMMITTED MISCONDUCT BY INTRODUCING STATEMENTS MADE BY RAYMOND SHYROCK DURING A VIDEOTAPED MEXICAN MAFIA MEETING REGARDING APPELLANT'S CRIMINAL ACTS IN FURTHERANCE OF THE GANG.

A. Proceedings Below:

Respondent's recitation of the proceedings appears geared toward persuading this Court to deny consideration of the issue on the merits because trial counsel did not "pursue a final ruling on the admissibility of the challenged statements." (RB 188-189.) The issue is adequately preserved for appeal.[17] (See, Argument VII, C, *post.*)

B. Respondent's Statement Of Legal Principles Governing Prosecutorial Misconduct:

Appellant agrees with respondent that a prosecutor commits misconduct by using deceptive or reprehensible methods to attempt to persuade the court or the jury. (RB 191.) Respondent's summary of the law governing misconduct does not go far enough, however.

A prosecutor plays a dual role, "as the defendant's adversary and as a guardian of the defendant's constitutional rights." (*People v. Trevino*

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[17] If it is not, then given the highly inflammatory character of the information imparted – that appellant committed other prior violent crimes for the Mexican Mafia – an ineffective assistance of counsel claim pursuant to *Strickland v. Washington* (1984) 466 U.S. 668 [80 L.Ed.2d 674, 104 S.Ct. 2052], will certainly be cognizable on habeas corpus. Unfortunately, resolution of counsel's ineffectiveness will have to await the appointment of habeas corpus counsel and the filing of a petition for a writ of habeas corpus.

(1985) 39 Cal.3d 667, 681; overruled on unrelated grounds in *People v. Willis* (1989) 47 Cal.3d 1194, 1219.) "Thus, the prosecution is obligated to respect the defendant's right to a fair and impartial trial in compliance with due process of law." (*Ibid.*; *Berger v. United States* (1935) 295 U.S. 78, 88 [79 L.Ed. 1314,1321, 55 S.Ct. 629].) Consistently, it is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order. (*People v. Crew* (2003) 31 Cal.4th 822, 839; *People v. Silva* (2001) 25 Cal.4th 345, 373; *United States v. Auch* (1st Cir. 1999) 187 F.3d 125, 129.)

In this case, the prosecutor introduced extremely inflammatory statements suggesting that appellant had committed numerous violent acts on behalf of the Mexican Mafia in violation of a court ruling that the evidence was inadmissible hearsay. It was both "deceptive" and "reprehensible" for the prosecutor to do so as well as a violation of a court ruling excluding the evidence as hearsay.

C. Appellant's Claim Of Prosecutorial Misconduct Should Not Be Deemed Forfeited.

Respondent argues that, because Judge Sarmiento's ruling was tentative, not final, appellant waived the admissibility of the statements about appellant's prior criminal activities for the gang by failing to object again when the videotape was played for the jury. (RB 192.) The ruling was not tentative.

The prosecutor did not have evidence available at the time of the *in limine* hearing to prove to the court's satisfaction that Raymond Shyrock was unavailable as a witness. Proof of unavailability is a prerequisite to the admissibility of statement as a declaration against penal interest. (Evid.

Code, § 1230.) The first time the judge inquired whether Shyrock was unavailable, the district attorney responded:

> For the purpose of his proceeding I'd like the court to assume he's unavailable. What I will do if necessary – he is a defendant in a RICO case supposed to start trial in this District in October. He's in custody in the Metropolitan Detention Center. ¶ Clearly, he has a right not to testify. In this case he has a Fifth Amendment privilege. I have not contacted his attorney. But what I will do, because clearly I have to show unavailability, is I will have his attorney fill out a document indicating that if he was called to testify he would take the Fifth. ¶ In addition, the U.S. Attorney's office has told me, although I'm just simply advising the court of this, that they would oppose any motion to bring him over here either as a witness or a defendant. . . .

(3 RT 508-509, 513.)

At the September 3, 1996 hearing, defense counsel disputed Shyrock's unavailability. Counsel indicated to the court that he would subpoena and call Raymond Shyrock to the stand "if it gets to that issue." (3 RT 514.) The court decided to proceed with the hearing and rule on all issues except unavailability, as evidenced by this statement:

> Hold on. What we can do is this: I will let you be heard on the other arguments. As far as the unavailability issue, I can make a ruling subject to whether or not he's available or not so at least you can have a ruling so all sides will know how to proceed on this issue.

(3 RT 515, 517.)

The judge ruled, but assumed for purposes of ruling that the district attorney could make good on his promise to prove Shyrock's unavailability. (3 RT 517.) Defense objections to Shyrock's statements referring to "Dido" as a Mexican Mafia dropout were overruled. (3 RT 517.) Counsel's objections to the videotaped statements describing appellant's prior actions

on behalf of the Mafia – such as "down[ing] a whole bunch of mother fuckers" and taking "care of" the people responsible for killing a baby – were sustained. (RB 190.)

During the hearing, the district attorney even acknowledged the reasonableness of the court's concern about admitting Shyrock's statements implicating appellant in prior criminal conduct on the Mafia's behalf. (3 RT 530.) He represented to the court that it would be his "intent to play a portion of the videotape where Mr. Maciel is brought in, introduced around, and then later on comes in and embraces the people present . . ." if limitations on Shyrock's statements about appellant's doing business for the Mafia were imposed. (3 RT 531.)

The judge announced, the "hearsay objection is sustained." (3 RT 532-533.) The prosecutor asked whether the court was making a ruling as to whether portions of the videotape could be played. The court responded that it was not ruling on the admissibility of the videotape, but was ruling on the proffered hearsay statements: "I don't think it meets the requirement of being against the interest of the declarant, Mr. Shyrock." (3 RT 533.) Counsel would reasonably have understood from what transpired that the court was excluding portions of the videotape depicting Shyrock's statements about appellant's purported activities on behalf of the Mexican Mafia.

Respondent also argues that the issue was forfeited because the videotape – including the material ruled inadmissible – was played for the jury twice without a contemporaneous a objection. Perhaps before the videotape was played for the first time, counsel was unaware that the promised redactions had not been made. Even if, however, trial counsel's failure to contemporaneously object was the result of inattention or

inexcusable professional neglect,[18] once the "cat was out of the bag," no admonition would have cured the harm. The jury would already have heard Shyrock bragging, on videotape, about appellant's demonstrated commitment to the Mexican Mafia through the commission of numerous violent crimes, including, inferentially, murder. (*People v. Albarran, supra*, 149 Cal.App.4th at p. 230 [despite limiting jury admonition, it was prejudicial error to introduce expert testimony regarding Mexican Mafia and other crimes committed by various gang members]; see also, *People v. Hill, supra,* 17 Cal.4th at pp. 820, 843, fn. 8.) There was nothing the trial court could have done to "unring the bell" sounded by the prosecutor's use of inflammatory evidence excluded by prior judicial order. (*People v. Alvarado* (2006) 141 Cal.App.4th 1577, 1586; see also, *People v. Hogan* (1982) 31 Cal.3d 815, 845-848; disapproved on another point in *People v. Cooper* (1991) 53 Cal.3d 771, 836.)

D. The Statements Were Not Admissible As Declarations Against Interest.

Respondent argues that the statements by Shyrock implicating appellant in criminal conduct qualified as declarations against penal interest. *People v. Samuels* (2005) 36 Cal.4th 96, is cited in support of this proposition. This case is clearly distinguishable because, in *Samuels*, the statements made by the hearsay declarant were not collateral to the charged crime; they admitted complicity in the same murder for which the defendant

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[18] Whether trial counsel's conduct of the case fell below professional norms, and resulted in prejudice to appellant are more appropriately considered in the context of a petition for writ of habeas corpus, where relevant facts and circumstances not reflected in the record on appeal can be brought to light. (*People v. Rundle* (2008) 43 Cal.4th 76, 174.)

was being tried. In addition, the context in the which statements were made bore much greater indicia of reliability.

In *People v. Samuels*, the defendant was convicted of the first degree murders of her ex-husband, Robert Samuels, and James Bernstein. She was also convicted of solicitation of and conspiracy to commit the murders of both men. (*Id.,* at p. 101.) The evidence generally established that the defendant solicited James Bernstein to murder Samuels following the couple's divorce. Bernstein agreed to do it, and solicited the help of another man, Mike Silva. Thereafter, Silva and Bernstein murdered Samuels. Bernstein became remorseful and decided to go to the police and admit his role in the murder. Defendant solicited another man, Paul Gaul, to kill Bernstein in order to stop him from going to the police. Thereafter, Gaul and another man, Darryl Edwards, killed Bernstein.

On appeal, the defendant argued that the trial court improperly admitted hearsay statements made by the deceased James Bernstein to a prosecution witness with whom he had discussed his role in the murders. Bernstein told witness David Navarro that he had committed the murder with Silva's help and that defendant had paid him. (*People v. Samuels, supra,* 36 Cal.4th at p. 120.) This Court held that the statement was properly admitted as a declaration against penal interest. (*Ibid.*) The Court distinguished the situation from circumstances presented in *People v. Lawley, supra,* 27 Cal.4th at pp.151-154, on the basis that Bernstein's "facially incriminating comments were in no way exculpatory, self-serving, or collateral." (*Ibid.*) The court disagreed that Bernstein's statement that the defendant had paid him was collateral to the statement against penal interest, or an attempt to shift blame. (*Ibid.*)

Shyrock's videotaped statements are more similar to the statements excluded in the *Lawley* case than they are to the hearsay admitted in *Samuels*. In *People v. Lawley, supra,* 27 Cal.4th 102, the defendant was also convicted of murder, conspiracy to commit murder and solicitation of murder. In defense, the defendant sought to prove that the murder was committed by another man, Brian Seabourn, pursuant to a contract issued by the Aryan Brotherhood prison gang. The defendant's first witness, Monty Ray Mullins, took the stand and testified that he had met Seabourn in prison and had a conversation with him about "a homicide." When the prosecutor objected on hearsay grounds, the court excused the jury and the defendant made an offer of proof that Seabourn had told Mullins that he killed someone in Modesto, that an innocent person was incarcerated for it, and that the Aryan Brotherhood had directed him to commit the crime. (*Id.,* at pp. 151-152.) Mullins took "the Fifth" when asked by the court whether Seabourn had identified the defendant as the innocent party by name. (*Id.*, at p. 152.) Mullins told the court that Seabourn had not said he was expecting money, or that he had received money for the killing from the Aryan Brotherhood. Mullins believed there were drugs or money involved in the transaction, but Seabourn did not identify who was paying him. (*Ibid.*) The defendant in *Lawley* also made a proffer that David Hager would testify that Seabourn had admitted killing the victim at the direction of the Aryan Brotherhood.

The trial court ruled that Seabourn's statements to Mullins and Hager that he had killed a man in Modesto were admissible as declarations against interest, assuming the statements related to the killing of the victim in the case (Stewart) and not some other killing. Seabourn's statements that he was hired to kill the victim, and that he received $6,000 for the murder,

were also admissible as declarations against interest. On the other hand, Seabourn's statement that the Aryan Brotherhood directed him to kill the victim was not admissible as against his penal interest. (*People v. Lawley, supra,* 27 Cal.4th at p. 152.)

On appeal, the defendant in *Lawley* argued that the trial court abused its discretion by excluding evidence that Seabourn had admitted killing the victim at the direction of the Aryan Brotherhood, and that an innocent person had been charged with a crime. This Court described the declaration against penal interest exception in the following terms:

> With respect to the penal interest exception, the proponent of 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." . . . . A court may not, applying this hearsay exception, find a declarant's statement sufficiently reliable for admission "'solely because it incorporates an admission of criminal culpability.'" . . . . As the high court reasoned in interpreting the analogous exception to the federal hearsay rule "[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory nature. One of the most effective ways to lie is to mix falsehood with truth especially truth that seems particularly persuasive because of its self-inculpatory nature." . . . . Whether a statement is self-inculpatory or not can only be determined by viewing the statement in context. . . . ¶ In view of these concerns, this court "long ago determined that 'the hearsay exception should not apply to collateral assertions within declarations against penal interest.' [Citation.] . . ."

(*People v. Lawley, supra,* 27 Cal.4th at p.153; citations omitted.)

The district attorney was the proponent of the hearsay in this case, and it was his burden to demonstrate that Shyrock's statements implicating appellant were against Shyrock's penal interest and sufficiently reliable to

warrant their admission despite their hearsay character. Shyrock's statements may arguably incorporate vague admissions of criminal culpability (*ibid.*) in the sense that Shyrock was a Mexican Mafia member at the time, and he clearly implied that his organization was conducting "business" of a criminal nature that included having people killed. The statements were completely collateral to the Maxson Street murders, however. Appellant was not being prosecuted for committing, or conspiring to commit any of the criminal acts inferentially mentioned by Shyrock at the April 2, 1995, videotaped meeting.

More importantly, the statements about appellant were not so clearly against Shyrock's penal interests as to render them reliable evidence in the context of appellant's trial on completely unrelated capital charges. To the contrary, as this Court observed in *Lawley*, Shyrock may well have been mixing falsehood and exaggeration with truth, in order to persuade other Mafia members of appellant's proven worthiness to join the gang.

In arguing that the statements qualify for admission as statements against penal interest, respondent completely ignores a second problem. The trial court in this case, after listening to the prosecutor's justifications for admitting Shyrock's statements about Maciel, still questioned the relevance of the evidence.

> All right. Mr. Monaghan, I want you to give me your theory of relevancy as to this. That's the biggest problem I have. I read your statement a number of times. I read your statement of facts and tried to put myself in your position figure, how you would use this at trial, and I'm having a great deal of difficulty seeing how this is going to relevant.

(3 RT 526.) In *People v. Samuels, supra,* 36 Cal.4th 96, in contrast, the extrajudicial declarations of the deceased hit man were clearly relevant to

prove the defendant's guilt of the two charged murders. In this case, the evidence was highly prejudicial, yet of little probative value to establish appellant's role in the Maxson Street murders. (Evid. Code, § 352.)

E. Appellant's Failure To Request A Limiting Instruction Should Not Be Deemed To Forfeit The Issue.

Because no limiting instruction was requested by defense counsel, respondent requests that this Court decline to rule on the merits of appellant's argument that the court erred by failing to give a limiting instruction. (RB 196.) Appellant urges this Court to apply the exception to the "no duty" rule, which applies when prior crimes evidence becomes a dominant part of the prosecutor's case, is highly prejudicial, and minimally relevant for any legitimate purpose. (*People v. Collie* (1981) 30 Cal.3d 43, 63-64.) (See, AOB 150.)

F. This Court Should Address On The Merits The Argument That The Court Erred And Compounded The Prejudice By Failing To Instruct The Jury That Shyrock Was An Accomplice Whose Statements Were Subject To The Rule Requiring Corroboration.

Respondent argues that appellant has forfeited review on the merits of the claim that the jury that should have been instructed that Raymond Shyrock was an accomplice as a matter of law. (RB198.) Alternatively, respondent argues that appellant could not have been prejudiced by the absence of the instruction. (RB 201.)

Respondent does not dispute that Raymond Shyrock was an accomplice as a matter of law. The People's theory was that Shyrock recruited appellant to arrange for the murder of "Dido" Moreno. Five

people were killed during the carrying out of the murder. (*People v. Sanders, supra,* 11 Cal.4th at p. 534 ["'An accomplice is one who is subject to prosecution for the identical offense charged against the defendant on trial . . . .'"].) Nor does respondent dispute the general rule, which is that courts have a *sua sponte* obligation to give accomplice instructions whenever it is undisputed that the source of the evidence is an accomplice as a matter of law. (*People v. Najera* (2008) 43 Cal.4th 1132, 1136-1137.) Respondent even agrees that appellant would have been entitled to a so-called "pinpoint" instruction identifying Shyrock as an accomplice for purposes of the accomplice rule, had such an instruction been requested. (RB 198-199.)

Regarding the argument that the issue was forfeited by the failure to request a "pinpoint" instruction identifying Shyrock as an accomplice for purposes of the accomplice rule, it suffices to say that, when cumulated with other errors, the absence of the instruction affected appellant's "substantial rights" and therefore should be addressed. (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 6.)

The evidence establishing appellant's involvement as the instigator was closely contested. Much of the evidence came from criminals of dubious reputation and credibility, and appellant presented a creditable affirmative defense. During the guilt phase, there was no evidence except for Shyrock's hearsay declarations suggesting that appellant had committed or arranged homicides for the Mafia prior to the Maxson Street murders. Admission of the evidence was not harmless, and neither was admitting the evidence without limiting instructions, and without even cautionary instructions advising the jury that Shyrock was an accomplice whose extrajudicial statements must be subjected to the corroboration requirement.

G. Appellant's Meritorious Claims Of Federal Constitutional Errors Should Not Be Deemed Forfeited.

Respondent argues that appellant has forfeited the right to assert errors under the state and federal constitutions, except for the denial of due process, because he did not raise these claims below. (RB 201.) The fact that a state appellate court may refuse to hear constitutional challenges not raised in the trial court does not mean that this Court is obliged as a matter of federal law from reaching constitutional questions. (*Dun & Bradstreet v. Greenmoss Builders* (1984) 472 U.S. 749 [86 L.Ed.2d 593, 105 S.Ct. 2939; *Orr v. Orr* (1979) 440 U.S. 268, 275, fn. 4 [59 L.Ed.2d 306, 99 S.Ct. 1102.)

In any event, this Court should reject this argument and address appellant's other constitutionally-based arguments – impingement upon First, Sixth, and Eighth Amendment rights – on the merits. In *People v. Partida, supra*, 37 Cal.4th 428, this Court held that an objection advanced under Evidence Code section 352 was adequate to preserve error asserted on appeal as a due process violation. (*Id.,* at p. 433-434.) Appellant's counsel argued for exclusion for prejudice under Evidence Code section 352. (3 RT 532.) The purpose of the Confrontation Clause is to "ensure reliability of evidence," . . . "by testing in the crucible of cross-examination." (*Crawford v. Washington, supra,* 541 U.S. at p. 61.) The Eighth Amendment guarantees reliability of sentencing in death penalty cases. (*Satterwhite v. Texas* (1988) 486 U.S. 249, 262-263 [126 L.Ed.2d 387, 114 S.Ct. 455].) It would elevate form over substance to refuse to consider whether appellant was denied constitutional rights of confrontation and reliability in death sentencing when an objection predicated on the Due Process Clause was advanced.

More importantly, defense counsel had no need to articulate other constitutional grounds for the exclusion of the evidence. The trial court ruled in appellant's favor that Shyrock's statements about appellant were inadmissible. The prosecutor simply ignored a court ruling to exclude the evidence. There is no reason to believe the prosecutor would have presented an appropriately redacted videotape of the statements of Raymond Shyrock, excluding the material ruled inadmissible, had other constitutional bases for excluding the evidence been articulated by defense counsel. Accordingly, no useful purpose would be served by declining to consider appellant's First, Sixth and Eighth Amendment challenges, which merely restate under alternative legal principles the appellant's claim that he was denied a fair trial. (*People v. Partida, supra,* 37 Cal.4th at p. 436.)

In addition, the question of whether appellant's First Amendment associational rights were violated (AOB 157-158) is a pure question of law that can be addressed for the first time on appeal on the undisputed facts. (*People v. Hines* (1997) 15 Cal.4th 997, 1061; *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1471.)

Respondent's assertion that there was no prejudice as a result of the claimed constitutional errors (RB 201-202) should likewise be rejected. Respondent asserts that the videotapes constituted but a relatively small portion of the prosecution's case. (RB 202.) To the contrary, the videotape evidence played a central role in proving the prosecutor's theory of the case; appellant was a Mexican Mafia "hit man," and therefore, it must be true that he arranged for the murder of "Dido" Moreno, a Mexican Mafia dropout. The April 2, 1995, videotape was given heavy emphasis; it was played twice by the prosecutor – once during the trial and again during guilt phase closing argument to the jury. (62 RT 9651.) After the second guilt

phase viewing, the prosecutor remarked, "It's chilling, isn't it?" (62 RT 9651.) During the penalty phase closing argument, the prosecutor once again referred to the videotape as proof that appellant had "embraced the gang culture and gang lifestyle" (65 RT 10131); he argued that "the best predictor of future violence is past violence." (65 RT 10130.) The record contains actual proof that jurors were filled with fear and trepidation as a result of the implication that appellant was a Mafia "hit man." (63 RT 9813 [juror expressing fear of gang retribution]; 65 RT 10235 [jurors requesting escorts to their cars].) Under the circumstances, there is no conceivable way that the error did not infect the guilt and penalty phase judgments. (See, AOB 154-158; *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824].)

Moreover, even if this particular error was not so prejudicial as to deprive appellant of a fair trial, when it is considered in cumulation with other errors, the result was to produce a trial that was fundamentally unfair. (*Mak v. Blodgett, supra,* 970 F.2d at p. 622; *People v. Hill, supra*, 17 Cal.4th at pp.844-845.)

VIII

REPLY TO RESPONDENT'S ARGUMENT VIII: THE TRIAL COURT ERRED BY ADMITTING STATEMENTS MADE BY RAYMOND SHYROCK DURING A VIDEOTAPED MAFIA MEETING REGARDING HIS PLAN TO KILL "DIDO."

A. Proceedings Below:

As previously set forth in the AOB, subject to the prosecutor's ability to prove Raymond Shyrock's unavailability at the time of trial, Judge Sarmiento ruled that the People could play a videotape of a surreptitiously recorded meeting of the Mexican Mafia on January 4, 1995, at which Shyrock talked about a Mexican Mafia dropout referred to as "Dido," whom he wanted to have killed. (8 SCT 1:1442-1443; People's Exhibits 118 and 119A; AOB 159; RB 203-206.) Shyrock's statements were received as declarations against penal interest, and defense counsel's objection that the evidence was more prejudicial than probative was overruled. (3 RT 512-517.)

B. Shyrock's Statements Were Not Admissible As Declarations Against Interest And/Or As Coconspirator Statements.

Respondent argues that Shyrock's statements were properly received as declarations against penal interest. (Evid. Code, § 1230.) It is argued that *People v. Samuels, supra,* 36 Cal.4th at p. 96, is dispositive of the issue. (RB 207.) The *Samuels* case – the same case discussed in Argument VII, above[19] – is distinguishable from this case in several important respects.

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[19] As is previously discussed, in *People v. Samuels*, the defendant was convicted of the first degree murders of her ex-husband, Robert Samuels, and James Bernstein, the contract killer who killed defendant's

In *Samuels*, the hearsay declarant was the contract killer hired by the defendant to kill her husband. His confession to murder for hire – a capital crime in California – was clearly disserving to his own penal interests since he had already committed the crime. (*Id.*, at p. 121.) In addition, the statement that the defendant had paid him was hardly collateral to the issues at the defendant's murder trial. (*Ibid.*)

In this case, the hearsay declarant was a third party who was not prosecuted along with appellant and the codefendants for Maxson Street murders. Moreover, the January 4, 1995, meeting at which Shyrock's statements were made occurred a full three months before appellant was even recruited as a member of the Mafia.

The statements do not qualify as declarations against interest because, when made, they would not have subjected Shyrock to criminal liability. (*Lilly v. Virginia, supra,* 527 U.S. at pp. 130-139.) At this point, no crime had yet been attempted or committed for which Shyrock could have been prosecuted.

> "An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission."

(*People v. Wallace* (2008) 44 Cal.4th 1032, 1077; citation omitted.) No act had been perpetrated toward murdering Anthony Moreno – even assuming he was the same "Dido" referred to by Shyrock – when the statements were made.

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husband. (*Id.*, at p. 101.) The deceased Bernstein admitted to a prosecution witness that the defendant had paid him to murder the defendant's husband. (*People v. Samuels, supra,* 36 Cal.4th at p. 120.)

Respondent is confusing the concepts of relevance and admissibility. Even if Shyrock's statements at the January 4, 1995, meeting were arguably relevant to show Shyrock had a motive to kill someone named "Dido," and even assuming Shyrock was referring to the same "Dido" who was killed on April 22, 1995 (see AOB 160-161), this is not enough to establish admissibility. Lots of relevant evidence is by law inadmissible. Shyrock's hearsay statements about "Dido," to be admissible, would still have to be (1) against the hearsay declarant's penal interest at the time the statements were made; and (2) sufficiently reliable to withstand scrutiny under the federal Confrontation Clause. (*Lilly v. Virginia, supra,* 527 U.S. at pp. 130-139.) Shyrock's videotaped statements – that "Dido" was a dropout, and that he had been living downstairs from Shyrock with a house full of "youngsters" – were, at the time they were made, neither particularly reliable nor against his penal interest. It is not even clear that the statements were based on first hand knowledge rather than reporting the statements of others.

Respondent also argues that the statements were admissible as coconspirator statements made in furtherance of the conspiracy. (RB 210.) A conspiracy charge, it is said, is the "darling of the modern prosecutor's nursery." (*Harrison v. United States* (2nd Cir. 1925) 7 F.2d 259, 263.) It is easy to see why from this case. Respondent repeatedly argues that inadmissible hearsay qualifies for admission under this exception no matter how long before or after the Maxson Street murders the declarant made the extrajudicial statement in question. (See, RB 210-211, 235-236, 249-252.)

Respondent suggests that appellant has forfeited the right to object that the statements are inadmissible as coconspirator statements because he failed to make that argument in the trial court and the trial court did not rely

on the coconspirator exception. (RB 210.) Respondent ignores this essential point. The evidence was hearsay. It was the proponent district attorney's burden – not appellant's – to establish that a hearsay exception applied.

> The proponent of proffered testimony has the burden of establishing its relevance, and if the testimony is comprised of hearsay, the foundational requirements for its admissibility under an exception to the hearsay rule.

(*People v. Morrison* (2004) 34 Cal.4th 698, 724.)

At the *in limine* hearing, the district attorney was directly asked by the judge when the conspiracy began for purposes of admitting statements of coconspirators under the hearsay rule, and he responded:

> I think that objectively one could certainly argue that the conspiracy began when Mr. Maciel went to went to the victim's residence on the day of the murders.

(3 RT 535.) The murders occurred on April 22, 1995, three months after Shyrock's statements about "Dido" were made.[20] Respondent is estopped from arguing for the first time on appeal that the conspiracy to kill Moreno began at an earlier time. (*People v. Moses* (1990) 217 Cal.App.3d 1245, 1252 ["It is elementary that a new theory cannot be raised on appeal where,

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[20] In a footnote, respondent now asserts that for purposes of the coconspirator exception to the hearsay rule, the conspiracy to kill began on January 4, 1995, when Shyrock discussed his plan to kill Moreno. It is suggested that the prosecuting attorney was only representing to the court that appellant's participation in the conspiracy did not begin until April 22, 1995. (RB 211, fn. 211.) The court's question and the district attorney's answer speak for themselves. Furthermore, this Court should disregard the argument, made "perfunctorily in a footnote without development," and without any references to the record. (*Oversea Construction v. California Occupational Safety & Health Appeals Bd.* (2007) 147 Cal.App.4th 235, 249.)

as here, the theory contemplates factual situations the consequences of which are open to controversy and were not put in issue in the lower court."].) Furthermore, because neither the prosecutor nor the court relied on the coconspirator exception, appellant had no reason to argue this exception did not apply.

Respondent cites *People v. Williams, supra,* 16 Cal.4th 635, as authority for the proposition that Shyrock's statement qualified for admission as a coconspirator's statement. (RB 211.) In *Williams*, however, the hearsay statements were made by a jointly charged, separately tried codefendant on the same day that the murders were committed. Moreover, in that case, the defendants were in the process of carrying out the objectives of their unlawful agreement at the time the statements were made.

