IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

People of the State of California, Plaintiff and Respondent, v. Ruben Perez Gomez, Defendant and Appellant.	)	No. S087773 Superior Court No BA156930

APPELLANT'S REPLY BRIEF

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Introduction

In appellant's opening brief, Mr. Gomez made twenty five arguments, seeking reversal of his convictions for the robbery of Xavier Salcedo; the murder of Robert Dunton and Robert Acosta; the kidnaping, robbery, and murder of Rajandra Patel; and the murder of Raul Luna; and reversal of the death sentences for the murders of Patel and Luna.

In this reply brief, Mr. Gomez incorporates by reference and reaffirms the arguments made in his opening brief. Mr. Gomez replies to contentions by respondent that necessitate an answer in order to present the issues fully to this Court. The absence of a reply to any particular argument, sub-argument, or allegation made by respondent, or of a reassertion of any particular point made in the opening brief, does not constitute a concession, abandonment, or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13), but reflects his view that the issue has been adequately presented and the positions of the parties have been joined.

Argument

I.

The evidence was insufficient to prove Mr. Gomez's guilt of the first degree murder of Raul Luna.

In appellant's opening brief, Gomez contended that the evidence was insufficient to support his conviction of the first degree murder of Raul Luna because there was not substantial evidence that he was at the scene at the time of Luna's shooting, and because even if there were substantial evidence that he was at the scene, there was not substantial evidence that he either shot Luna or that he aided and abetted the shooter.

The state's response is wrong on the facts and wrong on the law. In support of its contention that evidence showed that Gomez was at the scene and either shot Luna or aided and abetted the shooting, respondent mistakenly asserts that the weapon used to kill Luna was the same weapon used to kill Dunton and Acosta (RB 60), a weapon that was in Gomez's possession when he was arrested and bore his fingerprints. (See 11RT 1754-1756; 18RT 2741-2749; 19RT 2859-2863, 2869-2872; 21RT 3099-3100, 3119.) There is no evidence to support this assertion, and in fact, the prosecution conceded in summation that Luna was *not* killed with the same weapon that was found in Gomez's possession on his arrest. (27RT 3838-3840 [in discussing Luna case, prosecutor states, "it's the same gauge,

although not the same shotgun, that was used — that Ruben Gomez was arrested with"].)

Respondent also contends that a first degree murder conviction may be supported on an aiding and abetting theory with only "the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense." (RB 63.) Respondent is mistaken. In the context of direct aiding and abetting liability for murder (as opposed to natural and probable consequences liability), the aider and abettor "must know and share the murderous intent of the actual perpetrator." (*People v. Nunez* (2013) 57 Cal.4th 1, 43.)

Finally, respondent states that the jury's not-true finding as to the firearm allegation in the Luna case "makes no difference" because the jury could have convicted Gomez without agreeing about whether he was the shooter or an aider and abettor. (RB 56, 62-63.) Gomez does not contend that the jury had to unanimously agree on a theory of guilt. He does, however, contend that to uphold the conviction, there must be sufficient evidence to support at least one theory of guilt. Here, there was not sufficient evidence to support either theory. As set forth in appellant's opening brief and below, there was not sufficient evidence that Gomez was the actual shooter — as the jury itself recognized. (29RT 4348; 3CT 840.)

Nor was there sufficient evidence to support a rational conclusion, beyond a reasonable doubt, that Gomez aided and abetted whoever shot Luna. Indeed, the evidence was not sufficient even to place Gomez at the scene of the crime. Therefore, Gomez's conviction of the first degree murder of Raul Luna must be reversed.

A. There is no evidence that Ruben Gomez shot Raul Luna; respondent's contention that a shotgun cartridge near Luna's body was fired from the same shotgun used to kill Acosta, Dunton, and Escareno is wrong.

Respondent contends:

> [A]n *unspent* 12-gauge shotgun cartridge was found about 15 feet from Luna's body. (11RT 1701-1703.) *This spent cartridge* [sic] was fired from the same shotgun used to kill Acosta, Dunton, and Escareno. (18RT 2745-2749.) Witness One saw this shotgun being delivered to appellant. Moreover, Witness One helped appellant saw off the barrel, and Rubin, the firearms expert, opined that the five-inch metal tube recovered from Dunton's home could have been part of a shotgun barrel. (18RT 2749, 2761.) Accordingly, a reasonable fact-finder could conclude that appellant had the murder weapon at the time of the killing and that appellant, or his coperpetrator, killed Luna with that shotgun.

(RB 60 [emphasis added].)

Respondent is incorrect in multiple respects. There is no evidence that Luna was killed with the same shotgun used to kill Dunton and Acosta or with the same shotgun used to kill Escareno.[1] Respondent is correct that

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[1] With respect to the Escareno homicide, a criminalist testified that (continued...)

an unspent cartridge was found 15 feet from Luna's body. (11RT 1701-1703 [Detective Lancaster identifying Prosecution Exh. 12D, a photograph of a 12 caliber shotgun cartridge, a live (as opposed to spent) round lying 15 feet east of Luna's body]; see 11RT 1710.) But obviously, an unspent cartridge could not have been a "spent cartridge . . . fired from the same shotgun used to kill Acosta, Dunton, and Escareno." (RB 60.)[2]

More, the prosecutor conceded in summation that the shotgun used to kill Luna was not the same shotgun found in Gomez's possession when he was arrested. (27RT 3838-3840 ["[A] shotgun was used as the murder weapon [in the Luna case]. It's the same gauge as the one used, the 12-gauge shotgun is the one used in the Escareno, the Dunton and Acosta murders. And it's the same gauge, *although not the same shotgun*, that was used — that Ruben Gomez was arrested with." (emphasis added)]; see also

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[1](...continued)
two projectiles consistent with soft shell "double aught" buckshot, typically fired by a 12-gauge shotgun, were found in the car in which Escareno was killed. (15RT 2393-2395.) There was no evidence that Escareno was shot with the same weapon used to kill Luna or that he was killed with the same shotgun used to kill Dunton and Acosta.

[2] Two firearms examiners, Daniel Rubin and Anthony Paul, testified. Paul testified about the firearms evidence in the Patel case. (14RT 2131-2145.) Rubin testified that the spent cartridges in Prosecution Exhibits 21B, 21C, 21D, and 21F — which were all found at the Dunton/Acosta crime scene (see 21RT 3119) — were fired from Prosecution Exhibit 50, a shotgun. (18RT 2746-2747.) Neither firearms expert testified about the live cartridge found at the Luna crime scene.

27RT 3878 [prosecutor discussing firearms evidence linking the shotgun Gomez was arrested with to the shooting of Dunton and Acosta].) The shotgun thus did not, and could not, connect Gomez to the killing of Raul Luna.

In any event, respondent's argument that Luna was shot with a shotgun that Witness #1 saw being delivered to Gomez (RB 60) is belied by the record. Witness #1 identified the shotgun used to kill Dunton and Acosta (Prosecution Exhibit 50) as having been delivered to Gomez two or three days before Dunton and Acosta were killed. (20RT 3009-3010; see 18RT 2746-2747; 21RT 3119.) Dunton and Acosta were killed on July 1, 1997. (20RT 3037, 3064.) Raul Luna was killed almost three weeks earlier, on June 10, 1997. (13RT 2058, 2061.) Thus, if Witness #1's testimony about the delivery of this shotgun to Gomez is credited, it tends to show that Luna was not shot with a shotgun Witness #1 saw being delivered to Gomez.

Nor, for that matter, was there any evidence from which the jurors could rationally conclude that Gomez shot Luna — with any weapon. (See AOB 60-61; see also RB 64 [Respondent arguing: "[T]he jury . . . rejected the personal use allegation because they could not determine beyond a reasonable doubt that he fired the shotgun."].)

B. There was no evidence at all to support Mr. Gomez's conviction on an aiding and abetting theory.

Because there was no substantial evidence — indeed, no evidence at all — from which the jurors could conclude that Gomez was the actual shooter of Raul Luna, he could properly be convicted of first degree murder only if the jurors found that he aided and abetted the shooter. Gomez maintains that there was no substantial evidence that he was at the scene. (See AOB 49-60.) But even if it is assumed Gomez was present, there was no evidence shedding any light on what, if anything, he might have done, or what his mental state might have been at the time of the shooting. There was no evidence that Gomez did or said anything before or after the shooting.

Respondent appears to suggest that if there were substantial evidence that Gomez was present at the scene and had a general intent to encourage criminal conduct — of any type — he could be found guilty of first degree murder on an aiding and abetting theory. (RB 63.) Respondent cites *People v. Mendoza* (1998) 18 Cal.4th 1114, 1123, for the proposition that "the mental state necessary for conviction [as an aider and abettor] is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense." (RB 63.) But as respondent acknowledges, "[i]t is well settled that" an aider and abettor must act with,

among other things, "'the intent or purpose of committing, encouraging, or facilitating the commission of the offense.'" (RB 62, quoting *People v. Prettyman* (1996) 14 Cal.4th 248, 259.) Whatever application the statement in *Mendoza* may have in the context of natural and probable consequences liability — at issue in *Mendoza* (*People v. Mendoza, supra,* 18 Cal.4th at p. 1123)[3] — it has no application in a case like this one, where the jury was instructed only on direct aiding and abetting liability.[4]

To convict a defendant of aiding and abetting a murder, the jury must find beyond a reasonable doubt that the defendant knew the perpetrator's criminal purpose and acted "with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." (*People v. Beeman* (1984) 35 Cal.4th 547, 560.) As this Court put it most recently in *People v. Chiu*, conviction on a direct aiding and abetting theory requires

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[3] To the extent respondent relies on *Mendoza* for the proposition that, outside the natural and probable consequences context, a person may be convicted as an aider and abettor of murder if he merely intends generally to bring about criminal conduct of an unspecified nature, respondent is mistaken. As set forth in the text above, this Court has made abundantly clear that conviction on a direct aiding and abetting theory requires the prosecution to show that the "defendant aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission." (*People v. Chiu* (2014) 59 Cal.4th 156, 167.)

[4] Indeed, in *People v. Chiu, supra,* 59 Cal.4th at p. 166, this Court recently held that defendants may not be convicted of first degree premeditated murder on a natural and probable consequences theory.

the prosecution to "show that the defendant aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission. [Citation.] . . . [T]he mental state component — consisting of intent and knowledge — extends to the entire crime . . . ." (*People v. Chiu, supra,* 59 Cal.4th at p. 167.)

Thus, the mental state required for a conviction of aiding and abetting murder is not merely an intent to aid or encourage "unspecified 'nefarious conduct.'" (*Juan H. v. Allen* (9th Cir. 2005) 408 F.3d 1262, 1276, quoting *People v. Prettyman, supra,* 14 Cal.4th at p. 268.) Rather, the "'aider and abettor must know and share the murderous intent of the actual perpetrator.'" (*People v. Nunez, supra,* 57 Cal.4th at p. 43, quoting *People v. McCoy* (2001) 25 Cal.4th 1111, 1118.)

Here, there was no evidence that Gomez knew and shared the murderous intent of the actual perpetrator. Even if there were sufficient evidence to prove that Gomez was one of the individuals in the Lunas' front yard at the time of the shooting, there was no evidence from which the jury could conclude that he did anything to assist the killing or that he intended the killing — much less that he premeditated and deliberated it. (See *People v. Roberts* (1992) 2 Cal.4th 271, 320 [reversing first degree murder

conviction where evidence of premeditation and deliberation was insufficient].)

Respondent contends that "appellant and a coperpetrator drove the Oldsmobile to Luna's home, stopped for a while, and drove away. They returned on foot, searched for Luna, found him, and killed him. The perpetrator had appellant's shotgun, and there were shotgun shells displayed openly in the abandoned Oldsmobile. This is substantial evidence that appellant and a coperpetrator acted in concert with the intent to murder Luna." (RB 62.)

Respondent is wrong on several counts. Initially, respondent's use of the term "killed" (RB 62) and "killer" (RB 58-59) to describe both the individual who shot Luna and the other person who accompanied the shooter assumes the conclusion that the person who accompanied the shooter was, in fact, a "killer," i.e., an aider and abettor in Luna's killing. Use of this term should not be confused with actual evidence that the person who accompanied the shooter knew of and shared in the shooter's intent. There was no such evidence.

Second, as set forth above in Argument I.A., there is no evidence that the shotgun used to kill Luna belonged to Gomez or had any connection to him.

Third, even if the evidence established that Gomez and the perpetrator "drove the Oldsmobile to Luna's home, stopped for a while, and drove away, [then] returned on foot, searched for Luna, [and] found him" (RB 62) — and Gomez contends that it did not[5] — that would not demonstrate anything other than that Gomez accompanied the shooter to Luna's yard. Respondent cites no evidence tending to show that Gomez, if he were the person who accompanied the shooter, knew that the shooter intended to kill Luna — as opposed to confronting him, or purchasing drugs from him, for example. Nor does respondent cite any evidence tending to show that Gomez shared the shooter's intent.

Respondent appears to contend that the fact that there was no evidence as to whether Gomez, if he were the person accompanying the shooter, knew the shooter would shoot or intended that he shoot is "irrelevant because the test for substantial evidence on appeal is whether a reasonable fact-finder could conclude beyond a reasonable doubt that a defendant aided and abetted murder, not whether there were other facts supporting the opposite conclusion." (RB 63.)

But Gomez contends that the evidence here did *not* support two competing inferences, one of which pointed to guilt and one of which

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[5] See pp. 15-17, below.

pointed to innocence. Rather, *there was no evidence at all* as to the intent or purpose of the person who accompanied the shooter in Luna's front yard — whoever that person was. (See *People v. Harvey* (1984) 163 Cal.App.3d 90, 105, fn. 7 [no substantial evidence supported conviction of attempted robbery where defendant may have approached victim intending to rob him, but robbery is only one of several arguable explanations, which also include racial harassment or animosity towards sailors].)

There was no evidence in this case from which the jury could draw any inference as to whether the person who was with the shooter in Luna's yard knew of and shared the shooter's intent to kill — much less any evidence to support the conclusion that the person with the shooter premeditated and deliberated the killing. (See *People v. Chiu, supra,* 59 Cal.4th at p. 166 [mental state of premeditation and deliberation "is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the act that caused the death."].)

It would be pure speculation to suggest that Gomez, if he were the person accompanying the unknown perpetrator, intended to confront Luna or purchase drugs from him; likewise, it would be pure speculation to

suggest that he intended that Luna be killed. (*People v. Harvey, supra,* 163 Cal.App.3d at p. 105, fn. 7 [where there are several arguable explanations for defendant's approaching the victims, no substantial evidence supported conclusion that defendant approached victims intending to rob them].)

"An absence of evidence is not the equivalent of substantial evidence." (*Rodenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 655.) And, of course, speculation is not evidence. (*People v. Waidla* (2000) 22 Cal.4th 690, 735; *People v. Morris* (1988) 46 Cal.3d 1, 21, overruled on other grounds by *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5; see also *People v. Davis* (2013) 57 Cal.4th 353, 360 ["'A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.'"], quoting *People v. Morris, supra,* 46 Cal.3d at p. 21; *People v. Centeno* (Dec. 4, 2014, S209957, Slip opn. at p. 12; 2014 WL 6804508, at *6 ["Facts supporting proof of each required element must be found in the evidence or the People's burden of proof is unmet."].)

Even if it could be inferred that the person accompanying the shooter, if it were Gomez, knew that the shooter had a shotgun, no evidence supports an inference that he knew the shooter carried the shotgun *with the intent to kill Luna*. Accompanying an armed associate with knowledge that

the associate is armed is not sufficient evidence to support a conviction for aiding and abetting murder. (See *Juan H. v. Allen, supra,* 408 F.3 at p. 1278 ["[T]he circumstantial evidence presented does no more than establish that a rational trier of fact could conclude that Juan H. knew his brother was armed and ready to confront [the victims] if [his] family or home . . . were . . . threatened. That Juan H. stood behind his older brother . . . even if he knew his brother was armed, does not permit the rational inference that he knew his brother would . . . assault or murder the victims."].)

This Court distinguished *Juan H.* in *People v. Gonzales* (2011) 52 Cal.4th 254, noting: "Significant differences exist between the evidence presented in *Juan H. v. Allen, supra,* 408 F.3d 1262, and that presented in the case before us. Unlike Juan H., Gonzales did and said things both before and after the shootings that indicated his intent to aid and abet the murders. Gonzales joined with Soliz in (1) asking the driver to turn the car around so they could confront Skyles and Price, (2) arguing with Skyles and Price, and (3) warning Judith Mejorado to forget what she had just witnessed. Finally, Gonzales was armed, further supporting the inference he provided backup by adding deadly force support to Soliz." (*Id.* at p. 297.)

In this case, however, as in *Juan H.*, and unlike in *Gonzales*, there is no evidence that Gomez did or said anything before or after the shooting

that indicated an intent to aid and abet Luna's killing. There is no evidence Gomez was armed. Even if it is assumed that Gomez was the individual seen running, seven to nine blocks away, five to ten minutes after the shooting (see AOB 47-48), that does nothing to demonstrate that he did anything to aid and abet the killing, much less to demonstrate that he intended it. (See *Juan H. v. Allen, supra,* 408 F.3d at p. 1277.)

People v. Williams (1997) 16 Cal.4th 153, is instructive. In *Williams,* this Court held that there was insufficient evidence to show that Mark Williams was the defendant's accomplice. (*Id.* at p. 225.) Before the shooting, a witness saw passengers in the perpetrator's van, though the witness apparently could not identify them. (*Id.* at pp. 178-179.) The witness did identify Mark Williams as one of the passengers in the perpetrator's van three or more minutes after the perpetrator shot the victim. (*Id.* at p. 225.) But because there was no evidence that Mark Williams intended to facilitate the shooting, and because the witness identified Mark Williams as a passenger in the van three or more minutes *after* the shooting, this Court concluded that the evidence was insufficient to support a conclusion that Mark Williams was an accomplice. (*People v. Williams*, *supra,* 16 Cal.4th at pp. 178-179, 225.)

Here, William Owens testified that he saw Gomez five to ten

minutes after the shooting, seven to nine blocks from the scene. (14RT 2184-2187; see 28RT 4077; see Prosecution Exh. 46; 27RT 3875.) Owens's identification was not only weak (AOB 47-48, 51-54),[6] but even if credited, it did not provide sufficient evidence to conclude that Gomez aided and abetted Luna's killing. (See *People v. Williams, supra,* 16 Cal.4th at p. 178-179, 225.)

Nor does the fact that Gomez's fingerprints were found on a car

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[6] As set forth in appellant's opening brief, shortly after the crime, Owens described the man to police as Hispanic, apparently from Central America, with a thick Spanish accent. (14RT 2192-2193.) No evidence suggested that Gomez had a heavy Spanish accent. At trial, Owens estimated that the man was 5 feet, 9 or 10 inches. (14RT 2191.) Ruben Gomez is 6 feet, 2 inches. (29RT 4293.) This is a significant difference of at least one-third of a foot. While Owens claimed that he had viewed a photo array and "pointed out one picture and . . . said 75 to 85 percent," the detective who showed Owens the six-pack testified that Owens stated that a photograph of Gomez in a six-pack photo lineup "somewhat resembled" the man he had seen, but that Owens could not identify him to the detective's satisfaction. (14RT 2199-2200; 15RT 2325, 2330-2331.) (The detective did not have Owens circle Gomez's photo; he asks the witness to circle a photo when he feels the witness has made an accurate identification. (15RT 2330.)) After Owens had viewed the photo array, and then, nearly three years later, encountered Gomez three times in court, including the morning of his testimony, Owens informed the prosecutor that he could identify Gomez as the man he had seen running down the street. (11RT 1698; 14RT 2249; see also 14RT 2202; see *People v. Cardenas* (1982) 31 Cal.3d 897, 909 [in-court identifications were unreliable where witness had difficulty in identifying defendant before trial]; *People v. Trevino* (1985) 39 Cal.3d 667, 696-697 [in-court identification was speculative and equivocal where witness misremembered circumstances surrounding her viewing of photo lineups].)

parked near the scene establish that Gomez was ever in Luna's front yard — much less that he knew the shooter intended to kill Luna and shared that intent. At most, it shows association with a car that might have been associated with the crime. (See *People v. Robinson* (1964) 61 Cal.2d 373, 379, 397-399 [evidence, including evidence of defendant's fingerprints in and around the passenger seat and door of a getaway car, was insufficient even as slight evidence necessary to corroborate accomplice testimony; even if the fingerprints "cast suspicion, even grave suspicion," such is insufficient]; see also *United States v. Strayhorn* (4th Cir. 2014) 743 F.3d 917, 923 [in challenges to convictions involving fingerprints on moveable objects, "in the absence of evidence regarding when the fingerprints were made, the government must marshal sufficient additional incriminating evidence so as to allow a rational juror to find guilt beyond a reasonable doubt. Although the government may meet this burden with circumstantial evidence, that evidence must be sufficiently incriminating to support the conviction."].)