Respondent also cites Evidence Code section 1223 and *People v. Hinton* (2006) 37 Cal.4th 839, for the proposition that Shyrock's statements about "Dido" are admissible as coconspirator statements even though they occurred long prior to appellant's involvement in the alleged conspiracy. Respondent misunderstands the application of the rule to the facts of this case. A statement offered against a party is not inadmissible by the hearsay rule if made by a declarant while participating in a conspiracy to commit a crime and in furtherance of the objective of that conspiracy. (Evid. Code, § 1223; *People v. Hinton, supra,* 37 Cal.4th at p. 895.) Appellant is the party. Shyrock is the declarant. Respondent conceded that the conspiracy began on April 22, 1995, more than three months after the statements about "Dido" were made by Shyrock. It follows, *ipso facto*, that Shyrock was not yet participating in a conspiracy to commit murder at the time the statements about "Dido" were made.

C. Shyrock's Statements Were More Prejudicial Than Probative.

Respondent argues that the trial court correctly ruled that the videotaped statements about "Dido" were more probative than prejudicial. Appellant disagrees. Given the highly inflammatory nature of the statements, coupled with their dubious reliability, it should have been obvious to the trial court that their admission would risk infecting the integrity of the trial proceedings with error. Shyrock's statements were chilling. They bespoke a willingness on his part to murder someone named "Dido" in cold blood merely because he had dropped out of the gang in 1983, twelve years earlier.

To the extent the statements were relevant to prove Shyrock's and/or the Mexican Mafia's motive to kill Anthony Moreno, the evidence was cumulative of other evidence and completely unnecessary. Appellant's acquaintance and association with the Mexican Mafia were not in serious dispute. (3 RT 532.) As respondent concedes (RB 209), Moreno's status as a Mexican Mafia dropout was established by numerous other witnesses. (55 RT 8528 [Valdemar]; 56 RT 8716 [Davis]; 56 RT 8797 [witness 15]. Eme's motive to kill both Aguirre and Moreno was likewise established through other evidence. The gang expert testified at length about the Mafia's practice of killing dropouts like Moreno, and persons like Gustavo Aguirre who robbed Mafia drug dealers and did not pay "taxes" to the gang. (55 RT 8512-8616.) Witness 15 also testified that Moreno and Aguirre were likely Mafia targets. (56 RT 8741-8742, 8825, 8760, 8799-8800.) Hence, the videotape's marginal probative value was far outweighed by its obvious potential to inflame the jury.

D. The Contention That The Trial Court Erred By Failing To Instruct The Jury That Shyrock Was An Accomplice As A Matter Of Law Was Not Forfeited And Has Merit.

Arguments VII and VIII of the AOB both allege the inadmissibility of videotaped statements of Raymond Shyrock. Both arguments include sub-arguments asserting error in the lack of an instruction advising the jury that Shyrock was an accomplice as a matter of law. Respondent, in Argument VII, F, of the Respondent's Brief, addresses this issue. (RB 198.) The response is reiterated again in Argument VIII, D. (RB 213.) Since appellant has adequately replied to the argument in Argument VII, D, of the Reply, that same argument is merely incorporated by reference at this point.

E. Appellant's Should Not Be Deemed To Have Forfeited Meritorious Claims That His Federal Constitutional Rights Were Violated.

In Argument VIII, E, of the Respondent's Brief, the Attorney General argues that appellant has forfeited constitutional claims rooted in the state and federal Confrontation Clauses, and prohibitions against cruel and unusual punishment that guarantee reliability of death judgments. (RB 215.) This argument is essentially the same as the argument advanced in Argument VII, G, of the Reply, regarding forfeiture of the right to challenge the admission of Raymond Shyrock's statements about appellant. (RB 201.) Since appellant has adequately replied to this argument in Argument VII, G, of the Reply, the argument is merely incorporated by reference as though set forth in full herein.

Respondent also argues that the error, if any, was harmless. (RB 215.) This argument, too, should be rejected. Respondent asserts that the

videotapes constituted but "one piece of a compelling evidentiary puzzle." (RB 216.) To the contrary, the videotape evidence – including People's Exhibit 118 and 119 – played a central role in proving the prosecutor's theory of the case – that appellant was recruited into the gang three months after the January 4, 1995, meeting for the express purpose of carrying out the murder of "Dido" Moreno. The videotapes were played more than once and the jury had the opportunity to play the video recordings again in the jury room. (55 RT 8555; 62 RT 9651, 9763, 9651.) The prosecutor exploited the gang "hit man" theme in his guilt and penalty phase closing arguments:

> You have seen and heard almost first hand the power of the Mafia in state prison to cause the death of other inmates. . . . .
>
> You have seen the power of the Mafia in our community to cause those brutal killings that took place, five people in one room at one time that was brought about by the Mexican Mafia.
>
> I'm going to play for you both videotapes, the January 4th tape which is about two minutes long, and the April . . . 2nd meeting which is about 25 minutes to a half hour long.
>
> The January 4th establishes the motive. . . . .

(62 RT 9650-9651.)

> I submit to you that when Luis Maciel embraced the gang culture and gang lifestyle the way we all saw him embrace the Eme on the video, he, himself, when he did that, he, himself chose the death sentence.

(62 RT 10131; emphasis added.)

The record contains actual proof that jurors were terrified as a result of the videotape recordings, relied upon to suggest appellant was a "hit man," acting to advance the interests of the Mexican Mafia. (63 RT 9813 [juror expressing fear of gang retribution]; 65 RT 10235 [jurors requesting

escorts to their cars].) Regardless of the standard of review applied, there is no conceivable way that the error did not infect the integrity of the guilt and penalty phase judgments. (AOB 154-158; *People v. Watson* (1956) 46 Cal.2d 818; *Chapman v. California*, *supra*, 386 U.S. 18.)

In addition, the right of confrontation and cross-examination is an essential and fundamental requirement for a fair trial. (*Pointer v. Texas*, *supra*, 380 U.S. at p. 405.) The Confrontation Clause reflects a preference for face-to-face confrontation at trial – a right secured by the opportunity to cross-examine. (*Douglas v. Alabama* (1965) 380 U.S. 415 [13 L.Ed.2d 934, 85 S.Ct. 1074]; *Mattox v. United States* (1895) 156 U.S. 237, 242-243 [39 L.Ed. 409, 15 S.Ct. 337].) Appellant had no opportunity to cross-examine Shyrock at his trial. Without this important means of testing the accuracy of Shyrock's statements, the ultimate integrity of the factfinding process was undermined. (*Chambers v. Mississippi* (1973) 410 U.S. 314, 315 [35 L.Ed.2d 297, 93 S.Ct. 1038].)

Furthermore, even if this single error was not so prejudicial as to deprive appellant of a fair trial, when the error is considered in cumulation with other errors, the result was to produce a trial that was fundamentally unfair. (*Mak v. Blodgett, supra,* 970 F.2d at p. 622; *People v. Hill, supra*, 17 Cal.4th at pp. 844-845.)

IX

REPLY TO RESPONDENT'S ARGUMENT IX: THE TRIAL COURT ERRED BY ADMITTING STATEMENTS BY GUSTAVO AGUIRRE THAT THE MAFIA WAS GOING TO COME AND THERE WAS GOING TO BE TROUBLE.

A. Proceedings Below:

From respondent's summary of proceedings, it appears that respondent does not quarrel with the trial court's ruling that the testimony of witnesses 8 and 11 (in which they recounted Aguirre's pre-offense statements to them about his fear that the Mafia was coming to do him harm) was hearsay, and inadmissible for the truth of the facts stated. (RB 217-222.) Respondent accurately observes that the court admonished the jury not to consider these hearsay statements by a victim for the truth of the matters asserted. However, for reasons more fully addressed in argument IX, C, of the AOB and below, the instruction was inadequate to cure the prejudice.

B. Aguirre's Hearsay Statements Were Not Admissible As Contemporaneous Statements To Explain Aguirre's State Of Mind.

Respondent argues that Aguirre's hearsay statements, in which he predicted a visit by the Mafia and harm to himself, were admissible as contemporaneous statements to explain Aguirre's state of mind. (RB 222-228.) Respondent discusses a number of cases, but none support receipt of the evidence in appellant's case.

People v. Guerra, supra, 37 Cal.4th 1067, is cited for the general rule that evidence is not hearsay unless it is offered to prove the truth of the matter asserted. (*Id.,* at p. 223; RB 223.) Respondent argues that there was

no error because the evidence was not offered for the truth of the matter asserted. (RB 223.) A hearsay objection to an out-of-court statement may not be overruled simply by identifying a nonhearsay purpose for the statement; the trial court must also find that the nonhearsay purpose is relevant to some issue in dispute. (*People v. Jablonski* (2006) 37 Cal.4th 774, 820-821.) In this case, Aguirre's state of mind was not in dispute. Hence, his expressions of fear of the Mafia's impending visit were irrelevant.

As far as the merits go, *People v. Guerra, supra,* 37 Cal.4th at p. 1114, stands for the proposition that evidence of a victim's state of mind, when offered to prove or explain the declarant's conduct, is only relevant if the victim's mental state or conduct is placed at issue. In *Guerra*, the victim's statements were relevant to negate the possibility she consented to sexual intercourse with the defendant. (*Ibid.*)

People v. Rowland (1992) 4 Cal.4th 238, is cited for the "abuse of discretion" standard of review for evidentiary rulings. (RB 223.) The substantive holding of *Rowland*, however, is the same as that in the *Guerra* case. Evidence of a victim's state of mind is only admissible if relevant to a contested issue. In *Rowland,* the victim's statement was found admissible under the state of mind exception to the hearsay rule (Evid. Code, § 1252) because the defendant was charged with rape, and the victim's statements were found relevant to prove lack of consent. The admitted hearsay was the statement of the victim of a rape-murder telling the witness "'she better get herself home because she had a headache and she had to go to work in the morning.'" (*Id.,* at p. 262.) In this case, Aguirre's state of mind was not an issue.

People v. Rodriguez (1999) 20 Cal.4th 1, 9-10, is cited for the rather benign proposition that reversal of a judgment is not required unless the trial court exercises its discretion to admit or exclude evidence in an arbitrary, capricious or patently absurd manner that results in a miscarriage of justice. (RB 223.) *Rodriguez* does not involve the allegedly erroneous admission of hearsay proving a victim's state of mind.

People v. Waidla (2000) 22 Cal.4th 690, 723, is cited by respondent for the proposition that "[e]vidence of the murder victim's fear of the defendant is admissible when the victim's state of mind is relevant to an element of the offense.'" (RB 224.) This is the evidentiary rule that appellant relies upon to exclude the evidence of Aguirre's statements. In *Waidla*, unlike this case, the defendant was charged with felony-murder-robbery and felony-murder-burglary of a woman who had previously taken him into her home. Evidence of the victim's extrajudicial statements expressing fear of the defendant was ruled admissible to prove lack of consent to the burglary and robbery related to her murder. (*Id.*, at 722-723.)

Respondent cites *People v. Jablonski, supra,* 37 Cal.4th at p. 819, for the rule that "[e]vidence of a murder victim's fear is also relevant 'when the victim's conduct in conformity with that fear is in dispute.'" Appellant does not quarrel with the rule. However, in appellant's case, Aguirre's conduct was consistent – not inconsistent – with his fear of the Mexican Mafia. He expressed fear that the Mafia was going to come and cause trouble, and tried to flee when the gang members who killed the victims arrived. During the trial, it was never asserted that Aguirre's conduct was inconsistent with his fear of the Mexican Mafia. Indeed, the slaughter of five people was undisputedly murder regardless of Aguirre's state of mind. The only contested issue was whether appellant played any role in the crimes. In

Jablonski, the victim's statements were inadmissible under the state of mind exception because the victim's state of mind was not an issue. (*Id.*, at p. 820.)

People v. Crew, supra, 31 Cal.4th 822, discussed by respondent (RB 225), is clearly distinguishable from this case on its facts. *Crew* involved murder for financial gain and grand theft. The defendant married the victim for her money, but the marriage was not working out and the victim separated from the defendant and contemplated annulment. Subsequently, the victim decided to try to make the marriage work. On the eve of planned two-week honeymoon road trip with the defendant, the victim confided to a witness, "If you don't hear from me in two weeks, send the police." (*Id.*, at p. 829.) The statement was found admissible pursuant to Evidence Code section 1250 because the victim's statement was relevant to disprove the defense – that the victim disappeared of her own accord because she was depressed. (*Ibid.*; cf. *People v. Noguera* (1992) 4 Cal.4th 599, 620-623 [victim's hearsay statements expressing fear of the defendant found inadmissible when the defense raised no issue concerning the state of mind of the victim].) In this case, the defense raised no issue concerning the state of mind of Gustavo Aguirre.

Lastly, respondent discusses *People v. Cox* (2003) 30 Cal.4th 916, in which the defendant was sentenced to death for multiple murder. (RB 226.) In that case, as in the other cases cited by respondent, the victim's attitude toward the defendant was placed in issue. The defense presented evidence that the victim "'would get into a car with a stranger.'" (*Id.*, at p. 957.) Whether the victim would enter the car voluntarily or whether the defendant overcame her resistence by force were in issue. (*Ibid.*) Hence, this Court held that evidence of three instances in which the victim hid from the

defendant were admissible to support the inference that the defendant must have used a weapon to get the victim into his car. (*Ibid.*) In contrast, in appellant's case, victim's expressions of fear of the Mexican Mafia, and his belief that the Mafia was coming to get him, were irrelevant and inadmissible to explain the victim's attempt to flee when the perpetrators of the murders arrived. (See AOB 171-178.)

C. Appellant Should Not Be Deemed To Have Forfeited His Otherwise Meritorious State And Federal Constitutional Challenges To The Receipt Of This Evidence.

Respondent argues appellant forfeited the right to assert violations of his state and federal constitutional rights to confrontation and to a reliable death judgment by failing argue those theories for exclusion in the trial court. (RB 228.) The fact that a state appellate court may refuse to hear constitutional challenges not raised in the trial court does not mean that this Court is obliged as a matter of federal law from reaching constitutional questions. (*Dun & Bradstreet v. Greenmoss Builders, supra,* 472 U.S. 749.)

Defense counsel made a hearsay objection. The purpose of the hearsay rule is to "preclude a class of evidence considered to be generally less reliable than in-person testimony of events observed by a testifying witness." (*United States v. Hernandez, supra,* 333 Fed.3d at p.1179.) Otherwise stated, the purpose of the hearsay rule is to prohibit the use of unsworn, uncross-examined testimony as substantive evidence in a criminal case. (*United States v. Carmichael, supra,* 232 F.3d at p. 521.) Similarly, the purpose of the Confrontation Clause is to "ensure reliability of evidence," . . . "by testing in the crucible of cross-examination." (*Crawford v. Washington, supra,* 541 U.S. at p. 61.) The Eighth Amendment and

article I, section 17 of the California Constitution likewise insure the reliability of judgments in death penalty cases. (*Satterwhite v. Texas, supra,* 486 U.S. at pp. 262-263.)

Defense counsel's specific hearsay objections should be deemed adequate to have given the court and prosecutor an opportunity to "prevent error" or to "take . . . steps designed to minimize the prospect of reversal" based on Aguirre's hearsay expressions of fear to witnesses 8 and 11. (*People v. Partida, supra,* 37 Cal.4th at p. 434; cf. *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1029 [Confrontation Clause error waived with respect to the denial of mistrial motions brought on grounds other than introduction of hearsay].) Accordingly, no useful purpose would be served were this Court to refuse to consider appellant's Sixth and Eighth Amendment challenges. (*People v. Partida, supra,* 37 Cal.4th at p. 436.)

Without elaboration, respondent also argues that the error, if any, was harmless because the trial court gave a limiting instruction. (RB 228-229.) Appellant devoted a significant portion of his argument in the AOB to demonstrating why the error was not harmless, despite the limiting instruction. (AOB 178-180.) In the interests of judicial economy, those arguments are not reiterated here.

It suffices to remind respondent and this Court that the jury asked to have the testimony of witness 8 and witness 11 re-read; hence, the testimony was definitely the focus of the jury's deliberations. (62 RT 9776.) The re-reading of the testimony, which included Aguirre's hearsay statements, was done without the benefit of another limiting instruction. Furthermore, from this particular inadmissible hearsay, the jury could have inferred that (1) appellant went to the victims' residence prior to the killings; and (2) that he was recognized as a Mafia member by Aguirre.

Otherwise, there was no evidence to corroborate witness 15's less than credible testimony that appellant visited the victims to set them up just prior to the murders. (See, AOB 20-22, 40-41 [discussing witness 15's credibility problems].) The limiting instruction was inadequate to "unring the bell," considering this testimony was heard twice by the jury. (*People v. Alvarado, supra,* 141 Cal.App.4th at p.1586.)

Last but not least, even if this one error were not so prejudicial as to deprive appellant of a fair trial, when it is considered in cumulation with other errors, the result was to produce a trial that was fundamentally unfair. (*Mak v. Blodgett, supra,* 970 F.2d at p. 622; *People v. Hill, supra*, 17 Cal.4th at pp. 844-845.)

X

REPLY TO RESPONDENT'S ARGUMENT X: APPELLANT WAS PREJUDICED BY THE RECEIPT OF STATEMENTS MADE BY ANTHONY TORRES TO WITNESS 13 REGARDING HIS INVOLVEMENT IN THE MURDERS.

A. Statement Of Proceedings Below:

Rather than repeat a description of the proceedings relevant to this argument, appellant refers to and incorporates by reference the "Testimony and Objections" section of Argument X of the AOB. (AOB 181-185.)

B. Appellant's Claim Regarding The Erroneous Admission Of Torres' Statements As Described In Witness #13's Audiotaped Testimony Is Meritorious, And Should Not Be Deemed Forfeited.

Respondent argues that appellant forfeited his right to challenge the admissibility of Torres' hearsay statements to his sister by failing to object again on hearsay grounds when the prosecutor had to resort to playing an audiotape of the witness' prior inconsistent description of Torres' statements from a prior trial. (RB 234.) As authority for this proposition, respondent cites *People v. Morris, supra,* 53 Cal.3d at p.190, and *People v. Holloway*, supra, 33 Cal.4th at p.133. Both *Morris* and *Holloway* stand for the proposition that a tentative pretrial motion *in limine* to exclude evidence may not satisfy the requirements of Evidence Code section 353, if the defendant could have, but did not, renew the objection or offer of proof in the context of the trial itself. These cases reason that sometimes actual testimony is different than pretrial predictions of what a witness will say on the stand; hence, until the evidence is actually offered, the trial court cannot intelligently assess relevance, probative value, and potential for prejudice.

(*People v. Morris, supra,* at pp. 189-190; *People v. Holloway, supra,* at p. 133.)

Defense counsel's objection to witness 13's testimony was not made at an *in limine* pretrial hearing. A hearsay objection was made during trial, when the prosecutor asked, "And what did you say to Anthony and what did he say to you?" (57 RT 8957.) The objection was overruled without even requiring the prosecutor to offer an exception to justify the receipt of evidence that was plainly hearsay. (57 RT 231.) The rulings and reasoning of the *Morris* and *Holloway* decisions have no application to appellant's circumstances. The trial court was fully capable of assessing the admissibility of the evidence – and did so without any explanation – in the context of the trial.

Respondent also asserts that the statements of Torres were properly received as statements of a coconspirator. Because the statements in question were undisputedly made to Torres' mother and sister after the objectives of the conspiracy had been achieved, they cannot have aided or assisted in the consummation of the object of the conspiracy. (AOB 185.) Respondent nonetheless resorts to arguing that the conspiracy should be deemed to have extended beyond the substantive crimes "'to activities contemplated and undertaken by the conspirators in pursuance of the objectives of the conspiracy.'" (RB 236, quoting *People v. Leach, supra,* 15 Cal.3d at p. 431, and *People v. Saling, supra,* 7 Cal.3d at p.844.)

People v. Saling and *People v. Leach* demand a contrary result in this case. In *Saling,* the conspiracy was an agreement to commit murder for hire. A husband wanted to have his wife killed in order to collect on a life insurance policy. (*Id.,* at p. 850.) Statements made by a coconspirator three days after the murder were properly admitted under the coconspirator

hearsay exception because the statements were made several weeks before the killers were paid. This Court reasoned that one of the objectives of the conspiracy, as far as the killers were concerned, was to collect the money from the husband, who could not pay them until he collected the insurance. (*Id.*, at p. 852.) Recorded hearsay statements of a coconspirator made three and a half weeks after the murders, after payment had been made, were ruled inadmissible under the coconspirator exception. (*Id.*, at p. 853.)

In *People v. Leach, supra*, 15 Cal.3d at pp. 429-438, this Court discussed and explained its holdings in *Saling*, and ruled inadmissible under the coconspirator exception to the hearsay rule statements made by alleged coconspirators after a killing-for-hire was accomplished. In *Leach*, although the spouse was the beneficiary of the decedent's life insurance policy – the proceeds of which had not been collected at the time the hearsay statements were made – there was no evidence presented that the collection of insurance was one of the objectives of the conspiracy. Respondent also relies on *People v. Hardy, supra,* 2 Cal.4th 86, in support of admissibility pursuant to Evidence Code section 1223. (RB 236.) *Hardy*, the antithesis of *Leach*, involved a contract killing for the express purpose of collecting insurance proceeds. Conspirator statements made after the victim's death were properly admitted under the coconspirator exception precisely because the conspiracy's objective, to collect the insurance money, had not yet been accomplished at the time the statements were made. (*Id.,* at pp. 146-147.)

In this case, the alleged conspiracy was the unlawful agreement to execute Mexican Mafia dropout, "Dido" Moreno. When Torres spoke with his sister and mother, the objectives of this conspiracy had already been met. There is no evidence whatever to suggest that any of the participants

had other group objectives at the time the statements were made. Accordingly, witness 13's testimony recounting Torres' post-offense admissions did not qualify for admission as coconspirator statements according to *Saling, Leach* or *Hardy.*

Respondent also seeks to compare this case to that of *People v. Manson* (1976) 61 Cal.App.3d 102. (RB 236.) The notorious Charles Manson, shortly after the Spahn Ranch murders, purportedly directed one of his followers to kill another man. On appeal, it was argued that Manson's statement should not have been received under the coconspirator exception to the hearsay rule because, as in *People v. Leach, supra,* the objectives of the conspiracy had already been achieved by the time the statement was made. The Court of Appeal ruled that the rule of *Leach* was inapplicable because the overriding purpose of the conspiracy in *Manson* was the fomentation of a race war. Hence, the boundaries of the conspiracy were not limited by the murder of the seven victims at the Spahn Ranch. (*Id.,* at pp.155-156.)

Respondent argues that the conspiracy continued, as evidenced by the subsequent murder of Jimmy Palma, "presumably for his role in the shooting deaths of the children." (RB 237.) At the time Torres made statements implicating Palma in the killing of the children, Palma was still alive. Years later, in 1997, he was murdered while on death row at San Quentin State Prison. (55 RT 8584-8586, 8603; 57 RT 8966; 59 RT 9289.) This does not suffice as evidence that the killing of Palma was part and parcel of the conspiracy to kill Moreno. If there was a conspiracy to have Palma killed, its inception was sometime after the Maxson Street killings, and there is no evidence – only supposition – that appellant, Shyrock or the Mexican Mafia were involved. Furthermore, there is no evidence, as there

was in the *Manson* case, that the coconspirators had an objective any broader than the killing of Moreno.

At most, the audiotaped statements of witness 13, relating Torres' statements, indicate that in April of 1995, unnamed Sangra gang members were looking for Palma and wanted to "take care of him" because he had killed the children. (8 SCT 1:1633.) Moreover, at the time of trial, it was not the prosecutor's theory of the case that the conspiracy encompassed crimes other than the murder of Moreno.

Alternatively, respondent argues that Torres' statements were admissible as declarations against penal interest. (RB 238.) Ironically, respondent cites *People v. Lawley, supra,* 27 Cal.4th at p.174, which holds that Evidence Code 1230's exception does not apply to collateral statements a declarant makes, which attempt to shift blame or minimize the declarant's role in the crime itself. (RB 238; see, AOB 185-186.) As this Court explained in *Lawley,*

> One of the most effective ways to lie is to mix falsehood with truth especially truth that seems particularly persuasive because of its self-inculpatory nature. . . . . Whether a statement is self-inculpatory or not can only be determined by viewing the statement in context. . . . ¶ In view of these concerns, this court "long ago determined that 'the hearsay exception should not apply to collateral assertions within declarations against penal interest.' [Citation.]"

(*People v. Lawley, supra,* 27 Cal.4th at p. 153; citations omitted.)

Torres' statements to witness 13 contained a mixture of statements; some were self-incriminating but many sought to shift primary responsibility for the killing of innocent people, including children, to others. (8 SCT 1:1618-1636.) Of course, since the trial court never put the prosecutor to the test of articulating why any of Torres' extrajudicial

statements qualified as exceptions to the hearsay rule, there was no opportunity for counsel to alternatively argue that some, but not all, of Torres' statements qualified for admission as declarations against penal interest.

Respondent argues that this case is more like *People v. Samuels, supra*, 36 Cal.4th at p.121, than *People v. Lawley, supra,* 27 Cal.4th 102. (RB 238-239.) Appellant disagrees. In *Samuels*, the circumstances in which declarant's inculpatory statements were made bore much greater indicia of reliability than did the extrajudicial statements of Torres in this case. The declarant in *Samuels* expressed remorse to a third party about his role in a murder-for-hire, and said he was thinking about turning himself in to the police. This Court distinguished the situation in *Samuels* from circumstances presented in *Lawley* on the basis that the declarant's "facially incriminating comments were in no way exculpatory, self-serving, or collateral." (*Ibid.*) In contrast, Torres' statements to his sister include many exculpatory and self-serving statements seeking to minimize his responsibility for the murders in the eyes of family members.

In addition, in *Samuels*, the declarant, after expressing the impulse to go to the police, was murdered. The confession he made prior to his death was strongly relevant to prove (1) that the declarant was in fact hired by the defendant to kill her husband; and (2) that the defendant hired someone else to kill the declarant in order to prevent him from going to the police about the murder of her husband. (*Id.*, at p. 101.) Hence, the declarant's statement, that the defendant had paid him to kill her husband, was not at all collateral to the issues in the case.

In contrast, numerous of Torres' extrajudicial statements were completely collateral to proving appellant's involvement in the Maxson

Street killings. Torres never mentioned appellant's name. He insinuated that he had acted under duress since he had promised someone – impliedly the Mexican Mafia, according to witness 13 – to kill only one man. He shifted blame for the deaths of the children to Palma and Valdez. He implied Palma would be murdered in retaliation for killing the children. Even worse, he talked about other shootings and murders that were completely unrelated to the crimes with which appellant was charged. (57 RT 8958-8959; 8 SCT 1:1637-1637.) Unlike the situation presented in *Samuels*, the hearsay statements admitted in this case were both collateral and self-serving, and therefore lacked the necessary indicia of reliability for admission as declarations against penal interest. (See also, AOB 185-189.)

Though not cited by respondent, *People v. Geier* (2007) 41 Cal.4th 555, undermines respondent's assertion that Torres' statements were admissible as declarations against penal interest. In *Geier*, this Court upheld a trial court ruling excluding evidence of extrajudicial statements of the woman who hired the defendant to kill her husband, proffered as declarations against penal interest. This Court explained, *inter alia*:

> The fact that Dean confessed to killing her husband in the third statement did not, by itself, establish that the third statement was any more reliable than the other two [statements]. Dean's admission was accompanied by an explanation that she killed her husband because she had just quarreled with him and that he had hurt their daughter. Dean may have believed that this explanation minimized her culpability or excused her conduct altogether. Moreover, Dean was having an affair with Hunter, and her third statement, taking the blame for the murder with an excuse may have been her attempt to protect him and, by extension his confederate, defendant.

(*People v. Geier, supra,* 41 Cal.4th at p. 585.) Here, Torres' statements were intrinsically unreliable for the same reason. Torres' confession to aiding and abetting the Maxson Street murders was accompanied by

explanations that Torres clearly believed would minimize his responsibility or excuse his conduct in the eyes of his mother and sister. His blame of the Mexican Mafia – for making him kill – similarly may have been an attempt to excuse his own conduct as well as the conduct of his confederates who actually shot the victims. The statements lacked sufficient indicia of trustworthiness to qualify as declarations against penal interest. (*People v. Geier, supra,* at p. 584.)

C. Appellant's Contention That Statements Made By Torres To His Mother Were Triple Hearsay Are Meritorious And Should Not Be Deemed Forfeited.

Respondent contends that appellant has forfeited the right to challenge the statements made by Torres to his mother as triple hearsay since he never specifically objected to these particular statements. (RB 239.) Appellant objected to witness 13 describing what Torres said. (57 RT 8957.) The judge simply overruled the objection without hearing the prosecutor's proffer of grounds for admissibility. There is no reason to expect the judge would have acted differently had defense counsel objected again when the extrajudicial statements being elicited were those spoken to Torres' mother, and related to the sister. Lack of an objection is not a waiver when the objection would have been futile. (*People v. Hamilton, supra,* 48 Cal.3d at p.1184, fn. 27.)

People v. Lewis and Oliver, supra, 39 Cal.4th 970, which respondent so often cites, is distinguishable. (RB 240.) In that case there was no objection to the hearsay in question. (*Id.,* at p. 1028.) The same is true of most of the other cases relied on by respondent to support forfeiture of this argument. (RB 240; *People v. Cook* (2006) 39 Cal.4th 566, 594-595

[failure to object to an instance of prosecution witness' vouching for the credibility of a witness]; *People v. Demetrulias* (2006) 39 Cal.4th 1, 19-20 [no objection to improper good character evidence]; *People v. Guerra*, *supra*, 37 Cal.4th at p.1117 [no objection to improper good character evidence].)

In *People v. Hinton, supra,* 37 Cal.4th 839 (RB 240), the defendant objected on hearsay grounds to extrajudicial statements made by coconspirators. The prosecutor then elicited evidence to establish the fact of the conspiracy through independent evidence. The defendant made no objection to the coconspirators' statements after this foundation had been established. (*Id.,* at p. 894.) It was not disputed in *Hinton* that the extrajudicial statements of coconspirators had been made in furtherance of the objectives of the conspiracy. (*Id.,* at p. 895.)

Here, the trial court never put the prosecutor to the test of establishing a foundation for the admission of Torres' hearsay statements under any exception. The hearsay objection was simply overruled without explanation even though it was clear from witness 13's testimony, that the hearsay statements to be elicited were made by Torres after the murders had occurred. (57 RT 8957.) In this case, in contrast to what occurred in *Hinton*, it cannot be inferred that counsel, by not objecting, was acquiescing that a sufficient foundation had been laid to qualify Torres' statements for admission under the a hearsay exception. Rather, it appears that even if a hearsay objection had been made again when witness 13 recounted what Torres reportedly said to their mother, the objection would simply have been overruled.

Respondent argues, in essence, that witness 13's testimony regarding what Torres had told their mother was received not for the truth of the

matter asserted, but to explain her then existing state of mind or mental condition – i.e., why she confronted Torres. (Evid. Code, § 1250; RB 240-241.) There is absolutely no merit to this argument. A hearsay objection to an out-of-court statement may not be overruled simply by identifying a nonhearsay purpose for the statement; the trial court must also find that the nonhearsay purpose is relevant to some issue in dispute. (*People v. Jablonski, supra,* 37 Cal.4th at pp.820-821; see also, *United States v. Nielsen* (9th Cir. 2004) 371 F.3d 574, 581, fn. 1.) Witness 13's state of mind was not in dispute. Hence, it was irrelevant and not a reason to admit otherwise inadmissible hearsay. (*People v. Guerra, supra,* 37 Cal.4th at p. 1114.)

Reliance on *People v. Samuels, supra,* 36 Cal.4th at p. 122 (RB 241) is misplaced. In that case, there was no objection when the investigating officer testified that, as the result of an anonymous call to another detective identifying Mike Silva as the hit man, he had located and interviewed Silva. (*Ibid.*) Moreover, the testimony was not offered to prove that Silva had killed the defendant's husband; it was offered to explain why the detective obtained a search warrant and contacted Mike Silva for an interview. (*Ibid.*) In this case, Torres' statements were offered to prove the truth of the matters asserted – that Torres participated in the murders at the direction of the Mexican Mafia, but it was Palma and Valdez who entered the residence and killed all five people, including the children.

In *People v. Lewis and Oliver, supra,* 39 Cal.4th at pp. 1025-1026 (cited at RB 241), in a joint trial of two half-brothers, one was accused of entering a church and killing three family members and friends of Lewis' estranged wife. The wife's mother explained that the reason she remembered Oliver driving a red Mustang when he drove away after being

ejected from Lewis' house by the police, was because a neighbor had told her that a similar vehicle was used by the person who had torched Lewis' ex-wife's parents car. This Court ruled the witness' testimony was admissible to explain why she noticed and remembered the car, not for the truth of the matter asserted. (*Ibid.*) In *Lewis and Oliver*, the defendants were not charged with the arson of the car, and the statements were not introduced to prove that they committed arson.

In this case, witness 13's conversations with her own brother about the murder required no explanation. This witness testified that she heard about the murders on television news the morning after they happened. Aware that Sangra gang members had converged at her mother's home the evening before the murders, witness 13 questioned her brother about his possible involvement. (57 RT 8950-8953, 8956.) Witness 13 had a conversation with her mother about Torres' involvement in the murders before she questioned her brother. However, her testimony about the substance of the conversation between Torres and his mother was hearsay, and was not, as respondent argues, relevant or necessary to explain why witness 13 confronted her brother, or why she went to the police.[21] (RB 241)

D. Appellant's Challenge To Witness 13's Testimony Regarding Torres' Admission To The Murder Of A Rival Gang Member Is Meritorious And Should Not Be Deemed Forfeited.

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[21] Witness 13 went to the police because she was upset about what had happened to the children, and fearful the perpetrators would be sent to harm her and her children. (8 SCT 1: 1636-1637.)

Respondent argues that, because no objection was voiced to witness 13's audiotaped testimony regarding Torres' involvement in a drive-by shooting, the contention is forfeited. (RB 243.) Defense counsel did object on relevance grounds when the prosecutor asked an open-ended question that sought to elicit information regarding any prior murder, not just the murders in this case: "Did your brother ever tell you before that he had been involved in a murder?" (57 RT 8959.) The objection was overruled. The witness asked, "Before what?" (57 RT 8959.) The trial court answered, "Before this one." (57 RT 8959.) In other words, the trial court ruled that it would be relevant if Torres reported participating in any murders prior to the Maxson Street murders.

The audiotape of witness 13's testimony was then played. It includes witness 13's statement that Torres confessed to being the driver of a car used to perpetrate a retaliatory drive-by shooting. (8 SCT 1: 1637-1638.) Accordingly, an objection to this evidence was not made for the first time on appeal, as respondent argues. (RB 243.)

In any event, even assuming defense counsel was required to object again to preserve the error, the objection would likely have been futile because the trial court had already evinced its belief that any statement admitting Torres' involvement in a prior murder would be relevant and admissible. (*People v. Hamilton, supra,* 48 Cal.3d at p.1184, fn. 27; *People v. Hill, supra,* 17 Cal.4th at p. 822.)

Without citing to the record, respondent also asserts that it was defense counsel who first questioned witness 13 about evidence of a completely unrelated crime. (RB 243.) Respondent distorts the chronology of events. Before any testimony was given regarding other crimes, the prosecutor asked whether Torres had "ever . . . before" told witness 13 that

he had "been involved in a murder." (57 RT 8959.) The trial court overruled the defense objection and, rightly or wrongly, told the witness the prosecutor was referring to murders occurring before the Maxson Street killings.

The audiotape of witness 13's prior testimony (People's Exhibit 74) was played after defense counsel's relevance objection was overruled. (57 RT 8965.) During the recorded prior testimony, witness 13 was asked, "Have you ever heard your brother talk about killing anyone else?" (8 SCT 1:1637.) She answered by describing Torres' confession that he was the getaway car driver in a drive-by shooting. (8 SCT 1:1637-1638.)

After the audiotape was played, defense counsel cross-examined witness 13, and questioned her about the retaliatory drive-by shooting mentioned in the audiotape. (57 RT 8966.) Any attempt by counsel to attack the merits of damaging testimony to which he unsuccessfully objected should not be deemed a waiver of his objection. (*People v. Venegas* (1998) 18 Cal.4th 47, 94; *People v. Sam* (1969) 71 Cal.2d 194, 207.)

E. Appellant's Contentions Regarding The Denial Of His State And Federal Constitutional Rights Are Meritorious And Should Not Be Deemed Forfeited.

Respondent argues that appellant has forfeited the right to argue that his state and federal constitutional rights to due process, confrontation, and a reliable death judgment because counsel failed to argue constitutional grounds for exclusion of Torres' hearsay statements. (RB 244.) The fact that this Court may refuse to hear tardily raised federal constitutional challenges does not mean that it is obliged as a matter of law to refrain from

addressing such constitutional questions on the merits. (*Orr v. Orr, supra,* 440 U.S. at p. 275.) A reviewing court may consider any claim despite the lack of an objection when the error may have adversely affected the defendant's right to a fair trial. (*People v. Hill, supra,* 17 Cal.4th at p. 820, 843, fn. 8.)

Furthermore, the purpose of the Confrontation Clause is to "ensure reliability of evidence," . . . "by testing in the crucible of cross-examination." (*Crawford v. Washington, supra,* 541 U.S. at p. 61.) The purpose of the hearsay rule is to "preclude a class of evidence considered to be generally less reliable than in-person testimony of events observed by a testifying witness." (*United States v. Hernandez, supra,* 333 Fed.3d at p. 1179.) Otherwise stated, the purpose of the hearsay rule is to prohibit the use of unsworn, uncross-examined testimony as substantive evidence in a case. (*United States v. Carmichael, supra,* 232 F.3d at p. 521.) Hence, defense counsel's hearsay and relevance objections were clearly directed keeping irrelevant, and/or unreliable evidence from the jury. The objections should be deemed adequate to have given the court and prosecutor an opportunity to "prevent error" or to "take . . . steps designed to minimize the prospect of reversal." (*People v. Partida, supra,* 37 Cal.4th at p. 434.) No useful purpose would be served were this Court to refuse to consider appellant's Sixth and Eighth and Fourteenth Amendment challenges, or their California counterparts. (*People v. Partida, supra,* 37 Cal.4th at p. 436.)

Respondent also argues that the error, if any, was harmless because Torres' did not mention or directly implicate appellant in the murders, and because witness 13 was subjected to cross-examination. (RB 245.) It is disingenuous to say that Torres' statements caused no prejudice. The

prosecutor heavily emphasized Torres' hearsay statements in guilt phase closing argument. He relied upon Torres' statements as proof that the murders were committed on orders from the Mexican Mafia. The statements were also highlighted as proof that the killings of innocent bystanders, including Maria Moreno and the two children, were intentional and foreseeable because the killers understood that they were not to leave any witnesses to the killings. (62 RT 9662, 9666-9671.)

Cross-examining witness 13 was no substitute for cross-examining Torres, who had first-hand knowledge regarding the murders. Appellant had no opportunity to cross-examine Torres regarding what he said and/or what he meant when he told his sister he had no choice but to go through with the promised killing.

Respondent argues that the evidence was heavily weighted against appellant (RB 245), but this is not true. Appellant refers this Court to Argument I of the AOB, in which he details the paucity of substantial evidence to prove that he conspired with Raymond Shyrock and Sangra gang members to have any of the victims killed. (AOB 37-56.) Appellant has already devoted considerable argument to showing the magnitude of the prejudice resulting from the introduction of Torres' hearsay statements in the AOB. (AOB 190-193.) Those arguments are incorporated by reference, but not reiterated here. Regardless of the standard of review applied, there is no conceivable way that the error did not infect the guilt and penalty phase judgments. (*People v. Watson, supra,* 46 Cal.2d 818; *Chapman v. California, supra,* 386 U.S. 18.)

Furthermore, even if this single error was not so prejudicial as to deprive appellant of a fair trial, when the error is considered in cumulation with other errors, the result was to produce a trial that was fundamentally

unfair. (*Mak v. Blodgett, supra,* 970 F.2d at p. 622; *People v. Hill, supra*, 17 Cal.4th at pp. 844-845.)

XI

REPLY TO RESPONDENT'S ARGUMENT XI: HEARSAY STATEMENTS MADE BY WITNESS 15 TO SHYROCK REGARDING GUSTAVO AGUIRRE WERE ERRONEOUSLY ADMITTED

A. Proceedings Below:

Appellant refers to and incorporates by reference subsections A and B of Argument XI of the AOB, which encompass appellant's statement of supporting facts. (AOB 194-195.)

B. Shyrock's Statements Were Not Admissible As Coconspirator Statements.

Respondent argues that Shyrock's pre- and post-offense statements to witness 15, regarding Aguirre's drug dealing activities and his robberies of dealers protected by the Mexican Mafia, were properly received as coconspirator statements. (RB 249-252.) Appellant respectfully disagrees.

1. Pre-Offense Statements:

Witness 15 testified in the following manner regarding Shyrock's statements, purportedly made several weeks prior to the murders.

> He just told me and my brother that he was tired of Tito and tired of Tony Cruz, which is Cruzito, and he said that he was tired of both of them disrespecting him and robbing dope connections and that sooner or later they were going to have to pay for that.

(56 RT 8752.) The evidence was received, according to limiting instructions given by the judge, to show "Shyrock's intentions toward Mr. Aguirre." (56 RT 8751.) The Court found that the evidence was admissible

to show Shyrock's state of mind pursuant to Evidence Code sections 1250 and 1251. (56 RT 8748.)

The prosecutor did not argue that the evidence was admissible as a coconspirator statement at the time the evidence was proffered. (56 RT 8747.) Respondent now argues, based on statements made at a jury instructional conference, that prosecutors theory of the case was that there was "a conspiracy to kill the adult victims. . . ." (RB 249.) It is suggested that Shyrock's pre-offense statements were properly received as statements in furtherance of the conspiracy. (RB 249.)

Respondent's argument does not make sense. The quoted portions of the instructional conference characterize the prosecutor's theory as follows:

> So you could say that the original conspiracy . . . was to kill Dido. Then I will argue that the killing of the other two adults was in furtherance of the conspiracy . . . and that the killing of the children was a natural and probable consequence of going into a one room house and killing – and shooting three people, the kids were bound to be hurt, if not killed.

(61 RT 9520-9522.) This is consistent with other statements of the prosecutor, asserting that the conspiracy to kill Moreno began on the day of the murders, when appellant allegedly paid a visit to the victims' apartment to set up the murders.

> I think that objectively one could certainly argue that the conspiracy began when Mr. Maciel went to went to the victim's residence on the day of the murders.

(3 RT 535.)

The prosecutor's theory of conspiracy, as articulated more than once, would not appear to support the argument that Shyrock's pre-offense

expressions of animus toward Aguirre qualified for admission under Evidence Code section 1223, as admissions of a coconspirator. Since the prosecutor conceded that there was no preconceived conspiracy to kill Aguirre – he was just a witness murdered to prevent detection – it makes no sense to argue that Shyrock's statements about Aguirre were made in furtherance of a nonexistent conspiracy.

In any event, the statements were not made in furtherance of any objective of the supposed conspiracy. (Evid. Code, § 1223, subd. (a).) The statements were made during casual conversation between Shyrock and witness 15, who was not a participant in the conspiracy. Additionally, the probable effect of the statements would have been antithetical to accomplishing the objectives of the conspiracy, since it was very likely that Shyrock's implied threats of harm to Aguirre and Tony Cruz would be communicated by witness 15 to his brother, "Dido," and Gustavo Aguirre, who might then take steps to avoid harm.

Contrary to respondent's supposition, Shyrock's statements to witness 15 do not logically prove the existence of a plan to kill either Aguirre or Moreno. (RB 251.) "Dido" Moreno's name is not even mentioned. Furthermore, a plan by a single individual to kill is not the same thing as a conspiracy to kill. To be admissible under the coconspirator exception, there must be evidence of an unlawful agreement to kill, not just an expression of animus by one person against another.

Respondent relies on *People v. Williams, supra,* 16 Cal.4th at p. 681, as support for the argument that the pre-offense statements were admissible to prove planning. In *Williams*, however, the hearsay declarants, Moore and Brown, were the unwitting getaway drivers in a conspiracy involving three men to commit a contract killing that resulted in the deaths of four family

members. (*Id.*, at p. 648-649.) The court admitted as coconspirator statements the testimony of Moore and Brown regarding a conversation that occurred just prior to the murders, in which the perpetrators said they were going to the victims' house to "shoot it up," and everyone in the house was going to be killed. (*Id.*, at p. 681.) In *Williams*, the defendant did not object to the testimony as hearsay. (*Ibid.*) Addressing the issue on the merits despite the lack of objection, this Court opined that the trial court could reasonably have concluded the statement that the defendants were going to "shoot it up" was meant to reassure Moore and dissuade her from driving away and abandoning the shooters. (*Ibid.*) In this case, there is no evidence Shyrock's pre-offense statements were made in furtherance of an existing unlawful agreement between Shyrock and others to kill Aguirre.

People v. Hinton, supra, 37 Cal.4th 839, is also distinguishable. (RB 240.) In *Hinton*, the object of the conspiracy was a drug deal. The defendant initially objected on hearsay grounds to extrajudicial statements made by the coconspirators. The prosecutor then elicited evidence to establish the fact of the conspiracy through independent evidence. The defendant made no objection to the coconspirators' statements after a foundation had been established. (*Id.*, at p. 894.) In *Hinton*, the defendant did not dispute that declarants were participants in the conspiracy at the time that the statements were made, and that he joined the conspiracy subsequently. (*Id.*, at p. 895.) Here, the existence of a conspiracy to kill Aguirre is disputed.

People v. Morales (1989) 48 Cal.3d 527, 552, another case cited by respondent (RB 252), does not compel a different result. In *Morales*, the defendant and his cousin, Ortega, plotted to kill a woman who had maintained a sexual relationship with Ortega's male lover. (*Id.*, at p. 540.)

The woman was driven to a remote location by Ortega and the defendant, strangled, and bludgeoned with a hammer. Ortega and the defendant were tried separately for capital murder with lying-in-wait and torture-murder special circumstances. (*Id.*, at p. 551.)

At the defendant's trial, Ortega's former girlfriend was allowed to testify to a conversation five months prior to the slaying, in which she heard Ortega say he was planning to kill his male lover, and the lover's female lover if she were there, and described how he intended to accomplish the slaying. Ortega indicated to the witness that the defendant Morales would be with him. (*Ibid.*) Hence, in *Morales*, it was clear that there was a plan to kill the victim at the time the statements were made.

Appellant's record fails to establish the existence of a conspiracy to kill Aguirre at the time the statements by Shyrock were made. In fact, the trial prosecutor repeatedly stated that the conspiracy was to kill Moreno, not Aguirre, and that Aguirre was killed because he was a witness. (3 RT 535; 61 RT 9520-9522.) The extrajudicial statements of Torres – that they were only supposed to kill one man – confirm that the plan was to kill Moreno, not Moreno and Aguirre. (57 RT 8960.)

Other cases cited by respondent, including *People v. Remiro* (1979) 89 Cal.App.3d 809, 842, and *People v. Pike* (1962) 52 Cal.2d 70, 88 (RB 251), are equally inapt. They stand for the proposition that the People may prove that charged offenses were committed in furtherance of a criminal conspiracy even if the crime of conspiracy is uncharged. These cases do not support the proposition that coconspirator statements may be introduced to prove a conspiracy that the prosecuting attorney has admitted did not exist at the time the statements were made.

2. Post-Offense Statements:

Respondent also argues that Shyrock's post-offense statements to witness 15 were properly received as coconspirator statements. (RB 251.) The statements were made the day after the murders at a meeting in a park arranged by investigating officers from the El Monte Police Department. (56 RT 8752-8755, 8816-8818.) Out of earshot of the officers, Shyrock reportedly said that he was "sorry to hear" about the murders of witness 15's brother ("Dido") and sister (Maria Moreno) and the "two little babies . . . ." (56 RT 8755, 8756.) Shyrock also called Aguirre a "bastard" and said that Aguirre "was forcing me to kill him or do something to him so I don't feel bad about him dying." (56 RT 8755-8756.) He also said "if he would have done something like that, he wouldn't have done it the way it happened . . . ." (56 RT 8755, 8756.)

The trial court agreed with defense counsel that Shyrock's post-offense statements clearly did not qualify for admission under the coconspirator exception. (56 RT 8749.) Citing *People v. Leach, supra,* 15 Cal.3d at p. 451, and *People v. Manson, supra,* 61 Cal.App.3d at p.155, respondent nevertheless argues that this Court should find that the conspiracy continued to exist after the murders. (RB 251.)

People v. Leach is inapposite. In *Leach,* this Court ruled inadmissible under the coconspirator exception to the hearsay rule statements made by alleged coconspirators after a killing-for-hire was accomplished. In *Leach,* although the spouse was the beneficiary of the decedent's life insurance policy – the proceeds of which had not been collected at the time the hearsay statements were made – there was no evidence presented that the collection of insurance was one of the objectives of the conspiracy.

People v. Manson, supra, is equally inapplicable. There, after the charged murders the defendant reportedly directed one of his followers to kill another actor. On appeal, it was argued that the defendant's statement should not have been received under the coconspirator exception to the hearsay rule because, as in *People v. Leach, supra,* the objectives of the conspiracy had already been achieved by the time the statement was made. The appellate court held that *Leach* was inapt because the overriding purpose of the conspiracy in *Manson* was the fomentation of a race war. Consequently, the objectives of the conspiracy were not limited to the murder of the seven murder victims in that case. (*Id.,* at pp. 155- 156.) In this case, there is no similar evidence of a broader criminal objective beyond the killing of "Dido" Moreno. When Shyrock spoke with witness 15 in the park, the stated objective of the conspiracy had been completed.

Respondent also relies on *People v. Hardy, supra,* 2 Cal.4th at p. 147. (RB 252.) This case is equally distinguishable from the case at bench. *Hardy* involved a contract killing for the express purpose of collecting insurance proceeds. Conspirator statements made after the victim's death were properly admitted under the coconspirator exception precisely because the conspiracy's objective, to collect the insurance money, had not yet been accomplished at the time the statements were made. (*Id.,* at pp. 146-147.)

C. Shyrock's Statements About Aguirre Were Not Admissible To Show State Of Mind.

Respondent argues, alternatively, that Shyrock's statements were relevant to show the declarant's state of mind toward Aguirre. (Evid. Code, § 1250.) This is the theory on which the trial court admitted the statements. (56 RT 8748, 8751.) The problem is that, absent evidence of a conspiracy

to kill Aguirre, Shyrock's animus toward Aguirre was irrelevant. (*People v. Geier, supra,* 41 Cal.4th at pp. 586-587.)

The prosecutor repeatedly asserted that his theory of the case was that Shyrock recruited appellant to arrange for the killing of "Dido" Moreno, a Mafia dropout. Appellant, in turn, recruited Sangra gang members to accomplish the task. The perpetrators went to the residence to kill Moreno. All other adults in the residence – including Maria Moreno and Aguirre – were slaughtered according to the Mafia's directive not to leave any witnesses. The killing of the children was, according to the prosecutor, a natural and probable consequence of the plan to kill Moreno and leave no witnesses. (3 RT 535; 61 RT 9520-9522.)

There is no evidence Sangra gang members were acquainted with Aguirre, or acted pursuant to any preconceived plan to cause his death, specifically. Torres told his sister they were only supposed to kill one man. (57 RT 8960.) Witness 15 testified that Aguirre was hiding in the bathroom when appellant purportedly paid a visit to Moreno's residence to set up the murder. (56 RT 8822-8824.) Even if witness 15's dubious testimony is presumed true (see, AOB 40-41), appellant and Sangra gang members would <u>not</u> have known in advance that Aguirre would be at the Moreno's residence when they came to kill "Dido."

Again, the prosecutor cites *People v. Morales, supra*, 48 Cal.3d 527, this time to support the admission of Shyrock's statements to prove his state of mind. (RB 252.) However, in *Morales*, the alleged conspiracy <u>was</u> the plan to kill Ortega's lover's lover. This Court held:

> Ortega's admitted plan to kill Blythe, his stated assumption or expectation that defendant would help or encourage him in doing so, and his remark that if Winchell were present she would "get it too," in the aggregate were probative of the

question whether the two men later conspired to kill Winchell.

(*Id.*, at p. 552.) In this case, the prosecutor's theory was that Aguirre was killed pursuant to the Mafia's directive to kill all witnesses, not pursuant to a conspiracy to kill Aguirre. Shyrock may have had animus toward Aguirre, but that is not the reason he was killed. Therefore, the statements were not admissible to prove Shyrock's state of mind. (*People v. Geier, supra,* 41 Cal.4th at pp. 586-587.)

D. Shyrock's Statements About Aguirre Were More Prejudicial Than Probative.

Respondent disputes appellant's assertion that the statements, even if relevant, should have been excluded as more prejudicial than probative. (Evid. Code, § 352; RB 255.) The court felt the statements were relevant to show appellant's guilt because appellant had a "special relationship" with Shyrock and was likely to carry out his wish to have Aguirre killed. (56 RT 8749.)

Once again, respondent conveniently ignores the fact that Shyrock's wish to see Aguirre dead was irrelevant to prove appellant's participation in a conspiracy to kill Moreno. Respondent says that the evidence was admissible to show "Shyrock's state of mind toward at least one of the intended victims and the scope and objective of the conspiracy." (RB 256.) However, the position taken by respondent on appeal does not jibe with the position taken by the People in the court below. The prosecutor's statements to the trial court and the People's own evidence belie the notion that the killings were accomplished pursuant to a conspiracy to kill Aguirre and Moreno. According to the prosecutor's theory of the case, Aguirre and Maria Moreno were killed because they were present when Sangra gang

members came to kill Moreno. (3 RT 535; 61 RT 9520-9522; 57 RT 8960.) Given that the evidence had only tangential, if any, relevance to contested issues in the case – i.e., to prove that appellant planned and carried out the murder of "Dido" Moreno at the request of Shyrock – it was an abuse of discretion for the trial court to overrule appellant's objections under Evidence Code section 352.

Shyrock was consistently portrayed by the People as the ruthlessly violent regional head of a ruthlessly violent gang, the Mexican Mafia. Proof of appellant's complicity in of murder depended largely on (1) his membership in the Mafia and his association with Shyrock, for whom he was supposed to be an errand boy; (2) his alleged meeting with "Dido" Moreno and witness 15 on the day of the murders at a time when family members testified he was in church at his son's baptism, or in transit; (3) his alleged brief meeting with Jimmy Palma, described only by witness 14, at a time when family members testified that appellant was still at his child's baptismal party; and (4) phone records showing calls to appellant's pager and from some of the perpetrators before and after the murders – but no proof appellant was carrying his pager or answered the calls. The truth of testimony placing appellant at "Dido's" house mid-day, and with Jimmy Palma just prior to the murders, was stridently contested. To the extent the prosecutor was permitted to bring in irrelevant evidence of other violent crimes – whether contemplated by Shyrock and the Mafia, or allegedly committed by appellant or Sangra gang members on the Mafia's behalf (see, Arguments VII & X, *ante*), there would have been an overstrong tendency on the part of the jury to give this highly inflammatory evidence undue weight in deciding whether to believe appellant's alibi witnesses, or rather, witnesses 14 and 15, who were career criminals with a motive to lie.

The evidence should have been excluded because it was uniquely likely to evoke an emotional bias against appellant, while having only slight probative value with respect to the issues. (*People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345.)