And even if it is assumed that Gomez had Luna's cell phone some time after Luna's killing, that, similarly, does nothing to show that he did anything to aid and abet Luna's killing, much less to show that he knew of the shooter's purpose and shared it. (*People v. Prieto* (2003) 30 Cal.4th 226,

249; see *People v. Rogers* (2013) 57 Cal.4th 296, 335 [error to instruct that possession of victim's recently stolen property may create an inference that defendant is guilty of murder].)

"[A] 'reasonable' inference is one that is supported by a chain of logic, rather than, in this case, mere speculation dressed up in the guise of evidence." (*Juan H. v. Allen, supra,* 408 F.3d at p. 1277.) There is some evidence — though not sufficient evidence (see AOB 45-60) — that Gomez was present in the area around the time of Luna's killing, that he at one time touched a car that might have been associated with the killing, and that he possessed Luna's cell phone afterwards. That is all.

There is no "chain of logic" (*Juan H. v. Allen, supra,* 408 F.3d at p. 1277) allowing the inference that, if Gomez were present in the area, he did anything to assist the shooter or intended Luna's killing. Indeed, it is clear that guilt as an aider and abettor cannot be inferred from presence at the scene of a crime. (See, e.g., *People v. Richardson* (2008) 43 Cal.4th 959, 1024; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90; see also *United States v. Goldtooth* (9th Cir. 2014) 754 F.3d 763, 769.)

For all the reasons set forth above, this was not a "competing inferences" case, in which the evidence supported an inference consistent with guilt (i.e., that the person who accompanied Luna's shooter knew of

the shooter's intent and shared it), and an inference consistent with innocence (i.e., that the person who accompanied Luna's shooter did not know that the shooter intended to shoot Luna, or believed the shooter had a different purpose). Rather, it is a case in which the evidence could not support any inference about the intent of the person who accompanied Luna's shooter.

But even if, for the sake of argument, the evidence in this case supported such competing inferences, reversal would be required. In applying the *Jackson* standard, courts have explained that "[w]here the evidence as to an element of a crime is equally consistent with a theory of innocence as a theory of guilt, that evidence necessarily fails to establish guilt beyond a reasonable doubt." (*United States v. Harris* (7th Cir. 1991) 942 F.2d 1125, 1129-1130.)[7]

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[7] See *United States v. Flores-Rivera* (1st Cir. 1995) 56 F.3d 319, 323; *United States v. Sanchez* (5th Cir. 1992) 961 F.2d 1169, 1173; *United States v. Burgos* (1st Cir. 2012) 703 F.3d 1, 10, 12-13; *United States v. D'Amato* (2d Cir. 1994) 39 F.3d 1249, 1256; *Cosby v. Jones* (11th Cir. 1982) 682 F.2d 1373, 1383; *United States v. Santillana* (5th Cir. 2010) 604 F.3d 192, 195; *Morgan v. Dickhaut* (1st Cir. 2012) 677 F.3d 39, 47-48; *O'Laughlin v. O'Brien* (1st Cir. 2009) 568 F.3d 287, 300-302; see also *People v. Harvey, supra,* 163 Cal.App.3d at p. 105, fn. 7 ["Substantial evidence means more than simply one of several plausible explanations for an ambiguous event."].

Gomez acknowledges that this Court has stated that "'[a]lthough it is the duty of the jury to acquit a defendant if it finds that circumstantial

(continued...)

In sum, even if sufficient evidence established that Gomez was at the scene of the crime — and it did not — there was no evidence from which the jurors could draw any inference about his state of mind. There was no evidence from which jurors could draw the inference that Gomez, if he accompanied the shooter to Luna's front yard, knew that the shooter

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[7](...continued)
evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt.' 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.' [Citations.] The conviction shall stand 'unless it appears that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]. [Citation.]" (*People v. Cravens* (2012) 53 Cal.4th 500, 507-508.)

Under the *Jackson* standard, reversal is required where no reasonable jury could conclude beyond a reasonable doubt that the defendant is guilty. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-319.) Thus, "the application of the beyond-a-reasonable-doubt standard to the evidence is not irretrievably committed to jury discretion." (*Id.* at p. 317, fn. 10.) As the cases cited above explain, where circumstantial evidence, viewed in the light most favorable to the verdict, nonetheless gives rise to equally reasonable inferences supporting guilt and reasonable inferences supporting innocence, no reasonable jury could conclude beyond a reasonable doubt that the defendant is guilty. While, of course, the appellate court must view the evidence in the light most favorable to the prosecution, thereby deferring to the jurors' resolution of conflicting inferences and credibility issues, the overarching standard remains whether any rational jury, viewing the evidence in the light most favorable to the verdict, could be convinced of guilt beyond a reasonable doubt. (*Id.* at pp. 319, 326.) To the extent that the sufficiency of the evidence standard as applied by this Court conflicts with this principle, Gomez respectfully contends, it contravenes federal constitutional requirements. (*Ibid.*)

intended to kill Luna and shared that intent. Nor was there any evidence from which jurors could infer that Gomez himself shot Luna. Gomez thus respectfully asks this Court to reverse his conviction for the murder of Raul Luna.

C. Mr. Gomez's death sentences must be reversed.

Respondent contends that even "assuming some prejudicial error, appellant must show that there was no basis to impose the death penalty to obtain a new penalty phase." (RB 65.) Respondent cites no authority for this proposition; in fact, that is not the standard. The question, under the state reasonable possibility standard, is whether there is a reasonable possibility that, in the absence of the error, at least one juror would have declined to impose the death penalty for the Patel murder. (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

Under the federal *Chapman* standard, the question is whether the prosecution can prove beyond a reasonable doubt that the error did not contribute to death verdict in the Patel case. (*Chapman v. California* (1967) 386 U.S. 18, 24, 26.) To say that the error did not contribute to the verdict is to find it unimportant in relation to everything else the jury considered on the issue of penalty. (*People v. Pearson* (2013) 56 Cal.4th 393, 463, citing *Yates v. Evatt* (1991) 500 U.S. 391, 403.) The prosecution cannot prove that

the murder of Raul Luna was unimportant in relation to everything the jury considered on the issue of penalty.

Respondent cites *People v. Hillhouse* (2002) 27 Cal.4th 469, 512, noting that this Court found it unnecessary to reverse a death sentence where the defendant's conviction for kidnaping for robbery and a felony murder special circumstance were reversed for insufficiency. (RB 65.) In *Hillhouse*, the Court noted that the reversals — based on a conclusion that the defendant had killed the victim before moving him — did nothing to mitigate the defendant's acts. (*Id.* at pp. 499, 512.)[8] This case, of course, is distinguishable, as it does not involve merely an aggravating circumstance pertaining to a murder the jurors would have considered even without the error. Rather, it involves an additional killing that jurors would not have considered at the penalty phase absent this error.

Thus, it is more similar to *People v. Hernandez* (2003) 30 Cal.4th 835, 877,[9] in which this Court, applying the "reasonable possibility"

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[8] Similarly, in *People v. Silva* (1988) 45 Cal.3d 604, 632-633, also cited by respondent (RB 65), the invalidated aggravating circumstances did not remove a homicide from the picture before the penalty phase jury. (See also *People v. Hajek* (2014) 58 Cal.4th 1144, 1185-1186 [where lying in wait special circumstance was reversed, death sentence could stand because the jury was statutorily permitted to consider all of the facts and circumstances surrounding the murder].)

[9] *Hernandez* has been disapproved on other grounds by *People v.*

(continued...)

standard, reversed a death sentence where evidence of a stabbing that the defendant had been acquitted of was erroneously put before penalty phase jurors, and where error skewed the jury's consideration of the prosecution's most important aggravating evidence — evidence of another murder. *Roberts*, another case cited by respondent (and also applying the "reasonable possibility" standard), is addressed in appellant's opening brief and is distinguishable because Luna's murder is manifestly not one to which the jury attached a lesser "moral significance." (*People v. Roberts, supra,* 2 Cal.4th at pp. 327-329.) For all the reasons set forth above and in appellant's opening brief, Gomez respectfully asks this Court to reverse his death sentences.

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[9](...continued)
Riccardi (2012) 54 Cal.4th 758, 824, fn. 32.

II.

The evidence was insufficient to sustain Mr. Gomez's convictions of the kidnaping, robbery, and murder of Rajandra Patel.

Gomez contended in appellant's opening brief that the evidence was insufficient to sustain his convictions for the crimes against Rajandra Patel. (AOB Argument II.) As set forth at length there, the only evidence linking Gomez to these crimes was the testimony of two witnesses, Witness #1 and Witness #3. (AOB 82-94.) Taken together, the testimony of these two witnesses — one a heroin addict who lied to the jury and the other a drug dealer's wife who implicated Gomez while at the police station after a large amount of cocaine was found in her bedroom — was not sufficient to permit rational jurors to conclude beyond a reasonable doubt that Gomez was guilty of the crimes against Patel. (AOB 82-94.)

It was not sufficient not only because, for a myriad of reasons set out in appellant's opening brief, no reasonable juror could put stock in the testimony of these witnesses, but also because these witnesses contradicted each other, such that it was physically impossible for both witnesses' accounts to be true. (AOB 89-92.)

* * *

Respondent begins by noting that defense counsel conceded that Patel was kidnaped. (RB 66-67, citing 27RT 3903.) This concession is of no

moment. Defense counsel did not concede that Gomez kidnaped Patel — or that he robbed him or murdered him. (See 27RT 3903 [defense counsel: "I will concede there was a robbery, I will concede it was a murder, and I will concede it was a kidnapping. The issue . . . is whether or not Ruben Gomez is the person that committed [these crimes]."].) In any event, sufficiency of the evidence claims are never waived. (*People v. Rodriguez* (1998) 17 Cal,4th 253, 262; *People v. Parra* (1999) 70 Cal.App.4th 222, 224, fn. 2; *People v. Trujillo* (2010) 181 Cal.App.4th 1344, 1350, fn. 3; see also *People v. Martin* (1973) 9 Cal.3d 687, 695.)

As explained in appellant's opening brief, Witness #1 and Witness #3 contradicted each other, such that they could not possibly both be telling the truth regarding Gomez's possession of Patel's jewelry. (AOB 89-90.) Respondent contends that "appellant could have kidnapped appellant [sic], sold the jewelry the same night, and then dumped Patel's body on the freeway. Thus, contrary to appellant's assertion, appellant could have sold Patel's jewelry the night Patel was killed." (RB 70.) Respondent's argument fails to acknowledge Witness #1's testimony that Gomez and another person called "Little Diablo" brought Patel's jewelry to Dunton's house and tried to sell it to someone Dunton knew, and that the jewelry was still at Dunton's house the day after Gomez and "Little Diablo" brought it there.

(AOB 90; see 22RT 3256-3257; 24RT 3529.) If respondent's theory that Gomez kidnaped and killed Patel and sold his jewelry the same night is correct, Witness #1's testimony cannot also be correct.

Respondent also contends that "[e]ven assuming Witness One['s] recollection was inconsistent with Witness Three's recollection, the jury could rely on either witness to support the conclusion that appellant murdered Patel. Conflicting testimony does not render either witness's testimony physically impossible or inherently unreliable." (RB 70-71.) It is true that conflicts in testimony alone do not necessarily render a witness's testimony physically impossible or inherently unreliable.

But Gomez's argument is not that the conflict between Witness #1's testimony and Witness #3's testimony renders each witness's testimony physically impossible. Rather, Gomez's argument is that the testimony of both witnesses cannot be true, and the testimony of either one alone is not substantial evidence — not merely because it conflicts with that of the other witness but because both witnesses were themselves inherently unreliable. Witness #1 was a heroin addict who admitted lying to the court and Witness #3 implicated Gomez in circumstances suggesting she had a motive to deflect suspicion from herself and her husband. (AOB 82-95.) Given the unreliability of each of these witnesses, as well as the fact that it is not

possible for both of them to be telling the truth, no reasonable juror could conclude beyond a reasonable doubt that Gomez was guilty of the crimes against Patel.

Gomez therefore respectfully asks this Court to reverse his conviction of the killing of Rajandra Patel and his death sentences for the killings of Patel and Raul Luna.

III.

The evidence was insufficient to support Mr. Gomez's convictions of first degree murder for the deaths of Robert Dunton and Robert Acosta.

The mental state of premeditation and deliberation "is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the act that caused the death." (*People v. Chiu, supra,* 59 Cal.4th at p. 166.) The evidence in this case was insufficient to support any conclusion that Gomez acted deliberately, carefully weighing the considerations before contemplating the shooting. Indeed, much of the prosecution's evidence showed that he did not. It showed that after Gomez returned to Dunton's apartment that evening, believing someone else would kill Dunton and Acosta (20RT 3016), he set the shotgun he had used to rob a drug dealer on the table and began to roll a marijuana and cocaine cigarette (23RT 3385-3386; see 25RT 3671). Only after someone pointed a gun at Gomez did "all hell [break] loose," with the shooting of Dunton and Acosta. (20RT 3034-3035.)

* * *

Sufficiency of the evidence review, of course, requires an examination of the entire record, not merely those portions that favor the

prosecution. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577 [court does not limit its review to evidence favorable to the prosecution]; *Jackson v. Virginia*, *supra,* 443 U.S. at p. 319.)

In contending that there was sufficient evidence that Gomez premeditated and deliberated the killings of Dunton and Acosta, respondent ignores several crucial aspects of the evidence and fails to acknowledge the import of another crucial aspect of the evidence.

First, respondent ignores that, on the day before the killings, Gomez's co-defendant Arthur Grajeda told Witness #2 that Dunton and *Gomez* were the intended victims of homicides to be carried out that night. (16RT 2612-2614.) Second, Witness #1 testified that as he and Gomez returned to Dunton's apartment on the night of the killings, Gomez commented that "[t]hey sent somebody to fuck Huero [Dunton] and Spider [Acosta] up" (20RT 3016), suggesting that while Gomez knew about a plan to harm Dunton and Acosta, his understanding was that it would be carried out by someone else. Third, Witness #1 told the police that after they returned to Dunton's apartment on the night of the killings, Gomez set the shotgun he had carried on the table and rolled primos (marijuana cigarettes with rock cocaine, rolled into dollar bills). (23RT 3385-3386; see 25RT 3671.) Grajeda, on the other hand, was holding a gun. (20RT 3034.) All of

this evidence points against premeditation and deliberation on Gomez's part.

Respondent does note that, before the shootings, Gomez said "Don't point that at me. I don't like people pointing things at me." (20RT 3034-3035; see RB 74.) Respondent apparently contends that the fact that someone was pointing a gun at Gomez is motive evidence suggesting that Acosta "submitted to the Mexican Mafia rules requiring his execution," and therefore, of premeditation on Gomez's part. (RB 74.) Acosta's state of mind, of course, is irrelevant to whether Gomez deliberated and premeditated.

On the other hand, the fact that, just before the shooting, someone was pointing a gun at Gomez *is* highly relevant to whether Gomez deliberated and premeditated, and indeed, it shows that he did not. (See *People v. Burney* (2009) 47 Cal.4th 203, 249 [duress may negate premeditation and deliberation]; *People v. Anderson* (2002) 28 Cal.4th 767, 784 [same].)[10] It is difficult to imagine how one could, with a gun pointed at

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[10] Respondent appears to contend that Gomez said this to Acosta, although police who arrived at the scene testified that when the coroner first examined Acosta's body, his gun was tucked in his armpit, under his jacket. (11RT 1757-1758.) Regardless of who pointed a gun at Gomez, however, the fact that a gun was pointed at him just prior to the shooting is evidence militating against a finding of premeditation, as set forth above.

oneself, "carefully weigh[] the considerations for and against a choice to kill" before contemplating a shooting and carrying it out. (*People v. Chiu, supra,* 59 Cal.4th at p. 166.)

As set forth in appellant's opening brief, in *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, this Court set forth factors to be considered in determining the sufficiency of the evidence of premeditation and deliberation. (AOB 101.) Under *Anderson* and its progeny, the question is not merely whether evidence of planning, motive, and an exacting manner of killing are present, but whether such evidence provides substantial evidence for a conclusion that "the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse. [Citations]." (*People v. Booker* (2011) 51 Cal.4th 141, 173.)

Regarding the first, and most important of the *Anderson* factors[11] — planning — respondent asserts only that Gomez and codefendant Grajeda committed the crimes together, and that both armed themselves before the killing. (RB 74-75.) But the prosecution's evidence at trial suggested that Gomez was armed either because he feared being the victim of violence, and/or because he had just returned from robbing a drug dealer — not because he planned to kill Dunton and Acosta. (See 20RT 3010-3015

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[11] See RB 74, citing *People v. Alcala* (1984) 36 Cal.3d 604, 627.

[Witness #1's testimony about robbery of drug dealer]; 16RT 2588-2595, 2611-2614 [Witness #2's testimony that Grajeda planned to kill Gomez].)

More, respondent does not explain how the fact that Gomez and Grajeda "committed the crimes together" (RB 75) demonstrates planning. Respondent points to no evidence that Gomez and Grajeda planned the crimes together — or that Gomez planned the crimes at all. It is simply not logical to infer planning on Gomez's part from the circumstances here — in which Gomez shot Dunton and Acosta immediately after a gun was pointed at him. (20RT 3035.) Indeed, given all the circumstances discussed above — circumstances respondent in large part ignores — evidence of planning by Gomez was nonexistent.

Respondent's argument that the gang-related nature of the killings demonstrates premeditation also fails. This is a far cry from *People v. Gonzales* (2011) 52 Cal.4th 254, 295, cited by respondent, in which a gang member killed a rival in retaliation for a prior killing.[12] While the evidence

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[12] Respondent contends that "[t]he seized 'green light' lists showed the Mexican Mafia had marked Dunton and Acosta for death, evidencing an obvious motive by some under the Mexican Ma[]fia rules to kill Acosta and Dunton, due to their failure to pay taxes or otherwise follow the rules. (See 15RT 2440-2441, 2444.)" (RB 73.) The portions of the record cited by respondent do not support a conclusion that seized "green light" lists showed that Dunton and Acosta were marked for death. The gang expert testified that of the lists that had been seized, he had seen the name "Huero" many times, and that he had seen the name "Spider." (15RT 2441.) He

(continued...)

may establish the gang-related nature of the killings, that does not tend to establish premeditation on Gomez's part. The motive evidence may establish premeditation on Grajeda's part; Witness #2 testified that Grajeda told him the day before the killings that Dunton and Gomez would be killed for not paying "taxes," and even asked Witness #2 to drive him to Dunton's apartment so that he could kill them. (16RT 2611-2614; 16RT 2588-2595.) And it also establishes knowledge, on Gomez's part, that Dunton and Acosta would be killed by the Mexican Mafia. (20RT 3016.) But it does not establish that Gomez premeditated and deliberated the killings.