E. Admission Of Shyrock's Statements Violated Appellant's State And Federal Constitutional Rights.

1. Appellant's Confrontation Clause Claim is Meritorious And Should Not Be Deemed Forfeited.

Respondent argues that appellant's Confrontation Clause claim is forfeited because counsel objected on hearsay grounds, but did not raise a state or federal Confrontation Clause claim. (RB 257.) The fact that this Court may refuse to hear tardily raised federal constitutional challenges does not mean that it is obliged as a matter of law to refrain from addressing such constitutional questions on the merits. (*Orr v. Orr, supra,* 440 U.S. at p. 275.) A reviewing court may consider any claim despite the lack of an objection when the error may have adversely affected the defendant's right to a fair trial. (*People v. Hill, supra,* 17 Cal.4th at pp. 820, 843, fn. 8.)

Furthermore, the purpose of the Confrontation Clause is to "ensure reliability of evidence," . . . "by testing in the crucible of cross-examination." (*Crawford v. Washington, supra,* 541 U.S. at p. 61.) The purpose of the hearsay rule is to "preclude a class of evidence considered to be generally less reliable than in-person testimony of events observed by a testifying witness." (*United States v. Hernandez, supra,* 333 Fed.3d at p. 1179.) Otherwise stated, the purpose of the hearsay rule is to prohibit the use of unsworn, uncross-examined testimony as substantive evidence in a

case. (*United States v. Carmichael, supra,* 232 F.3d at p. 521.)

Defense counsel's hearsay and Evidence Code section 352 objections were clearly directed keeping irrelevant and/or unreliable evidence from the jury. No useful purpose would be served were this Court to refuse to consider appellant's Confrontation Clause challenges to Shyrock's hearsay statements. (*People v. Partida, supra,* 37 Cal.4th at p. 436.)

Respondent disputes appellant's contention that Shyrock's statements during the post-offense meeting with witness 15 were testimonial, and therefore introduced in violation of *Crawford v. Washington, supra,* 541 U.S. at p. 56.[22] (RB 257.) Respondent's reasoning appears to be that *Crawford* recognizes that coconspirator statements are not usually testimonial (*Id.*, at p. 74); therefore, since Shyrock's post-offense statements were coconspirator statements, they were properly admitted and did not violate the Confrontation Clauses of the state or federal constitutions. Appellant has already explained why the trial court was correct in ruling that the post-offense statements did not qualify as coconspirator statements. (See, Argument XI, B, 2; 56 RT 8749.) Rather than reiterate those arguments, they are incorporated by reference here.

Respondent also argues that the statements were not testimonial within the meaning of *Crawford* because they were made outside the presence of investigating officers who summoned the participants to the meeting in the park. (RB 258.) That the investigating officers kept their

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[22] Respondent appears to concede that *Crawford v. Washington* is retroactively applicable to cases still pending on direct appeal. (RB 258; *People v. Cage, supra,* 40 Cal.4th at p. 970; *Whorton v. Bockting* (2007) 549 U.S. 406 [167 L.Ed.2d 1, 127 S.Ct. 1173].)

distance is not dispositive. The El Monte officers were investigating the Maxson Street killings. They called witness 15, his brother Joseph Moreno, and Raymond Shyrock, and directed them to meet at Lambert Park. The participants in the meeting were "shaken down" when they arrived. Joseph and witness 15 were told by Officer Marty Penny, "I want you to talk to Huero Shy." (56 RT 8754.) If investigators stepped away temporarily to allow witness 15 and Joseph to speak privately with Shyrock, they did so in the rather transparent hope that Shyrock would make incriminating statements about the murders to "Dido" Moreno's two brothers, which they could use later in a criminal case. (56 RT 8753-8754.) The primary purpose of the questioning conducted by witness 15 and his brother was, accordingly, "to establish or prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington* (2006) 547 U.S. 813, 822 [165 L.Ed.2d 224, 126 S.Ct. 2266, 2273]; *People v. Cage, supra,* 40 Cal.4th at p. 982; see also, *Melendez-Diaz v. Massachusetts* (2009) ___ U.S. ___ [129 S.Ct. 2527].)

Testimony is a solemn declaration or affirmation made for the purpose of establishing or proving some fact. (*Crawford v. Washington, supra,* 541 U.S. at p. 51.) A statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime. (*Davis v. Washington, supra*, 126 S.Ct. at pp. 2273-2274.) Shyrock's statements to witness 15 were "testimony" in the sense that they constituted affirmations or declarations of fact, including: (1) that Shyrock did not kill "Dido" and Maria Moreno; (2) if he had done so, the crime would not have been committed in such a manner; (3) Shyrock was <u>not</u> sorry about the death of Gustavo Aguirre; and (4) because Aguirre was robbing Mafia connections,

and Shyrock knew it, this victim would eventually have been killed by Shyrock or the Mafia anyway. At the time the statements were made, Shyrock was certainly aware that anything he said to the victim "Dido" Moreno's brothers could be used in the investigation and prosecution of the Maxson Street murders. Accordingly, his statements qualified as testimonial hearsay within the meaning of *Crawford.*

Respondent argues that the statements were nontestimonial and did not violate the Confrontation Clause because they were not offered for the truth of the matter asserted, but rather, to prove Shyrock's intentions toward Aguirre, i.e., his state of mind. (RB 258.) Under *Crawford*, there are no restrictions on the use of out-of-court statements for nonhearsay purposes. (*People v. Cage, supra,* 40 Cal.4th at p. 975, fn. 6.) Evidence admitted pursuant to Evidence Code section 1250's state of mind exception is hearsay, however; it describes a mental or physical condition, intent, plan, or motive and is received for the truth of the matter asserted. (*People v. Geier, supra,* 41 Cal.4th at p. 587, citing with approval *People v. Ortiz* (1995) 38 Cal.App.4th 377, 389; see also, 1 Witkin, Cal. Evidence (3d ed. 1986) The Hearsay Rule, § 735, p. 716.) Such evidence of state of mind may only be introduced if the declarant's state of mind is an issue in the case. (*Ibid.*) As previously stated, Shyrock's attitude toward Aguirre was not a disputed fact of relevance to proving appellant's complicity in the murders. According to the prosecutor's own theory of guilt, orders were given to kill "Dido" Moreno. Aguirre was killed, and so were Maria Moreno and her two children, because they were present when gang members came to kill Moreno, and the Mexican Mafia – purportedly speaking through appellant – had instructed that Sangra gang members should not leave any witnesses alive.

In contrast, a statement that does not directly declare a mental state, but is merely circumstantial evidence of a declarant's state of mind, is not hearsay. Such statements are only nonhearsay when it does not matter whether the statements are true or not; the fact that the statements were made must be relevant to prove the declarant's state of mind. (*People v. Ortiz, supra,* 38 Cal.App.4th at p. 389.) Shyrock's statements were not just received for a nonhearsay purpose. Shyrock's statements were declaratory of his wish to see Aguirre dead; whether Shyrock wanted Aguirre dead was precisely the issue for which the statements were received. The trial court instructed the jury that the statements were coming in "as it may bear upon Mr. Shyrock's intentions toward Mr. Aguirre." (56 RT 8751.) Shyrock was not available to cross-examine regarding his testimonial fact statements; hence, a Confrontation Clause violation resulted.

2. Admission Of Shyrock's Testimonial Statements Violated Appellant's Rights To Due Process, Confrontation And A Reliable Death Judgment.

Respondent argues that, assuming any of appellant's constitutional claims have not been forfeited, the Shyrock's statements of animus toward Aguirre were made under circumstances establishing their trustworthiness, and witness 15 was subjected to cross-examination regarding Shyrock's statements. (RB 260.) Assuming a Confrontation Clause violation occurred, "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." (*Crawford v. Washington, supra,* 541 U.S. at p. 61.) The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." (*Ibid.*)

In any event, the statements by Shyrock were given in a circumstances that rendered them inherently untrustworthy. To begin with, witness 15 was an intrinsically unreliable witness, inclined to tell investigating officers and prosecutors exactly what they wanted to hear, not necessarily the truth. (See, AOB 40-41, 201-204, 224-226.) In addition, regarding the post-offense statements attributed to Shyrock, the conversation between witness 15 and Shyrock was held on orders from police, while the police waited in close proximity. Confronted with one victim's brothers, Shyrock would not have been particularly inclined to speak the truth about his involvement, or even the involvement of his associates or fellow gang members, in the ruthless slaughter of four members of the Moreno family, or their family friend, Gustavo Aguirre.

The evidence was completely unnecessary and highly prejudicial. There was no evidence that Sangra gang members were familiar with Aguirre, or that gang members knew that Shyrock and/or appellant wanted Aguirre killed. Even if appellant visited the victim's residence midday prior to the killings, as witness 15 incredibly claims, Aguirre was hiding at the time; hence, his presence was unknown to appellant and visiting Sangra gang members. Since appellant was not anywhere near the victim's house when the murders took place, he would have had no way of anticipating that Aguirre was there, and could not have ordered his murder.

Under the circumstances, introducing Shyrock's statements had no purpose but to inflame the jury by suggesting that Shyrock was in the habit of ordering his enemies killed. Given other evidence that appellant was a recent Mexican Mafia recruit, and expert testimony that he would more likely than not do the bidding of the person who sponsored his membership in the gang, the jury would necessarily have concluded that appellant would

kill Aguirre in cold blood if Shyrock asked him to do it. In addition, because Shyrock denied that he approved of the murder of Maria Moreno and the children, the jury may have inferred from this evidence that appellant ordered that all witnesses, even women and children, be killed. (See, AOB 202-203.) Hence, for these reasons, and reasons previously articulated in the AOB, the error resulted in a prejudicial denial of appellant's rights to due process, a fair trial, and reliability in death sentencing, as well as the denial of confrontation rights. (AOB 201-204.)

XII

REPLY TO RESPONDENT'S ARGUMENT XII: APPELLANT'S CONTENTION THAT THE COURT IMPROPERLY INSTRUCTED THE JURY PURSUANT TO CALJIC NO. 2.11.5 IS MERITORIOUS AND SHOULD NOT BE FORFEITED.

A. Proceedings Below:

Appellant adopts and incorporates by reference the procedural facts set forth in Argument XII of the AOB. (AOB 205-207.)

B. Appellant's Contention Should Not Be Deemed Forfeited.

Respondent argues that, since appellant failed to make any objection to the instruction, he may not raise either state law or constitutional challenges to the instruction on appeal. (RB 262.) In similar circumstances, this Court has found the alleged instructional error waived. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126, fn. 30; *People v. Sully* (1991) 53 Cal.3d 1195, 1218.) However, as respondent concedes, this Court will address instructional error claims when it appears that the challenged instruction may have affected an appellant's substantial rights. (RB 263; *People v. Croy, supra,* 41 Cal.3d at p.12, fn. 6.) In this case, for reasons previously set forth in the AOB, the error should be addressed on the merits because it affected appellant's substantial rights. (AOB 205-207.)

C. Appellant's Contention Is Not Without Merit.

The merits of appellant's claim of instructional error have been adequately addressed in Argument XII of the AOB. (AOB 205-207.) Nevertheless, appellant recognizes that, even when this Court finds that

clarifying instructions should have been given as to the application of CALJIC No. 2.11.5 to witnesses given immunity in exchange for trial testimony, this Court has declined to find the error prejudicial, so long as other appropriate instructions on weighing the credibility of witnesses have been given. (See, e.g., *People v. Brasure* (2008) 42 Cal.4th 1037, 1055; *People v. Lawley, supra,* 27 Cal.4th at pp. 162-163; *People v. Sully, supra,* 53 Cal.3d at p.1219.)

Appellant requests that this Court reconsider its policy of finding such error harmless. The evidence against appellant was extremely weak, particularly if the large quantities of highly prejudicial, erroneously received evidence is disregarded. (See, AOB and Reply, Arguments I, V, VI, VII, VIII, XI, X, XI.) In addition, the error is all the more egregious because it occurred in the context of a death penalty case. For these reasons, and the reasons more fully developed in the AOB, the giving of CALJIC No. 2.11.5 should be found prejudicial in this case. (AOB 205-207.)

XIII

REPLY TO RESPONDENT'S ARGUMENT XIII: APPELLANT'S JUDICIAL MISCONDUCT CLAIMS ARE MERITORIOUS AND SHOULD NOT BE DEEMED FORFEITED.

A. Legal Principles Of Judicial Misconduct.

Appellant does not dispute respondent's statement of hornbook law governing claims of judicial misconduct. (RB 270-271.) He contests the application of legal principles to the facts of his case.

B. Appellant's Contention Should Not Be Deemed Forfeited By Trial Counsel's Failure To Object.

Respondent argues that, because no objections were made by trial counsel to any of the trial court's comments and questions, all judicial misconduct should be deemed forfeited. (RB 279.) Appellant anticipated this argument in the AOB, and has already offered justifications why counsel's failure to object and/or to request curative admonitions should not be deemed a waiver. (AOB 215.)

From the record it is overwhelmingly clear that it would have been futile to object. (*People v. Hill, supra,* 17 Cal.4th at p. 821.) Given the evident hostility by the judge toward defense counsel, it would have been unfair to require defense counsel to choose between repeatedly provoking the trial judge into making negative statements about defense counsel, or alternatively, giving up the client's ability to argue misconduct on appeal. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237; see also, *People v. Mahoney* (1927) 201 Cal. 618, 622.) Failure to request an admonition is not necessary where an admonition would exacerbate rather than cure the harm. (*People v. Bolton* (1979) 23 Cal.3d 208, 214-215, fn. 5.)

In any event, this Court may address the claim despite the absence of objections if the trial court's misconduct may have adversely affected the defendant's right to a fair trial. (*People v. Hill, supra,* 17 Cal.4th at p. 843, fn. 8.) Here, the cumulative effect of judicial misconduct, prosecutorial misconduct, and the court's failure to rein in the prosecutor's excesses (see, Arguments XIII, XV, & XVI) would necessarily have had an adverse impact on appellant's right to a fair trial, as well as making it futile and counterproductive to object. (*People v. Hill, supra,* 17 Cal.4th at p. 821.)

C. Appellant's Assignments Of Judicial Misconduct Are Meritorious.

Respondent suggests that the court exercised admirable restraint and impartiality throughout a lengthy and difficult trial. (RB 279.) The judge exercised anything but restraint and impartiality.

1. 55 RT 8522:

Respondent asserts that the trial judge did nothing more than caution both attorneys not to make speaking objections. (RB 280.) This is not all the judge did. The admonition against speaking objections followed a question by defense counsel, not the prosecutor. Moreover, after admonishing defense counsel, the court briefly took over questioning for the prosecutor, and after eliciting the witness's response, overruled defense counsel's speaking objection.

2. 55 RT 8592-8593:

Respondent suggests that the judge, by intervening, strengthened counsel's argument that Sgt. Valdemar had offered different testimony during the grand jury proceedings regarding the reference to a silencer. (RB 280.) Respondent misses the point. Counsel asked Sgt. Valdemar

"what [he] told the grand jury about a silencer." The answer to the question was important because Valdemar had lied to the grand jury. The court interrupted counsel and criticized his wording of the question. When counsel explained he wanted to know what Sgt. Valdemar told the grand jury, the court snapped, "Well, I don't want to know what he told the grand jury – ." (55 RT 8592-8593.) The clear message to the jury was that Valdemar was credible despite his false testimony to the grand jury. This was tantamount to the judge commenting favorably on the credibility of the witness, and usurping the function of the jury. (*People v. Sergill* (1982) 138 Cal.App.3d 34, 41.)

3. 56 RT 8794-8795:

Respondent argues that the court merely admonished defense counsel not to denigrate witness 15, after counsel asked him if he was a "down and out hype.". (RB 280.) Even though the witness agreed with this colloquial and unflattering characterization, the judge apparently felt it necessary to refer to the witness as a "gentleman," effectively minimizing the significance of the witness's admitted pattern of criminal conduct to the jury's assessment of credibility. Moreover, this rebuke of trial counsel for name-calling occurred immediately after the court had endorsed one of the witness' statements by exclaiming, "Amen." (56 RT 8794-9795.) This, as well as other disparaging remarks directed toward counsel during the cross-examination of prosecution agents, would have left the impression that the court was protective of and allied with the prosecution. (See, 58 RT 9082-9083, 9199.)

In this case, defense counsel was respectful and deferential to the judge at all times. However, even if contemptuous conduct by a party or attorney provokes a trial judge, if he "cannot 'hold the balance nice, clear,

and true between the state and the accused' [citation]," then he or she may not preside. (*Taylor v. Hayes* (1974) 418 U.S. 488, 501 [41 L.Ed.2d 897, 94 S.Ct. 2697.) Therefore, even if the court's criticism of counsel's name-calling could be defended, it would not justify reprimanding counsel before the jury. (*People v. Fatone* (1985) 165 Cal.App.3d 1164, 1174, cited with approval in *People v. Sturm, supra*, 37 Cal.4th at p. 1240.)

4. 57 RT 8889-8890:

Respondent characterizes the judge's remarks as merely overruling counsel's objection to the prosecutor's inquiry into the terms of a witness' immunity agreement. (RB 280-281.) That is not the impression that the judge's intervention would have left in the minds of jurors. Counsel made an objection when an immunized witness was asked what would happen to him if he did not testify truthfully, or answer all questions at appellant's trial. The judge did not just overrule the objection and allow the prosecutor to continue questioning. The judge rephrased the question and asked what would happen if the judge said the witness was lying, and underscored the importance of the witness' answer – that he would not be granted immunity and would be prosecuted for murder if the judge believed he was lying. The court's conduct effectively usurped the function of the jury to determine whether this witness was lying. (*People v. Sergill, supra,* 138 Cal.App.3d at p. 41.)

5. 57 RT 8939:

Respondent characterizes the court's comments as merely "informing" defense counsel that a juvenile adjudication could not be used for impeachment purposes. (RB 181.) This is not what happened. The judge, perceiving the witness to be too young to have suffered a conviction for assault with a deadly weapon, interrupted defense counsel's examination

of the witness. After questioning the witness himself, the judge announced that the witness could not have been "convicted" of anything in 1989. The judge did not stop there, however. He also declared that "juvenile adjudications are irrelevant." (57 RT 8939-8940.)

While, technically speaking, the fact of a juvenile adjudication is not usable to impeach, the court's gratuitous remark "juvenile adjudications are irrelevant," was misleading. State law allows impeachment of a witness with prior conduct evincing moral turpitude even if such conduct was the subject of a juvenile adjudication. (*People . Lee* (1994) 28 Cal.4th 1724, 1739.) Respondent does not dispute that this is the law. (RB 282, fn. 109.) This is yet another example of the judge demeaning the importance of impeaching information that trial counsel was attempting to elicit from a prosecution witness.

6. 58 RT 9082-9083:

Respondent implies that the trial court properly sustained the prosecutor's objection to defense counsel's argumentative questioning. (RB 281.) That may be so; but the judge did not merely sustain the prosecutor's objection. He scolded Mr. Esqueda: "You know who it is, I assume. If so, give him a name. It's not a secret. It's a public record." (58 RT 9083.) It is improper to reprimand a lawyer before the jury. "When the court embarks on a personal attack on an attorney, it is not the lawyer who pays the price, but the client." (*People v. Fatone, supra,* 165 Cal.App.3d at p. 1175.)

7. 58 RT 9199:

Respondent argues that the court merely sustained an objection to defense counsel's irrelevant question, whether Detective Davis would be willing to listen to his interview tape of witness 14, review his notes, and

come back to court. (RB 281.) The court did more than just sustain an objection. He informed the jurors defense counsel was wasting their time. (58 RT 9199.) It is improper for a judge to convey to a jury his negative personal views concerning the competence, honesty or ethics of an attorney. (*People v. Sturm, supra,* 37 Cal.4th at p. 1240; *People v. Fatone, supra,* 165 Cal.App.3d at pp. 1174-1175.)

8. 62 RT 9714-9715:

Respondent says the trial court merely clarified the law and the prosecutor's theory of liability, when he interrupted trial counsel's argument concerning appellant's liability for the murder of Ambrose Padilla. Respondent cites *People v. Marshall* (1996) 13 Cal.4th 799, 854-855, in support of the contention that the trial court properly intervened. The case is inapposite.

The *Marshall* case stands for the general proposition that a court retains discretion to impose reasonable time limits on argument, and to insure that argument "does not stray unduly from the mark." (*Id.,* at pp. 854-855.) Counsel's argument did not "stray unduly from the mark." Appellant was charged with the special circumstance of multiple murder. To count the murder of Ambrose Padilla toward the multiple murder special circumstance finding, the jury had to find beyond a reasonable doubt that appellant had the intent to kill when he aided and abetted this particular murder. (AOB 49; 3 CT1 719; *People v. Anderson* (1987) 43 Cal.3d 1104, 1138-1150.) The court's "correction" of the law was therefore misleading to the extent it implied the prosecutor had no burden to prove specific intent.

Furthermore, as the trial court itself observed, counsel's argument accurately characterized one of multiple theories upon which appellant

could be held liable for Ambrose Padilla's murder. (62 RT 9714-9715.) There was no reason for the trial court to interrupt counsel's argument at this point without giving him an opportunity to address the dearth of evidence to support a murder conviction on other theories of liability as well. The overall effect of the court's commentary was to disparage counsel's argument, and to imply to the jury that there was ample evidence to support a conviction on other theories of liability, even if not a theory of deliberate, premeditated murder.

Respondent compares the court's conduct in this case to the judge's behavior in *People v. Bell* (2007) 40 Cal.4th 582, 605. (RB 282.) In *Bell*, the trial court joked to jurors that the attorneys would "think up something to talk about between now and Monday." (*Id.*, at p. 604.) This Court found that the trial court was not criticizing counsel, but attempting to "cajole the jurors into patience with the proceedings partly by sardonically casting responsibility for delays on the attorneys." (*Ibid.*) In addition, in *Bell*, the court praised the attorneys for not wasting a lot of time in their questioning. (*Ibid.*) In appellant's case, the court disparaged counsel's conduct numerous occasions, and at one point directly accused counsel of wasting the jury's time.

Respondent cites *People v. Hawkins* (1995) 10 Cal.4th 920, 948, for the proposition that the trial judge did not commit misconduct because he did not withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or usurp the jury's ultimate factfinding power. (RB 280.) In *Hawkins*, the issue was whether the trial judge committed misconduct when he intervened in the interrogation of the senior ballistics expert to question him about another scientist's work. This Court reiterated the rule that a judge has the power and duty to participate in

the examination of a witness whenever he or she believes that doing so may fairly accomplish certain ends: eliciting the truth; preventing misunderstanding; clarifying testimony; covering omissions; allowing a witness to explain; or eliciting facts material to a just determination of the cause. (*Id.,* at pp. 497-498.) In *Hawkins*, however, the Court also recognized that a trial judge's interrogation "'must be . . . temperate, nonargumentative, and scrupulously fair.'" (*Id.,* at p. 948; accord: *People v. Sturm, supra,* 37 Cal.4th at p.1232.)

In appellant's case, the trial court's intervention in the examination of witnesses was neither "temperate" nor "scrupulously fair." The court, without any need to do so, frequently elicited testimony and/or commented upon counsel's objections or witnesses' answers in a manner which bespoke clear negative opinions about defense counsel's conduct of the case, or the futility or insignificance of counsel's efforts to impeach the state's witnesses. The court's words implied: (1) any defense witness who testified for appellant was likely lying to protect the Mexican Mafia (58 RT 8522); (2) Sgt. Valdemar's prior false testimony to the grand jury was not very important (55 RT 8592-8593); (3) witness 15 was a gentleman and a witness, not just a "down and out hype" (56 RT 8794-8795); (4) the judge would be the ultimate arbiter of whether immunized witness 16 was giving truthful testimony in accordance with the immunity agreement, and the judge believed the witness was being truthful (57 RT 8890-8891); (5) witness 16's prior act of committing an assault with a deadly weapon was irrelevant to impeach his credibility (57 RT 8939-8940); (6) trial counsel was wasting the jury's time by not revealing the identity of the district attorney who reached a plea agreement with witness 14 (58 RT 9082-9083.); (7) trial counsel was wasting the jury's time by asking whether

Detective Davis would be willing to refresh his memory by listening to a tape and checking his notes (58 RT 9199); and (8) trial counsel was misleading the jury, and/or ignorant of the law that governed appellant's liability for the death of the six-month old victim. (62 RT 9714-9715.) The court gave the distinct impression, repeatedly, that it was "allying itself with the prosecution." (*People v. Carpenter* (1997) 15 Cal.4th 312, 353.) This constituted improper conduct. (*People v. Sturm, supra,* 37 Cal.4th at p. 1242.)

D. The Court's Misconduct Was Not Harmless.

Respondent argues that appellant cannot show that the court's conduct caused prejudice regardless of the standard of review that is applied. (RB 283.) Respondent emphasizes that the claim of misconduct rests on only eight remarks made during a month-long jury trial. (RB 283.)

Respondent ignores the fact that there were more than eight improper remarks during appellant's trial. Appellant also assigns additional instances of judicial misconduct that occurred during the penalty phase of the trial. (AOB 239; Reply, Argument XVI, B, post.) Furthermore, in addition to the numerous specific acts assigned as judicial misconduct, the trial court treated the defense and prosecution disparately, which could not have escaped the jury's attention. (See, Arguments XV & XVI, post.) As in *People v. Hill, supra,* 17 Cal.4th at p. 846, the court's disparagement of defense counsel, while at the same time permitting wide latitude to the prosecutor – over defense objection – would have given the strong impression of judicial partiality.

Furthermore, it is not the only number of acts of misconduct that is dispositive. Reversal is required when a trial judge demeans and disparages

defense counsel with sufficient frequency that it convey his or her negative attitude toward the defense to the jury. (*People v. Fatone, supra,* 165 Cal.App.3d at p. 1176.) In *People v. Black* (1957) 150 Cal.App.2d 494, the court's comments regarding counsel's inept questioning of the complaining witness in an incest case improperly conveyed "a judicial stamp of approval on the [defendant's] daughter's testimony." The judgment was reversed. In *People v. Mahoney, supra,* 201 Cal. 618, even though no objections were made by defense counsel, this Court reversed a judgment where a trial judge's disparaging and discourteous remarks would have communicated to the jury that the judge discredited the defense. (*Id.*, at p. 627; accord: *People v. Dickman* (1956) 143 Cal.App.2d Supp. 833, 836.) In this case, the instances during which the judge treated Mr. Esqueda disparagingly or discourteously occurred with sufficient regularity during the trial that the jury would readily have perceived the court's antipathy toward the defense.

Though respondent repeatedly states that the evidence against appellant was overwhelming, the record shows that the contrary is true. (RB 284.) Appellant was not present at the time of the murders. He was undisputedly attending his son's baptismal party. While several career criminals – each with clear motives to fabricate – testified that appellant visited the victims' residence on the day of the murders, and met with Palma at his apartment shortly before the murders, alibi witnesses not burdened by criminal records testified that appellant was elsewhere when these preparatory events allegedly occurred.

Throughout the trial, the trial judge made one-sided ruling and remarks directed against defense counsel before the jury, disparaging counsel and weakening the defense's ability to present evidence countering the charges against appellant. The court corrected Mr. Esqueda's questions

to prosecution witnesses in such way that the jury could not help but succumb to the strong impression that, in the court's view, counsel was merely "wast[ing] the jury's time." (95 RT 9199.) "Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials." (*People v. Sturm, supra,* 37 Cal.4th at p. 1233.) The court's biased conduct of the trial reduced presumption of innocence to a sham.

"Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." (*Glasser v. United States* (1942) 315 U.S. 60, 71 [86 L.Ed. 680, 62 S.Ct. 457.) When trial is by jury, a "fair trial in a fair tribunal" (see, *Bracy v. Gramley* (1997) 520 U.S. 899, 904 [138 L.Ed.2d 97, 117 S.Ct. 1793]) requires the judge to refrain from conduct that can prejudice the jury. "This requirement of neutrality . . . safeguards [one of] the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations . . . ." (*Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 242 [64 L.Ed.2d 182, 100 S.Ct. 1610].) In appellant's case, adjudication by a biased judge necessarily rendered the trial fundamentally unfair. (*Rose v. Clark* (1986) 478 U.S. 570, 577-578 [92 L.Ed.2d 460, 106 S.Ct. 3101].)

Defendants, <u>especially those facing death</u>, have a right under the Due Process Clause to a judge who takes seriously his or her responsibility to look out for the rights of even the most undeserving defendant. (*Bracy v. Schomig* (7th Cir. 2002) 286 F.3d 406, 419.) The trial court's biased conduct of the trial irreparably distorted the penalty phase deliberations, depriving appellant of a fair trial and a constitutionally reliable death judgment. (*Satterwhite v. Texas, supra*, 486 U.S. at pp. 262-263.)

Furthermore, when the trial court's acts are considered together,

contrary to respondent's contention, they were not harmless, but conspired to undermine the fairness of appellant's capital trial, in violation of the Sixth, Eighth, and Fourteenth Amendments. A trial court conducted in such a "poisonous atmosphere" of bias violated appellant's most fundamental constitutional rights under the state and federal constitutions. (*People v. Hill, supra,* 17 Cal.4th at p. 821.)

XIV

REPLY TO RESPONDENT'S ARGUMENT XIV: APPELLANT'S CONTENTION THAT THE TRIAL COURT SHOULD HAVE GIVEN LIMITING INSTRUCTIONS REGARDING EVIDENCE OF WITNESS THREATS AND FEARS IS MERITORIOUS AND SHOULD NOT BE DEEMED FORFEITED.

A. Proceedings Below:

Appellant concedes that his attorney failed to ask the trial court to give a limiting instruction at the guilt and penalty phases on the use of evidence of threat and witness fear evidence. (RB 285.) For reasons more fully set forth below, and in the Appellant's Opening Brief, appellant asserts this should not bar consideration of the issue on the merits.

B. Appellant's Contention Should Not Be Deemed Forfeited.

Respondent asserts that trial counsel's failure to request an instruction directing the jury on the limited uses of threat and fear evidence should be a bar to this Court's consideration of the issue on the merits. Appellant does not disagree with the accuracy of respondent's characterization of the general principles of forfeiture and waiver. (RB 286-287; see, *People v. Saunders* (1993) 5 Cal.4th 580, 590, & fn. 6; *United States v. Olano* (1993) 507 U.S. 725, 731 [123 L.Ed.2d 508, 113 S.Ct. 1770].) He merely asserts that considering the unique facts of this case, the claim of instructional error should be addressed on the merits because "the substantial rights of the defendant were affected thereby." (*People v. Croy, supra,* 41 Cal.4th at p.12, fn. 6; *People v. Chavez* (1985) 39 Cal.3d 823, 830.)

Similarly, appellant does not dispute that a defendant's failure to

request a clarification instruction will normally forfeit the issue on appeal. (RB 286, citing *People v. Young* (2005) 34 Cal.4th 1149, 1202.) Nor does he dispute the general proposition that defendants bear the burden of requesting amplifying language if instructions are too general or incomplete. (RB 286-287, citing *People v. Lewis and Oliver, supra,* 39 Cal.3d at p. 991, *People v. Guiuan* (1998) 18 Cal.4th 558, 570, and *People v. Andrews* (1989) 49 Cal.3d 200, 218.) However, in this case, the error is not that the instructions on threats and fear evidence were too general, too incomplete, or unclear. Here, there were no instructions at all on the permissible uses for evidence that various people had been threatened by, or feared retaliation by, appellant or unnamed agents of the Mexican Mafia.

A generic instruction on evidence limited as to purpose was given in the guilt and penalty phases of the trial. But those instructions merely admonished jurors to obey admonitions previously given regarding the limited purposes for which evidence was received. (3 CT 1: 772.) Guilt and penalty phase instructions also included a general instruction on believability of witnesses. (3 CT 1:667, 777.) These generic instructions were too general to address the jurors' eventual reactions to the fear and threat testimony. Under the circumstances, this Court should reject respondent's forfeiture argument, and address the issue on the merits.

C. Appellant's Contention Is Meritorious.

Respondent, anticipating that this Court might chose to address the merits, argues that the court had no duty to instruct on the limited purposes for which evidence of threats and fear was received. (RB 287.) Appellant respectfully disagrees. He suggests that this is the rare case in which evidence of fear and threats played such a dominant role in the

prosecution's case that the court had a *sua sponte* obligation to instruct the jury on the limited uses of the evidence. (*People v. Collie, supra,* 30 Cal.3d at pp. 63-64; *People v. Padilla* (1995) 11 Cal.4th 891, 950.) Fear of, and express or implied threats by, the Mexican Mafia and its members were the common threads that ran through the entire case. Evidence of fear and threats by the Mexican Mafia was used to explain nearly every piece of evidence presented by the prosecution: the conduct of the victims; the conduct of prosecution and defense witnesses; the conduct of the actual perpetrators of the murders; and, last but not least, appellant's alleged involvement in the crimes. (See, AOB 217-221.) Such evidence permeated the guilt and penalty phases. Moreover, the court itself elicited some of the fear evidence, elevating its salience and status in the minds of jurors. (See, Argument XIII, ante; 63 RT 9877-9880.[23])

For example, the credibility of key prosecution witnesses was bolstered by evidence that they were testifying despite fear or threats by agents of the Mexican Mafia. Witness 14 testified that, originally, he did not want to testify for fear of being killed. (58 RT 9078.) He agreed to testify truthfully because the district attorney promised he would get him transferred to another prison. (58 RT 9059-9060.) Witness 15 testified that he had warned his brother (one of the victims) that Shyrock was going to kill him because he was robbing Mexican Mafia drug connections. (56 RT 8761-8762.) This witness also testified that he, himself, was on the Mafia's "hit" list. (55 RT 8799.) He reported that while he was in jail, fifteen

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[23] The following colloquy occurred during the testimony of witness 17. "THE COURT: [¶] Q: Were you afraid to say who stabbed you? [¶] A: Yes, Sir. [¶] Q. Okay. And is that because of the gang culture? [¶] A. Yes."

attempts to stab him had been made, which he attributed to appellant's "people." (56 RT 8833.) Witness 16 testified that Sangra gang members were going to have him killed for breaking their "code" and testifying. (57 RT 8925-8926.) Even though several of witness 15's answers were stricken pursuant to objections by trial counsel (56 RT 8761-8762, 8833), during argument, the prosecutor repeatedly emphasized that none of the witnesses would be risking their lives to testify about appellant's involvement in the murders if their testimony was not true! Witnesses 14, 15 and 16 were at times mentioned by name. (62 RT 9730-9731, 9730-9731.) For example, in closing the district attorney argued:

> You will see it in the jury room. You will see the picture of [witness no. 16] in the middle with his face scratched out and "187" written across his chest. [¶] "187" written across the image meaning that he is a marked man. [¶] Nobody is going to risk their lives to come and testify about this fellow [Maciel].

(62 RT 9731.)

A tape-recorded statement was played for the jury in which Torres' sister, witness 13, expressed reluctance to give evidence due to her fear that gang members would send someone to hurt her children. (People's Exhibit 74; 57 RT 8960.) Witness 13 testified regarding codefendant Torres' extrajudicial statements, in which Torres claimed he and the other perpetrators committed the murders under compulsion of the Mexican Mafia. (8 SCT 1:1631; see, Reply, Argument X, *ante*.) During his argument to the jury, the district attorney referred to Torres and other defendants, emphasizing that the perpetrators of the murder would have been killed themselves had they failed to carry out the orders of the Mexican Mafia. (62 RT 9663-9664, 9669, 9724.)

Fear of retaliation on the part of witnesses played an equally central role in the penalty phase. Nathanial Lane, the victim of a beating, refused to testify at all. The jury was told Lane did not want to come into the courtroom. (63 RT 9835.) Witness 17, another penalty phase witness, testified that he did not want to testify against appellant. (63 RT 9876.) He blurted out in front of the jury that appellant was "sending messages to [his] family." (63 RT 9877.) However, there was no admissible evidence presented that this was true. During penalty phase closing argument, the prosecutor repeatedly suggested that keeping appellant alive in prison would be handing him a "license to kill." (65 RT 10136.)

At no time during the trial was it explained to the jury that the evidence of threats or fear, to the extent admissible at all, could not be considered for the truth of the matter asserted, i.e., that threats had been made by appellant or agents of the Mexican Mafia or Sangra gang. At no time did jurors receive instructions that evidence of threats or fear could only be considered in weighing the credibility of the witnesses or hearsay declarants who claimed to have experienced fear or threats.

Respondent does not appear to contest the fact that threats and fear played a dominant role in the case. (RB 293.) Rather, it is argued that, in similar circumstances, this Court has held that a trial court has no obligation to give instructions without request. (RB 293.) Respondent points to *People v. Sapp, supra,* 31 Cal.4th at pp. 300-301, as exemplary. However, in the *Sapp* case, there was a single cited instance in which a witness testified that he was afraid of the defendant, not numerous instances occurring throughout the trial as occurred here. (*Ibid.*) This Court held that it was "neither reasonably possible . . . nor reasonably probable . . . that the evidence or its treatment" altered the outcome of the trial. (*Id.* at p. 301.)

In *Sapp*, this Court did not directly address whether in the face of overwhelming quantities of threat and fear evidence, a trial court would have the obligation to give limiting instructions without a request.

Respondent also cites *People v. Padilla, supra,* 11 Cal.4th at p. 950. (RB 293.) In *Padilla*, the issue was the court's failure to instruct on evidence of the defendant's prior crimes; this is not analogous. This Court held that there was little danger in *Padilla* that the evidence would be used for improper purposes, including to show Padilla's "general criminal disposition." (*Id.* at p. 950.) Additionally, in *Padilla*, the defendant's prior actions were directly relevant to prove the central issue in the case: whether the perpetrator of a murder had acted on his own, or whether he had been hired by the defendant to kill the victim. (*Ibid.*)

In contrast, this case involves evidence of numerous vague, alleged threats to kill, maim or hurt witnesses, and numerous instances in which witnesses expressed fear of being hurt. Some of the fears and threats were specifically attributed to appellant; others, were attributed to Shyrock, or agents of the Mexican Mafia or Sangra gang. The danger was great that the jury would consider the vague and unsubstantiated evidence of threats and fear to infer appellant's consciousness of guilt or criminal disposition, or to attribute to these witnesses knowledge of appellant's dangerous propensity. The evidence was neither relevant or admissible for such purposes. (*United States v. Young* (4th Cir. 2001) 248 F.3d 260, 272; *People v. Mason* (1991) 52 Cal.3d 909, 946-947; see, 56 RT 8705)

> Evidence of threats not connected with a defendant should at once be suspect as . . . an endeavor to prejudice the defendant before the jury in a way which he cannot possibly rebut satisfactorily because he does not know the true identity of the pretender.

(*People v. Weiss* (1958) 50 Cal.2d 535, quoted in *People v. Mason, supra,*

52 Cal.3d at p. 946.) Where such vague and unsubstantiated evidence is used to infer consciousness of guilt, a defendant may be convicted in violation of the principles of *In re Winship* (1970) 397 U.S. 358, 361-365 [25 L.Ed.2d 368, 90 S.Ct. 1068]; to wit, the Due Process Clause protects against conviction except upon proof beyond a reasonable doubt of every act necessary to constitute the charged crime.

D. The Error Was Not Harmless.

Respondent argues that, even if the Court had a duty to instruct, the failure to do so was harmless in accordance with the prejudicial error test embodied in *People v. Watson, supra,* 46 Cal.2d at pp. 836-837. Appellant disagrees; the error cannot be deemed harmless regardless of what standard is applied.

It is the "essence of sophistry and lack of realism" to presume that, without a detailed limiting instruction, the jury would have ignored the overwhelming quantity of fear and threat evidence. (Cf. *People v. Gibson, supra,* 56 Cal.App.3d at p. 130.) The record belies the possibility that the jurors were not affected. (See, 63 RT 9813 [juror expressing fear of gang retribution]; 65 RT 10235 [jurors requesting escorts to their cars].) Under the circumstances, there is no conceivable way that the error did not infect the guilt and penalty phase judgments. (See, AOB 154-158; *Chapman v. California*, supra, 386 U.S. 18.)

Respondent asserts, without any discussion, that the "evidence of appellant's guilt was strong, and the nature of the crimes heinous." (RB. 295.) The record shows that the contrary is true. Appellant was not present at the time of the murders. He was undisputedly attending his son's baptismal party. While several career criminals – each with clear motives to fabricate – testified that appellant visited the victims' residence on the

day of the murders, and met with Palma at his apartment shortly before the murders, alibi witnesses not burdened by criminal records testified that appellant was elsewhere when these preparatory events allegedly occurred. In fact, the evidence against appellant was extremely weak, particularly if the large quantities of highly prejudicial, erroneously received evidence is disregarded. (See, AOB and Reply, Arguments I, V, VI, VII, VIII, XI, X, XI.)

Evidence of threats and fear would have created an overwhelming tendency on the part of jurors to conclude that appellant was predisposed to commit violent crimes, and/or that he must be guilty of the charged offenses because, otherwise, there would be no reason for appellant and/or unidentified associates to threaten harm to so many witnesses. The error is all the more egregious because it occurred in the context of a death penalty case. For these reasons, and the reasons more fully developed in the AOB, the failure to give an appropriate limiting instruction on the use of threat and fear evidence was not only prejudicial; in addition, it deprived appellant of his right to a fair trial and deprived the death judgment of reliability in violation of the state and federal constitutions. (*Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 972.)

Furthermore, individual errors that may not be so prejudicial as to deprive the defendant of a fair trial when considered alone may cumulatively produce a trial that is fundamentally unfair. (*Mak v. Blodgett, supra,* 970 F.2d at p. 622; *People v. Hill, supra*, 17 Cal.4th at pp.844-845.) In this case, a wealth of serious errors caused cumulative prejudice; hence, reversal is required even if the complained of instructional error was not prejudicial, standing alone.

XV.

REPLY TO RESPONDENT'S ARGUMENT XV: THE CONTENTION THAT THE TRIAL COURT IMPROPERLY REFUSED TO INVESTIGATE AND HOLD A HEARING ON THE ALLEGED VIOLATION OF *BRADY V. MARYLAND* (1963) 373 U.S. 83 [10 L.Ed. 215, 83 S.Ct. 1194] IS MERITORIOUS, AND WAS NOT FORFEITED.

A. Proceedings Below:

Appellant's recitation of the proceedings below makes it sound as though defense counsel's motion was made without reference to any supporting evidentiary facts. (RB 296-299.) In fact, at the hearing on appellant's motion for new trial based on prosecutorial misconduct grounds (see 3 CT 1: 833), defense counsel advised the court that, after testifying, witness 15 had received a sentence of credit for time served in a case in which he was facing a possible "three strikes" sentence of 25 years to life in prison. (66 RT 10246.) Counsel informed the court that in 27 years of criminal practice, it was the first time that he had seen anybody facing 25 years to life in prison "walk out of court with time served." (66 RT 10246.) In light of the witness's letter to the sentencing judge, Judge Vanon, asking for lenient sentencing, counsel specifically argued that this supported the inference that the witness had received a *quid pro quo* for his testimony, despite his denial (56 RT 8811-8814) and denials by the prosecuting attorneys (66 RT 10247-10248).

B. Appellant's Contention Is Not Forfeited.

Respondent argues that appellant has forfeited the issue by failing to cite applicable legal authority or evidentiary facts in the court below. The claim that appellant failed to cite evidentiary facts is specious. The record

shows that Mr. Esqueda did explain at some length the facts upon which the claim of prosecutorial misconduct was based. (66 RT 10247-10249.)

Respondent argues that the issue of *Brady* error was perfunctorily asserted by trial counsel without argument or authorities, and therefore may be denied without consideration by this Court. (RB 299, citing *People v. Gionis* (1995) 9 Cal.4th 1196, 1214, fn. 11, *People v. Stanley* (2006) 39 Cal.4th 913, 793, and *People v. Gonzalez, supra,* 126 Cal.App.4th at p. 1543, fn. 3.) In support of the motion for new trial, Mr. Esqueda cited section 1181, subsection 5, which permits the granting of a new trial "when the district attorney . . . has been guilty of any misconduct by which a fair and due consideration of the case has been prevented." (3 CT 833.) At trial, an objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide. (*People v. Scott* (1978) 21 Cal.3d 284, 290.) In a criminal case, an objection will be preserved if, despite inadequate phrasing, the record shows that the judge understood the issue presented. (*Ibid.*) In this case, defense counsel's lengthy argument that prosecutors were hiding evidence showing that witness 15 had received an extraordinarily lenient sentence in return for his testimony could have left no doubt in the judge's mind that counsel was complaining about the prosecutors' failure to comply with the duty of disclosure imposed by *Brady v. Maryland, supra,* 373 U.S. 83. (See also, *People v. Gutierrez, supra,* 112 Cal.App.4th at p.1471, fn. 5.) The error was preserved.

Furthermore, the cases cited in support of respondent's "forfeiture" argument do not stand for the proposition that the right to appeal an issue is forfeited when a trial attorney fails to cite specific case law authority in support of a motion or objection. The *Gionis*, *Stanley* and *Gonzalez* cases hold that issues may be forfeited by appellate counsels' perfunctory

treatment on appeal. Appellate counsel has not given this issue perfunctory treatment. (See, AOB, Argument XV.)

C. The Trial Court Erred By Failing To Provide For An Investigation Of The Possibility Of A *Brady* Violation.

Respondent argues that the record fails to support a claim of *Brady* misconduct. For example, respondent points out that witness 15 was sentenced after the jury reached its verdicts in the guilt phase of appellant's trial. (RB. 302.) Respondent further argues that the record suggests that the Los Angeles County Sheriff's Department lobbied the judge on witness 15's behalf, and that the request for leniency was opposed by the trial prosecutor in the case. (RB 302.) It is also argued that evidence is lacking that the lobbying on the witness's behalf was contemplated at the time trial was pending in appellant's case. (RB 302-303.) Lastly, respondent contends that there is no evidence the District Attorney's office had advance knowledge that the efforts would be undertaken. (RB 303.)

Respondent misses the point. The trial court never made any inquiry or provided an opportunity for a hearing of the *Brady* claim. The motion for a new trial was denied on the completely specious ground that the motion included "no enumeration or explanation of the alleged misconduct of the prosecution whatsoever." (66 RT 10248.) Trial counsel was exceedingly clear about the factual basis for his motion. Plainly, counsel did not believe it was possible that a career criminal facing "Three Strikes" life sentencing could have received a "credit for time served" sentence unless there had been an undisclosed bargain relating to the witness's testimony in the defendants' cases. The court simply disregarded counsel's argument and failed to hold any inquiry, let alone an adequate inquiry to

develop and examine the facts. It is not true that counsel failed to articulate any factual basis for the motion.

Furthermore, the fact that the trial prosecutor represented to the court that the deputy district attorney who handled the witness's case had objected to sheriff's request for lenient sentencing does not rule out the possibility that the witness testified because of an undisclosed promise of lenity by some other agent of the state. A prosecutor's duty to disclose impeachment evidence to the accused extends to information known only to the police or other government agents. (*Kyles v. Whitley* (1995) 514 U.S. 419, 438 [131 L.Ed.2d 490, 115 S.Ct. 1555]; *Giglio v. United States, supra,* 405 U.S. 150; *Jackson v. Brown* (9th Cir. 2008) 513 F.3d 1057, 1072.) "A defendant's opposing party in a criminal proceeding is not the state's attorney but 'the state' itself." (*United States v. Castillo-Basa* (9th Cir. 2007) 483 F.3d 890, 904.) Impeachment evidence possessed by an agency of the state is possessed by the state for *Brady* purposes, even if the state's attorney has not received it. (*Ibid.*) Even if no specific deal was promised, an undisclosed promise by sheriff's department deputies "of a letter or phone call, or a vow to use one's best efforts to secure a deal" would be sufficient to establish a violation of *Brady*. (*Hovey v. Ayers* (9th Cir. 2006) 458 F.3d 892, 919; see also, *United States v. Butler* (9th Cir. 1978) 567 F.2d 885, 888, fn. 4.)

The facts presented by defense counsel at the hearing of the motion for new trial established a *prima facie* case of *Brady* error. The prosecutor conceded that the sheriff's department had successfully urged lenity on witness 15's behalf shortly after the witness testified against appellant at the guilt phase trial. The sheriff's department is an arm of the government to whom the state's obligation of disclosure applies. Under the circumstances,

the trial court should at least have held a hearing to determine whether there had been any communication between witness 15 and members of the sheriff's department, or members of the sheriff's department and the sentencing court, and if so, to probe the nature of the communication and when such communication occurred.

D. Assuming Witness 15 Testified Pursuant To An Undisclosed Promise Of Lenity, The Error Would Warrant Reversal Of The Entire Judgment.

Respondent devotes considerable argument to explaining why a *Brady* violation involving nondisclosure of inducements offered to witness 15 for his testimony could not have affected the outcome of the trial. (RB303-304.) The argument is disingenuous.

Respondent asserts that impeachment evidence is not "material" evidence within the meaning of *Brady*'s disclosure requirement unless the unimpeached witness provides the only evidence linking the defendant to the crime. (RB 303.) This is not the standard employed by reviewing courts to assess the prejudice caused by a *Brady* violation. The question is whether, despite the prosecutor's misconduct, the defendant received a trial "resulting in a verdict worthy of confidence." (*Kyles v. Whitley, supra,* 514 U.S. at p. 434.) "'A defendant need not demonstrate that, after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.'" (*Banks v. Dretke* (2004) 540 U.S. 668, 698-699 [157 L.Ed.2d 1166, 124 S.Ct. 1256]; internal citation omitted.)

Contrary to respondent's assertion, witness 15 played a huge role in appellant's conviction and death sentence. (See, 56 RT 8708-8850.) The

witness testified at length about victim Moreno's history with the Mexican Mafia, Moreno's relationship with Raymond Shyrock, Shyrock's relationship with appellant, and appellant's allegiance to the Mexican Mafia. He provided the lion's share of testimony relied upon the People to establish a motive for the killings of Moreno and Aguirre. Witness 15 testified that his brother, Moreno, had dropped out of the Mexican Mafia in 1983, making the brother an ongoing Mafia target for murder, and that Aguirre had incurred the wrath of the Mexican Mafia by committing robberies of Mafia drug dealers. He also testified regarding Shyrock's post-crime extrajudicial statements regarding Aguirre having to pay for "disrespecting" Shyrock and robbing Mafia connections. (56 RT 8752.)

Additionally, witness 15 was the only witness to place appellant in the home of the victims on the afternoon before the killings took place. He testified that appellant suspiciously dropped by the Moreno household and furnished the occupants some free heroin – evidence which was relied upon by the district attorney to persuade the jury that appellant had "set up" the murders for the Mexican Mafia. The district attorney argued that if not a part of a setup, appellant would have to explain: "Why Maciel went to the crime scene that afternoon other than to prepare the Sangras to commit the murders [sic]." (62 RT 9672, 9741.) In addition, witness 15 testified that, when appellant purportedly visited the victims on the day of the murders, appellant stood facing the partially open sliding glass doors at the rear of the house. At the time, three children were in the house with victim Maria Moreno watching television in the living room; two children were in the back yard playing on the swings. According to witness 15, the children were visible in the yard from where appellant was standing. (56 RT 8734-8735, 8738-8739.) From this evidence, the jury was invited to conclude

that appellant dispatched the assassins to the Moreno home to commit slaughter in callous disregard of the children whom he knew were living there.

At trial, witness 15 admitted that he had been in and out of prison on numerous occasions, and that he made his living stealing from others to support his heroin drug habit. This witness acknowledged that he was facing a "Three Strikes" sentence of 25 years to life, but insisted that the "district attorney's office" had given him no help "whatsoever." (56 RT 8712, 8813.) He claimed that he was testifying to vindicate the murders of his four murdered family members, not because he had any expectation at all of obtaining a "deal." (56 RT 8814-8817.) During closing argument the prosecutor emphasized that witness 15 had been given nothing for his testimony, "absolutely nothing." (62 RT 9727.)

Respondent insists that, even if a *Brady* violation occurred, the error was not prejudicial. It is asserted that witness 15's testimony made little difference in the overall strength of the evidence against appellant because his testimony was "corroborated by other evidence linking appellant to the charged crimes." (RB 303.) This argument conveniently ignores the facts. Without witness 15's testimony, there was only a thin connection, barely any evidence, associating appellant to the undisputed killers: Palma, Torres, Valdez, Logan and Ortiz. The sole remaining evidence of appellant's connection to the murders – other than guilt by association with Raymond Shyrock – was (1) witness 14's highly dubious, ever-changing, and hotly contested claim that appellant left in the middle of his son's baptismal party to meet with Jimmy Palma, and (2) records showing a series of calls made from the phones of Sangra gang members to appellant's pager. There was no other evidence to corroborate witness 15's claim that it was appellant

who introduced several of the killers to the victims just hours before the murders.

In *In re Miranda* (2008) 43 Cal.4th 541, the prosecutor's similarly withheld from the defense the fact that several prosecution witnesses were provided benefits, including favorable dispositions in unrelated criminal matters, in return for their willingness to testify against the defendant. (*Id.*, at p. 546.) This Court held that the failure to reveal favorable arrangements reached with prosecution witnesses violated prosecutors' *Brady* obligations. (*Id.*, at p. 577.) Moreover, this Court found prejudice – that there was a reasonable probability that the outcome of the defendant's trial would have been different, absent the *Brady* violations. (*Ibid.*)

If in fact witness 15 was promised assistance from members of the sheriff's department in connection with the "Three Strikes" charges that were pending, it would have shed an entirely different light on his uncorroborated testimony that appellant brought Sangra gang members to the victims' home just a few hours before the victims were gunned down. Accordingly, this is a classic case in which impeachment evidence could have made the difference between conviction and acquittal. (*Napue v. Illinois* (1959) 360 U.S. 264, 269 [3 L.Ed.2d 1217, 79 S.Ct. 1173]; *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 51 [94 L.Ed.2d 40, 107 S.Ct. 989].) Assuming appellant's allegation of a *Brady* violation is true, one cannot "plausibly deny the existence of the requisite 'reasonable probability of a different result' had the suppressed information been disclosed to the defense." (*Banks v. Dretke, supra,* 540 U.S. at p. 703; *In re Miranda, supra*, 43 Cal.4th 541.)

PART 2: PENALTY PHASE ISSUES

XVI

REPLY TO RESPONDENT'S ARGUMENT XVI: APPELLANT'S CLAIMS REGARDING JUDICIAL AND PROSECUTORIAL MISCONDUCT ARE MERITORIOUS AND SHOULD NOT BE DEEMED FORFEITED.

A. Legal Principles Of Prosecutorial Misconduct:

Appellant does not dispute respondent's hornbook recitation of the law governing prosecutorial misconduct claims. Rather, he disputes application of the law to the facts of this case.

B. Appellant's Prosecutorial Misconduct Claims Should Not Be Deemed Forfeited.

It is true that trial counsel failed to object to instances of prosecutorial misconduct during the penalty phase arguments. It is equally true that this Court has often held that such claims are forfeited by the failure to object and request a curative admonition. (RB 310.)

In the AOB, appellant asked this Court to address his prosecutorial misconduct claims on the merits based on exceptions to the waiver rule. Because of the court's discourteous and disparaging treatment of trial counsel throughout the trial (see, AOB, Argument XIII), counsel may reasonably have wished to avoid another confrontation with the court that might provoke another disparaging commentary. (*People v. Sturm, supra,* 37 Cal.4th at p. 1237.) Accordingly, he may reasonably have chosen not to object and incur the court's wrath when the prosecutor inaccurately described what it would be like for appellant to spend his life behind bars. (65 RT 10133; see, AOB 232-234.)