Finally, the nature of the killings was not "so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design.'" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1081.) As Witness #1 described it, after he heard Gomez say, "'Don't point that at me. I don't like people pointing things at me,'" "all hell broke loose"; he

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[12](...continued)
explained that the list used monikers and gang affiliations, so the names Robert Dunton and Robert Acosta never appeared on the lists he saw. (15RT 2441.) The expert did *not* testify that he identified Dunton and Acosta on the lists by means of their monikers and gang affiliations. (15RT 2440-2441, 2444.) Indeed, he testified that there were "many Hueros." (15 RT 2441.)

In any event, and more to the point, as set forth below, though there is evidence that Gomez knew that the Mexican Mafia intended to kill Dunton and Acosta, there is no evidence that he contemplated committing the killing himself or believed he would be expected to carry it out.

heard four shots and then footsteps running. (20RT 3035.) In these circumstances, neither the nature of Dunton and Acosta's wounds or Grajeda's gang motive provided substantial evidence of premeditation.

Gomez respectfully asks this Court to reverse his first degree murder convictions for the killings of Dunton and Acosta.

IV.

The trial court unconstitutionally foreclosed the possibility of self-representation, telling Mr. Gomez his decision to proceed with counsel was "final."

In *People v. Lancaster* (2007) 41 Cal.4th 50, this Court disapproved the trial court's statement, upon reappointing counsel for a capital defendant for (at least) the fourth time, that the decision to be represented by counsel had "to be a permanent decision on your part." (*Id.* at p. 69; see AOB 113, fn. 36.) The Court, nonetheless, found no *Faretta* error because "the court did not entirely foreclose the possibility of defendant's future self-representation; it told him it would make a decision on any renewed application, though the request would probably not be viewed with favor." (*Ibid.;* see *Faretta v. California* (1975) 422 U.S. 806.)

Here, by contrast, the trial court did foreclose the possibility of self-representation. (1RT 118-119.) It never told Gomez that it would make a decision on any renewed request for self-representation — in fact, its statement did not allow for any renewed request. In reappointing counsel for Gomez (for the first time — unlike in *Lancaster* where the defendant had a long history of vacillation on the issue, see AOB 113, fn. 36), the court unconstitutionally foreclosed the possibility of self-representation, telling Gomez "I'm going to hold you to this kind of a change," "I'm not

going to let you bounce back and forth," and, "*this is a final change.*" (1RT 118-119 [emphasis added].)

This denial of Gomez's right to self-representation requires reversal of the judgment and remand for a new trial.

A. Mr. Gomez's claim that the trial court unconstitutionally foreclosed the possibility of self-representation is not forfeited.

Respondent, citing *People v. Lancaster*, *supra,* 41 Cal.4th at p. 67, contends that Gomez's claim that the trial court unconstitutionally foreclosed the possibility of self-representation is forfeited. Respondent is incorrect. Lancaster made a series of claims that the trial court "'compelled' him to relinquish his in propria persona status." (*Id.* at pp. 66-67.) This Court noted that "[b]ecause defendant never made this claim below, it is questionable whether he may properly raise it now." (*Id.* at p. 67.) The Court nonetheless went on to address Lancaster's six claims that the trial court "'compelled' him to relinquish his in propria persona status." (*Id.* at pp. 67-69.)

The Court then addressed a *different* claim — not that the trial court compelled the defendant to relinquish his in propria persona status, but that when the defendant relinquished his in propria persona status, the trial court preemptively denied any future *Faretta* motion. (*People v. Lancaster, supra,* 41 Cal.4th at p. 69.) The Court did not suggest that it was

"questionable" whether this claim — preemptive denial of any *Faretta* motion — could be raised on appeal. (*Id.* at pp. 69-70.)

The preemptive denial of a *Faretta* request is reviewable even when the defendant has not subsequently requested self-representation. (See *People v. Dent* (2003) 30 Cal.4th 213, 218-219 [Court need not decide whether defendant unequivocally requested self-representation where trial court's preemptive denial of any *Faretta* request foreclosed any realistic possibility defendant would view self-representation as an available option].)

More, in this case, the trial court made clear that, as a condition of its grant of Gomez's request to relinquish his pro per status, its grant would be "a final change." (1RT 119.) Any further requests or objections, thus, would have been futile. (See AOB 114-115 [distinguishing *People v. Valdez* (2004) 32 Cal.4th 73, 100].)

B. The trial court unconstitutionally foreclosed the possibility of self-representation.

Respondent attempts to distinguish this case from *People v. Dent*, *supra,* 30 Cal.4th 213, and to liken it to *People v. Lancaster*, *supra,* 41 Cal.4th 50, asserting that "the trial court's comments about appellant's *Faretta* rights did not foreclose the possibility of another change, because the court did not indicate another request for self-representation would have

been summarily rejected without any consideration." (RB 87.) The record refutes this assertion.

When Gomez asked to relinquish his pro per status, the trial court stated as follows:

> I told you before you can't switch back and forth.
>
> * * *
>
> *I'm going to hold you to this kind of a change.* I think it's a good change for you. I think you're doing the right thing. *All I'm saying is I'm not going to let you bounce back and forth.* You have a right to represent yourself, I recognize that and gave that to you, and as of this moment you do represent yourself.
>
> And it's better for you and it's better for me as well to have an attorney who knows the rules and will effectively represent you to do that for you.
>
> *So at this point you understand that if I'm going to change back, this is a final change.*

(1RT 118-119 [emphasis added].)

The trial court thus made clear, that, as a condition of its grant of Gomez's request to relinquish pro per status, reappointment of counsel would be "a final change." (1RT 119.) The court, in effect, told Gomez that a future request for self-representation would not be granted. The court's language — "*I'm going to hold you to this kind of a change. I'm not going to let you* bounce back and forth" and "this is a final change" — was

unequivocal. It was more like the language that required reversal in *Dent* – "I am not going to let him proceed pro per." (*People v. Dent, supra,* 30 Cal.4th at p. 217) than the language in *Lancaster* — in which the court told the defendant, "I can't let you continue to change from one to the other. It has to be a permanent decision on your part. * * * you can't just say now I'm back pro per. That's a decision for the court to make, and *it probably would not be in your favor*." (*People v. Lancaster, supra,* 41 Cal.4th at p. 69 [emphasis added].)

In *Lancaster,* the Court made clear that it would entertain a renewed *Faretta* request — though it properly advised the defendant, who had previously made three *Faretta* requests and then changed his mind, seeking counsel (see AOB 113, fn. 36), that a fourth *Faretta* request would not likely be granted. (*People v. Lancaster, supra,* 41 Cal.4th at p. 69.) In this case, as in *Dent*, the trial court's words — that it would "not . . . let" Gomez return to self-representation and that if it were to grant Gomez's request for counsel it would be a "final change" (1RT 118-119) — "foreclosed any realistic possibility defendant would perceive self-representation as an available option." (*People v. Dent, supra,* 30 Cal.4th at p. 219.)

Here, unlike in *Lancaster*, the trial court said nothing to indicate it would consider a renewed *Faretta* request. (*People v. Lancaster, supra,* 41

Cal.4th at p. 69 ["the court did not entirely foreclose the possibility of defendant's future self-representation; it told him it would make a decision on any renewed application, though the request would probably not be viewed with favor"].) Rather, it stated the opposite: it would not let Gomez return to self-representation; his request for counsel, if granted, would be a "final change." (1RT 119.)

Respondent attempts to distinguish *Dent*, stating that Dent requested self-representation and the court denied it, and that Dent was not responsible for any potential delay in his trial because the court had dismissed his appointed attorneys. (RB 85; see *People v. Dent, supra,* 30 Cal.4th 213.) Respondent's attempt fails. First, this Court found it unnecessary to decide whether Dent adequately requested self-representation because the trial court had foreclosed the possibility; thus, *Dent* cannot be distinguished as a case in which "Dent requested but was categorically denied self-representation for improper reasons." (RB 85.)[13]

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[13] Respondent also contends that *Dent* is distinguishable because Dent was not permitted to speak directly to the court, because Dent was not advised of his rights and asked if he understood them, and because Dent was not asked to weigh the consequences of electing counsel or self-representation. (RB 85-86.) These are distinctions without a difference. Gomez does not claim that he was not permitted to speak directly to the court; that the right to counsel and the right to self-representation were not explained to him; or that he was not asked to weigh the consequences of his choice. Rather, Gomez contends that the trial court unconstitutionally

(continued...)

Second, since *Dent*, this Court has made clear that the defendant's responsibility for any potential delay caused by a "'prior proclivity to substitute counsel' is a legitimate factor for the court to consider in connection with an assertion of the right to self-representation." (*People v. Lancaster, supra*, 41 Cal.4th at p. 69.) But even in *Lancaster*, where the defendant had changed his mind at least six times (see AOB p. 113, fn. 36), such "proclivity" was not a reason to foreclose any future *Faretta* requests. (*People v. Lancaster, supra,* 41 Cal.4th at pp. 60-70.) In *Lancaster* — as in this case — "[t]rial was not imminent," and despite any prior proclivity to substitute counsel, "a renewed and timely *Faretta* motion would have been entitled to the court's full consideration." (*People v. Lancaster, supra,* 41 Cal.4th at p. 69; see *People v. Dent, supra,* 30 Cal.4th at pp. 221-222.)

The trial court here, however, not merely discouraged, but foreclosed any renewed *Faretta* motion, telling Gomez that he would not let him represent himself and that the reappointment of counsel was "final." (1RT 118-119.) The court thus unequivocally and preemptively denied any renewed *Faretta* motion, violating Gomez's Sixth and Fourteenth Amendment rights.

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[13](...continued)
foreclosed the possibility of self-representation when, as a condition of granting his motion to reappoint counsel, it made clear that it would not let him change his mind and represent himself. (1RT 118-119.)

C. Reversal is required.

Respondent states that "[i]t is . . . manifest that there was no prejudice to appellant." (RB 87.) As explained in appellant's opening brief, with citation to authority respondent ignores, deprivation of the right of self-representation cannot be harmless and is reversible per se. (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177 n. 8.) Gomez respectfully asks this Court to reverse the judgment and remand for a new trial.

V.

The trial court abused its discretion when it refused to sever the Patel and Luna homicide cases from each other and from the O'Farrell Street double homicide, the Escareno homicide, and the Salcedo robbery, violating Mr. Gomez's constitutional rights.

The Patel and Luna homicide cases were both non-gang-related cases marked by singularly weak evidence. In neither case did any eyewitness or forensic evidence link Gomez to the crime. In both cases, Gomez's identity as the perpetrator was in real question. (See Arguments I & II, above; AOB Arguments I & II.) These were the type of close cases in which extraneous, irrelevant, and prejudicial evidence can tip the balance towards conviction. (See *People v. Cardenas*, *supra,* 31 Cal.3d at p. 914 [reversal required where jury was confronted with extremely close question as to whether defendant was responsible for the crimes and prosecutor was erroneously allowed to portray defendant as a gang member predisposed to commit violent crimes and a drug addict desperate to obtain money]; *Chapman v. California, supra,* 386 U.S. at pp. 25-26 [reversing despite "reasonably strong 'circumstantial web of evidence'" where reasonable jurors might well have acquitted absent the error].)

As a result of the trial court's denial of Gomez's motion to sever, the jurors deciding the Patel and Luna cases heard eyewitness testimony identifying Gomez as the perpetrator in another homicide in which a victim

was shot in the head and robbed of his costume jewelry. And they heard forensic and eyewitness evidence identifying Gomez as the shooter in a double homicide committed at the behest of the Mexican Mafia. Still more, the jurors heard extensive evidence about the Mexican Mafia, evidence that frightened them, prompting them to ask the court whether they themselves were at risk.

It is unrealistic, to say the least, to imagine that jurors could put the Mexican Mafia, and the Dunton, Acosta, and Escareno killings out of their mind when considering whether Gomez was guilty of killing Luna or Patel. The court's error in refusing to sever counts resulted in a denial of Gomez's right to due process and to a fair trial, requiring reversal, at a minimum, of the Luna and Patel convictions and sentences.

A. The trial court abused its discretion in refusing to sever the Patel and Luna cases from the Escareno and Dunton and Acosta cases, and from each other.

1. Evidence of the Patel and Luna homicides would not have been admissible in separate trials of the Dunton and Acosta and Escareno homicides and the Salcedo robbery, or vice versa, and evidence of the Patel homicide would not have been admissible in a trial of the Luna case, or vice versa.

Respondent asserts that "[t]here was cross-admissible evidence for all the homicide cases." (RB 93.) Respondent's argument is flawed, first, because it analyzes the evidence at trial, rather than the case as it stood

before the court at the time of the motion to sever. (See *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1244; see *People v. Thomas* (2012) 53 Cal.4th 771, 798; *People v. Merriman* (2014) 60 Cal.4th 1, 46 [evidence developed at trial is relevant to due process argument but not to whether ruling on severance was an abuse of discretion at the time it was made].)

As set forth in appellant's opening brief, when the trial court ruled on the motion to sever counts, the prosecution had made no effort to show that evidence of the Patel or Luna homicides would have been admissible in a separate trial of the Salcedo, Escareno, and Dunton and Acosta cases, or vice-versa. Nor had it made any attempt to show that the Patel and Luna homicides would each have been admissible in trials of the other. (AOB 127-128.) In any event, even if this Court were to examine the trial evidence on this question, respondent has not demonstrated cross-admissibility.

* * *

First, respondent contends that Gomez's remark to Detective Winter during booking was admissible as to all the homicides because it describes "the Acosta/Dunton homicides as well as the Patel, Luna, or Escareno homicides." (RB 93.) This statement was not before the court at the time of the motion to sever. During the preliminary hearing, the court struck any

reference to it. (See 1CT 293.)[14] The prosecutor did not mention the statement during argument on the motion to sever. (See 1RT 69-92; 2CT 552A-556.) Nor was this statement mentioned in the prosecution's written opposition to the defense motion to sever. (2CT 552-560.)[15]

More, even if the statement were admissible as to all the counts, it was a small piece of evidence and it would hardly have consumed significant judicial resources to present it at separate trials. Its presentation consumed four transcript pages (13RT 2042-2045) in a record of well over four thousand pages of reporter's transcript.

In sum, Gomez's statement to Detective Winter provided no reason to deny severance at the time the motion was ruled upon, and it provides no reason now, in hindsight, to conclude that the motion was properly denied.

Second, respondent contends that Witness #1's testimony was relevant to all the homicide cases. That may be the case, but the portions of this witness's testimony that were relevant to each case were distinct from

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[14] After the court ruled on the motion to sever, the prosecutor stated his intention to introduce a statement by Gomez, but he did not indicate the nature of the statement. (1RT 93.)

[15] The prosecution opposition referred to other statements by Gomez — none of which were ever introduced at trial. (See 2CT 558-559.) In appellant's opening brief, Gomez explained that in determining whether the trial court erred in denying the motion to sever, this Court should not consider evidence that was not ultimately presented at trial. (AOB 143-146.) Respondent does not appear to dispute this point.

the portions of his testimony that were relevant to each of the other cases. His testimony about the Dunton and Acosta killings, his testimony about Patel's jewelry and car, his testimony about Gomez's possession of a handgun that resembled the gun used to kill Patel, and his testimony about Luna's cell phone, were all distinct and separate. (See AOB 133-134.) Respondent offers no argument as to why any of these portions of Witness #1's testimony would be admissible in any of the cases except the one to which they directly related. (RB 93.) The fact that Witness #1 testified that Gomez brought Patel's jewelry to Dunton's apartment, for example, has nothing to do with the Dunton and Acosta homicides. (See RB 93-94.)[16]

Third, respondent contends that "[t]he evidence regarding the shotguns, the spent shells, and the unspent shells, linked some of the homicides together." (RB 94.) (As explained above, respondent is incorrect in stating that the shotgun used to kill Luna was the same weapon used to kill Dunton and Acosta. (See pp. 2-5, above.)) Indeed, except for Dunton and Acosta, who were killed on the same occasion, there is no evidence

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[16] The fact that Luna's cell phone was found in Dunton's apartment is addressed in appellant's opening brief. (AOB 133-134.) This fact did not demonstrate cross-admissibility at the time of the motion to sever for the additional reason that defense counsel, asserted, without contradiction, that Witness #1 stated several times that "Little Diablo," not Gomez, brought Luna's cell phone to Dunton's apartment. (1RT 78.)

suggesting that any of the victims in this case were killed with the same weapon.) Respondent appears to assert that because a shotgun was used in each of the killings except Patel's, and because each of the victims was shot in the head (except for Acosta), the evidence of each killing would be admissible in the trial of each other killing. (RB 94.) As noted in appellant's opening brief, unfortunately, the use of shotguns in homicides and attempted homicides is not uncommon. (See AOB 131-133, fn. 42.) Nor, unfortunately, are shots to the head and at close range.[17] These factors hardly constituted a unique "signature" — particularly given the glaring differences between the four cases. (See AOB 129-130; compare *People v. Lucas* (2014) 60 Cal.4th 153, 215-216 [wounds shared characteristics

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[17] See, e.g., *People v. Mai* (2013) 57 Cal.4th 986, 995; *People v. Maciel* (2013) 57 Cal.4th 482, 542; *People v. Whalen* (2013) 56 Cal.4th 1, 13; *In re Shaputis* (2011) 53 Cal.4th 192, 201 [shot to neck at close range]; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1070-1071, 1074; *People v. McKinnon* (2011) 52 Cal.4th 610, 631; *People v. Lee* (2011) 51 Cal.4th 620, 637; *People v. Burney, supra,* 47 Cal.4th at p. 235; *People v. Carrington* (2009) 47 Cal.4th 145, 156; *People v. Butler* (2009) 46 Cal.4th 847, 852; *In re Burdan* (2008) 169 Cal.App.4th 18, 32-33; *People v. Lewis* (2008) 43 Cal.4th 415, 439, rejected on other grounds by *People v. Black* (2014) 58 Cal.4th 912, 919-920; *People v. Halvorsen* (2007) 42 Cal.4th 379, 422 [victims shot in head or neck from within a few feet]; *People v. Sandoval* (2007) 41 Cal.4th 825, 842; *People v. Leonard* (2007) 40 Cal.4th 1370, 1377; *People v. Lewis* (2006) 39 Cal.4th 970, 982; *People v. Ramirez* (2006) 39 Cal.4th 398, 408, 409; *People v. Sturm* (2006) 37 Cal.4th 1218, 1247 (Baxter, J., dissenting); *People v. Robinson* (2005) 37 Cal.4th 592, 601.

unlike anything San Diego coroner had seen in any other case], with *People v. Thomas*, *supra,* 53 Cal.4th at p. 798 [two sets of crimes were unrelated where the only similarity between them was that the same type of gun (though not the same gun) was used in each case].)

2. The Dunton and Acosta and Escareno charges were particularly inflammatory.

Respondent contends that all of the killings Gomez was charged with were equally inflammatory. Respondent's argument ignores case law acknowledging that gang evidence has a "highly inflammatory impact" (*People v. Champion* (1995) 9 Cal.4th 879, 922)[18] and that evidence of the Mexican Mafia, in particular, is extremely prejudicial (see, e.g. *People v. Albarran* (2007) 149 Cal.App.4th 214, 230-231 & fn. 15).

Indeed, in the context of a severance issue, this Court has found that gang evidence "might indeed have a very prejudicial, if not inflammatory effect on the jury in a joint trial. The implication that gangs were involved and the allegation that petitioner is a gang member might very well lead a jury to cumulate the evidence and conclude that petitioner must have participated in some way in the murders or, alternatively, that involvement

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[18] *Champion* has been overruled on other grounds as stated in *People v. Combs* (2004) 34 Cal.4th 821, 860, and disapproved on other grounds as stated in *People v. Ray* (1996) 9 Cal.4th 879, 949 (George, C.J., concurring [opinion joined by a majority of the justices]).

in one shooting necessarily implies involvement in the other." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 453, superseded by statute on other grounds as stated in *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1229; see also *People v. Hartsch* (2010) 49 Cal.4th 472, 492-495 [where one case was gang-related and two others were not, trial court did not err in refusing to sever where it told the prosecution it would sever unless the prosecution agreed not to present gang evidence, and the prosecution agreed].) Indeed, as noted in appellant's opening brief, in the context of opposing the motion to sever made by co-defendant Grajeda, the prosecutor himself opined that because of the alleged Mexican Mafia involvement, the Dunton and Acosta homicides were "much more grievous and much more aggravated" than the others. (1RT 22-23.)

Finally, respondent's contention that evidence of the Patel and Luna homicides was as inflammatory as the evidence of the Escareno homicide ignores a crucial factor: only circumstantial evidence — and exceptionally weak circumstantial evidence, at that — tied Gomez to the Luna and Patel killings. (See Arguments I & II.) The Escareno case, however, would feature Witness #1's eyewitness testimony about the killing and its aftermath. (See AOB 137-138.)

3. The Luna and Patel cases were much weaker than the Salcedo robbery and the Escareno and Dunton and Acosta homicide cases.

As trial counsel stated during argument on the motion to sever, "[i]f Witness No. 1 is believed in Dunton and Acosta and Escareno, the other cases are never going to be looked at on their own merits, because it is overwhelming." (1RT 71.)

Respondent summarizes the evidence in each of the cases and proclaims each "strong or overwhelming." (RB 98, 99, 100, 101.)[19] Respondent, however, makes no effort to compare the evidence in the Luna and Patel cases to the evidence in the Dunton and Acosta and the Escareno cases. (RB 98-101.) Such a comparison reveals that the Luna and Patel cases were and are significantly weaker than the Dunton and Acosta and the Escareno cases. In the Luna case, there was no evidence that Gomez was the shooter or any evidence supporting a conclusion that he aided and abetted the shooter. (See Argument I, above; AOB Argument I.) More,

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[19] Respondent contends that the evidence in the Patel case was strong because "the only issue was identity . . . ." (RB 99.) Even if identity were the only issue, that does not make the evidence strong. In both the Patel and Luna cases, the identity of the shooter was in serious question. Indeed, in the Luna case there was no evidence at all to suggest that Gomez was the shooter. (See Argument I, above; see also AOB Argument I.) And the only evidence identifying Gomez as the shooter in the Patel case consisted of statements to two highly unreliable witnesses — Witness #1 and Witness #3. (See AOB 83-94.)

neither the Luna or Patel case involved a witness at the scene or forensic evidence tying Gomez to the weapon used — despite the prosecution's mistaken contention that evidence tied Gomez to the shotgun used to kill Luna. (RB 60; see RB 98; Argument I.A., above.)

4. The trial court abused its discretion in denying severance; it is reasonably probable that absent this error, the result would have been more favorable to Gomez.

The charges against Ruben Gomez demanded severance. The Dunton and Acosta case involved highly prejudicial evidence about the Mexican Mafia that ended up frightening jurors profoundly (15RT 2386; 3SCT 591; 29RT 4335; 4SCT 746), as well as evidence of guilt consisting of a witness at the scene and Gomez's fingerprints on the weapon used to shoot the victims (20RT 3009-3010, 3034; 11RT 1754-1756; 18RT 2741-2749; 19RT 2859-2863, 2869-2872; 21RT 3099-3100, 3119). On the other end of the spectrum, yet tried to the same jury simultaneously, was the Luna case — a case without any gang involvement, and with no evidence that Gomez shot the victim, nor any evidence that he aided and abetted whoever did so. (See Argument I, above; AOB Argument I.) As set forth above, and in appellant's opening brief, the only factor weighing against severance was the "judicial economy" factor that is weighed in every case. (*Williams v. Superior Court, supra,* 36 Cal.3d at pp. 451-452.)

Respondent does not address Gomez's argument that the trial court's error in denying the severance motion was prejudicial except to contend that "there was no prejudicial error" and "ultimately, appellant has not met his burden of showing that it is reasonably probable the joinder affected the jury's verdicts . . . ." (RB 102-104; see AOB 151-170.)[20]

For all the reasons set forth in appellant's opening brief — including the prosecutor's summation arguments cumulating the evidence (see AOB 158-161), the jury's fearful reaction to the Mexican Mafia evidence (see AOB 156-158), the fact that the court's instructions failed to ensure that jurors would not consider evidence of one set of offenses as establishing the others (see AOB 161-162), and the fact that the cases were not presented seriatim and that instead, the prosecution's case jumped back and forth among the charges (AOB 163) — this error was prejudicial under any standard at the guilt phase, and under the "reasonable possibility" standard applicable at the penalty phase. (AOB 168-170; see *People v. Wilkins* (2013) 56 Cal.4th 333, 350-351; *People v. Brown, supra,* 46 Cal.3d at pp. 447-448.)

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[20] In the course of its argument that joinder did not result in gross unfairness, respondent notes conclusorily that the jury deadlock on the Escareno charges shows that there was not a reasonable probability of a different result. (RB 103.) As noted below, respondent ignores Gomez's argument on this point. (See AOB 173-174; pp. 54-55, below.)

B. Even if the trial court did not err when it refused to sever, the joint trial violated Mr. Gomez's constitutional rights to due process and a fair trial, requiring reversal.

Respondent's only responses to the argument that the joint trial resulted in gross unfairness and denied Gomez his right to due process are (1) that the court did not abuse its discretion in denying severance before trial; (2) that the fact that the jury deadlocked in the Escareno case shows that the jury was able to differentiate among the charges; and (3) that denying severance significantly conserved judicial resources. (RB 102-104.)

As to respondent's first point, the question whether the trial court abused its discretion in denying severance does not resolve whether trying all the counts together has resulted in a due process violation. If it did, it would not be necessary for courts to assess whether due process has been violated; it would be enough to determine whether a trial court abused its discretion in denying severance in the first place. (*People v. Merriman*, *supra,* 60 Cal.4th at p. 46 [even when court determines that trial court did not abuse its discretion in denying severance, it must further inquire whether joinder actually resulted in gross unfairness and denial of due process].)

Respondent's second point — that the fact that the jury deadlocked in the Escareno case shows that the jury was able to differentiate among the

charges — is addressed in appellant's opening brief (AOB 163-166, 173-174), in an argument respondent fails to answer. In brief, this Court, in *People v. Smallwood* (1986) 42 Cal.3d 415, 433,[21] rejected the "cure by verdict" theory, finding that an error in severance could not be saved by a jury deadlock on one count. Indeed, that six jurors apparently voted to convict Gomez of the Escareno murder despite the absence of accomplice corroboration suggests that the joinder was prejudicial — not that it was harmless. (See AOB 163-166, 173-174; 29RT 4338-4340.)[22]

Respondent's third point — that joinder significantly conserved judicial resources — is irrelevant to the due process question. Respondent cites *People v. Soper* (2009) 45 Cal.4th 759, 782, *People v. Mason* (1991) 52 Cal.3d 909, 935, and *People v. Burnell* (2005) 132 Cal.App.4th 938, 947. All three of these cases address the conservation of judicial resources in relation to assessing whether a trial court abused its discretion in denying a severance motion (or, in the case of *Burnell*, whether trial counsel was

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[21] *People v. Bean* (1988) 46 Cal.3d 919, 939, fn. 8, disagreed with *Smallwood* on other grounds.

[22] *People v. Lucas, supra,* 60 Cal.4th at pp. 216-217, is distinguishable. In that case, compelling independent evidence supported the defendant's conviction with respect to one set of murders, strongly suggesting that there was no "spillover prejudice" with respect to those counts. In this case, the jury convicted Gomez of two murders as to which the evidence of his guilt was exceptionally weak. (See AOB, Arguments I & II.)

ineffective in not making a severance motion) — not in the context of the due process question. The conservation of judicial resources — no matter how significant — cannot justify denying defendant due process or a fair trial. (*Williams v. Superior Court, supra,* 36 Cal.3d at pp. 451-452 ["Quite simply, the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial."]; *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1086; see also *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 325 [Court lacks authority to relax constitutional requirements to accommodate necessities of trial and adversary process].)

The joint trial of all the charges against Gomez violated his right to a fair trial and to due process of law. Had the Dunton and Acosta charges been severed from the Patel and Luna charges, the jury considering the latter would not have heard the evidence about the Mexican Mafia or Gomez's gang membership. This alone violated Gomez's right to due process; the Mexican Mafia evidence about the gang's penchant for murdering those who thwarted its criminal ends or cooperated with law enforcement (see AOB 156-158) was so frightening that it prompted two juror notes expressing concern for the jury's safety — and the trial court noted that "[t]hey might well be concerned that there's some danger that they're in . . . ." (15RT 2386; 3SCT 591; 29RT 4335; 4SCT 746; see *People*

v. Albarran, supra, 149 Cal.App.4th at pp. 230-231, fns. 15, 17.)[23]

But the court's refusal to sever the charges was not only grossly unfair because it placed the irrelevant Mexican Mafia evidence before the jury considering the Patel and Luna cases. The substantial disparity in the strength of the evidence between the Dunton and Acosta case on one hand, and the Patel and Luna cases on the other, also resulted in gross unfairness.

As respondent acknowledges, in the Patel case, identity was at issue. (RB 99.) Gomez's presence at the scene was not established by any evidence. (See Argument II, above; AOB Argument II.) In the Luna case, even if Gomez were in the area around the time of the crime, there was no evidence at all that he was the shooter or did anything to aid or abet the shooter. (See AOB Argument I.)

In the Dunton and Acosta cases, by contrast, an eyewitness placed Gomez at the scene at the time of the shooting, and fingerprints linked him to the gun apparently used to shoot Dunton and Acosta. (20RT 3009-3010, 3034; 11RT 1754-1756; 18RT 2741-2749; 19RT 2859-1863, 2869-2872;

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[23] This case is a far cry from *People v. Mendoza* (2000) 24 Cal.4th 130, 162-164, where this Court concluded that three fleeting and minor references to gang membership (two witnesses' testimony that defendant said he was a "homeboy," the testimony of one of those witnesses that "homeboy" meant gang member, and the prosecutor's statement that defendant's hair was combed "Cholo style, gang style") did not amount to a denial of due process resulting from a refusal to sever.

21RT 3099-3100, 3119.)

For these reasons, as well as the other reasons set forth in appellant's opening brief (AOB 151-176) — including, not least, the prosecutor's summation arguments lumping the cases together (see AOB 158-161; see also p. 53, above) — the trial court's refusal to grant the severance motion denied Gomez the right to due process and a fair trial. Gomez respectfully asks this Court to reverse the judgment. At a minimum, he asks this Court to reverse the convictions and sentences in the Patel and Luna cases, in which he was most egregiously prejudiced by the refusal to sever.

VI.

The trial court's refusal to sever Mr. Gomez's trial from that of his co-defendant requires reversal.

This issue was fully briefed in appellant's opening brief. (AOB 177-184). Gomez reasserts those arguments and incorporates them by reference herein.

VII.

The trial court erroneously required the presentation of evidence regarding Mr. Gomez's refusal to come to court one morning, erroneously instructed jurors that they could consider that refusal as evidence of consciousness of guilt, and failed to perform the role of a neutral arbiter; these errors violated Mr. Gomez's rights under California law and the State and Federal Constitutions.

One day during trial, Gomez refused to leave his cell. (9RT 1473-1474.) After the court issued an extraction order, Gomez left his cell and was brought to court. (9RT 1473.) Gomez's initial refusal to come to court resulted in a 38-minute delay in the proceedings. (12RT 1850-1851, 1857.)

The trial court, in response to defense counsel's motion for a mistrial made after the trial court told jurors they might learn the reason for the delay, arranged for the presentation of evidence regarding Gomez's refusal to come to court. (9RT 1507-1509; 10RT 1604-1612.) This testimony, by Deputy John Ganarial, included the inflammatory details that Gomez was in a disciplinary unit in the jail, that he was fed through a slot in his cell, and that he had to be waist-chained and handled by a movement team to come to court. (12RT 1841-1851.)

The court then instructed jurors that they could consider Gomez's refusal to come to court as evidence of a consciousness of guilt. (29RT 4124; 3CT 876.)

This evidence and instruction was justified neither by the law —

which makes clear that the evidence is irrelevant and prejudicial and that the instruction was wrong — nor by the court's evident desire to punish Gomez for his affront to the court and to send a message that such behavior will not be tolerated.

The prosecution cannot prove these errors — which were of constitutional dimension and were inherently prejudicial — harmless beyond a reasonable doubt. Indeed, they were not harmless under any standard. For all the reasons set forth in appellant's opening brief and below, Gomez respectfully asks this Court to reverse the judgment.

A. The evidentiary and instructional errors are reviewable on appeal.

Respondent contends that Gomez forfeited most of his current challenges to the evidence about his refusal to come to court and that he "merely argued that the evidence was inadmissible under Evidence Code section 352." (RB 111.) Respondent is mistaken.

Counsel for Gomez did not merely argue that the evidence was inadmissible under Evidence Code section 352. He contended, at length, that the evidence was not relevant to consciousness of guilt. (10RT 1652-1663; see 10RT 1663 [counsel states that aside from his disagreement with the court on the issue of consciousness of guilt, he objects to the testimony under Evidence Code section 352].) And he contended that the evidence

would be "another form of the court or the prosecution putting on character evidence when you really can't do that unless he testifies" (10RT 1663, 1665), thus preserving the argument that the evidence was inadmissible character evidence.

More, after Deputy Ganarial testified about Gomez's refusal to come to court, counsel moved to strike his testimony, contending again that it was irrelevant. (12RT 1854.)

Under this Court's precedents, Gomez may argue, as he does, that the trial court's abuse of discretion in admitting the evidence and refusing to strike it, and instructing the jurors that it could be considered as consciousness of guilt evidence, had the effect of violating Gomez's federal and state constitutional rights to a fair trial, to a properly instructed jury, to counsel, to due process of law, to a reliable determination of his guilt and sentence, and to be free from cruel and unusual punishment. (See *People v. Partida* (2005) 37 Cal.4th 428, 433-439; see additional authorities cited at AOB 208; U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

Finally, respondent makes no specific argument that Gomez's challenge to the trial court's consciousness of guilt instruction was forfeited. (RB 111-112, 118-119.) Nor could it. Not only did defense

counsel specifically argue, at length, that Gomez's refusal to come to court had no bearing on consciousness of guilt (10RT 1652-1663), but Penal Code section 1259 provides that, even in the absence of an objection, a defendant may challenge, on appeal, instructions that violate his substantial rights. (See *People v. Benavides* (2005) 35 Cal.4th 69, 99-100 [no objection necessary to preserve claim that consciousness of guilt instruction was erroneous].)

B. The trial court abused its discretion in arranging for the presentation of Deputy Ganarial's testimony about Mr. Gomez's refusal to come to court, in direct contravention of this Court's cases establishing that a defendant's absence from court is irrelevant.

1. Deputy Ganarial's testimony was irrelevant.

This Court has made clear that a defendant's absence from court is not relevant at either the guilt or the penalty phase of a capital trial:

- In *People v. Sully* (1991) 53 Cal.3d 1195, this Court, addressing a case in which a defendant had voluntarily absented himself from the penalty phase of his capital trial, concluded that "[a]n instruction to disregard defendant's absence would have been proper on defendant's timely request." (*Id.* at p. 1241.)

- In *People v. Medina* (1995) 11 Cal.4th 694, this Court reaffirmed *Sully* and made clear that its conclusions apply to the guilt phase of a capital trial as well. (*Id.* at pp. 739-740.)

Numerous other cases, including the United States Supreme Court's decision in *Taylor v. United States* (1973) 414 U.S. 17, 17-18, are in accord.

(See AOB 199-200.)

Though it never directly addresses this Court's decisions in *People v. Sully, supra,* 53 Cal.3d at pp. 1238, 1241, and *People v. Medina, supra,* 11 Cal.4th at pp. 735, 739-740, respondent's argument amounts to both an attempt to persuade this Court to overrule them and an attempt to create a new category of consciousness of guilt evidence — rude or defiant conduct. This Court should reject respondent's proposal.

This Court's cases upholding the admission of consciousness of guilt evidence share common characteristics: they involve deceptive or evasive behavior. (See *People v. Bolin* (1998) 18 Cal.4th 297, 327; *People v. Carrasco* (2014) 59 Cal.4th 924, 963 [escape from jail pending trial is generally relevant to establish consciousness of guilt and is admissible where it involved no "inflammatory features"]; see also authorities cited at AOB 196-197.)

Cases involving false exculpatory or misleading statements, obviously, involve deceptive behavior. (See RB 113; *People v. Watkins* (2012) 55 Cal.4th 999, 1028 [defendant gave a false name upon arrest]; *People v. Geier* (2007) 41 Cal.4th 555, 588-589 [false and misleading statements], overruled on other grounds by *Melendez-Diaz v.*

Massachusetts, *supra,* 557 U.S. 305.)[24]

Cases in which defendants refuse to participate in prosecution efforts to gather evidence involve evasive behavior. (See RB 113-115; see, e.g., *People v. Watkins, supra,* 55 Cal.4th at p. 1027 [refusal to stand in lineup]; *United States v. Jackson* (7th Cir. 1989) 886 F.2d 838, 845-846 [refusal to furnish writing exemplars].)

Cases in which defendants flee the scene of the crime, escape or attempt to escape, or fail to appear in court while out of custody also, of course, involve evasive conduct. (See, e.g., *People v. Jackson* (2010) 189 Cal.App.4th 1461, 1468 [law allows an inference of consciousness of guilt

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[24] Respondent also cites cases involving a murder defendant's tattoos or hairstyles displaying the number 187, contending that "certain behaviors while in custody support an inference a defendant has a consciousness of guilt." (RB 113.) Respondent does not offer any explanation as to how Gomez's refusal to come to court was similar to getting a tattoo of the number corresponding to the Penal Code section for murder. Obtaining such a tattoo is more appropriately deemed an admission. In *Ochoa*, in the course of upholding the admission of evidence that a murder defendant had a "187" tattoo, this Court stated that the trial court properly found the tattoo represented an admission of defendant's conduct and a manifestation of his consciousness of guilt. (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-439.) In discussing the matter, the Court compared the tattoo to evidence it had upheld in another case, "a coded list that arguably referred to a series of homicides committed by the defendant." (*Id.* at p. 439.)

Gomez's conduct, unlike that of a gang member who displays the Penal Code section for murder on his body, cannot be deemed an admission of any sort.

where the defendant has engaged in "acts . . . designed to escape arrest, trial or conviction"].)

But when an in-custody defendant refuses to come to court, his conduct is neither evasive nor deceptive. He cannot thereby evade prosecution and he does not seek to deceive the court in any way. Contrary to respondent's argument, appellant's actions are distinguishable from those of an out-of-custody defendant who refuses to come to court. Out-of-custody defendants may be able to avoid prosecution and punishment if they do not appear for trial. Their refusal to appear in court is evasive conduct, akin to flight — which "manifestly . . . require[s] a purpose to avoid being observed or arrested." (*People v. Crandell* (1988) 46 Cal.3d 833, 869, abrogated on other grounds, *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.)

There was nothing evasive about Gomez's conduct. An in-custody defendant who refuses to leave his cell to be transported to trial cannot avoid prosecution and punishment. Indeed, as Gomez knew, he could be forcibly extracted from his cell and brought to court. (See 1RT 163, 196-197 [in Gomez's presence, trial court states that co-defendant Grajeda had

to be extracted from his cell].)[25]

Respondent further contends that it is "highly unlikely" that an innocent person would refuse to come to court and that an innocent person "would have no interest in" "rudely and willfully disobey[ing] the court's orders to come to court." (RB 115.) There is simply no precedent for respondent's contention. By respondent's logic, any rude behavior towards the court could be admitted and considered as consciousness of guilt evidence. Neither law nor logic supports the inference that rudeness or defiance demonstrates guilt or reveals a guilty conscience.[26] This Court should decline respondent's invitation to create a new category of consciousness of guilt evidence.