In addition, the prosecutor's invitation to jurors to close their eyes

and experience the emotionally and physically painful deaths of Maria and the two children was so inflammatory as to be well beyond the curative powers of the court. (65 RT 10137-10138; see, *People v. Kirkes* (1952) 39 Cal.2d 719, 726; *Garron v. State* (Fla. 1988) 528 So.2d 353, 358; see also, *State v. Rhodes* (Mo. 1999) 988 S.W.2d 521, 528-529.) Graphically detailing the crime as if jurors were victims is regarded as grossly improper because it can only arouse fear in the jury, unduly infecting the jury's decision with passion. (*State v. Storey* (Mo. Banc. 1995) 901 S.W.2d 886, 901.)

In all other respects, arguments in favor of applying an exception to the waiver rule have been adequately addressed in the AOB and will not be reiterated here.

C. Appellant's Contentions Regarding Alleged Prosecutorial Misconduct Should Not Be Dismissed as Meritless.

Respondent argues that the statements assigned as misconduct were well within the "wide latitude" afforded prosecutors during closing argument. (RB 311.) Respondent specifically argues that the prosecutor's argument was proper, insofar as it emphasized appellant's potential to harm others while in prison. (RB 312.) However, appellant's assignment of misconduct does not regard the district attorney's arguments focusing on appellant's behavior in prison. Rather, he asserts that it was misconduct for the prosecutor to argue, in essence, that, if appellant received a life sentence, he would be allowed to spend the remainder of his life pleasantly amusing himself. (AOB 232-233.)

There was no evidence introduced at either phase of the trial

regarding conditions in prison under a sentence with life without parole. According to this Court, evidence of the conditions of confinement that a defendant will experience if sentenced to life imprisonment without parole is "irrelevant to the jury's penalty determination because it does not relate to the defendant's character, culpability, or the circumstances of the offense." (*People v. Quartermain* (1997) 16 Cal.4th 600, 632; cf. *People v. Mason, supra,* 52 Cal.3d at pp. 960-961.) It was misconduct for the district attorney to refer to such facts, to the extent not established by the evidence. (*People v. Hill, supra,* 17 Cal.4th at p. 827; *People v. Hall* (2000) 82 Cal.App.4th 813, 816.)

Empirical studies of mock and actual capital jurors have shown that jurors in many states, including California, tend to underestimate the reality and severity of a sentence of life without the possibility of parole. Researchers report that ". . . despite being told by trial judges in California that a life sentence means life without parole, only 18.4% of the 152 capital jurors . . . indicated that they believed capital murderers given a life sentence would usually spend the rest of their lives in prison." (Steiner, Bowers & Sarat, *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness* (1999) 33 Law & Soc. Rev. 461, 499; see also, Bowers & Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing* (1999) 77 Texas L. Rev. 605, 653, fn. 220.) The prosecutor's reference to an illusionary panoply of "privileges" (see, AOB 233-234) artificially reinforced misconceptions about life imprisonment held by many capital jurors. The argument was misleading, highly prejudicial and would have tipped the sentencing process toward a death verdict by implying that life imprisonment without parole

was not a real or severe punishment.

Respondent suggests that the comments about prison life were so "brief and mild" that they could not have caused any prejudice, standing alone. (RB 313.) As authority for this proposition, respondent cites *People v. Huggins* (2006) 38 Cal.4th 175, 253, in which the prosecutor offered argument regarding the benefits the defendant would receive under a sentence of life without parole. In *Huggins*, this Court did not address the propriety of the argument. Instead, based on the defendant's lack of an objection, this Court surmised that Huggins' defense counsel may have preferred to offer the defendant's "bleak vision of the tribulations attendant to a lifelong prison sentence than to cut off discussion on the subject by objecting to the prosecutor's remarks." (*Ibid.*)

This case is manifestly distinguishable. Here, when defense counsel attempted to respond to the prosecutor's argument by talking about the dire conditions of confinement at Pelican Bay Prison (65 RT 10150), the trial court interrupted trial counsel, and sustained its own objection based on the lack of any evidence showing prison conditions. (65 RT 10151.) Hence, even assuming appellant's counsel did not object because he intended to pursue the same strategy that this Court imputed to trial counsel in *Huggins*, this strategy was thwarted by the court. The trial court's disparate treatment of prosecution and defense in this instance is among the grounds raised for asserting judicial misconduct. (See, AOB and Reply Argument XVI.)

Respondent also refers to *People v. Bradford* (1997) 14 Cal.4th 1005, 1063-1064, as support for the proposition that the misconduct, if any, was mild. However, in *Bradford*, the alleged misconduct was a prosecutor's argument regarding the defendant's future dangerousness to "female guards in prison," despite the lack of evidence that any female

guards worked in the prison. In *Bradford*, the defense attorney objected, and even though the trial court overruled the objection, the prosecutor refrained from any further argument along those lines. Here, the prosecutor misleadingly told the jury that in prison appellant would have access to recreational facilities and activities including basketball, lifting weights, watching television and movies, reading magazines, visiting the law library and having visitors. (65 RT 10133.) When defense counsel tried to respond by painting a more realistic and bleak picture the conditions of confinement (see, AOB 233-234), his argument was short-circuited by the court.

Respondent also argues that it was not misconduct for the prosecutor to invite the jury to experience what the victims were feeling during the murders. (RB 313.) More specifically, respondent asserts that it was not misconduct for the prosecutor to resort to reading a passage from Gaylin, *The Killing of Bonnie Garland.* (RB 313.) Appellant is well aware that this Court has consistently condoned prosecutors' use of this particular literary reference in closing argument, to emphasize the absence of the victims from the courtroom. (See, *People v. Cook, supra,* 39 Cal.4th at p.526, fn. 8; *People v. Clark* (1993) 5 Cal.4th 950, 1033-1034, fn. 41; *People v. Gurule* (2002) 28 Cal.4th 557, 658-659, fn. 32; *People v. Rowland, supra*, 4 Cal.4th at p. 277, fn. 17.) Quoting from Gaylin does not automatically make the rest of the prosecutor's argument proper, however.

Here, the prosecutor's use of passages from *The Killing of Bonnie Garland* was preceded by extraordinarily graphic arguments, such as asking the jury to imagine what it felt like to Maria Moreno "when the bullet exploded in her brain." (65 RT 10137.) The district attorney also invited jurors to consider what it felt like for Ambrose Padilla, the baby, to close

his eyes in terror and fear, as a bullet passed through his eyelid, and for Laura Moreno to reach for her mother as her "last act" while she lay dying on the floor. (65 RT 10137-10138.) This is precisely the type of inflammatory argument that so many courts have condemned as improper. For example in *State v. Rhodes, supra,* 988 S.W.2d 521, a death judgment was reversed where the prosecutor argued, *inter alia*:

> Try, try just taking your wrists during deliberations and crossing them and lay down and see how that feels (demonstrating). Imagine your hands are tied up. . . . . [¶] And ladies and gentlemen, you're on the floor, and you're like that, with your hands behind your back, and this guy is beating you. Your nose is broken. Every time you take a breath, your broken rib hurts. And finally, after you're back over on your face, he comes over and he pulls your head back so hard it snaps your neck . . . .[¶] Hold your breath. For as long as you can. Hold it for 30 seconds. Imagine it's your last one.

(*Id.*, at p. 528; see also, *State v. Williams* (Conn. 1987) 529 A.2d 653, 665, fn. 13; *State v. Combs* (Oh.1991) 581 N.E.2d 1071, 1076-1077; *Von Dohlen v. State* (S.C. 2004) 602 S.E.2d 738, 743-745.)

Respondent cites *People v. Wrest* (1992) 3 Cal.4th 1088, 1107, for the proposition that it is not misconduct for a prosecutor to exhort the jury to imagine what is going on in the minds of the victims and to imagine what impact the defendant's acts had on the victims. Also cited for the same general proposition is *People v. Edwards* (1991) 54 Cal.3d 787, 839. (RB 313.) The *Wrest* and *Edwards* cases do not involve the kind of visually graphic arguments, painting the victims' imagined agony in detail, that were used in this case, however. The prosecutor did much more than just ask jurors to imagine how the victims must have felt.

As a general rule, this Court has given prosecutors great latitude to

invite jurors to put themselves in the place of the murder victims and imagine their suffering. (See, e.g., *People v. Dykes* (2009) 46 Cal.4th 731, 794.) However, even if at the penalty phase of a death penalty trial, prosecutors may appeal to jurors to view the crime through the eyes of the victim, emotion must not be permitted to reign over reason. Courts have a duty to guard against prejudicially emotional argument that invites an irrational, purely subjective response on the part of jurors. (*People v. Jackson* (2009) 45 Cal.4th 662, 691; *Gardner v. Florida* (1977) 430 U.S. 349, 358 [51 L.Ed.2d 393, 97 S.Ct. 1197].) By asking jurors to imagine in detail the agonizing physical and emotional sensations experienced by the female victim and children, the prosecutor in appellant's case crossed the line. He effectively invited jurors to decide the sentence based on revulsion and pity over the fate of these innocents, and to disregard the very tenuous evidence of appellant's connections to the crimes. (See, e.g., *Garron v. State, supra,* 528 So.2d at pp. 358-359; *State v. Kleypas* (Kan. 2001) 40 P.3d 139.) The misconduct was, accordingly, prejudicial.

D. The Legal Principles Governing Judicial Misconduct:

Respondent concedes that a court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense, or give the impression the court is allying itself with the prosecution. (RB 314.) That is precisely what occurred in this case. The trial court engaged in a pattern of misconduct at the guilt phase, including the eight instances described in the AOB, in which counsel was disparaged, and the court appeared to ally itself with the prosecutor. (See, AOB 208-211.) At the penalty phase, the court committed misconduct on several more occasions. (See, AOB 239-244.)

E. Appellant's Assignments Of Judicial Misconduct Should Not Be Treated As Forfeited.

Respondent makes the familiar argument that appellant's claims of judicial misconduct have been forfeited by trial counsel's failure to object. (RB 317.) Respondent incorporates by reference the "forfeiture" arguments advanced in the Respondent's Brief with respect to appellant's claims of guilt-phase judicial misconduct. (RB 317.)

Anticipating respondent's waiver arguments, appellant argued in the AOB the reasons why this Court should address appellant's judicial misconduct claims on the merits, despite counsel's failure to object. (AOB 215-216, 244-245.) Rather than belabor the same points again, appellant incorporates by reference those arguments, as well as the arguments against forfeiture made in Argument XIII of this Reply.

F. Appellant's Claims Of Penalty Phase Judicial Misconduct Are Meritorious.

Respondent argues, alternatively, that the trial court did not commit any penalty phase misconduct. (RB 317.) First, it is asserted that the trial court was within its discretion to impose reasonable limits upon counsel's argument referring to the deprivations appellant would suffer at Pelican Bay Prison. (RB 317.) Respondent ignores the substance of appellant's complaint. The trial court allowed the prosecutor – despite a lack of evidence -- to tell the jury that appellant would have access to "basketball, weights, television, movies, magazines, law library, [and] visiting privileges" while in prison. (65 RT 10133.) When counsel attempted to tell the jury that, *au contraire*, appellant would be isolated in his cell for 23 hours a day, the court immediately interrupted him, told the jury this was

"not always the case," and that counsel's statements did not qualify as evidence. (65 RT 10151.) It is the court's discriminatory treatment of defense counsel that amounts to misconduct. (AOB 240.)

Respondent argues that it was improper for trial counsel to comment on the security conditions at Pelican Bay prison, because such matters are not judicially noticeable, and are drawn from "common knowledge." (RB 317.) Again this misses the point. The court did not sustain its own objection when the prosecutor talked about prison conditions for life prisoners. It only did so when Mr. Esqueda raised the subject of conditions in prison.

Moreover, the prosecutor devoted much of his penalty phase argument to discussing prior violent acts committed by appellant while he was confined in county jail. (65 RT 10133-10135.) The district attorney argued that "custody does not inhibit this man." (65 RT 10134.) He further asked jurors to imagine whether they would want their sons, daughters, husbands or wives working "anywhere near this man if he is sentenced to life imprison." (65 RT 10136.) He asserted that imposing a life sentence would be granting appellant "a license to kill." (65 RT 10136.) Conditions of confinement in a county jail are far different from a maximum security prison. In all fairness, defense counsel should have been given latitude to respond by arguing that appellant, if confined in a cell for 23 hours a day, would not behave as he allegedly did in the county jail. (*People v. Mason, supra,* 52 Cal.3d at pp. 960-961; cf. *People v. Quartermain, supra,* 16 Cal.4th at p. 633.)

Respondent argues that it was not misconduct for the judge to interrupt to correct defense counsel's alleged misstatement of the law when he argued that the "United States Supreme Court has held that the death

penalty is not cruel and unusual punishment because the jury has unbridled discretion to select the appropriate penalty." (65 RT 10143.) Underlying respondent's argument is the assumption that sentencing juries may not exercise "unbridled" discretion. (RB 318.) In fact, in California, once a defendant has been determined by the jury to be a member of the class made eligible for the death penalty by statute, the jury is given "unbridled discretion" to impose a life or death sentence. (*People v. Moon* (2005) 37 Cal.4th 1, 41; *People v. Vieira* (2005) 35 Cal.4th 264, 303; *California v. Ramos* (1983) 463 U.S. 992 [77 L.Ed.2d 1171, 103 S.Ct. 3446].) Accordingly, there was no reason to interrupt trial counsel to "correct" a misstatement of the law.

Respondent also argues that the trial court's momentary interruption to correct defense counsel was not discourteous or disparaging; nor did it indicate bias, or suggest that the court was allying itself with the prosecution. (RB 318.) Appellant disagrees. The tone of the court was extremely disparaging. "I hate to interrupt, but I will, however, when counsel misstates the law. You do not have unbridled discretion to do whatever you feel like on a whim. . . ." (65 RT 10143-10144.) The court could have called Mr. Esqueda to the bench, and invited him to explain or clarify the alleged "misstatement," and/or politely informed the jury that its discretion should be guided by the factors enumerated in the instructions. Instead, the judge assumed the typically disrespectfully and demeaning attitude toward counsel that he demonstrated many other times during the trial. (See, AOB 208-211.)

G. The Cumulative Effect Of The Errors Undermined The Fairness Of The Trial And The Reliability Of The Resulting Death Judgment.

Without reference to specific instances of prosecutorial or judicial misconduct, respondent seeks to paint judicial and prosecutorial misconduct as harmless by (1) ignoring its effect on the jury, and (2) disregarding the pattern of behavior and its cumulative harm over the course of appellant's trial. (RB 319.) It suffices to say that the prosecutor's entreaty to jurors to experience the deaths of Maria Moreno and the children inflamed the jury's passions, creating a climate in which the jury could not have dispassionately weighed the aggravating circumstances against mitigating factors. One indication of this is the fact that the jury returned a verdict finding appellant guilty of intentionally causing the death of five-year-old Laura Moreno, and used that murder count in finding the multiple murder special circumstance allegation true, even after the prosecutor had conceded in guilt phase argument the absence of evidence proving that appellant intended to cause the death of either of the children. (3 CT1: 719, 738-739; 62 RT 9660.)

Secondly, the court diminished counsel's credibility in the eyes of the jury by audibly scolding him about the absence of law, or facts, to support his arguments in favor of a life sentence. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1109.) Unfortunately, similar disparaging treatment occurred many times during the guilt phase of the trial, having cumulatively detrimental impact on the jury's view of defense counsel and thus of his client at both phases of the trial. (*People v. Sturm, supra,* 37 Cal.4th 1218.)

The prosecutor's inaccurate assertion – that Maciel, if not executed, would enjoy a lifetime of basketball, weights, television, movies, magazines, law library, and visiting privileges – was left uncorrected.

Conversely, jurors were forcefully and inaccurately admonished that it was untrue that if imprisoned for life, Maciel would live in isolation for 23 hours per day. (*People v. Hill*, 17 Cal.4th at 827-828.) Jurors would have been left with the impression that the penalty of life without parole amounted to no punishment at all, rather than death in prison after years of isolation and deprivation. The trial court's disparate treatment of prosecution and defense irreparably distorted the penalty phase deliberations, depriving appellant of a fair trial and a constitutionally reliable death judgment. (See, *United States v. Young*, *supra*, 86 F.3d 944.)

Furthermore, failure by the trial court to rein in erroneous and emotion-laden prosecution arguments while directly rebuking defense counsel for allegedly arguing unproven prison conditions and "incorrect" legal principles resulted in a lopsided process. The jury's attention was improperly focused on emotional aggravation, despite considerable doubt regarding appellant's individual culpability. Prosecutorial and judicial misconduct thus skewed the weighing process in violation of appellant's right to a rational, non-arbitrary sentencing decision. (*Ibid.*)

Additional reasons why the misconduct was not harmless are more fully explained in the AOB. Arguments discussing prejudice caused by judicial and prosecutorial misconduct are incorporated by reference rather than repeated in full again here. (See, AOB 215-216, 246-247.)

XVII

REPLY TO RESPONDENT'S ARGUMENT XVII: APPELLANT'S CONTENTION THAT THE TRIAL COURT IMPROPERLY DENIED HIS REQUEST TO EXCUSE JUROR NO. 2 FOR CAUSE IS MERITORIOUS AND SHOULD NOT BE DEEMED FORFEITED.

A. Proceedings Below:

The proceedings below are adequately summarized in the AOB, Argument XVII, at pages 248-249. It suffices to say that trial counsel moved to excuse juror 2 for cause after it was revealed that the juror was acquainted through his employment with two penalty phase prosecution witnesses, Deputies Poindexter and Looney. Juror 2 worked on the same shift, and occasionally ate lunch with the deputies in the cafeteria at the Los Angeles County Jail. The trial court denied the motion to excuse juror 2, but indicated that trial counsel could "reopen" if counsel had anything he wanted the court to "read." (63 RT 9831-9832.) Counsel never moved to "reopen."

B. The Issue Should Not Be Deemed Forfeited By Trial Counsel's Failure To Move To Reopen.

Respondent asserts that appellant forfeited his right to appeal from the denial of the motion to excuse juror 2 because his trial attorney did not take the trial court up on its offer to "reopen" the matter. (RB 322.) Cases cited by respondent to support this contention are inapplicable. Not a single one of the cited authorities addresses forfeiture in the context of a mid-trial motion to excuse a juror for cause.

In *People v. Panah* (2005) 35 Cal.4th 395, 436 (RB 322), the court appointed two psychiatrists to examine the defendant after he entered a not guilty by reason of insanity plea. Defense counsel asked for a third

psychiatrist to be appointed because the defendant had refused to cooperate with the first two. The court denied the request without prejudice to renew the motion. The defendant did not renew the motion and ultimately withdrew his insanity plea. On appeal, the defendant asserted that the refusal to appoint a third mental health expert was error. This Court held that the defendant's unjustified refusal to cooperate with the first two psychiatrists did not require the court to appoint another expert. (*Id.* at p. 436.) It is difficult to see how *Panah* supports finding a waiver of the issue in this case.

In *People v. Davenport* (1995) 11 Cal.4th 1171 (RB 323), a defendant moved to quash the entire jury venire on the ground that Hispanic jurors were underrepresented. Rather than litigate the motion alone, the defendant asked to have his motion joined with a similar motion pending in another case. Because the other case was not going to be ready for a hearing on the venire challenge until after the date that the defendant's case was set for trial, the court denied the motion to join. The court did so without prejudice to renew the joinder motion, in the event that the defendant's case had to be continued for some other good cause.

Defense counsel n *Davenport* never pursued his motion to quash the venire, nor did he renew his motion to join the other defendant's venire challenge at a later date. Nevertheless, the defendant's trial did not commence for nearly three years. On appeal, the defendant asserted, as a ground for reversal, denial of his right to a jury trial drawn from a fair cross-section of the community due to the underrepresentation of Hispanic jurors. Not surprisingly, this Court found no abuse of discretion on the part of the trial court in denying without prejudice the defendant's motion to continue. (*Id.* at pp. 1195-1196.)

This case is clearly distinguishable from the facts of the *Davenport* case. Here, there was no motion to continue and no motion to join another defendant's motion to challenge either a juror, or the entire jury venire. Rather, defense counsel made an unequivocal motion to dismiss juror 2 for cause based on the juror's disclosure of a potentially biasing relationship with two penalty trial witnesses. The court unequivocally denied the motion, leaving room to reopen only in the event counsel had additional evidence to offer.

Two of the cases cited by respondent on the forfeiture issue do not even address the issue of forfeiture. In *People v. Gurule, supra,* 28 Cal.4th at pp. 613-614 (RB 323), the defendant moved to strike a witness's testimony. The court denied the motion, saying the motion was premature because the prosecution had not yet finished its presentation of the case, and it was possible that the relevance of the witness's testimony would be established by evidence yet to come. The court left the door open for the defense to renew the motion to strike, if there was insufficient evidence presented to link the defendant to the testimony. This Court never addressed the Attorney General's forfeiture argument, but rather, ruled on the merits that the court had broad discretion to determine the relevance of the evidence

People v. Catlin (2001) 26 Cal.4th 81 (RB 323), involves a chain-of-custody objection. The defendant objected to expert opinion testimony based on the lack of testimony establishing a complete chain-of-custody. The motion was denied. The defendant did not renew his motion again after several more chain-of-custody witnesses testified. In *Catlin*, this Court did not address the Attorney General's forfeiture argument. Rather, the Court rejected on the merits the defendant's chain-of-custody argument

raised on appeal. (*Id.* at pp. 133-134.)

In *People v. Hinton, supra,* 37 Cal.4th at p. 860 (RB 323), appellant alleged that the trial court, during jury *voir dire*, had erred in refusing to excuse six jurors for cause. However, the defendant had only challenged one of the six jurors for cause at trial. This Court held that the defendant failed to preserve his appellate challenge to five of the six allegedly biased jurors. Regarding the sixth juror, this Court held that the defendant had failed to preserve the issue on appeal since he still had 12 unused peremptory challenges available when he accepted the jury. (*Ibid.*)

These cases bear so little resemblance to the circumstances presented in appellant's case that the reader may well be forced to wonder why the Attorney General bothered to cite them. Here, the narrow issue is whether the trial court erred in denying appellant's motion to excuse juror no 2 for cause. The court conducted a hearing and ruled on the motion. Counsel could have renewed his motion to dismiss juror 2, but doing so would have been futile unless based on some additional evidence. Respondent's repeated invocation of the concept of forfeiture is mere ritual and beside the point of appellant's contention here.

C. The Trial Court Erred In Denying Appellant's Motion.

Respondent asserts that the trial court did not error in refusing to excuse juror 2 for cause. (RB 323-327.) Appellant disagrees, and respectfully suggests the Court will find little support for respondent's position in cases cited in the RB.

Respondent cites *People v. Ledesma* (2006) 39 Cal.4th 641,668-670 (RB 323-324), and argues that the case involves a substantially similar claim which was rejected by this Court. The facts of *Ledesma* are not like

those presented here. *Ledesma* arises in the context of a challenge for cause advanced during jury *voir dire*. The defense attorney challenged a panelist because he worked in the main jail and was aware that the defendant was in custody there. Both parties stipulated that the juror could be excused for cause but the court refused to excuse him. The trial court's exercise of discretion was upheld on appeal.

Without explaining the relevance of the cases, respondent also relies on *People v. Bradford* (1997) 15 Cal.4th 1229, 1336, and *People v. Valdez* (2004) 32 Cal.4th 73, 121. Both of these cases reject claims that defendants were prejudiced by revelations that the defendant was in custody during trial. The common thread running through the *Ledesma*, *Bradford* and *Valdez* cases appears to be that a defendant is not necessarily prejudiced when jurors learn of a defendant's custodial status during trial. But in none of these cases did a trial court refuse to excuse a juror acquainted with key prosecution witnesses, as the court did here.

People v. Farnam (2002) 28 Cal.4th 107, 132, is cited for the general proposition that a trial court's decision will be accepted on appeal if the record shows that a juror has given conflicting or ambiguous statements. (RB 323.) Appellant does not quarrel with this general principle, only with its application to the facts of this case.

In *Farnam*, the defendant appealed the trial court's denial of a motion to excuse several jurors for cause based on their pro-death penalty bias. This Court rejected the claim on appeal, primarily because the defendant had accepted the jurors and alternates while he had several unused peremptory challenges remaining. (*Id.,* at p. 133.) Addressing the merits of the bias claim, this Court found the trial court's decision not to excuse the panelists was supported by the record. (*Id.,* at p. 134.) *Farnam*

bears no similarity to this case; *Farnam* did not involve jurors who work with, and sometimes dine with penalty phase witnesses.

People v. Kaurish (1990) 52 Cal.3d 648, 675, is mentioned for the general proposition that "qualifications of jurors challenged for cause are matters within the trial court's discretion that are seldom disturbed on appeal." (RB 327.) As a general principle, this may be true. However, *Kaurish* nevertheless provides little guidance with respect to this case; that case arose in the context of a defendant's challenge for cause to a juror who made conflicting statements about her attitude toward police witnesses during *voir dire*. The *Kaurish* case did not involve a juror acquainted with trial witnesses, but rather a juror with relatives employed in law enforcement who were not involved in the defendant's case.

Respondent cites *People v. Holt* (1997) 15 Cal.4th 619, 655, seemingly for the point that an excusal for cause is only appropriate if the juror's relationship to the case suggests "emotional involvement" in the case. (RB 325.) In *Holt*, the trial court dismissed a prospective juror after she revealed that she had a lawsuit pending against the district attorney. The juror denied that the lawsuit would affect her ability to be impartial. Defense counsel acquiesced, and did not voice any objection when the court decided to excuse the panelist. On appeal, Holt challenged the dismissal for cause, arguing that he was denied a juror with scruples about the death penalty who was otherwise qualified to be seated. (*Ibid.*) This Court rejected the contention on the merits, and also based on defense counsel's failure to assert in the trial court that the dismissal would deny him a death-penalty scrupled juror.

The differences between this case and the circumstances presented in *Holt* are obvious. *Holt* does not involve a court's refusal to excuse a juror

who admits having a significant acquaintance with two material penalty phase witnesses. Moreover, if *Holt* has any significance for this case at all, it is to confirm that a juror's denial of bias is not necessarily binding on a trial court when ruling on a motion to excuse for cause. (See, *People v. Tidwell* (1970) 3 Cal.3d 62, 72 [a juror's claim that he has the ability to be impartial "is of course not conclusive."].) The reasons for this are obvious.

> "Bias can be revealed by a juror's express admission of that fact, but, more frequently, jurors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence."

(*United States v. Allsup* (9th Cir. 1977) 566 F.2d 68, 71.)

In *United States v. Allsup, supra,* two prospective jurors revealed that they worked for one of the banks that the defendant was charged with robbing. The jurors did not work in the same branch that had been robbed. The trial court denied the defendant's motion to excuse the prospective jurors for cause upon obtaining assurances from the panelists that they would be able to decide the case fairly despite their employment. Thereafter, the defense attorney used up two of his peremptory challenges to excuse these jurors.

The Ninth Circuit Court of Appeals held that the trial court erred by denying the motion to excuse the bank employees for cause. (*Id.,* at p. 71.) The reviewing court explained:

> The potential for substantial emotional involvement, adversely affecting impartiality, is evident when the prospective jurors work for the bank that has been robbed. Persons who work in banks have good reason to fear bank robbery because violence, or the threat of violence, is a frequent concomitant of the offense. . . .The employment relationship coupled with a reasonable apprehension of

> violence by bank robbers leads us to believe that bias of those who work for the bank robbed should be presumed.

(*Id.*, at pp. 71-72.)

Respondent seeks to distinguish the *Allsup* case from appellant's case, referring to the absence of any apparent "emotional involvement" stemming from the juror's acquaintance with the two deputy-witnesses. In fact, the circumstances of this case are more similar to the *Allsup* case than different.