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[25] Some courts have gone as far as to suggest that an in-custody defendant can never be voluntarily absent. (See *Cross v. United States* (D.C. Cir. 1963) 325 F.2d 629, 631 ["No case . . . has even suggested that a defendant in custody, other than by escaping, can 'voluntarily absent' himself from his trial."].) This Court need not accept that proposition, however, in order to conclude that an in-custody defendant's refusal to come to court does not evince an intent to avoid prosecution or punishment.

[26] Respondent also contends that "[a]ppellant's counsel conceded that appellant's statement, 'fuck court,' was not something an innocent man would do." (RB 115.) Trial counsel did not concede that saying "fuck court" was not something an innocent man would do. Rather, the trial court asked: "Why don't you deal with his comment at the time, 'fuck court.' . . . What does that mean? Does that mean, I'm an innocent man, let's go to court, I want to exonerate myself?" Defense counsel responded, "no, no. . . . It means, 'fuck court.' He don't give a . . . darn what's going on and that's being a complete a-hole." (10RT 1658-1659.)

Respondent attempts to distinguish cases standing for the proposition that a defendant's absence from court is irrelevant, contending that those cases did not involve defiance, disruption, and delay. (RB 117.) Though failing to address *Sully* and *Medina,* respondent contends that the additional cases cited in appellant's opening brief are inapposite because "they do not involve the defiance of a court order or the disruption and delay caused by a deliberate refusal to come to court." (RB 117, citing AOB 199.)

To be sure, several of the cases cited in appellant's opening brief involve defendants who were permitted to absent themselves from court. (See *People v. Majors* (1998) 18 Cal.4th 385, 414.) In some of those cases, however, the defendant was permitted to absent himself after he disrupted the proceedings or declared that he would do so. (*Ibid.* [court allowed defendant to be absent from penalty phase after defendant told court he would act out]; *People v. Lewis* (1983) 144 Cal.App.3d 267, 271 [defendant announced his intention to disrupt the proceedings if required to be present, unless he were bound and gagged]; *People v. Arias* (1996) 13 Cal.4th 92, 144-148.) Thus, respondent's attempt to distinguish these cases fails; these cases involve the same defiance, disruption, and delay.

More, *People v. Sully,* one of the cases respondent ignores, involves a defendant who disrupted the proceedings and then informed the court that

he would continue to disrupt the proceedings if required to be present. (*People v. Sully, supra,* 53 Cal.3d at p. 1238.) *People v. Medina*, the other precedent from this Court that respondent fails to address, also involves a defendant whose absence was attributable to his repeated disruptive conduct. (*People v. Medina, supra,* 11 Cal.4th at p. 736.) These cases are thus not distinguishable for the reason respondent posits. The proposition they stand for — that a defendant's absence from court is irrelevant to guilt or innocence or even to the penalty determination — thus applies in this case as well.

There is thus ample support in this Court's precedents for the proposition that a defendant's absence from court — even when it involves defiance, disruption, and the inevitable delay that ensues — is irrelevant. Given this clear precedent, the trial court abused its discretion in engineering the presentation of irrelevant and prejudicial evidence that Gomez refused to come to court.

More, respondent offers no argument at all (nor, Gomez submits, could it) that the additional evidence presented in Deputy Ganarial's testimony — that Gomez was in a disciplinary unit; that he was fed through a slot in his cell and was waist-chained and handled by a "movement team" when going to court — bore any relevance to guilt or innocence. (12RT

1842-1851.) Indeed, this evidence is irrelevant and inherently prejudicial as a matter of constitutional law. (See *Holbrook v. Flynn* (1986) 475 U.S. 560, 568-569; *Deck v. Missouri* (2005) 544 U.S. 622, 635; *Estelle v. Williams* (1976) 425 U.S. 501, 504-506; U.S. Const., 14th Amend.)

2. Deputy Ganarial's testimony was highly inflammatory.

Aside from its irrelevance, demonstrated above, the testimony about Gomez's refusal to come to court was highly inflammatory. Respondent contends that Deputy Ganarial's testimony was not prejudicial because "failure to come to court is not the type of evidence that 'uniquely tend[s] to evoke an emotional bias against' appellant." (RB 117-118.) Of course, Ganarial did not simply testify that Gomez "failed" to come to court; contrary to respondent's argument, the jury did not "merely hear[] evidence that appellant willfully refused to come to court until after the court issued an extraction order." (RB 118.) As the trial court itself noted, the testimony necessarily revealed that Gomez was in custody. (10RT 1660.)

In fact, the testimony went well beyond the mere facts that Gomez was in custody and had refused to come to court; Ganarial told the jury that Gomez was in a disciplinary unit in the jail, was fed through a slot in his cell, and was waist-chained and handled by a "movement team" when going to court. (12RT 1841-1851.) (As noted above, respondent fails to offer any

defense of the introduction of this testimony.)[27] As a matter of constitutional law, prejudice inheres in such evidence. (See *Deck v. Missouri, supra,* 544 U.S. at p. 635, quoting *Holbrook v. Flynn, supra,* 475 U.S. at p. 568.)

Respondent also argues that because Gomez was on trial for five murders, there "was nothing overly prejudicial about his refusal to come to court." (RB 118.) Respondent appears to be suggesting that because of the number of serious charges Gomez faced, Ganarial's testimony was not prejudicial. Of course, that Gomez was being tried for a number of homicides does not serve to license the admission of evidence that prejudices the jury's determination of whether he is, in fact, guilty of those crimes.

C. The trial court erred in instructing the jurors that they could consider Mr. Gomez's refusal to come to court as evidence showing a consciousness of guilt.

As explained in appellant's opening brief, this Court's case law establishes that a defendant's voluntary absence from court, rather than being a matter legitimately probative of guilt and proper for jurors to consider, is something that jurors must, on request, be told to disregard. (*People v. Sully, supra,* 53 Cal.3d at p. 1241; *People v. Medina, supra,* 11

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[27] The testimony also involved Ganarial's accounts of Gomez's obscenities, directed at the court. (12RT 1847-1848.)

Cal.4th at p. 740; AOB 207.) The instruction given by the court in this case directly contravened this precedent.

Respondent's argument that the court's instruction was proper entirely ignores this precedent. (RB 118-119.)

D. The trial court's abuse of discretion in arranging for the presentation of Deputy Ganarial's testimony and in refusing to strike it, and the erroneous instruction that jurors could consider it as evidence of consciousness of guilt violated Gomez's federal constitutional rights.

Respondent's only substantive response to Gomez's argument that the trial court's abuse of discretion violated his federal constitutional rights is to reiterate its contention that the evidence was relevant and not unduly prejudicial. (RB 118.)

For the reasons set forth above, the evidence about Gomez's refusal to come to court — which included evidence that he was in a disciplinary unit, fed through a slot, and waist-chained and handled by a "movement team" when he came to court (12RT 1841-1851) was not relevant, and it was unduly prejudicial. The court's abuse of discretion in admitting the evidence had the effect of violating Gomez's federal constitutional rights, as set forth in appellant's opening brief. (AOB 208-215.) It violated Gomez's federal and state constitutional rights to a fair trial, to a properly instructed jury, to counsel, to due process of law, to a reliable determination

of his guilt and sentence, and to be free from cruel and unusual punishment. (See *People v. Partida, supra,* 37 Cal.4th at pp. 433-439; see additional authorities cited at AOB 208; U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

Ganarial's testimony that Gomez was housed in a disciplinary unit, fed through a slot, and waist-chained and handled by a "movement team" (12RT 1841-1851) undermined the presumption of innocence and violated Gomez's right to due process by signaling an "unmistakable indication[] of the need to separate [him] from the community at large," in other words, a "sign that he is particularly dangerous [and] culpable." (*Holbrook v. Flynn, supra,* 475 U.S. at p. 569; see also *Deck v. Missouri, supra,* 544 U.S. at pp. 630, 635.) As such, it was "inherently prejudicial," requiring no further demonstration of prejudice to make out a due process violation. (*Deck v. Missouri, supra,* 544 U.S. at p. 635.)

The trial court's consciousness of guilt instruction violated Gomez's federal constitutional rights as well. (AOB 208-215.) It constituted an unconstitutional permissive inference, rendered Gomez's trial fundamentally unfair, violated due process, and violated Gomez's right to a reliable determination of guilt in this capital trial. (U.S. Const., 8th & 14th. Amends.; Cal. Const., art. I, §17; see authorities cited at AOB 208-215.)

Respondent does not respond to these contentions at all. (RB 118-119.)

E. The trial court failed to function as a neutral arbiter, violating Mr. Gomez's right to due process and his right to counsel.

1. This issue is reviewable on appeal.

Respondent contends that appellant has forfeited the argument that the trial court failed to act as a neutral arbiter. (RB 119.) Not so. First, the record makes clear that any objection on these grounds would have been futile. (See *People v. Alfaro* (2007) 41 Cal.4th 1277, 1325; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648; *People v. Sturm, supra,* 37 Cal.4th at p. 1237.) The trial court here made it abundantly clear that it intended to ensure the presentation of the deputy's testimony. (10RT 1607 ["I don't plan to let it go"]; 10RT 1608 ["I'm not going to let this go."]; 10RT 1609-1610 ["you challenged me, and I'm responding to the challenge . . . . This is what I'm doing."].)[28]

More, objection should be excused because the trial court's response to defendant's mistrial motion — a motion made after the trial court first

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[28] The court's remark, "you may have another solution to this, but I don't plan to let it go" (10RT 1607) demonstrates that any further objection on defense counsel's part would have been futile. The obvious "solution," ordering the defendants extracted from their cells and brought to court if necessary, is something the trial court recognized, but evidently deemed insufficient. (10RT 1607 ["I've ordered them to be extracted, both of them from their jail cell and brought forcefully to court, if necessary, *and I want the jury to know that that's what's necessary.*" (emphasis added)].)

told jurors that they may find out the reason for the delay in starting court that morning — deterred any further objection by the defense. The court explained, "All I'm saying is that you challenged me, and I'm responding to the challenge. . . . [Y]ou did move for a mistrial, making it a major issue." (10RT 1609-1610.) The court's response to defense counsel's mistrial motion was to arrange for testimony against Gomez and deliver a jury instruction that that testimony could be considered consciousness of guilt evidence. Defense counsel may well have feared additional repercussions for any argument that the trial court was engaging in misconduct or failing to act as a neutral arbiter — an argument all the more likely to raise the judge's ire.[29]

In these circumstances, this Court should excuse the failure to object and review the issue. (See *People v. Sturm, supra,* 37 Cal.4th at p. 1237 [objection to judicial misconduct excused where it "would have been futile

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[29] Indeed, the record suggests that defense counsel feared angering the judge. At one point, after the court referred to having been a "pioneer" in jailing a female attorney for contempt, counsel stated: "Please understand one thing, I am not arguing with you." (10RT 1608.) Though the court responded, "Well, you are arguing. I'll give you that opportunity," it then added that counsel had challenged it and that it was responding to the challenge — which, as set forth above, itself may have deterred defense counsel from further "challenging" the court. (10RT 1609-1610; see also 9RT 1508 [counsel: "You know, I'm not trying to be obstinate with you . . . ."].)

and counterproductive to [counsel's] client"].)

2. The trial court failed to function as a neutral arbiter, violating Mr. Gomez's federal constitutional rights.

Respondent contends that "[a]ppellant speculates that the trial court intended to punish appellant for his disrespect to the court." (RB 120.) Appellant's contention is not based on speculation, but on the record. (See AOB 218-219.) At one point the court stated that "if nothing else," Deputy Ganarial's testimony and the consciousness of guilt instruction "prevents a defendant who is charged with a capital case from constantly holding up the trial." (10RT 1665-1666.) This comment suggested that the court viewed its action as justified, if not by the law, then by the need to deter actions like Gomez's refusal to come to court.

Indeed, the court's repeated statements that "I don't plan to let it go" because it did not want defendants to "play with the court" or "control the court" (10RT 1607, 1608) suggest that its insistence on the presentation of Ganarial's testimony and on its relevance to consciousness of guilt sprang more from its desire to control Gomez's behavior than from a belief that the testimony would help to ensure a just determination of guilt or innocence. The court, after all, did not repeat that it did not want to let the matter go because it believed Ganarial's testimony highly relevant or crucial to the jury's correct determination of Gomez's guilt or innocence.

Respondent contends that "the court's comments that appellant, and codefendant Grajeda, were not going to control the trial were whol[ly] appropriate because it is simply irrational to allow defendants to choose if, and when, he or she wishes to attend his trial." (RB 120.) Gomez's argument, of course, is not that he should have been permitted to control the trial or even to choose whether or not to attend trial. Gomez's argument is that trial courts should not use evidentiary rulings and instructions as a means of controlling a defendant's behavior. The court had proper and legitimate means at its disposal to ensure the defendants' attendance at trial: it could have — as it in fact later did — issued a standing extraction order. (10RT 1607, 1611; see also AOB 220, fn. 68.)

Respondent also appears to suggest that it is not improper for a trial court to use its power to present evidence and to instruct the jury as a means of deterring a criminal defendant's behavior in relation to the court. (RB 121 ["[T]he court took proper action in response reacted to [sic] appellant's decision to disobey court orders."].) Respondent fails, however, to cite any authority for the proposition that a trial court may call witnesses, rule on the admissibility of evidence, or craft jury instructions in order to punish a criminal defendant for an affront to the court's dignity or to deter future, similar affronts.

Respondent contends, as well, that it is not misconduct for a court to intend to deter a defendant's misconduct. (RB 121.) Gomez does not contend that it is misconduct for the trial court to intend to deter misconduct. Nor does Gomez contend that the court should not have tried to deter future similar incidents. (RB 121.) Rather, Gomez contends that the means the court selected for doing so was improper. Nothing allows the trial court to mete out evidentiary rulings and instructions in order to punish a defendant for defiant behavior or to deter future defiant behavior by the defendant or any other defendant.

Although respondent appears to dispute Gomez's contention that the trial court improperly assumed the role of an advocate (RB 119), respondent does not directly address this argument. As explained in appellant's opening brief, the power to call witnesses must be exercised impartially. (AOB 217-218.) Yet several of the trial court's comments on the record leave the disturbing impression that its decision to present the jurors with Ganarial's testimony and to instruct them that the refusal to come to court could show consciousness of guilt was not driven by the desire to "fairly aid in eliciting the truth" (*People v. Hawkins* (1995) 10 Cal.4th 920, 948),[30] but by the

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[30] *Hawkins* has been abrogated on other grounds by *People v. Lasko* (2000) 23 Cal.4th 101, 110.

desire to punish Gomez. (See 10RT 1607, 1608, 1613, 1665-1666; 9RT 1475; see AOB 218-219.) The court's failure to impartially exercise its power to control the evidence presented to the jury violated Gomez's right to due process of law. (See *People v. Harris* (2005) 37 Cal.4th 310, 346; *Withrow v. Larkin* (1975) 421 U.S. 35, 46; *People v. Mahoney* (1927) 201 Cal. 618, 626 ["Every defendant . . . is entitled to a fair trial on the facts and not a trial on the temper or whimsies of the judge who sits in his case."].)

F. These errors were not harmless under any standard.

As this Court has recognized, consciousness-of-guilt evidence may "utterly emasculate whatever doubt the defense has been able to establish on the question of guilt." (*People v. Hannon* (1977) 19 Cal.3d 588, 603, limited on other grounds by *People v. Martinez* (2000) 22 Cal.4th 750, 762; see also *Dow v. Virga* (9th Cir. 2013) 729 F.3d 1041, 1050 [improperly admitted consciousness of guilt evidence bolstered prosecution's case that defendant was guilty by injecting a new reason for jury to convict him].)

More, the testimony that Gomez was housed in a disciplinary unit in the jail, fed through a slot, and waist chained and handled by a "movement team" when coming to court was, like shackling, "inherently prejudicial" in that it was an "unmistakable indication[] of the need to separate [the] defendant from the community at large." (*Holbrook v. Flynn, supra,* 475

U.S. at pp. 568-569; accord *Deck v. Missouri, supra,* 544 U.S. at pp. 631, 635.)

Respondent's boilerplate argument that these errors were not prejudicial says nothing about the recognized prejudice in consciousness of guilt evidence, nothing about the prejudice inherent in the testimony signifying that Gomez was "particularly dangerous or culpable" (*Holbrook v. Flynn, supra,* 475 U.S. at p. 569), and nothing about this case, other than to refer generally to respondent's statement of facts. (RB 121-122.) Nor does it address Gomez's case-specific argument that these errors require reversal. (RB 121-122; see AOB 221-225.)

For all the specific reasons set forth in appellant's opening brief, these errors were not harmless under any standard — with respect to any of the convictions, and particularly those in the Patel and Luna cases, or with respect to the death sentences in those cases. (AOB 221-225.)

Gomez respectfully asks this Court to reverse the judgment.

VIII.

The trial court's erroneous admission of highly inflammatory evidence about the Mexican Mafia, which rendered jurors fearful for their own safety, deprived Mr. Gomez of his right to due process and a fair trial.

Irrelevant and prejudicial evidence about the ruthless and brutal inner workings of the Mexican Mafia prompted questions from jurors about their own safety, depriving Gomez of his right to due process and a fair trial, particularly with respect to the Patel and Luna cases, as to which no Mexican Mafia evidence was relevant. For all the reasons set forth below and in appellant's opening brief, reversal of the judgment is required.

A. This claim is reviewable on appeal.

Respondent contends that Gomez's argument about the erroneous admission of inflammatory Mexican Mafia evidence is "almost entirely forfeited." (RB 122.) For the reasons explained in appellant's opening brief, Gomez disagrees and contends that the argument has not been forfeited. (AOB 227-228, fns. 71 & 72; see also *People v. Chism* (2014) 58 Cal.4th 1266, 1291 [defendant need not object where codefendant has done so and defendant had no basis to present additional information that might have altered the court's ruling];[31] *People v. Valdez* (2012) 55 Cal.4th 82, 129, fn.

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[31] In *People v. Capistrano* (2014) 59 Cal.4th 830, 867, defendant contended on appeal that the trial court improperly denied him the opportunity to impeach a witness on cross-examination. This Court

(continued...)

30 [court will review issue on merits where preservation question is close and difficult].) More, as explained in appellant's opening brief, while this Court should resolve any close and difficult preservation questions in favor of the defendant (*People v. Ayala* (2000) 23 Cal.4th 225, 273), should this Court nonetheless conclude that counsel failed to preserve any of these issues for review, such ineffective assistance of counsel should be addressed in habeas corpus proceedings. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Finally, Gomez disagrees with respondent's contention that because counsel made no federal constitutional objection in the trial court, his federal claims of error are "entirely forfeited." (RB 129.) As respondent acknowledges, this Court has made clear that when a defendant has objected on state-law grounds, he may argue on appeal that the court's error

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[31](...continued)
concluded that Capistrano forfeited the claim because it was his co-defendant, not he, who sought to question the witness on this point. The Court noted that during the extensive discussion on the matter, counsel for Capistrano remained silent, did not join co-defendant's request, and never made an offer of proof as to the relevance of the evidence to his own defense. (*Id.* at p. 867.) *Capistrano* is distinguishable; that case involved precluded cross-examination, not an objection to prosecution evidence. More, the Mexican Mafia evidence at issue in this case was equally irrelevant and prejudicial as to both defendants. Once the court rebuffed co-defendant Grajeda's objections, any repetition of the same objection by counsel for Gomez would have been futile. (See AOB 227-228, & fns. 71 & 72.)

in overruling the objection had the additional legal consequence of violating his constitutional rights. (*People v. Partida, supra,* 37 Cal.4th at pp. 433-439; *People v. Gutierrez* (2009) 45 Cal.4th 789, 809, 812-813; see AOB 241-244.)