Deputy Poindexter testified about an incident in the jail, in which appellant used a spear to stab another inmate in the stomach. (63 RT 9890-9897.) Deputy Looney testified about a different incident in the jail, in which appellant was strip-searched and stabbing instruments known as "shanks" were found hidden in his thong sandals. (93 RT 9898-9903.) Both incidents involved acts of violence or potential violence. Juror 2 claimed a "close personal knowledge" of the deputies, because both worked the same shift as the juror worked doing "general maintenance." (63 RT 9828.) The juror admitted he had "had lunch with [Poindexter and Looney] in the same cafeteria," although he denied discussing appellant's case with them. (63 RT 9828-9829.)

Just as jurors who work in a bank that is robbed "have good reason to fear bank robbery," a maintenance worker whose job takes him into "every area of every floor of every module"[24] of a jail, has reason to fear violence at the hands of inmates who are incarcerated there. In a real sense, in this case, Deputies Poindexter and Looney were directly responsible for

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[24] During voir dire, juror 2, while still a prospective juror, indicated that he worked in "every area of every floor of every module" of the jail. (52 RT 8011.)

the safety of juror 2, as their jobs apparently included keeping the jail free of contraband and weapons that could be used to hurt other inmates or jail staff. Under such circumstances, the potential for "substantial emotional involvement, adversely affecting impartiality" was even greater than it was in the case of the bank employees in the *Allsup* case. In *Allsup*, personal acquaintanceships were not even involved; the jurors merely worked for a different branch of the same bank that was robbed. Here, the juror who was not excused for cause worked in the same jail facility on the same shift, and occasionally shared lunch with deputy-witnesses in the same cafeteria!

Respondent quotes the entirety of Code of Civil Procedure section 229, and argues that juror 2 did not meet any of the statutory grounds for finding "implied bias" as defined by the statute. (RB 325-327, fn. 116.) Respondent too narrowly construes the statutory language. A challenge for cause may be taken if the juror evinces "enmity against, or bias towards, either party." (Code of Civ. Proc., § 229, subd. (f).) Disqualifying bias should be presumed, as in *Allsup*, where the juror works in a place where alleged acts of violence by the defendant have occurred, and the juror might have a reasonable apprehension that he could be victimized in the work place by similar acts of violence. (*United States v. Allsup, supra*, 566 F.2d at p. 71.)

In this case, the fact that juror 2 worked alongside two important penalty phase witnesses – deputies charged with the responsibility of keeping other inmates and jail employees safe who witnessed alleged acts of violence by appellant – infected the whole process of penalty adjudication. (*People v. Williams* (1989) 48 Cal.3d 1112, 1130; accord: *People v. Tidwell, supra,* 3 Cal.3d at p. 74.) Appellant was denied his right to a fair penalty trial by a panel of impartial, indifferent jurors. (*Turner v.*

Louisiana (1965) 379 U.S. 466, 470 [13 L.Ed.2d 424, 85 S.Ct. 546].)

Additionally, although juror 2 denied bias, it is noteworthy that the court's supposed "inquiry" to uncover bias consisted of fewer than 10 extremely leading questions, taking up fewer than three transcript pages. (63 RT 9828-9830.) The questioning of juror 2 strongly hinted that the juror would not be excused so long as he had not had any "social" contact with the deputies, and had not overtly discussed the merits of appellant's case. (63 RT 9829-9829.) Under this type of questioning, it is extremely unlikely that juror 2 would have confessed any bias, or any inclination to give the deputies' testimony greater weight. (*United States v. Allsup, supra,* 566 F.2d at p. 71.) "Often such predilections are consciously not evident even to the one possession them and cannot be uncovered by . . . general questioning . . ." (*Commonwealth v. Klaspy* (Penn. 1991) 616 A.2d 1359, 1362.)

In another context, initial *voir dire*, courts have insisted that when jurors may harbor bias, in-depth questioning is essential to ferret out "deep seated prejudices they might harbor." (*Ibid.*) As the United States Supreme Court commented in *Morgan v. Illinois* (1992) 504 U.S. 719 [119 L.Ed.2d 492, 112 S.Ct. 2222], general, leading questions – like those asked of the trial court here – may allow a juror to attest "in all truth and candor" to their "fairness and impartiality" even though they harbor a bias inconsistent with impartial judgment in a particular case, because the "specific concern" which is the root of the bias was left "unprobed." (*Id.*, at p. 735.) In this case, the effect of juror 2's employment was just such a "specific concern." The court's few leading questions were hopelessly insufficient to provide any assurance of his impartiality.

For these reasons, in addition to the reasons previously set forth in

the AOB, the judgment must be reversed. (AOB 248-250.).

XVIII.

REPLY TO RESPONDENT'S ARGUMENT XVIII: THE TRIAL COURT ERRED BY REPLACING JUROR 1 WITH AN ALTERNATE DURING THE PENALTY PHASE OF THE TRIAL.

A. Proceedings Below:

The objections, motions, and rulings pertaining to this argument have been adequately summarized in the AOB, Argument XVIII, at pages 251-256, and in the RB, Argument XVIII, at pages 328-338.)

B. The Trial Court Erred By Dismissing Juror 1 Based On Her Stated Inability To Deliberate During The Penalty Phase Of The Trial.

Since respondent begins its response with a discussion of the applicable standard of review (RB 338-339), appellant will do the same. In *People v. Wilson* (2008) 44 Cal.4th 758, this Court recently discussed the standard of review applicable when a trial court decides to remove a juror pursuant to section 1089.

> Although we have previously indicated that a trial court's decision to remove a juror pursuant to section 1089 is reviewed on appeal for abuse of discretion (see, e.g., *People v. Leonard* [(2007) 40 Cal.4th 1370, 1409]), we have since clarified that a somewhat stronger showing that what is ordinarily implied by that standard of review is required. Thus, a juror's' inability to perform as a juror must be shown as a "demonstrable reality" (*People v. Cleveland* (2001) 25 Cal.4th 466, 474 . . ., which requires a "stronger evidentiary showing than mere substantial evidence" (*id.* at p. 488 (conc. opn. of Werdeger.)). As we recently explained in *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052 . . . "To dispel any lingering uncertainty, we explicitly hold that the more stringent demonstrable reality standard is to be applied in review of juror 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,* at p. 821; parallel citations omitted.) It is clear from this Court's discussion in *Wilson* that the "demonstrable reality" standard requires considerably more stringent review than for "abuse of discretion."

Respondent cites *People v. Cleveland, supra,* 25 Cal.4th 466, for the proposition that discharge is proper if the trial court finds as a "demonstrable reality" that the juror has become physically or emotionally unable to continue to serve as a juror. (RB 339.) Appellant respectfully suggests that this Court should apply the even more stringent standard of review used by the federal circuit courts in *United States v. Symington* (9th Cir. 1999) 195 F.3d 1080, 1087, and *United States v. Brown* (D.C. Cir. 1987) 823 F.2d 591, 596. Pursuant to those cases, if the record suggests "any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror." (*People v. Cleveland, supra*, 25 Cal.4th at p. 481, quoting *United States v. Symington, supra,* at p.1087.) "[O]therwise, 'the right to a unanimous verdict would be illusory.'" (*People v. Cleveland, supra,* 25 Cal.4th at p. 481, quoting *United States v. Brown, supra,* at p. 596.)

Appellant recognizes that this Court has thus far refused to adopt the rule applied in the federal *Brown and Symington* cases. (See, *People v. Cleveland, supra,* 25 Cal.4th at p. 484.) Appellant asks that this Court reconsider its decision not to do so.

In this case, the circumstances suggest a reasonable possibility that juror 1 harbored doubts about the sufficiency of the evidence to support a

death judgment. At one point, she actually told the court her opinion was leaning toward imposing a life sentence. (65 RT 10178; see also 65 RT 10173 ["I don't know if I can make, like, the right decision."]; 65 RT 10166 ["His life is depending on me."].) Her responses, rather than indicating a refusal to deliberate, show a juror struggling to do exactly that – make a wrenching decision.

In addition, this juror came forward to express her qualms not long after penalty phase deliberations had begun. The jury began deliberating at 1:30 p.m. on February 4, 1998. (65 RT 10156.) Jurors recessed at 4 p.m. and began deliberating again at 9 a.m the next day. (65 RT 10162-10163.) At 2:16 p.m., shortly after the jury's hour-and-a-half lunch recess, the court was advised that juror 1 wanted to address the court about her emotional distress during deliberations. (65 RT 10163-10164.) At this point, the jury had only been deliberating about penalty for fewer than six hours, although testimony had been taken for 15 days over a three-and-a-half week period.[25] Juror 1 stated she wanted to be excused at the beginning of deliberations – "while everybody is not really started on it yet" (65 RT 10166) – due to her trepidation about her ability to make the right decision on a life or death issue. The juror stated she had begun feeling anxious during the lunch hour the previous day, even before deliberations had actually started. (65 RT 10167.) The onset of anxiety about imposing a death verdict is "understandable given the consequences of [such a] vote." (*People v. Bennett* (2009) 45 Cal.4th 577, 623.)

Even if the "demonstrable reality" test is applied, the record does not establish juror 1's unwillingness or inability to perform the functions of a

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[25] Testimony was taken in 1998 on January 13, 14, 15, 16, 20, 21, 22, 23, 26, 27, 28, 29, 30, and February 2 and 3.

juror as a "demonstrable reality." The juror admitted nervous tension, confusion, and a tendency to be swayed by the arguments of others; at no time, however, did she say she would not continue deliberating, nor did she say she would not try to follow the court's instructions. In fact, in response to a court question about her ability to understand the instructions, juror 1 said that the other jurors had broken down the instructions for her, which had "helped make things clearer." (65 RT 10175.)

Even when the court asked a series of leading questions that seemed directed at getting the juror to articulate legal grounds for discharge, the juror continued to equivocate. She said she did not "think" she could decide the issue based on a weighing of aggravating circumstances and do so – in the court's words – "clear-headedly," or she did not "believe" she could decide the issue based on a "rational and clear headed" weighing of aggravation and mitigation. (65 RT 10176, 10177.) Asked if she had a doubt about this, the juror still did not answer directly. Rather, she said all she could feel was the "toll" it was taking on her. (65 RT 10176.) She was having difficulty keeping her mind from "wandering" while she was at work. (65 RT 10176.)

Despite respondent's lengthy quotation of the record (R 328-338), that record does not suggest that the juror was incapable of deliberating, or would refuse to deliberate at all. From the questions and answers as a whole, it appears that the juror was expressing doubt about the degree to which her deliberations would be "rational" and "clear-headed." Given that this juror had been exposed to a highly graphic and emotionally evocative portrait of the victims' last moments as imagined by the prosecutor (see, Argument XVI, A), such a reaction was to be expected. "The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis

does not constitute a refusal to deliberate and is not a ground for discharge." (*People v. Cleveland, supra,* 25 Cal.4th at p. 485, cited with approval in *People v. Wilson, supra,* 44 Cal.4th at p. 824; *United States v. Symington, supra,* 195 F.3d at pp. 1084-1087 [error to discharge juror whose age appeared to be in mid-70s merely because other jurors claimed she was confused and unfocused during deliberations].)

Furthermore, at the penalty phase of a capital trial, the jury's function is inherently moral and normative, not factual. It was up to juror 1 to rely on her own life experience to inform the life or death judgment. (*People v. Wilson, supra*, 44 Cal.4th at pp. 829-830.) The fact that juror 1 was finding it very difficult to choose the penalty of death because of her youth and inexperience, or other personal factors, did not make her incapable of continuing as a juror. (*People v. Stewart* (2004) 33 Cal.4th 425, 446-447; see *United States v. Symington, supra,* at pp.1084-1087.)

> As discussed above, proper grounds for removing a deliberating juror include the refusal to deliberate. The refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury.

(*People v. Cleveland, supra*, at p. 485.) That did not occur here.

Cases cited by respondent as supportive of the trial court's exercise of discretion are distinguishable from this case. (RB 339.) Many of the cases involve acts of misconduct by jurors, not mere emotional disability caused by anxiety about choosing penalty. (See, e.g., *People v. Ledesma,*

supra, 39 Cal.4th at pp. 742-743 [disobedience to court order not to discuss case]; *People v. Ramirez* (2006) 39 Cal.4th 398, 455-456 [sleeping juror]; *People v. Johnson* (1993) 6 Cal.4th 1, 21 [sleeping juror, and concealment of prior criminal charges].) Others involve outright refusals to deliberate or follow instructions. (*People v. Williams* (2001) 25 Cal.4th 441, 447.) Cases are also cited by respondent which affirm a trial court's exercise of discretion to retain jurors over defense objection. (See, e.g., *People v. Marshall, supra,* 13 Cal.4th at pp. 844-846.)

One of the cited cases involves a trial court's exercise of discretion to excuse a juror for job-related anxiety. (*People v. Fudge, supra,* 7 Cal.4th at pp.1098-1099.) In that case, however, immediately after a conversation with her employer, the juror said that anxiety over her job situation would affect her ability to deliberate in the case. In appellant's case, the dismissed juror said that weight of the life or death decision was making it difficult to concentrate at work, not that anxiety over her job was making it difficult to deliberate.

One case cited by respondent involves a juror who could not concentrate. (*Mitchell v. Superior Court* (1984) 155 Cal.App.3d 624.) Even this case is distinguishable from appellant's case. In *Mitchell,* during a burglary trial, a juror was exposed to the comments of a prospective juror who had been excused from serving. The excused juror's comments were critical of the effort to adjudicate the guilt of a black defendant before an all white jury. The juror who overheard the remark sent a note to the court indicating that, since hearing the comment, he could no longer take notes or listen to the testimony. The juror admitted he had missed some of the evidence, and had already started judging the defendant without hearing all of the evidence. (*Id.* at p. 626.) The court declared a mistrial because the

defendant refused to stipulate to a trial by 11 jurors. The Court of Appeal found no abuse of discretion on the part of the trial court in granting the mistrial because the juror had prejudged the case, and was no longer able to perform his duties.

Appellant's juror was excused during the penalty phase deliberations of a death penalty trial, not during the evidentiary phase of an ordinary felony trial. Here, the evidentiary phase of the trial was over. Hence, the juror was not missing out on evidence as a result of her professed inability to concentrate. Furthermore, the juror had not prejudged the case. Far from it, she was struggling with the inherently moral and normative life versus death penalty determination. Furthermore, in this case, in contrast with the *Mitchell* decision, this court does not simply look at whether the discharge of juror 1 was an abuse of discretion. Rather, heightened scrutiny of the trial court's judgment applies. (*People v. Wilson, supra,* 44 Cal.4th at p. 821.) In this case, for reasons previously stated, the court's decision cannot withstand that scrutiny.

D. The Trial Court Exceeded The Permissible Scope of Questioning.

In response to appellant's argument that the juror was merely yielding to subconscious pressure from the court, respondent asserts that the trial judge properly used leading questioning to inquire about juror 1's inability to deliberate. (RB 341.) Appellant respectfully suggests that the trial court's questioning went too far.

Consistent with *Cleveland*, any investigation into a juror's unwillingness or inability to continue "'must be conducted with care so as to minimize pressure on legitimate minority jurors.'" (*People v. Cleveland,*

supra, 25 Cal.4th at p. 478, internal citation omitted.)

> Although the provisions of Evidence Code section 1150 apply only to the postverdict situation and not to an inquiry conducted during jury deliberations, the numerous decisions discussed nonetheless support our conclusion that a trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the juror's deliberations. The inquiry should focus on the conduct of the jurors, rather than the content of their deliberations. Additionally, the inquiry should cease once the court is satisfied that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper ground for discharge exists.

(*People v. Cleveland, supra*, 24 Cal.4th at p. 485.)

In this case, nearly immediately, the judge began patronizingly asking the juror about her age, whether she still lived at home, whether she could sleep at night, and even whether she had been having difficulty looking at an exhibit during guilt phase closing argument. (65 RT 10167-10168.) The scope of the inquiry did not focus on what the juror was doing, i.e., whether she had been participating in deliberations, but rather, on other inappropriate matters, such as her immaturity, financial and emotional dependence on her parents, sleep deprivation and emotional response to guilt phase evidence. These inquiries necessarily encroached on the sanctity of the juror's deliberations. (65 RT 10167-10169.)

Juror 1's answers to this line of questioning did not clearly establish an inability or unwillingness to continue deliberating. Defense counsel correctly observed that everybody had "lost sleep" over this case, but that did not justify juror 1's removal as juror. (65 RT 10171.) The court, in contravention of *Cleveland, supra*, at p. 485, continued questioning the

juror, even though it was clear that she was still participating in deliberations and engaging in dialog with other jurors regarding the appropriate penalty. The court asked, "At one point you said that: This is too heavy. Something like that. What do you mean by that?" (65 RT 10173.) Juror 1 explained her worry that appellant's life was depending on her. She expressed uncertainty regarding whether she wanted a death judgment on her "conscience," but also expressed uncertainty about being unable to impose a sentence of life without parole. (65 RT 10173, 10175.)

The juror's affirmative responses to the court's leading questions, that she "thought" or "believed" she would be incapable of weighing the evidence "clear-headedly," came later. By this time, however, it would have been obvious to juror 1 that all she needed to do to be excused was to conform her answers to what the court seemed to be saying would suffice as grounds for excusal. (John H. Blume, Sherri Lynn Johnson, A. Brian Threlkeld, *Symposium: Probing Life Qualification Through Expanded Voir Dire* (2001) 29 Hofstra L. Rev. 1209, 1233-1234.) Jurors are extremely attuned to the power imbalance in the courtroom, and conform their answers to what they perceive judges are seeking. (See, Shuy, *How a judge's voir dire can teach a jury what to say* (Sage 1995) Discourse and Society, Volume 6(2): 207-222, at pp. 220-221 [discussing a technique commonly applied by judges involving inaccurate restatement of a juror's initial answer, leading the juror to adjust answers to match what he or she perceives is expected to him]; [http://das.sagepub.com].)

The palpable risk was that this lone juror, feeling she could not in good conscience vote for death, may have felt under great pressure to feign incapacity "so as to place the burden of decision on an alternate juror." (See, *United States v. Lamb* (9th Cir. 1975) 529 F.2d 1153, 1156.) This is

precisely why American Bar Association Criminal Justice Standard 15-2.9, governing alternate jurors, does not permit replacement of a juror once the jury has retired to consider its verdict.[26] (*United States v. Lamb, supra,* 529 F.2d at p. 1156.)

E. At Most There Existed Cause To Inquire Of Other Jurors Whether Juror 1 Was Capable Of Performing The Duties Of Juror; This Argument Was Not Forfeited.

1. Forfeiture:

Respondent asserts that appellant forfeited the argument, made in the alternative in Argument XVIII, E of the AOB, that the record at most would have justified a further investigation of the juror's inability to deliberate. (RB 342-343.) Respondent's argument assumes that this claim or error is not preserved because trial counsel did not ask the court to conduct a further hearing. Respondent's forfeiture argument should be rejected.

First and foremost, appellant maintains that the record as developed does not establish the juror's incapacity to deliberate, properly applying the heightened "demonstrable reality" standard. Second, at the conclusion of all of the trial court's questioning, counsel made it clear that he did not believe the juror was incapable of continuing to serve as a juror; he stood his ground and asked the Court to encourage juror 1 to "go back there and continue her deliberations." (65 RT 10180.) The court could have done as counsel asked, and directed the juror to do her best to deliberate in accordance with the court's instructions. Alternatively, the court could have inquired of one or more other jurors whether juror 1 was or was not

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[26] ABA Jury Trial Standard 15-2.9 can be found at http://www.abanet.org/crimjust/standards/jurytrial_blk.html.

appropriately engaging with other jurors in the deliberative process. (See, *People v. Wilson, supra,* 44 Cal.4th 758, in which such a procedure was conducted.)

Respondent cites *People v. Ramirez, supra,* 39 Cal.4th at pp. 460-461, in support of finding the argument waived. In *Ramirez*, a juror was shot to death during the pendency of jury deliberations for reasons unrelated to the case. This Court found that the defendant waived the contention that the trial court had failed to conduct an adequate inquiry into the jury's exposure to news coverage of the juror's death because defense counsel did not raise this issue in the trial court. (*People v. Ramirez, supra,* at p. 460.) Here, in contrast, counsel objected to excusing the juror.

In *Ramirez,* this Court also rejected as forfeited a defendant's claim that the trial court did not make a meaningful inquiry into the effect on the jury of the juror's death. Counsel for Ramirez had not asked the court to conduct an inquiry at the time jurors resumed their deliberations following the juror's death; rather, he asked the court to interrupt deliberations and inquire fully two weeks after the jury had resumed its deliberations. This Court held that the trial court correctly refused to inquire because interrupting the jury's deliberations after such a long delay would have undermined the sanctity of deliberations. (*People v. Ramirez, supra,* at pp. 460-461.) In this case, the timing was entirely different; a further inquiry would not have interrupted ongoing deliberations. Counsel objected to the excusal of juror 1 without delay.

The purpose of the doctrine of waiver is to encourage a party to bring errors to the attention of the trial court, so that errors may be corrected or avoided in the first place. (*People v. Saunders, supra,* 5 Cal.4th at p. 590, cited at RB 343.) In this case, the court had an opportunity to correct

the error; it could have sent the juror back to deliberate further, or conducted a properly limited inquiry of other jurors, focused on whether juror 1 was participating in deliberations. The judge discharged the juror over counsel's clear objection. Therefore, the issue was not forfeited.

In any event, respondent concedes that it is not clear that the forfeiture doctrine applies to the "for cause" excusal of a juror in a capital trial. (RB 343, fn. 117, citing *People v. Lewis and Oliver, supra,* 39 Cal.4th at p. 1007, fn. 8; *People v. Holt, supra,* 15 Cal.4th at p. 652, fn. 4; cf. *People v. Hill* (1992) 3 Cal.4th 959, 1005.) When "the question whether defendants have preserved their right to raise this issue on appeal is close and difficult," this Court will assume that defendants have preserved their right, and proceed to the merits. (*People v. Champion* (1995) 9 Cal.4th 879, 908, fn. 6; accord: *People v. Lewis and Oliver, supra,* 39 Cal.4th at p.1007, fn. 8.) The Court should reach the merits in this case.

2. The Merits:

Respondent asserts that there was no reason for the Court to inquire further because there was no evidence that juror 1 was pressured or coerced by other jurors. (RB 343.) This misses the point. Appellant first and foremost submits there was no justification for inquiring beyond the point that it became clear that juror 1 was still capable of deliberating, and in fact had been engaging with jurors in the deliberative process up until the time she requested to be excused. (*People v. Cleveland, supra,* 25 Cal.4th at p. 485; see, *People v. Bennett, supra,* 45 Cal.4th at pp. 622-623 [juror not excused after expressing anxiety and reluctance to be publicly polled].) However, even assuming juror 1's initial answers raised a question in the judge's mind about her willingness and ability to deliberate, instead of

engaging juror 1 in a discussion of her age, immaturity, and susceptibility to being swayed by the opinions of other jurors, it would have been more appropriate for the court to ask one or more other jurors whether all jurors were participating in deliberations, and, assuming an affirmative response, to direct the jury to continue deliberating. (*People v. Cleveland, supra,* 25 Cal.4th at p. 480.)

Furthermore, appellant disagrees with respondent's contention, in which respondent argues that there is nothing in the record from which it could be inferred that juror 1's reluctance to continue stemmed from doubts the juror had about the appropriateness of the death penalty in appellant's case. (*United States v. Brown, supra,* 823 F.2d 591, 596.) To the contrary, this juror's anxiety clearly and in her own words derived from the inherently difficult decision to impose life without the possibility of parole or death. (*People v. Bennett, supra,* 45 Cal.4th at p. 623.) She said:

> His life is depending on me. I really don't know how to go about that. I mean if I decide to go one way and I agree with all – If all the jurors and I all agree on the death penalty, it is like – that is too heavy on me. I don't really want that on my conscience. And If I decide to give him life in prison, I don't really know if I should do that either.

(65 RT 10173.) Later she reiterated, "But what is really getting to me is his life is in my hands. I really just don't know how to go about that." (65 RT 10175.) At another point juror 1 stated: "I feel like I'm a strong person. If I believe in one thing, I will go with it even if I have to go against everybody." (65 RT 10178.) Even Judge Horan thought it appeared that "preliminarily a number of jurors, at least, have taken a position adverse to Mr. Maciel . . . ." (65 RT 10179.) The record establishes more than a reasonable possibility that the impetus of juror 1's dismissal stemmed from her views about the merits of the case. (*People v. Cleveland, supra,* at p.

483; *United States v. Symington, supra,* 195 F.3d at p. 1087.)

Respondent ironically takes the position that conducting any more investigation would have violated the sanctity of the jury's deliberations. (RB 344.) However, it only violates the sanctity of jury deliberations when questioning of deliberating jurors focuses on the content of deliberations. (*People v. Cleveland, supra,* at p. 476.) In this case, there was no need to probe the content of deliberations, only to ascertain whether juror 1 was engaging in the deliberative process, i.e., whether she was speaking to fellow jurors, listening to their views, or refusing to speak or listen, or seeking to separate herself physically from other jurors. *(People v. Cleveland, supra*, 25 Cal.4th at p. 485.) Hence, the trial court could have attempted to ascertain whether juror 1 was willing and able to participate in deliberations without intruding unnecessarily into the content of deliberations.

F. This Court Should Reconsider Its Decisions In *People v. Fields* (1983) 35 Cal.3d 329 and *People v. Green* (1971) 15 Cal.App.3d 524.

Respondent cites *People v. Fields, supra,* 35 Cal.3d at p. 351, fn. 9, and *People v. Green, supra*, 15 Cal.App.3d 524, for the proposition that "unforeseen circumstances may require the substitution of a juror at the penalty phase of a capital trial, even though the alternate did not take part in the guilt phase deliberations." (RB 345; see also, *People v. Collins* (1976) 17 Cal.3d 687 [holding the practice of substitution during deliberations to be constitutional].) For reasons more fully articulated in the AOB, Argument XVIII, at pages 259-260, this Court should reconsider its holdings in *Fields* and *Collins*, and prohibit or severely circumscribe the practice of allowing dismissal of a deliberating juror in the midst of the

penalty phase of a death penalty trial.

The ABA as a policy matter has rejected the practice of excusing deliberating jurors in the drafting of its Criminal Justice Standards. (*ABA Criminal Justice Standards, Standard 15-2.9.*) The broad exercise of juror replacement procedures encourages jurors to become actively involved in their own composition, which impedes the unfettered deliberative process. (McDermott, *Note: Substitution of Alternate Jurors During Deliberations and Implications on the Rights of Litigants: The Reginald Denny Trial* (1994) 35 Boston College L. Rev. 847, 881.) Indeed, this Court has recognized that it would be undesirable to adopt a policy "which contemplates substitution of alternate jurors after the guilt trial as a routine procedure." (*People v. Fields, supra,* 35 Cal.3d at p. 351, fn. 9.) This Court should reconsider its rulings in *Collins* and *Fields,* and require that, upon dismissal of a deliberating juror in the penalty phase of a capital trial, a mistrial should be declared, or alternatively, the jury must begin the process of guilt phase deliberations anew.

In any event, in this case, when the court asked juror 1 if she "started feeling this way" . . . "just today" or when the jury went out to deliberate, she initially responded that she began experiencing more anxiety at the commencement of penalty phase deliberations. (65 RT 10166-10167.) However, she later indicated that she was having problems sleeping for the "past couple of weeks." (65 RT 10168.) She admitted she "couldn't look" at a guilt phase photographic exhibit of one of the victims. (65 RT 10169.) Prior to the penalty phase, she was having trouble with her mind "wandering" at work. (65 RT 10176.) Moreover, the court, in dismissing juror 1, said he was doing so because she could not think, could not sleep and could not look at the evidence. (65 RT 10181.) The juror could not

sleep or look at evidence, and her mind was wandering during the guilt phase as well as the penalty phase deliberations. Accordingly, apart from the holdings of *Collins* and *Fields*, in this case, once the juror was excused, it was error not to begin guilt phase deliberations again.

G. The Error Was Neither Harmless Nor Were Constitutionally Based Objections Waived.

1. Harmless Error:

Respondent argues that the error was harmless because the dismissed juror appeared just as likely to vote for the death penalty as against it. (RB 346.) Harmless error analysis does not apply to the erroneous "for cause" dismissal of a juror during jury deliberations. If the evidence does not show as a "demonstrable reality" that the jury was incapable or unwilling to deliberate, the penalty phase verdict must be reversed. (*People v. Wilson, supra,* 44 Cal.4th at p. 842.)

2. Forfeiture:

Respondent argues that appellant's failure to couch his objections in federal constitutional terms precludes him from asserting federal constitutional error on appeal. (RB 346.) The purpose of section 1089 is to provide a vehicle for the dismissal of a sworn juror when facts are discovered from which it can reasonably be concluded that the juror, although originally thought to be biased, cannot be fair and impartial. (*People v. McNeal* (1979) 90 Cal.App.3d 830, 840.) The right to trial by a fair and impartial jury is guaranteed by the state and federal constitutions. An objection to the dismissal of a deliberating juror is inherently a constitutionally based objection.

The purpose of the waiver doctrine would not be served by refusing

to address appellant's federal constitutional claims on the merits. Appellant's objection to excusing the juror was brought to the attention of the trial judge, who had every opportunity to do take the right, rather than the wrong course of action. (*People v. Saunders, supra,* 5 Cal.4th at p. 590.) Appellant's constitutional arguments on appeal do not invoke facts or legal standards any different from those the trial court had to apply to determine whether juror 1 was unwilling or unable to deliberate as a "demonstrable reality." In such circumstances, there is no forfeiture of new constitutional arguments on appeal. (*People v. Lewis and Oliver, supra,* 39 Cal.4th at p. 990, fn. 5; see also, *People v. Lewis* (2008) 43 Cal.4th 415, 490, fn. 19 [State constitutional claims based on the same facts as federal constitutional claims and requiring similar analysis are not forfeited by the failure to articulate the state constitutional claim at trial.].) Accordingly, respondent's forfeiture argument should be rejected.

XIX.

REPLY TO RESPONDENT'S ARGUMENT XIX: APPELLANT'S CONTENTION THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED BY GIVING AN INSTRUCTION ADVISING JURORS TO NOTIFY THE COURT OF ANY JUROR NOT FOLLOWING INSTRUCTIONS IS NEITHER FORFEITED NOR WITHOUT MERIT.

A. Appellant's Contention Should Not Be Deemed Forfeited.

Respondent argues that appellant's claim of instructional error is forfeited due to the failure to object to the instruction in the court below. (RB 349.) Appellant's contention that the instruction was error of constitutional dimension is based on this Court's decision in *People v. Engelman* (2002) 28 Cal.4th 436, 441-447. *Engleman* was decided after appellant's trial. Any failure to object was excusable, given that this Court's critique of the risks inherent in giving CALJIC No. 17.14.1 was unforeseeable at the time of trial. (*People v. Crowson* (1983) 33 Cal.3d 623, 628; see also *People v. DeSantiago* (1969) 71 Cal.2d 18, 22-27.) In any event, appellant has not found a single case, nor has respondent cited one, in which this Court refused to address the merits of an appellant's post-*Engelman* challenge to the use of CALJIC No. 7.41.1. (See, e.g., *People v. Wilson, supra,* 44 Cal.4th at pp. 805-806; *People v. Romero* (2008) 44 Cal.4th 386, 419; *People v. Barnwell*, supra, 41 Cal.4th at pp.1054-1055; *People v. Brown, supra,* 33 Cal.4th at p. 393.)

B. This Court Should Reconsider Its Decisions Holding That The Giving Of CALJIC No. 17.41.1 In A Capital Trial Does Not Result In A Violation Of Constitutional Rights.

Respondent cites a list of cases decided prior to the filing of the Respondent's Brief, in which this Court rejected constitutional challenges to the giving of CALJIC No. 17.41.1. (RB 349-350; *People v. Engelman, supra,* 28 Cal.4th at pp. 439-440; *People v. Brown, supra,* 33 Cal.4th at p. 393.) Several more cases rejecting identical challenges to CALJIC No. 17.41.1 have recently followed. (*People v. Wilson, supra,* 44 Cal.4th at pp. 805-806; *People v. Romero, supra,* 44 Cal.4th at p. 419; *People v. Barnwell, supra,* 41 Cal.4th at pp. 1054-1055.) Appellant respectfully requests that this Court reconsider its prior decisions to the extent they conclude that giving CALJIC No. 17.41.1 did not result in a violation of constitutional rights, including rights guaranteed by the Sixth, Eighth and Fourteenth Amendments.

In addition, appellant respectfully suggests that this case is different from the cases that have come before. In appellant's case, the instruction was given at the penalty phase of a capital trial, where the sentencing function is "inherently moral and normative, not factual. . . ." (*People v. Wilson, supra,* 44 Cal.4th at p. 830.) Furthermore, the record in this case contains evidence that the instruction may in fact have led juror 1 to self-report the difficulties she was having in agreeing with a death verdict, possibly in response to pressure from other jurors. (See, Argument XVIII, *ante*.) In other cases, this Court's finding of no constitutional violation has been premised, at least in part, on the fact that the risks associated with the giving of CALJIC No. 17.41.1 had failed to materialize; in other words, no juror had actually reported another juror's failure or refusal to follow the

instructions. (Accord: *People v. Ortiz* (2003) 109 Cal.App.4th 104, 119, fn. 7.)

In *People v. Wilson, supra,* 44 Cal.4th 758, 824, this Court emphasized the crucial distinction between legitimate disagreement and inability or refusal to deliberate. By giving CALJIC No. 17.41.1 in this case, the trial court improperly fostered a deliberative process in which "the circumstance that a juror disagrees with the majority" (*ibid.*) was viewed with confusion and erroneously used as the reason for dismissal of a self-reporting dissenter. The instruction necessarily magnified the coercive influences already at play when, during penalty phase deliberations, a minority juror reveals an inclination to dissent. These coercive influences have been documented by the Capital Jury Project in empirical studies conducted in many states, including California.[27] (See, Fleury-Steiner, *Jurors' Stories of Death: How America's Death Penalty Invests in Inequality* (Ann Arbor: U. Mich. Press 2004) 117.) The words of a majority juror who had persuaded a holdout juror to vote for death are illustrative.

> I felt like the jury badgered him [the holdout] to the point to where he changed his vote . . . . But this guy really thought that you could sentence someone to life and he would be never released into society. And that was a problem.

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[27]Initiated in 1991 by a consortium of university-based researchers with support from the National Science Foundation (NSF), the Capital Jury Project [CJP] was designed to: (1) systematically describe jurors' exercise of capital sentencing discretion; (2) assess the extent of arbitrariness in jurors' exercise of such discretion; and (3) evaluate the efficacy of capital statutes in controlling such arbitrariness. Since 1993, some 30 articles presenting and discussing the findings of the CJP have been published in scholarly journals. (See the CJP website at http://www.albany.edu/scj/CJPhome.htm for an updated listing of articles, commentaries and doctoral dissertations.)

(*Id.*, at p. 117.) The holdout juror's correct interpretation of the law was no match for the pressure of fellow jurors who eventually convinced him he must vote for death. In light of the temporal proximity in this case between the court's instruction and the juror's coming forward, the pernicious influence of CALJIC No. 17.41.1 cannot be ignored.

For this reason, as well as the reasons previously articulated in Argument XIX of the AOB, this Court should depart from its precedent and find the error harmful in appellant's case.

XX.

REPLY TO RESPONDENT'S ARGUMENT XX: THE TRIAL COURT ERRED BY REFUSING APPELLANT'S REQUESTED INSTRUCTION ON IMMUNITY AND CODEFENDANTS' SENTENCES.

Defense counsel requested and was refused a penalty phase instruction that would have informed jurors that they could consider immunity grants to witness 16 and witness 12 as mitigating factors. He also requested an instruction that would have allowed jurors to consider the lenient sentences received by codefendants as mitigation. The trial court denied the instructions under authority of *People v. Danielson* (1992) 3 Cal.4th 691, 718. (65 RT 10042-10046, 10075.)

In the AOB, appellant argued that the denial of these instructions violated appellant's federal constitutional rights to equal protection, due process and a reliable death judgment. (AOB 266-269.) Appellant urged this court to reconsider its ruling in *People v. Danielson, supra,* 3 Cal.4th at p. 718, and to find that *Danielson* and its progeny contravene the United States Supreme Court's decision in *Parker v. Dugger* (1991) 498 U.S. 308, 314 [112 L.Ed.2d 812, 111 S.Ct. 731].

In the RB, numerous cases are cited in which this Court has rejected identical arguments, and/or refused to reconsider its earlier rulings. (RB 352-353; see, e.g., *People v. Rodrigues, supra,* 8 Cal.4th at pp.1188-1189.) Rather than reiterating the arguments already set forth in the AOB, appellant once again urges this Court to overrule *People v. Danielson, supra,* 3 Cal.4th at p. 718, and to find the denial of the requested instructions to be prejudicial error.

XXI.

REPLY TO RESPONDENT'S ARGUMENT XXI: CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

In the AOB, appellant presented a multifaceted attack on the constitutionality of California's death penalty scheme. (AOB 270-306.) Respondent asserts that this Court should reject appellant's "contentions by case citations without additional legal analysis." (RB 354.) Appellant's 36-page death penalty challenge does not include "contentions by case citations without additional legal analysis." Furthermore, in *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered "routine" challenges to California's capital punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (I) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.*, at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257 [88 L.Ed.2d 598, 106 S.Ct. 617].) In the AOB, appellant attempted to comply with the letter and spirit of the *Schmeck* case by stating claims "in a straightforward manner accompanied by a brief argument." (*Id.*, at p. 304.) Should this Court decide to reconsider any of the rejected claims, appellant requests the right to present supplemental briefing.

A. Section 190.2 Is Impermissibly Broad.

In the AOB, appellant argued that California's twenty-eight death penalty eligibility factors, i.e., those special circumstances that existed at the time of appellant's alleged offenses, fail to narrow application of the death

penalty to those murders most deserving of the death penalty. (AOB 272-273.) Respondent correctly points out that this Court has repeatedly rejected this challenge to the state's death penalty scheme. (RB 355.) This Court has continued to reject challenges to the constitutionality of section 190.2 since the Respondent's Brief was filed. (See, e.g., *People v. Bennett, supra,* 45 Cal.4th at p. 630.)

This Court should reconsider its prior rulings on the issue. The report of the California Commission on the Fair Administration of Justice, *supra*, released on June 30, 2008 [*Commission Report*], found California's death penalty system to be completely dysfunctional. Among the recommended solutions to California's systemic problems was to greatly narrow the list of special circumstances to which the death penalty applies. (*Commission Report*, p. 60.) The CCFAJ noted that the Constitution Project in Washington D.C., established a blue-ribbon bipartisan commission of judges, prosecutors, defense lawyers, elected officials, FBI and police officials, professors and civic and religious leaders to examine the administration of the death penalty in the United States. The commission achieved broad consensus on two key recommendations. First, the commission recommended limiting death eligibility to five factors including: (1) peace officer murders; (2) murders by a person while imprisoned; (3) multiple murders where there was an intent to kill more than one person; (4) torture-murders; and (5) murders by a person under a felony criminal investigation of anyone involved in the investigation. Second, the commission also recommended that felony-murder should be excluded as a basis for death penalty eligibility. (*Commission Report*, pp. 61-62; The Constitution Project, *Mandatory Justice: The Death Penalty Revisited*, p. xxiv-xxv (2001; 2005 update) [hereafter *Mandatory Justice*

Report].) .) Similar recommendations were made by the Illinois Governor's Commission on Capital Punishment. (*Commission Report*, pp. 62-63.)

The California Commission on the Fair Administration of Justice undertook a comprehensive review to determine which special circumstances were found in all cases in which the death penalty was imposed in California from 1978 through 2007. The Commission found that if California had limited application of the death penalty to the five eligibility factors recommended for retention by the *Mandatory Justice Report*, California would have had only 368 people on death row, rather than 670.[28] (*Commission Report*, p. 64.) The report also estimated that, if every condemned California prisoner whose conviction did not include one of the *Mandatory Justice Report*'s five proposed eligibility factors had his or her sentence commuted to life without the possibility of parole, California could save $27 million each year over the current cost of confining these same prisoners on death row. (*Commission Report*, p. 69.)

According to the prosecutor's theory of liability, appellant would not be eligible for the death penalty if the Commission recommendations were adopted. The Commission's recommendation would limit multiple murder to circumstances where (a) the deaths were the result of an intent to kill more than one person, or (b) the defendant knew the act or acts would cause death, or create a strong possibility of death or great bodily harm to murdered individual. (Commission Report, p. 61.) The prosecutor's theory was that appellant conspired to kill one man only – Moreno. Even assuming appellant played any role in the killings – something he denies –

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[28] According to the California Department of Corrections and Rehabilitation's Death Row Tracking System, as of August 13, 2009, there were 685 people on death row.

the People's evidence unequivocally establishes that appellant did not intend to cause the deaths of Maria and the children. Additionally, the People's evidence shows that appellant had no reason to believe that Gustavo Aguirre would be present at the Moreno's residence when the allegedly planned murder of Moreno was carried out; therefore, he cannot have intended Aguirre's death, or even have known of the risk that Aguirre would be killed.

While the *Commission Report* did not make findings regarding the constitutionality of California's capital sentencing scheme, the report provides good reason to revisit and reconsider whether, considering current conditions, including California's disproportionately high death row population, California's law sufficiently performs the narrowing function demanded by the Eighth Amendment.

B. Section 190.3, Factor (a) Is Impermissibly Overbroad.

The AOB asserts that California's death penalty is invalid because section 190.3, subdivision (a), as applied, allows for the arbitrary and capricious imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 274-276.) Subdivision (a) of section 190.3 allows the jury to consider the "circumstances of the crime." Viewing section 190.3 subdivision (a) in the context of ways in which it has actually been used, appellant asserts that every fact that is a part of a murder could theoretically be consider an "aggravating circumstance," thus emptying the term of any meaning, and allowing arbitrary and capricious death sentencing. (AOB 275-276.) As was also pointed out in Argument XVI, C, this broad language may be used as an excuse for prosecutors to improperly argue for death based on graphic and emotionally jarring victim

impact evidence.

Respondent accurately points out that constitutional challenges to subdivision (a) of section 190.3 have uniformly been rejected by this Court. (RB 356-357.) This Court has continued to reject this argument in recent decisions. (*People v. Bramit* (2009) ___ Cal.4th ___, *51; *People v. Friend* (2009) ___ Cal.4th ___, *179; *People v. Farley* (2009) ___ Cal.4th ___, *178; *People v. Dykes, supra,* 46 Cal.4th at p. 813; *People v. Hawthorne* (2009) 46 Cal.4th 67, 104.) Once again, appellant simply asks this Court to reconsider the issue.

C. California's Death Penalty Statute Lacks Proper Safeguards To Avoid Arbitrary And Capricious Death Sentencing.

In the AOB, Argument XXI, C, it is asserted that California's death penalty sentencing scheme on its face and/or as applied to appellant suffers from constitutional flaws which include the following:

(1) Appellant's death judgment was not based on findings beyond a reasonable doubt by a unanimous jury that one or more aggravating factors existed, and that such aggravating factors outweighed mitigating factors beyond a reasonable doubt as required by the decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435, 120 S.Ct. 2348], *Ring v. Arizona* (2002) 536 U.S. 584 [153 L.Ed.2d 556, 122 S.Ct. 2428], *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403, 124 S.Ct. 2531], *United States v. Booker* (2005) 543 U.S. 220 [160 L.Ed.2d 621, 125 S.Ct. 738], and *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856, 127 S.Ct. 856]. In this case, jurors were instructed there was no need to reach a unanimous agreement regarding the truth of aggravating factors. (65 RT 10113-10114, 10128; AOB 276-289.)

(2) Appellant's jury was not instructed that they could impose death only if they were persuaded beyond a reasonable doubt that aggravating factors existed and that aggravating factors outweighed the mitigating factors beyond a reasonable doubt. This resulted in violation of the Due Process Clauses and Cruel and Unusual Punishment Clauses of the state and federal constitutions. (AOB 290-292.)

(3) California law violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to require that the jury base its death sentence on written findings regarding aggravating evidence. (AOB 293-295.)

(4) California's death penalty statute, as interpreted by this Court, forbids inter-case proportionality review, thereby guaranteeing arbitrary, discriminatory and disproportionate imposition of the death penalty. (AOB 295-297.)

(5) In the penalty phase of appellant's trial, the prosecution unconstitutionally relied on unadjudicated criminal activity as aggravating circumstances. Furthermore, the jury was not instructed that they could only consider unadjudicated criminal activity an aggravating factor if they unanimously agreed that the evidence proved beyond a reasonable doubt that appellant committed the alleged unadjudicated acts. (AOB 297-298.)

(6) The use of restrictive adjectives, such as "extreme" (see, section 190.3, subdivisions (d) and (g)) and "substantial" (see, section 190.3, subdivision (g)) acted as barriers to the consideration of mitigating evidence in violation of the Fifth, Sixth, and Fourteenth Amendments. (AOB 298.)

(7) The failure to instruct that statutory mitigating factors were relevant solely as potential mitigators precluded a fair, reliable, and evenhanded administration of the death penalty. (AOB 298-301.)

Respondent disputes each of the above constitutional challenges, citing decisions of this Court in which the same or similar challenges have been rejected. (RB 359-362.) This Court has continued to reject identical constitutional challenges to California's capital sentencing scheme in cases decided since the filing of the Respondent's Brief. (See, e.g., *People v. Farley, supra,* ___ Cal.4th at *175-*179; *People v. Bunyard* (2009) 45 Cal.4th 836, 860-881; *People v. Gutierrez* (2009) 45 Cal.4th 789, 829-834; *People v. Avila* (2009) 46 Cal.4th 680, 723-725; *People v. Bennett, supra,* 45 Cal.4th at pp. 629-632; *People v. Lindburg* (2008) 45 Cal.4th 1, 51-54; *People v. Romero, supra,* 44 Cal.4th at p. 429; *People v. Riggs* (2008) 44 Cal.4th 248, 329-330; *People v. Harris* (2008) 43 Cal.4th 1269, 1323; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1185-1187.) In keeping with this Court's decision in *People v. Schmeck, supra,* 37 Cal.4th at pages 303-304, appellant incorporates by reference the arguments advanced in the AOB, and once again requests this Court's reconsideration of the issues.

D. California's Capital Sentencing Scheme Violates The Equal Protection Clause Of The Federal Constitution By Denying Safeguards To Capital Defendants That Are Afforded To Non-Capital Defendants.

Appellant contends in the AOB that equal protection is denied by virtue of greater procedural protections afforded non-capital defendants compared with capital defendants. For example, in a non-capital case, a court must state reasons for selecting the upper or lower term sentence, including a concise statement of the ultimate facts relied upon as circumstances in mitigation or aggravation. (Cal. Rules of Ct., rule 4.420.) In addition, sentencing enhancements based on something other than the fact of a valid prior conviction must be found true beyond a reasonable

doubt by a unanimous jury. (*People v. Towne* (2008) 44 Cal.4th 63, 82-83; §§ 1158, 1158a.)

Respondent observes, correctly, that this Court has consistently rejected this identical equal protection challenge to California's capital sentencing scheme. (RB 363; see also, *People v. Bennett, supra,* 45 Cal.4th at p. 632.) Therefore, in accordance with *People v. Schmeck, supra,* 37 Cal.4th at pp. 303-304, appellant incorporates by reference the arguments previously set forth in the AOB, and requests reconsideration of this issue.

E. California's Use Of The Death Penalty As A Regular Form Of Punishment Violates International Norms Of Humanity and Decency And The Eighth And Fourteenth Amendments.

In the AOB, appellant argues that California's use of the death penalty falls short of international norms of decency and humanity, thus violating the Eighth and Fourteenth Amendments. (AOB 304-306.) Respondent accurately points out that this Court has consistently rejected challenges to California's use of the death penalty founded in international law or norms. (RB 364; see also, *People v. Gutierrez, supra,* 45 Cal.4th at p. 834; *People v. Bunyard, supra,* 45 Cal.4th at p. 861.) Appellant respectfully suggests that it is time for this Court to reassess the constitutionality of California's application of the death penalty considering evolving international attitudes toward capital punishment.

Public opinion is turning against the use of capital punishment. As Justice Moreno recently observed in his dissenting opinion in *People v. Martinez* (2009) ___ Cal.4th ___ [2009 Cal. LEXIS 8079]:

> I note that the problem of how to deal with prospective jurors in capital cases who oppose the death penalty may well be a large and growing one. Polls show that about one-third of

> those surveyed in this state oppose the death penalty, up from only 14 percent in 1989. (See Field Research Corp., The Field Poll, Release # 2183 (Mar. 3, 2006) 1-2, 6 (The Field Poll) [poll conducted February 12–26, 2006, showed 63 percent favored and 32 percent opposed the death penalty in California].) The exclusion of one out of three potential jurors because the attitudes toward the death penalty might predispose them to vote for life imprisonment without parole would indeed result in a jury panel "uncommonly willing to condemn a man to die" in violation of the defendant's Sixth Amendment rights.

(Id., at *128-*129.)

In the past several years, the United States Supreme Court has continued to emphasize the importance of increasing national and international antipathy toward the death penalty in deciding whether its use in the United States violates the Eighth Amendment. For example, in *Roper v. Simmons* (2005) 543 U.S. 551 [161 L.Ed.2d 1, 125 S.Ct. 1183], which abolished capital punishment for juvenile offenders, the federal high court stated:

> Our determination that the death penalty is disproportionate punishment for offenders under 18 finds conformation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. . . .[T]he Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments."

(*Id.*, at p. 577; see also, *Kennedy v. Louisiana* (2008) ___ U.S. ___ [171 L.Ed.2d 525, 128 S.Ct. 2641, 2650].) The high court also placed heavy emphasis on the fact that a majority of our states had rejected the death penalty for juveniles. The court concluded that states' rejection of the juvenile death penalty bespoke evolving standards of decency, such that

abolition of the juvenile death penalty was now required by the Eighth Amendment. (*Roper v. Simmons, supra,* 543 U.S. at pp. 563-568.)

In January of 2009, Amnesty International reported that 135 countries, including Canada, Mexico, and all countries of Western Europe, have abolished the death penalty completely or have death penalty laws that are no longer in use. (See, http://.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries.) The United States stands alone among nations of the western world in its expansive use of capital punishment. In 2008, according to the Death Penalty Information Center, the United States ranked fourth in its active use of the death penalty, behind China, Iran, and Saudi Arabia. (See, http://www.deathpenaltyinfo.org/death-penalty-international-perspective.)

The international trend toward abolition continues to the present. On August 3, 2009, the Associated Press reported what may be the largest mass commutation of death sentences in modern history. President Mwai Kibaki of Kenya commuted all death sentences imposed on convicted prisoners to life imprisonment. In a statement to the public, President Kibaki explained that no death sentence had been carried out in his country for the past 22 years, leading to an accumulation of over 4,000 prisoners on death row in Kenyan prisons. Like California's prisons, Kenya's prisons are overcrowded, underfunded and understaffed. They were built for a population of about 15,000 but have an inmate population of more than 40,000. The decision to commute took into consideration that extended stays on death row may cause undue mental anguish and suffering, psychological trauma, and anxiety, and may constitute inhuman treatment. The Kenyan president has directed government officials to study whether the death penalty has any impact on fighting crime. (See, Associated Press,

August 3, 2009, *Kenyan Leader Reduces All Death Sentences to Life*.)

Although this Court lacks the authority to commute all of the state's death sentences, it should reconsider its prior rulings and set aside appellant's death judgment because the continued broad application of capital punishment violates international law and norms as well as the Eighth and Fourteenth Amendments.

XXII.

REPLY TO RESPONDENT'S ARGUMENT XXII: THE CUMULATIVE EFFECT OF THE ERRORS DEPRIVED APPELLANT OF A FAIR TRIAL DURING BOTH THE GUILT AND PENALTY PHASES OF THE CASE AND THUS DEPRIVED THE JUDGMENTS OF FAIRNESS OR RELIABILITY.

Respondent asserts that, whether considered individually or in the aggregate, the alleged errors could not have influenced the outcome of appellant's trial. (RB 366.) Rather than restating what has already been said, appellant incorporates by reference the cumulative error argument of the AOB (AOB 307-309), and suggests that "if there were ever a case for application of cumulative error principles, this is it." (*United States v. Killian* (9th Cir. 2002) 282 F.3d 1204, 1211.)

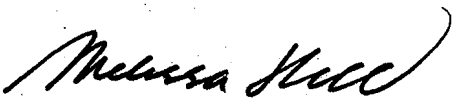
The following United States Supreme Court decisions, *inter alia*, in effect at the time the error occurred, are presented in support of this claim: *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, and fn. 15 [56 L.Ed.2d 468, 98 S.Ct. 1930] (cumulative effect of errors may violate due process); *Brady v. Maryland, supra*, 373 U.S. 83 (withholding of evidence favorable to accused violates due process); *Pointer v. Texas, supra,* 380 U.S. 400 (confrontation clause provides criminal defendant right to directly confront adversarial evidence); *Gardner v. Florida, supra,* 430 U.S. 439 (due process violation in capital proceeding where petitioner sentenced on basis of unreliable information); *Godfrey v. Georgia* (1980) 446 U.S. 420 [64 L.Ed.2d 398, 100 S.Ct. 1759] (Eighth Amendment requires higher degree of scrutiny in capital proceedings); *Hicks v. Oklahoma* (1979) 447 U.S. 343 [65 L.Ed.2d 175, 100 S.Ct. 2227] (federal due process claim in state-created right).

CONCLUSION

For the foregoing reasons, the entire judgment must be reversed. Additionally, the appellant should be afforded any further relief supported by the law and evidence including, in the alternative, reversal of one or more of the convictions of first degree murder; reversal of the multiple murder special circumstance finding; remand for an evidentiary hearing on the prejudicial effect of the denial of consular rights guaranteed by the Vienna Convention; remand for an evidentiary hearing to determine whether witness 15 received a *quid pro quo* for his testimony, and reversal of the death penalty with a remand for a new penalty trial.

Dated: August 31, 2009

Respectfully submitted,



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WORD COUNT CERTIFICATE

I certify, pursuant to California Rules of Court, rule 8.630, as follows:

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The WordPerfect X3 "properties" program indicates that the attached Appellant's Reply Brief, exclusive of Certificates, Tables, Indices, and Proof of Service, is proportionally spaced, has a typeface of 13 points, and contains 66,255 words (in excess of the 47,600 allowed). A motion to for permission to exceed allowable word count limits accompanies this brief.

Dated: August 31, 2009

Respectfully submitted,

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PROOF OF SERVICE

I reside in the State of New Mexico, Sandoval County. I am over the age of 18 and I am a duly-licensed California attorney representing Luis Maciel, the appellant in this action. My business address is P.O. Box 2758, Corrales, New Mexico 87048.

On August 31, 2009, I served the within Appellant's Reply Brief on the interested parties to this action by placing a true copy thereof, enclosed in a sealed envelope with postage prepaid, in U.S. Mail in Corrales, New Mexico, addressed as follows:

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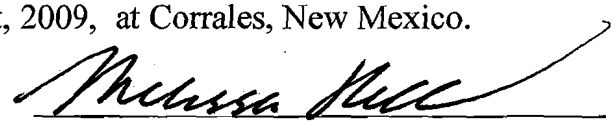
I declare under penalty of perjury under the laws of the State of California that this statement is true.

Executed this 31st day of August, 2009, at Corrales, New Mexico.



Melissa Hill