B. The trial court abused its discretion in permitting testimony about the history of the Mexican Mafia, about crimes committed by "hardcore" gang members in jail, about retaliatory crimes committed on behalf of the Mexican Mafia, and that Mexican Mafia members would use any means possible to obstruct criminal prosecution.

Respondent contends that the Mexican Mafia evidence was relevant as to the motive for the Dunton and Acosta killings. (RB 130.) Gomez conceded in appellant's opening brief that some gang evidence may have probative value where a crime is alleged to be gang-related and the gang evidence is offered to prove motive. (AOB 233.)

But testimony about rape and murder and other crimes committed by gang members in jail, testimony that murder was the main topic of conversation in Mexican Mafia meetings, testimony about the history of the Mexican Mafia and its use of family members to carry out retaliatory murders — testimony that incorporated by reference the film "American Me" — was not relevant to establish motive in this particular case. (See AOB 234-241; see also 14RT 2220-2221; 15RT 2346-2347, 2353-2354, 2361-2363, 2383-2384.)

Likewise, testimony about how the Mexican Mafia enlisted individuals to commit perjury on its behalf and that the Mexican Mafia would use any means necessary to obstruct criminal proceedings was not relevant to establish motive in this case. (15RT 2384-2385; see 14RT 2231-2232.)[32]

Respondent contends that the history of the Mexican Mafia showed that "it was a criminal enterprise run by a relatively small group of powerful inmates." (RB 130.) Respondent does not, however, explain how this information was relevant to the Dunton and Acosta killings, let alone to the other charges. Respondent further contends that "[t]he in-custody crime by Mexican Mafia inmates shows that this powerful prison gang was capable of murdering people inside and outside of prison." (RB 130-131.) Respondent fails to explain, however, how any killings in prison, or

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[32] In *People v. Maciel, supra,* 57 Cal.4th at pp. 524-529, this Court rejected a defendant's challenge to the gang expert's testimony that in his opinion, the son of a murder victim would come into court and lie for members of the Mexican Mafia who are being prosecuted for crimes. *Maciel* is distinguishable. As this Court noted, the gang expert in *Maciel* "merely testified that in his experience it was possible that an individual could be so sympathetic to the Mexican Mafia, that despite his own loss, he would 'lie for a Mexican Mafia member being tried for murder.'" (*Id.* at p. 525.) Here, by contrast, Valdemar testified that the Mexican Mafia expected that "loyal gang members would use any means possible to delay, obstruct or reverse any kind of a criminal prosecution against its members." (15RT 2384-2385.)

anywhere, by the Mexican Mafia would be relevant. This case did not involve any killings in prison. And to the extent the prosecution sought to show that the Mexican Mafia was "capable of murdering people," the evidence simply, and prejudicially, implied guilt by association.

Respondent further contends that the challenged testimony was not "unduly prejudicial" and that "[g]iven the very violent nature of appellant's crimes, it was not uniquely bias-inducing for the jury to hear about the history, activities, relationships, and methods of the Mexican Mafia." (RB 131.) But the question before the jurors — particularly with respect to the Luna and Patel charges — was whether appellant had committed the crimes at issue. The Mexican Mafia evidence was entirely irrelevant to those charges, and the fear it produced risked biasing the jury's consideration of whether Gomez was guilty of those crimes. As to those counts, the evidence brought nothing but prejudice to the trial.

C. The admission of the Mexican Mafia evidence violated Gomez's right to due process.

Respondent cites *Montana v. Egelhoff* (1996) 518 U.S. 37, 42, for the proposition that an Evidence Code section 352 determination is a judgment call that is "unquestionably constitutional." (RB 132.) *Egelhoff* does not support this proposition. *Egelhoff* states that a section 352-like *rule* is "unquestionably constitutional" as an example of a statute that may

constitutionally restrict the presentation of relevant defense evidence. (*Montana v. Egelhoff, supra,* 518 U.S. at p. 42.) It does not state that any particular application of such a rule by a trial court is "unquestionably constitutional." (*Ibid.*) Indeed, as respondent concedes, the admission of evidence may violate due process where it is so prejudicial as to render the trial fundamentally unfair. (RB 132, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 67-72.)

As Gomez contended in appellant's opening brief, the expert opinion that the Mexican Mafia would use "any means possible to delay, obstruct or reverse any kind of a criminal prosecution against its members" (15RT 2385) in particular served to undermine the very purpose of a trial — to determine the defendant's guilt or innocence in accordance with legal standards. After all, if the Mexican Mafia would use "any means possible" to thwart prosecution, then how could anything the defense said or did be trusted? Given the testimony about the brutal lengths to which Mafia-associated individuals had gone in other instances — the expert testified that a man had killed his brother on Mexican Mafia orders (15RT 2383-2384) — speculation that jurors were at risk, though lacking any basis in the facts of the case, would hardly seem farfetched.

The expert's testimony invited, and indeed produced, fear-inducing

speculation about what "any means possible" would entail; indeed, it directly preceded the break during which a juror sent a note to the court expressing concern about jurors' safety. (15RT 2386; 3SCT 591; 29RT 4335; 4SCT 746.) The testimony rendered Gomez's trial fundamentally unfair. Jurors focused on their own safety are necessarily focused on matters other than the factual questions before them and are speculating, with no basis in fact, about acts the defendant might commit or direct.

D. The error was not harmless.

As set forth in appellant's opening brief, the Mexican Mafia evidence was nothing but prejudicial with respect to the Luna and Patel charges — charges which had nothing to do with the Mexican Mafia, or with any gang — and risked prejudicing the jurors' consideration of the Dunton and Acosta counts as well. (AOB 244-249.)

Respondent's only argument that the erroneous admission of the Mexican Mafia evidence was not prejudicial as to the Luna and Patel counts is as follows: "All of appellant's crimes were violent and despicable, so hearing about the Mexican Mafia when compared to appellant's own violent conduct [sic]. As also explained above in Arguments I, II, and III, appellant's convictions were supported by strong evidence." (RB 132.) Gomez, of course, disagrees that the convictions were supported by strong

evidence; indeed, he contends that the evidence was insufficient to support his convictions. (See Arguments I, II, and III, above; AOB, Arguments I, II, and III.) In any event, "strong evidence" is not the standard for harmless error review, under *Watson, Chapman*, or the "reasonable possibility" standard for state law error at the penalty phase. (See *People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California, supra,* 386 U.S. at pp. 25-26; *People v. Brown, supra,* 46 Cal.3d at pp. 447-448.)

More, even to the extent that the killings of Patel and Luna were "violent and despicable" (RB 132), as respondent suggests, the question before the jury was whether Gomez committed these crimes. The nature of the crimes does not make it any less likely that jurors considering whether Gomez was guilty would be affected by evidence that was so chilling that it caused them to fear for their own safety.

For all the reasons set forth here and in appellant's opening brief, the challenged Mexican Mafia evidence was not harmless under any standard. Gomez respectfully asks this Court to reverse the judgment.

IX.

The trial court's admission of a note left by Robert Acosta in the pages of a Bible violated *Crawford v. Washington.*

Robert Acosta, evidently fearing he would be killed, left a signed note, in the pages of a Bible, for his wife to find and show to the police. This note was testimonial hearsay — "testimony from the grave," as the prosecutor put it — and its admission violated Gomez's Sixth Amendment rights. For the reasons set forth below and in appellant's opening brief, reversal of Gomez's convictions for the Dunton and Acosta killings and of his death sentences in the Luna and Patel cases is required.

A. This error has not been forfeited.

Respondent contends that because Gomez did not object to the admission of Robert Acosta's note on Sixth Amendment grounds, his *Crawford v. Washington* claim is forfeited. (RB 135-136; see *Crawford v. Washington* (2004) 541 U.S. 36.) As explained in appellant's opening brief, any objection on Sixth Amendment grounds would have been futile, as *Crawford* had not yet been decided. Before *Crawford*, the trial court's conclusion that the note was admissible under Evidence Code section 1250 rendered any further Confrontation Clause objection futile. (See AOB 252-253, citing, inter alia, *People v. Majors*, *supra,* 18 Cal.4th at pp. 403-405; *Ohio v. Roberts* (1980) 448 U.S. 56, 66.)

Respondent contends that in *People v. Riccardi*, *supra,* 54 Cal.4th at p. 827, fn. 33, this Court rejected the contention that a Confrontation Clause objection made on *Crawford*-like grounds before *Crawford* was decided would have been futile. (RB 135-136.) It is true that in *Riccardi,* the defendant was arrested in 1991, and tried before *Crawford* was decided, and that this Court deemed a *Crawford* argument forfeited. (See *People v. Riccardi*, *supra,* 54 Cal.4th at pp. 773, 827, fn. 33, & 833 fn. 36 [noting appellant's brief was filed before *Crawford* was decided].) It is unclear, however, whether Riccardi contended that any *Crawford* objection would have been futile before *Crawford* was decided. In any event, this Court did not address any such futility argument in *Riccardi.*[33]

More, in *People v. Redd* (2010) 48 Cal.4th 691, 731, the case *Riccardi* relied on in concluding that the defendant's *Crawford* claim was forfeited, this Court did specifically address the defendant's argument that any objection would have been futile before *Crawford* was decided. The Court appeared to accept the well-settled principle that a defendant need not anticipate unforeseen changes in the law and make objections based upon the hope that the law will change. (*People v. Redd, supra,* 48 Cal.4th at pp.

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[33] Likewise, in *People v. D'Arcy* (2010) 48 Cal.4th 257, 288-292, this Court did not address a futility argument.

730-731 & fn. 19, citing *People v. Kitchens* (1956) 46 Cal.2d 260, 263.) The Court rejected Redd's futility argument, however, because his claim on appeal was unrelated to the new rule articulated in *Crawford.*

And, in any event, in a number of cases decided after *Riccardi*, this Court has made clear that *Crawford* applies to cases that were pending on direct appeal when *Crawford* was decided. (See *People v. Pearson, supra,* 56 Cal.4th at pp. 461-462; see also *People v. Edwards* (2013) 57 Cal.4th 658, 704-705 [adhering to *Pearson*]; *People v. Chism*, *supra,* 58 Cal.4th at p. 1288, fn. 8; *People v. Banks* (2014) 59 Cal.4th 1113, 1167; *People v. Capistrano*, *supra,* 59 Cal.4th at p. 872; *People v. Harris* (2013) 57 Cal.4th 804, 840.)

Here, of course, Gomez's claim is based squarely on *Crawford*, a case decided in 2004, well after his trial, which radically changed Confrontation Clause jurisprudence and which his trial counsel cannot be expected to have anticipated. Any objection on Confrontation Clause grounds would have been futile. (See *People v. Black* (2007) 41 Cal.4th 799, 810-812; *People v. DeSantiago* (1969) 71 Cal.2d 18, 22-23; see also *People v. Edwards, supra,* 57 Cal.4th at pp. 704-705.)

B. Acosta's note was testimonial.

Respondent contends that Acosta's note was not testimonial because

it was not formal and because its primary purpose did not "pertain[] in some fashion to a criminal prosecution." (RB 136.) Setting aside the question whether formality is a *sine qua non* for finding a statement testimonial,[34] Gomez contends that Acosta's note was sufficiently formal to bring it within the category of testimonial hearsay, and that its primary purpose did pertain to a criminal prosecution.

Respondent contends that "Acosta wrote the note to his wife, and not to a law enforcement agent in a formalized manner; so, the note was not testimonial," and cites several cases in which courts have held that statements to family members were not testimonial. (RB 137-139.) All of these cases are distinguishable.

In *United States v. Manfre* (8th Cir. 2004) 368 F.3d 832, upon which respondent relies, Manfre's co-conspirator, who was killed in the arson the two planned, had made statements to his brother about his conversations

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[34] Lack of formality of form alone, Gomez respectfully contends, is not sufficient to remove a statement from the ambit of the Confrontation Clause. Rather, *Michigan v. Bryant* (2011) 131 S.Ct. 1143, supports the position Justice Liu takes in dissent in *Lopez*: "[T]he proper determination of a statement's formality for purposes of the confrontation clause is closely intertwined with the nature and purpose of the process that produced the statement." (*Lopez, supra,* 55 Cal.4th at p. 594 (Liu, J., dissenting); *Bryant, supra,* 131 S.Ct. at p. 1160 ["Formality is not the sole touchstone of our primary purpose inquiry . . . [I]nformality does not necessarily indicate the presence of an emergency or the lack of testimonial intent."].)

with Manfre. (*Id.* at p. 838.) The Eighth Circuit, in a footnote addressing *Crawford*, which had just recently been decided, concluded that the letter was "to loved ones or acquaintances and [is] not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks." (*Id.* at p. 838, fn. 1.) More, the letter in that case carried no suggestion that it was to be used in a criminal prosecution.

In this case, by contrast, Acosta's note was not merely a statement to a loved one. In fact, the prosecutor sought its admission on the basis that Acosta wrote it "for his wife *to find and to show to the authorities* when he's on his way to a meeting where he knows or believes he's going to be killed." (8RT 1263-1264 [emphasis added].) Respondent is thus wrong when it states that "the prosecutor argued that Acosta wanted to let *any* reader know that he had authored the note, but did not argue that Acosta wrote the note for the police." (RB 139.)

Respondent also cites *People v. Gutierrez*, which held that a three-year-old's statement to his aunt was not testimonial. (*People v. Gutierrez*, *supra,* 45 Cal.4th at pp. 812-813.) A three-year-old's statement to his aunt is manifestly not comparable to the note the adult Acosta placed in a Bible and left for his wife, with the expectation that she would alert the authorities. Indeed, it is questionable whether a three-year-old's statement

could ever be made with sufficient formality, much less with the expectation that it would be used in court.

People v. Loy (2011) 52 Cal.4th 46, addresses a twelve-year-old homicide victim's statement to friend over the telephone, accusing the defendant of molesting her — a statement she asked her friend not to repeat to anyone. (*Id.* at pp. 54, 64-67.) In that case, again, it was clear that the statement was not made with any formality or with the expectation that it would be repeated anywhere — much less used in court. (*Ibid.*)

In *People v. Gonzalez* (2012) 54 Cal.4th 1234, 1270-1271, while the statement at issue was not made by a child, it was made to the declarant's brother-in-law; it was again clear that the statement was not made with any formality or with the expectation that it would be used in court.

And finally, in *People v. Blacksher* (2011) 52 Cal.4th 769, 817-818, again, while the statement was not made by a child, it was made by a distraught person to family members offering solace. Such a statement is a far cry from a statement put in writing, signed, and placed in a Bible.[35]

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[35] Respondent also contends, citing *People v. Letner* (2010) 50 Cal.4th 99, beginning at page 199, and *People v. Geier*, *supra,* 41 Cal.4th at p. 605, that "there is no evidence, or reason to believe, that Acosta or his wife were acting as police agents." (RB 137.) *Geier* discusses the "involvement of government officers" and agents as implicating Confrontation Clause concerns. (*People v. Geier, supra,* 41 Cal.4th at p. 605.) *Letner* cites *Geier* for the proposition that statements are testimonial

(continued...)

Acosta's placement of his note in a Bible indicated the kind of solemnity that renders a statement testimonial. And as the prosecution argued below, it was written with the intent that it be given to the authorities after his death (8RT 1263-1264) — and for what other purpose than criminal investigation and prosecution?

Respondent contends that "while Acosta used his full name and moniker, he still wrote the note to his wife; so, its primary purpose was providing her with his feelings about the upcoming meeting, and not describ[ing] past facts for use in a criminal trial." (RB 138.) Respondent's contention does not hold up. It defies common experience and common sense to think that a person whose primary purpose was simply to let his spouse know his feelings about an upcoming meeting would memorialize these feelings in a note placed in the pages of a Bible in a dresser drawer.

More, that Acosta's note discussed events that had not yet occurred does not remove it from the realm of testimonial hearsay. (See *State v. Jensen* (Wis. 2007) 727 N.W.2d 518, 521, 528 [rejecting state's argument

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[35](...continued)
if, among other things, they are made to a law enforcement officer or by or to a law enforcement agent. (*People v. Letner, supra,* 50 Cal.4th at pp. 199-200.) Gomez contends that Acosta's statements in the note were testimonial because they were made with the intent that they would be communicated to law enforcement and used in court, and that the authorities discussed in the text above make clear that such statements are testimonial, even if not made directly to law enforcement. (See also AOB 253-254.)

that deceased declarant's letter, given to a friend with instructions to give it to police if anything happened to her, was not testimonial because it was written before any crime was committed]; *State v. Sanchez* (Mont. 2008) 177 P.3d 444, 450-453 [note by victim to whom it may concern, detailing defendant's threats against her, and suggesting that if the victim died "you will have some answers," was testimonial].)

Respondent attempts to dismiss the prosecutor's arguments at trial — that the note was "very formal," "not the kind of note that a husband would normally leave for his wife," and "almost — the testimony of Robert Acosta from his grave." (RB 139; see 27RT 3851-3852.) Of course, these arguments are not "determinative" of the *Crawford* question. (RB 139.) But surely it is relevant to the analysis that the prosecutor won the admission of Acosta's note by arguing that it bore all the hallmarks of what is now deemed testimonial.

Because Acosta's note bears classic indicia of solemnity or formality, having been signed and placed in a Bible, and because its admission was grounded on the notion that it was written with the expectation that it would be delivered to authorities, it was testimonial.

C. The prosecution cannot prove this error harmless beyond a reasonable doubt.

Respondent states that the note did not mention Gomez, and

contends that the note "played only a minor role in proving appellant murdered Acosta and Dunton" and that the prosecution presented "overwhelming evidence" with, or without Acosta's note. (RB 140.)

Respondent fails to address Gomez's argument that the note prejudiced the jurors' consideration of whether the murders were deliberate and premeditated because the note significantly bolstered the prosecution's case that Grajeda was present at the scene of the crime and, on behalf of the Mexican Mafia, ordered Gomez to kill Dunton and Acosta. (See AOB 256-257; RB 139-140.) The prosecution cannot prove beyond a reasonable doubt that the guilty verdicts — and, specifically, the findings that the Dunton and Acosta killings were first degree murders — were surely unattributable to this evidence that provided the most convincing proof that Arthur Grajeda, a Mexican Mafia associate, was involved in the crime, and that the crimes were therefore premeditated and deliberate.

Respondent also fails to address Gomez's argument that the error was prejudicial with respect to the death sentences in the Luna and Patel cases. For the reasons set forth in appellant's opening brief, this error requires reversal of the death sentences, as well as the reversal of counts 10 and 11. (AOB 258-259; RT 139-140.)

X.

The trial court's improper and unconstitutional instructions effectively required jurors to take notes and sternly discouraged readback of testimony — in fact, prohibiting it in the first two days of deliberations.

"A fundamental premise of our criminal trial system is that 'the *jury* is the lie detector.'" (*United States v. Scheffer* (1998) 523 U.S. 303, 312-313.) And "observation of demeanor by the trier of fact" is a crucial element of the right of confrontation. (*Maryland v. Craig* (1990) 497 U.S. 836, 846.) The usual order of things allows jurors to observe witnesses' demeanor while they testify; if, as a result of such observation, jurors fail to remember the exact content of a witness's testimony, they may ask for readback. The trial court upended this, delivering instructions that directed jurors to take notes, even at the expense of observation of witnesses, and roundly discouraged readback. The court's instructions thus compromised Gomez's right to a jury trial and right to confrontation. For all the reasons set forth below and in appellant's opening brief, reversal of the judgment is required.

A. This claim is not forfeited.

Respondent contends that Gomez has forfeited his claim that the trial court's instructions on notetaking were erroneous. (RB 140, 144.) In support of its contention, respondent cites *People v. Dennis*, a case which

addressed a claim that the trial court's instructions on notetaking were insufficient. (RB 144, citing *People v. Dennis* (1998) 17 Cal.4th 468, 537-538.)

Gomez's claim is not that the trial court's instructions on notetaking were incomplete or needed clarification. Indeed, the trial court made itself very clear. Gomez's claim is that the court's instructions were erroneous and violated his substantial rights. (See AOB 265-268.) "Even if the court has no sua sponte duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly." (*People v. Castillo* (1999) 16 Cal.4th 1009, 1015.)

Respondent's forfeiture argument (RB 144) misunderstands Gomez's argument and ignores Penal Code section 1259 and well established precedent holding that even without objection, "a defendant may challenge on appeal an instruction that affects 'the substantial rights of the defendant . . . .'" (*People v. Hillhouse*, *supra,* 27 Cal.4th at pp. 505-506.) Because, as set forth in appellant's opening brief and below, the court's erroneous instruction violated Gomez's substantial rights, this issue is reviewable on appeal.

B. The trial court's instruction on notetaking was error.

Respondent notes that the correctness of jury instructions is to be

determined from the entire charge, not from consideration of parts of an instruction. (RB 145.) But respondent fails to show that any portion of the court's instructions somehow ameliorated the error in the instructions Gomez has identified. (See AOB 261-264.)[36]

Respondent contends that the instructions were proper because the court "never told or implied that each juror was *required* to take notes. . . . The court did not say 'must,' 'mandatory,' 'required,' or any other language which would cause a juror to believe there was no other choice." (RB 146.) It is true that the court did not use the words "required," "must," or "mandatory." But the court told jurors:

- "It's very very important that you take notes during this trial." (8RT 1297.)

- that it was their "job" to "record[] the information that you need to remember at the end of this trial." (8RT 1298.)

- that the court would be "infuriate[d]" if they asked for extensive readback after a couple of hours of deliberations, indicating that the jurors "didn't do their job" by taking notes. (8RT 1298.)

- "[Y]ou should write down the names of witnesses, dates, times, places, things that are said and done." (8RT 1298.)

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[36] As explained below, the witness credibility instructions respondent cites (RB 149, citing 3CT 874-876) were delivered after the presentation of evidence, and thus came too late to mitigate the harm of the court's notetaking instructions. (See 29RT 4118-4123.)

- "You will not remember if you don't take notes." (8RT 1299.)

- "[T]ake a lot of notes . . . ." (8RT 1299.)

- "The main thing is I'm going to be very discouraged when I sit back and see jurors just sitting there with their notes in their laps and they're looking at the witnesses, and I realize it's all going by and it won't be recorded in your memories because you aren't trying to take those notes." (8RT 1300.)

- "So take notes." (8RT 1301.)

The court could not have been clearer: it was instructing jurors to take notes. (8RT 1298-1301, 1308.) It was instructing jurors to take a lot of notes. (8RT 1299.) It would be "infuriate[d]" if jurors did not take adequate notes. (8RT 1298.)

Respondent identifies several portions of the court's instructions on notetaking that were not objectionable, and to which Gomez has not objected: the instruction that notes were for personal use; that notes should not prevent jurors from watching and listening as evidence is presented; that notes would not be accessible to anyone else; and that jurors could take notes on any aspect of the case, though opening statement and summations were not evidence. (RB 146-147.)

But respondent does not address the erroneous portions of the trial court's instructions, highlighted by Gomez in his opening brief (AOB 261-264), except to conclusorily deny that the court interfered with the jury's

power to evaluate witness credibility, sent the message that observation of witnesses was not as important as notetaking, or implied that jurors who did not take notes would have to rely on jurors who did. (RB 147.)

Contrary to respondent's contention, the court did send the message that observation of witnesses was not as important as notetaking when it told jurors it would be "*very discouraged when I sit back and see jurors just sitting there with their notes in their laps and they're looking at the witnesses* . . . ." (8RT 1300 [emphasis added].)

While jurors were also told that they "should watch the witness while they're testifying as well" (8RT 1299), this instruction lacked the emphasis and repetition of the judge's directions that jurors take notes. (8RT 1297-1301.) The court directed jurors to take notes: "[T]ake a lot of notes . . . So take notes." (8RT 1299, 1301.) It told them that they "should write down the names of witnesses, dates, places, things that are said and done." (8RT 1298.)

Unlike the trial court in *Whitt,* which made clear its preference that jurors "observe the witness, observe the demeanor of that witness, listen to how that person testifies rather than taking copious notes" (*People v. Whitt* (1984) 36 Cal.3d 724, 747-748), the trial court here made clear that taking notes was the more important part of their "job" — and that it would be

"discouraged" and "infuriate[d]" if jurors did not. (8RT 1298, 1300.)

The court's notetaking instructions risked impairing the jurors' assessment of credibility by insisting that jurors take a lot of notes, and by communicating that the trial court valued notetaking over observation of witnesses. How else were jurors to interpret the court's statement that it would be "very discouraged" to see jurors "just sitting there with their notes in their laps and they're looking at the witnesses"? (8RT 1300.)

Respondent also states that "[t]he court never implied a juror would face any repercussions for rejecting the court's advice to take notes" and suggests that because, in the course of its instruction on notetaking, the court noted that jurors often failed to heed its instruction to take notes, the court did not instruct jurors to take notes. (RB 146.) The court's instruction on notetaking was more than "advice." (RB 146.) The court directed jurors to take notes. (See pp. 100-101, above.) And it made clear that it would be angry if jurors did not. (8RT 1298.) Surely, a party challenging the trial court's instructions need not establish that jurors were told that they would face repercussions if they failed to heed the court's instructions in order to establish that the instructions constituted error. In any event, as noted in appellant's opening brief, the record affirmatively indicates that jurors *did* follow the court's notetaking instructions. (See AOB 283 fn. 91; 29RT

4167, 4176-4177; 26RT 3804; 28RT 3976.)

Finally, though it makes a conclusory response to Gomez's contention that the court's instructions interfered with the jury's assessment of credibility (RB 147), respondent entirely fails to address the other problems Gomez has identified with the court's instructions. (AOB 270-274.) Some jurors may not be literate or experienced enough to take accurate or useful notes. (AOB 271.)

More, crucially, the trial court's instructions elevated the content of the witnesses' testimony over the crucial questions of whether it was true, accurate, and credible. The court's direction that jurors "should write down names of witnesses, dates, times, places, things that are said and done" (8RT 1298) assumed the truth and accuracy of the testimony, urging jurors to memorialize it in notes, while crucial aspects of the witnesses' demeanor and attitude might well pass jurors by. While the failure to recall precisely what was said can be remedied by readback, a juror's failure to register an impression of whether a witness was telling the truth or was lying or mistaken cannot be remedied in any way. (*People v. Whitt, supra,* 36 Cal.3d at pp. 747-748.)

C. The trial court's instructions on readback were erroneous.

Respondent contends that the trial court never prohibited the jury

from hearing readback of testimony. (RB 148.) Gomez does not contend that the trial court entirely prohibited readback; rather, as set forth in Gomez's opening brief, the trial court prohibited it in the first two days of deliberations. (AOB 278-282.)

The court did not "merely suggest[] jurors to discuss the evidence and examine the exhibits before requesting a readback." (RB 148.) Rather, the court told jurors "I would not want to hear from you today or tomorrow" and it told them they could make a readback request "after a day or two." (29RT 4176-4177.)

As noted in appellant's opening brief, the jury made only one "very very brief" request for readback. (AOB 287; 29RT 4285.) Respondent also points to the jury's note requesting assistance in defining first degree murder. (RB 148.) Obviously, a note requesting assistance in understanding jury instructions is not the same as a note requesting readback. The jury note regarding first degree murder sheds no light on this issue.

D. Respondent fails to address Mr. Gomez's contention that the error was structural.

While respondent contends that "[a] violation of section 1138 [on readback of testimony] is not a basis for reversing a conviction unless prejudice is shown" (RB 149), respondent does not address Gomez's contention that harmless error does not apply to these instructional errors —

including the erroneous instructions on notetaking — because the effect of this error is "difficult[] [to] assess[]" (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 148-149 & fn. 4), "difficult to prove" (*Waller v. Georgia* (1984) 467 U.S. 39, 49, fn. 9), or "cannot be ascertained." (*Vasquez v. Hillery* (1986) 474 U.S. 254, 263.)[37]

For all the reasons set forth in appellant's opening brief, Gomez contends that harmless error analysis does not apply, and reversal is required. (AOB 282-284.)

E. Even if harmless error analysis applies, reversal is required.

Respondent contends that the error is harmless because "the jury was given numerous instructions on witness credibility (3CT 874-876), and nothing in the challenged instructions superseded the credibility instructions, or undermined the jury's credibility determinations." (RB 149.) The instructions respondent cites were given after the close of evidence; thus, they cannot have affected the jury's notetaking behavior or its observation of witnesses during testimony.

The remainder of respondent's harmless error argument is that "the

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[37] Respondent cites *People v. Robinson*, *supra,* 37 Cal.4th at pp. 635-636, fn. 21, parenthetically noting: "rejected claim that error was structural." (RB 149.) *Robinson* involved claims that the trial court abdicated control of the readback process, and that readback was both overinclusive and underinclusive. Gomez does not make those arguments.

convictions were supported by overwhelming evidence." (RB 149.) Gomez disagrees, for all the reasons set forth in Arguments I, II, and III above and in appellant's opening brief. In any event, "overwhelming evidence" is not the harmless error standard, for either federal constitutional error or state law error. Respondent bears the burden of proving the federal constitutional error harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24; see also *People v. Pearson, supra,* 56 Cal.4th at p. 463.) In light of the fact that jurors did take notes, and made only one request for a brief readback during the trial of over two months (see AOB 283, fn. 91; 29RT 4285), respondent cannot bear that burden. Respondent's harmless error analysis ignores the serious credibility questions that beset the prosecution's witnesses. (See AOB 285-286.) Respondent has made no effort to meet its burden of proving, and indeed it cannot prove, that the trial court's instructions did not cause one or more jurors to credit testimony they would have discredited if they were able to focus on observing the witness, rather than writing down what he or she said.

Even should this Court apply the state law standard of harmless error review, there is, given the credibility problems of the prosecution witnesses, a "*reasonable chance*, more than an *abstract possibility*" that in the absence of the error, one or more jurors would have reached a different conclusion

and the result would have been different. (*People v. Wilkins*, *supra,* 56 Cal.4th at p. 351, quoting *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050; *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715; *People v. Bowers* (2001) 87 Cal.App.4th 722, 736; *People v. Soojian* (2010) 190 Cal.App.4th 491, 520-524; see AOB 288-289.)

Finally, Gomez notes that even should this Court conclude that the error is of state law only, prejudice at the penalty phase is assessed under the more rigorous "reasonable possibility" standard, a standard akin to the *Chapman* standard. (*People v. Prince* (2007) 40 Cal.4th 1179, 1299-1300; see *Chapman v. California, supra,* 386 U.S. at pp. 24, 26.) Respondent fails to address Gomez's contention that, at the least, there is a reasonable possibility that the error affected the penalty verdicts by hampering the jurors' assessments of witness credibility at the guilt phase and obscuring lingering doubts about guilt that jurors otherwise would have maintained. (RB 149; see AOB 289.)

For all the reasons set forth above and in appellant's opening brief, Gomez asks this Court to reverse the judgment.

XI.

The trial court erroneously and unconstitutionally instructed jurors during voir dire regarding the exchange of testimony for leniency, effectively telling them that prosecution witnesses were lesser participants and that the defendants were the "greater culprits."

During voir dire, the trial court made statements priming jurors to believe that the prosecution could be trusted, in examining available evidence in a case, to determine who the true culprit or culprits were, and then to prosecute and dispense leniency accordingly. Presenting a hypothetical, the court told prospective jurors, for example, that if "there is insufficient evidence to establish who the person is that went in to the bank and did the killing, . . . the choice is we'll prosecute the guy that was the lookout and let the other guy go because we can't prosecute him or give that person some immunity in order to get the testimony that's necessary to establish who it was that actually did the killing." (7RT 1098.)

The court's impermissible guilt-assuming hypothetical constituted an erroneous instruction and an improper comment on the evidence, and violated Gomez's constitutional rights. The prosecution's witnesses included an accomplice as a matter of law, as well as a witness who could be deemed an accessory after the fact, and the trial court's error prejudiced the jurors' assessment of the credibility of these witnesses, predisposing the jurors to credit accounts that assigned greater culpability to Gomez and his

codefendant and lesser — or no — culpability to the prosecution witnesses. Indeed, because the court's instructions carried the message that the prosecution knows who has actually perpetrated a crime and can be trusted to charge the right person, even in the face of insufficient evidence (7RT 1096-1098), the error unfairly bolstered the prosecution with respect to all the charges against Gomez. Gomez thus respectfully asks this Court to reverse the judgment.

A. This claim has not been forfeited.

Respondent contends that this claim may not be raised under Penal Code section 1259 because the court's statements about the exchange of testimony for leniency were not jury instructions. (RB 152.) Gomez contends, for the reasons set forth in his opening brief, that the trial court's statements are reviewable as jury instructions. (AOB 301-302 fn. 94.) More, Gomez notes, this Court has recently reaffirmed that on appeal, a defendant may challenge statements the trial court makes to jurors during voir dire, stating: "The Attorney General is incorrect that defendant forfeited this claim by failing to object at trial. We have held that a defendant generally cannot forfeit a claim that the trial court erred at voir dire when describing to prospective jurors their penalty phase duties, just as other instructional errors cannot usually be forfeited by a defendant's mere failure to object."

(*People v. Banks, supra,* 59 Cal.4th at p. 1201, citing *People v. Dunkle* (2005) 36 Cal.4th 861, 929.)

People v. Romero (2008) 44 Cal.4th 386, Gomez contends, is distinguishable. In that case, the defendant challenged comments the court made during voir dire because they failed to include a statement that mitigation may include any circumstance that extenuates the gravity of the crime. (*People v. Romero, supra,* 44 Cal.4th at p. 423.) This Court concluded that the court's comments during voir dire were not intended to be, and were not, a substitute for full instructions at the end of trial; indeed, the comments Romero attacked included the caveat that the examples it had given of mitigating factors were not exhaustive and that the court would provide a full list of mitigating factors if the case went to a penalty phase. (*Ibid.*)

Here, by contrast, the trial court's explanation of the exchange of testimony for leniency was presented as information about the way the justice system works; the court did not tell jurors that they would receive a fuller explanation at trial, and indeed they did not. Gomez's argument is not that the court's explanation omitted something that would or should be covered in instructions to the jury on the law; it is that the court's explanation was argumentative and contrary to the way in which the law

requires jurors to approach the prosecution's case and its witnesses.

In *People v. Pearson*, *supra,* 56 Cal.4th at pp. 415-416, also cited by respondent, this Court addressed a claim that the court's voir dire was "tainted" because jurors may have been disqualified on the basis of an erroneous definition of aggravating circumstances. In concluding that the claim was forfeited, the Court cited another case, *People v. Forster* (2010) 50 Cal.4th 1301, 1324, in which it had held that a claim that voir dire was inadequate had been forfeited. Gomez's claim is different; he does not contend that the voir dire was inadequate. Rather, he contends that the court erroneously instructed jurors and commented on the evidence. (AOB 302, fn. 94; see AOB 300.)

With respect to his constitutional claims, Gomez contends that under Penal Code section 1259, he may raise, on appeal, instructional error affecting his substantial rights. Surely, rights protected by the Constitution are substantial.[38]

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[38] The cases respondent cites for the proposition that Gomez's federal constitutional claims are forfeited do not involve instructions; rather, *People v. Tully* and *People v. Howard* involve challenges to death qualification, and *People v. Heard* involves an evidentiary challenge, but was decided before *People v. Partida* made clear that on appeal, a defendant may contend that a trial court's objected-to error under state law had the effect of violating defendant's constitutional rights. (See RB 152; *People v. Tully* (2012) 54 Cal.4th 952, 1066; *People v. Howard* (2010) 51 Cal.4th 15, 26; *People v. Heard* (2003) 31 Cal.4th 946, 972, fn. 12; *People*

(continued...)

Finally, as Gomez also noted in his opening brief, this Court should reserve any close and difficult preservation questions in favor of the defendant. (AOB 302, fn. 94; see *People v. Ayala*, *supra,* 23 Cal.4th at p. 273.) And should this Court nonetheless conclude that the issue is forfeited, counsel's ineffective assistance in forfeiting the issue should be addressed in habeas corpus proceedings. (*People v. Mendoza Tello, supra,* 15 Cal.4th at pp. 266-267.)

B. The trial court's explanation of prosecution testimony obtained by leniency violated Gomez's rights under state law and the Federal Constitution.

Respondent argues that the court's statements were not erroneous because "[i]t . . . would be clear to any juror that a prosecutor's choice of who deserves leniency is a judgment call of the prosecutor. As applied to the facts of this case, the jury would certainly know, regardless of the court's remarks, that the prosecutor's theory was that appellant was the killer and that Witness One was a lesser player in the Escareno homicide." (RB 155-156.) Gomez's contention is not, however, that the court erroneously *revealed* the prosecutor's theory; his contention is that the court erroneously *credited* the prosecutor's theory, telling jurors, by means of a guilt-assuming hypothetical, that the prosecution grants leniency to lesser

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[38](...continued)
v. Partida, supra, 37 Cal.4th at p. 433-439.)

participants to obtain testimony against actual culprits. (AOB 294-300.)

Respondent also contends that guilt phase instructions on witness credibility "told the jury to evaluate and determine witness credibility and were not superseded or modified by the court's comments during voir dire." (RB 156-157.) But nothing in the court's final instructions corrected the erroneous statement that the prosecution only grants leniency to less culpable parties in order to prosecute more culpable parties. Of course, the jury was told that it was to determine witness credibility. (3CT 874 (CALJIC No. 2.20).) But jurors had already been told, more specifically, that the prosecution only offered leniency to less culpable parties. Indeed, the court presented it as obvious: "obviously if we gave immunity to the guy that went into the bank and killed somebody in order to get the lookout, that wouldn't sound right." (7RT 1097; 7RT 1096-1098.) The jurors were, therefore, predisposed to credit the prosecution's theory that its witnesses were less culpable, and, to conclude that to the extent leniency had been afforded them, it was in order to convict the defendants, who were guilty.

C. Reversal is required.

Respondent contends that "[t]he fact that the jury failed to convict appellant as to the Escareno crimes, despite the testimony of his accomplice, unquestionably shows that challenged comments did not direct,

interfere, or otherwise effect the jury's determination as to the credibility . . . of accomplices to appellant's crimes" and that therefore the voir dire was not inadequate. (RB 157.)[39] Respondent again ignores the fact that jurors who believed Gomez guilty of the crimes against Escareno — perhaps because they had been primed to view Witness #1 as the less culpable party — were permitted to consider those crimes at the penalty phase. At the penalty phase, the murder of Escareno constituted extreme aggravating evidence; thus, there is a reasonable possibility that the error, which biased jurors towards believing Gomez guilty of these crimes, affected the penalty phase verdicts. (*People v. Brown*, *supra,* 46 Cal.3d at p. 448.)

Respondent suggests that the error could have no effect on the jury's consideration of Witness #3's testimony because she "was not a participant to the charged crimes." (RB 156, fn. 47, citing AOB 304-305.) But Witness #3 was found with a pawn slip for Patel's jewelry in her possession when she was arrested in a drug case. (12RT 1913-1922, 1928; 12RT 1872-1873.) And she admitted pawning Patel's jewelry. (12RT 1920-1922; see 12RT 1872-1873.) As the court noted at a sidebar, she was potentially subject to criminal liability for her actions, though she was not, apparently,

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[39] Again, contrary to respondent's suggestion, Gomez's argument is not that the voir dire was inadequate. (See RB 157; see also RB 154-155.)

prosecuted. (12RT 1932-1934.)

Finally, as Gomez contended in his opening brief, the court's error affected the jurors' consideration of all the charges, for it implied that whether or not a case involved an accomplice or some less culpable party, the prosecution would know who had actually perpetrated the crime, and could be trusted to charge the right person, even if it could not muster sufficient evidence to support the charge. (6RT 950-951; 7RT 1096-1098.)

For all the reasons set forth above and in appellant's opening brief (see AOB 302-308), this error requires reversal of the judgment.

XII.

The CALJIC instructions defining the process by which jurors reach a verdict on the lesser offense of second degree murder, and the court's failure to instruct the jury with CALJIC No. 17.11, unconstitutionally skewed the jurors' deliberations toward first degree murder, requiring reversal.

In appellant's opening brief, Gomez contended that the delivery of the former CALJIC Nos. 8.71, and the court's failure to instruct the jury with CALJIC No. 17.11, skewed the jurors' deliberations toward first degree murder.[40] Gomez acknowledged two Court of Appeal cases holding that the former CALJIC Nos. 8.71 was proper (in one of which, like this case, the court also failed to instruct with CALJIC No. 17.11). (AOB 314-316; *People v. Gunder* (2007) 151 Cal.App.4th 412, 424-425; *People v.*

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[40] CALJIC No. 8.71, as delivered by the court, was as follows:

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give the defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.

(29RT 4151-4152; 3CT 885.)

CALJIC No. 17.11, which the court failed to give, provides, "[i]f you find the defendant guilty of the crime of _____, but have a reasonable doubt as to whether it is of the first or second degree, you must find [him][her] guilty of that crime in the second degree."

Pescador (2004) 119 Cal.App.4th 252, 255-258.) He noted, however, that after those cases were decided, this Court, in *People v. Moore* (2011) 51 Cal.4th 386, 409-412, concluded that the former CALJIC No. 8.71 "carr[ies] at least some potential for confusing jurors about the role of their individual judgments in deciding between first and second degree murder . . . ." (*Id.* at p. 411; see AOB 310, 314-315.)

Respondent urges this Court to "rely on *Gunder,*" one of the Court of Appeal cases decided before *Moore*, and to "find no instructional error occurred below because the jury was instructed with CALJIC Nos. 8.74 and 17.40, which cured any ambiguity in CALJIC No. 8.71." (RB 163; see *People v. Gunder, supra,* 151 Cal.App.4th 412.)[41] In *Moore*, this Court expressly left open the question whether *Gunder* was correct in holding that CALJIC No. 17.40 dispels the possibility of confusion engendered by the former CALJIC No. 8.71. (*People v. Moore, supra,* 51 Cal.4th at p. 412.)

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[41] CALJIC No. 8.74 informs jurors that they have to agree unanimously whether defendant was guilty of first degree murder or second degree murder, but says nothing about reasonable doubt, and said nothing to cure the implication that the jurors must unanimously maintain a reasonable doubt as to defendant's guilt of first degree murder to convict him of second degree murder.

CALJIC No. 17.40 instructs jurors not to decide "'any question in a particular way because a majority of the jurors, or any of them, favor that decision.'" (*People v. Moore, supra,* 51 Cal.4th at p. 411.)

Respondent simply asserts conclusorily that this Court should follow *Gunder.* (RB 163). Because Gomez has already, in his opening brief, explained why he believes this Court should not follow *Gunder* (AOB 315-316), he makes no further argument on that point here.

Gomez contended in his opening brief, and maintains now, that the error was structural, obviating the need for harmless error analysis. (AOB 317-318.) Gomez acknowledges that this Court's decision in *Moore* constitutes an implied rejection of his contention that the error is structural. (*People v. Moore, supra,* 51 Cal.4th at pp. 411-412.) Nonetheless, for the reasons set forth in appellant's opening brief (AOB 317-318), he urges this Court to revisit *Moore* and conclude that the error is structural.

Finally, should this Court decide to apply harmless error analysis, Gomez notes that respondent again states an incorrect standard of harmless error review, contending that because each conviction "was supported by strong evidence, . . . therefore, any instructional error was harmless beyond a reasonable doubt." (RB 165.) "Strong evidence" is not the standard. (See *Chapman v. California, supra,* 386 U.S. at pp. 24-26 [error was prejudicial even though case presented a "reasonably strong 'circumstantial web of evidence'"].)

Respondent further contends that "there was no showing that . . . any

juror had a doubt as to the degree of the Luna, Acosta, and Dunton murders." (RB 164.) Respondent has erroneously reversed the burden of proof. *Chapman* harmless error review requires the prosecution to prove beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California, supra,* 386 U.S. at pp. 24, 26.) It places no burden on the defendant. For all the reasons set forth in his opening brief, Gomez respectfully asks this Court to reverse the first degree murder convictions for the killings of Luna, Acosta, and Dunton, and of the death sentences. (AOB 318-320; AOB Arguments I.B.2. & III.)

XIII.

The trial court's instruction of the jury with CALJIC No. 17.41.1 violated Mr. Gomez's rights under the Sixth, Eighth, and Fourteenth Amendments.

In his opening brief, Gomez contended that the trial court's instruction of the jury with CALJIC No. 17.41.1 violated his federal constitutional rights. (AOB Argument XIII.) Respondent contends that this claim has been forfeited, and in any event lacks merit. (RB 165-166.)

Gomez has not forfeited this claim. Even without objection, a defendant may challenge on appeal an instruction that affects his substantial rights. (*People v. Hillhouse*, *supra,* 27 Cal.4th at pp. 505-506; see Pen. Code § 1259; see also *People v. Castillo*, *supra,* 16 Cal.4th at p. 1015.)

In several cases addressing similar claims, this Court has not found forfeiture, despite the lack of any indication in its opinion that the defense objected to the instruction. (*People v. Maciel*, *supra,* 57 Cal.4th at pp. 548-549; *People v. Souza* (2012) 54 Cal.4th 90, 121; *People v. McKinnon*, *supra,* 52 Cal.4th at p. 681; *People v. Banks, supra,* 59 Cal.4th at pp. 1170-1171.) And in *People v. Wilson* (2008) 44 Cal.4th 758, 805-806, this Court addressed a challenge to CALJIC No. 17.41.1 where defense counsel at trial had, jointly with the prosecutor, requested the instruction.

With regard to the guilt phase, Gomez acknowledged in his opening

brief that this Court has previously declined to reconsider *Engelman*, in which it held that while CALJIC No. 17.41.1 should not be given, it did not violate the defendant's constitutional rights. (AOB 322; *People v. Engelman* (2002) 28 Cal.4th 436, 441, 445, 449; *People v. Rogers*, *supra,* 57 Cal.4th at pp. 339-340.) Gomez now acknowledges that this Court has continued to reject defendants' arguments that it should reconsider *Engelman*. (*People v. Souza*, *supra,* 54 Cal.4th at p. 121; see *People v. Maciel, supra,* 57 Cal.4th at pp. 548-549; *People v. Chism*, *supra,* 58 Cal.4th at p. 1309; *People v. Banks, supra,* 59 Cal.4th at pp. 1170-1171.) For the reasons stated in his opening brief, Gomez respectfully asks the Court to reconsider *Engelman*. (AOB 322-339.)

Gomez also acknowledged that *People v. Brady* (2010) 50 Cal.4th 547, 587, had rejected a claim that instruction with CALJIC No. 17.41.1 at the penalty phase violated the defendant's constitutional rights. (AOB 322 fn. 100.) In *People v. Maciel, supra,* 57 Cal.4th at pp. 548-549, the Court again rejected a claim that the penalty phase use of CALJIC No. 17.41.1 is unconstitutional. For the reasons set forth in his opening brief, Gomez respectfully asks this Court to reconsider that holding. (See AOB 335-339.)

For all the reasons stated in appellant's opening brief, this error requires reversal. (AOB 339-343.)

XIV.

A series of guilt phase instructions impermissibly and unconstitutionally undermined and diluted the requirement of proof beyond a reasonable doubt.

In appellant's opening brief, Gomez contended that a series of guilt phase instructions impermissibly and unconstitutionally undermined and diluted the requirement of proof beyond a reasonable doubt. (AOB 344-361.) Gomez acknowledges that this Court has rejected these claims. Respondent answers the argument by relying on the cases in which this Court has rejected these claims, without substantial additional analysis. (RB 167-169.) The issues are therefore joined and there is no need for further reply.

XV.

The trial court's instruction on kidnaping erroneously and unconstitutionally told jurors to consider the totality of the circumstances in determining whether the movement of the victim was substantial, requiring reversal.

Respondent concedes that the trial court erred when it used the 1996 revision of the kidnaping instruction, which told jurors to consider the "totality of the circumstances" — including whether the movement increased the risk of harm, decreased the likelihood of detection, or increased the danger inherent in an attempt to escape — in deciding whether the asportation element had been proven. (RB 169-171; see 3CT 886-887; 29RT 4155-4157.)

Respondent's only argument is that the error was harmless. It contends that "there was no doubt that Patel had been moved a distance 'substantial in character' as defined by prior case law." (RB 173.) Respondent notes that defense counsel conceded that Patel was kidnaped. (RB 173.) Though counsel conceded Patel was kidnaped, the jury, of course, was still required to find that the prosecution had proven all the elements of kidnaping beyond a reasonable doubt in order to convict Gomez of that crime. The question now is whether the prosecution can prove the error harmless beyond a reasonable doubt. (AOB 365-367; see *Chapman v. California, supra,* 386 U.S. at pp. 24-26.)

Respondent contends that "[t]he prosecution presented evidence showing that Patel had been forced into the trunk of his car and, while alive, moved to a freeway on-ramp in an industrial area, where he was killed. For example, Patel was placed in the trunk of his car after he suffered non-fatal stab wounds, which left blood in the trunk." (RB 173.) Respondent provides no record citations for these assertions.[42] To be sure, the evidence showed that Patel's blood was in the trunk. (12RT 1886-1889, 1904-1911.) But, as set forth in appellant's opening brief, there was no evidence suggesting that Patel was moved at all, let alone a substantial distance, while in the trunk. (AOB 366-367.) At most, the blood in the trunk shows that Patel's killer or killers attempted to put him in the trunk.

Respondent contends that "there was no basis to conclude that Patel was only moved on the freeway on-ramp, or moved in his car when he was

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[42] The only record cites respondent provides in the paragraph in which it contends that the evidence allowed no reasonable dispute that Patel was kidnaped are to 9RT 1475-1477, 12RT 1858-1859, and 9RT 1523-1530, 1565. The first two citations are to Detective LaBarbera's testimony about the location at which Patel's body was found, a freeway on-ramp. The last citation, to 9RT 1523-1530, 1565, is to Dr. Carpenter's testimony about Patel's autopsy. Gomez concedes that Patel's body was found on a freeway on-ramp and that his death was caused by multiple injuries, including a gunshot wound to the back of the head, and stab wounds to the neck and chest. (9RT 1524.) The question here is whether any juror might have had a reasonable doubt as to whether Patel was moved a substantial distance before he was killed.

already dead." (RB 174.) A reasonable doubt, of course, need not find a "basis" in the evidence; it may be based on a lack of evidence. (*People v. Simpson* (1954) 43 Cal.2d 553, 566; *Jackson v. Virginia*, *supra,* 443 U.S. at p. 317 fn. 9, quoting *Johnson v. Louisiana* (1972) 406 U.S. 356, 360; U.S. Const., 14th Amend.; *People v. McCullough* (1979) 100 Cal.App.3d 169, 182; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1238; see also *People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1508-1510.) Here, a juror or jurors might reasonably have found that while the evidence showed Patel had been in the trunk at one time, no evidence showed beyond a reasonable doubt that the car was moved while Patel was in the trunk.

Respondent contends that the jury could reasonably infer that Patel was moved a substantial distance because he was killed on a freeway on-ramp, normally accessed by automobiles. (RB 174.) There is nothing in the evidence to suggest, however, that Patel did not encounter the person or people who killed him on the freeway on-ramp. And, the question here, again, is not whether the jurors could have inferred that Patel was moved a substantial distance. That is the test for sufficiency of the evidence. The question now is whether the prosecution can show beyond a reasonable doubt that the court's erroneous instruction did not contribute to the verdict.

(*Chapman v. California, supra,* 386 U.S. at p. 24).[43]

More to the point, the question is not whether a reasonable, properly instructed jury might have found that Patel was moved a substantial distance. The question is whether the error here might have contributed to the verdict. Gomez submits that there is no possibility that it did not; the jury was told that in determining whether the asportation was substantial it should consider the totality of the circumstances — when the totality of the circumstances in fact had no proper place in that determination. Jurors are presumed, of course, to follow instructions. (*People v. Pearson, supra,* 56 Cal.4th at p. 477.)

The jury here was instructed with a legally incorrect theory of kidnaping. When a trial instructs on two theories of guilt, one of which is legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. (*People v. Chiu, supra,* 59 Cal.4th at p. 167, citing *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129; *People v. Green* (1980) 27 Cal.3d 1, 69-71.)

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[43] Or, if the *Watson* standard is applied, the question is whether it is reasonably probable that, in the absence of the error, the result would have been more favorable to Gomez (*People v. Watson, supra,* 46 Cal.2d at p. 836.) In appellant's opening brief, appellant provided incorrect citations for *People v. Watson.* (See AOB 366-367, & fn. 112.) The correct citation is *People v. Watson* (1956) 46 Cal.2d 818.

Here, where the jury was instructed *only* on a legally invalid theory of guilt — that the totality of circumstances could establish a the asportation element of kidnaping — there can be no basis for finding that the verdict is based on a valid ground. A fortiori, reversal is required.

For all the reasons set forth here and in appellant's opening brief (AOB 365-368), Gomez contends that the error was not harmless under any standard.

XVI.

The definition of simple kidnaping announced by this court at the time of the kidnaping charged in this case was unconstitutionally vague.

In appellant's opening brief, Gomez contended that the definition of simple kidnaping announced by this Court at the time of the kidnaping charged in this case was unconstitutionally vague. (AOB 369-384.) Gomez acknowledged that this Court has rejected this claim in *People v. Morgan* (2007) 42 Cal.4th 593, 604-607 and argued that this Court should revisit the issue. Respondent answers the argument by relying on *Morgan*, without substantial additional analysis. (RB 174-177.) The issue is therefore joined and there is no need for further reply.

XVII.

The prosecutor violated *Griffin v. California* when, in an effort to fill a crucial evidentiary gap in his case, he argued that there was no evidence that Mr. Gomez read certain newspaper articles; reversal is required.

The only evidence the prosecution offered to attempt to corroborate Witness #1's accomplice testimony about the Escareno killing was Gomez's statement, which, the prosecution contended, revealed details of the killing not released to the press. Defense counsel produced several newspaper articles containing information about the Escareno killing. In summation, the prosecution attempted to counter this defense evidence by noting that there was no evidence that Gomez read the articles in question. Because the only evidence Gomez could have presented on this question was his own testimony, the prosecution's argument ran afoul of *Griffin v. California* (1965) 380 U.S. 609. For all the reasons set forth below and in appellant's opening brief, this error requires reversal.

A. The *Griffin* issue was not forfeited.

Respondent concedes that the defense moved for a mistrial after the prosecutor's summation, but appears to contend that the *Griffin* error is entirely forfeited because counsel did not make a contemporaneous objection and request an admonishment. (RB 179-180.) Respondent is mistaken.

"The rule that failure to object bars appellate review applies only if a timely objection or request for admonition would have cured the harm." (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184, fn. 27.) Where a trial court's later ruling makes clear that any objection would have been overruled, the issue is reviewable on appeal. (*Ibid.*) Here, the trial court, in response to Gomez's motion for a mistrial, ruled that there had been no *Griffin* error. (27RT 3861-3862.) The court also refused to instruct the prosecutor not to comment any further about Gomez's failure to present evidence that he read newspaper articles about the homicides. (27RT 3868-3869.) Given the trial court's position on the matter, it is clear that any contemporaneous objection would have been overruled and any request for an admonishment denied.

More, where, as here, the trial court has ruled on an issue, it may be reviewed as if an objection had been made. (*People v. Abbott* (1956) 47 Cal.2d 362, 372-373.)

Finally, even where the Attorney General has argued that an objection came too late, this Court has found the question of preservation "close and difficult" and has reviewed the issue. (*People v. Riel* (2000) 22 Cal.4th 1153, 1191-1192.)

Respondent cites *People v. Coffman* (2004) 34 Cal.4th 1, 74, and

People v. Hughes (2002) 27 Cal.4th 287, 372, for the proposition that Gomez's mistrial motion was insufficient to preserve the issue for review. (RB 180.) Both cases are distinguishable because there is no indication that a motion for a mistrial was made in connection with the asserted *Griffin* error in either case. (*People v. Coffman, supra,* 34 Cal.4th at p. 74; *People v. Hughes, supra,* 27 Cal.4th at p. 372.)

Because defense counsel moved for a mistrial based on *Griffin* error, and because the trial court ruled that no *Griffin* error had occurred, and even refused to admonish the prosecutor not to make any similar comments, this issue is preserved for review.

B. The prosecutor committed *Griffin* error.

The Attorney General contends that the prosecutor's comments did not constitute *Griffin* error because evidence that Gomez read the newspaper articles in question "could have been elicited . . . from sources other than appellant" and because "the prosecution did not tell the jury that appellant was the only source of this evidence, that he should have testified, or that the jury could infer guilt from appellant's failure to testify." (RB 181.) The law makes clear, however, that a prosecutor may violate *Griffin* not only directly — by explicitly calling attention to the defendant's failure to testify — but indirectly, by referring to the absence of evidence that only

the defendant's testimony could provide. (*People v. Brady, supra,* 50 Cal.4th at pp. 565-566; see *Griffin v. California, supra,* 380 U.S. 609.)

Respondent asserts that evidence that Gomez read the articles in question could have been elicited from sources other than Gomez himself. (RB 181.) Respondent itself does not identify any such sources, though it notes that the trial court had done so. (RB 179, 181.) But respondent ignores the argument in appellant's opening brief explaining the flaws in the trial court's reasoning that Gomez could have provided evidence of a newspaper subscription (not likely, as he did not have a fixed address), or that he had commented to others about reading the articles in question (which would have been subject to a hearsay objection). (See AOB 390-392; see RB 181.) As explained in appellant's opening brief, the only witness who could testify that Gomez read the articles in question was Gomez himself. (AOB 391.)

The prosecutor's comments (27RT 3837-3838; 28RT 4076) thus ran afoul of *Griffin v. California, supra,* 380 U.S. 609.

C. This error was not harmless beyond a reasonable doubt.

This error is subject to review under *Chapman*'s harmless beyond a reasonable doubt standard, which respondent fails to mention, let alone

apply. (*Chapman v. California, supra,* 386 U.S. at p. 24; see RB 180-182.)[44] Respondent contends, citing *People v. Monterroso* (2004) 34 Cal.4th 743, 770, that indirect, brief, and mild references to defendant's failure to testify are "'uniformly held to constitute harmless error.'" (RB 181.) But as explained in appellant's opening brief, in an argument respondent ignores, the error here "serve[d] to fill an evidentiary gap in the prosecution's case" and "touched a live nerve in the defense," demonstrating its prejudice. (*People v. Vargas* (1973) 9 Cal.3d 470, 481, quoting *People v. Modesto* (1967) 66 Cal.2d 695, 714; see AOB 392-393.) In context, thus, the error and its effect can hardly be deemed "mild."[45]

Gomez's argument, of course, was not that the error was prejudicial with respect to a conviction for the Escareno killing, for there was no such conviction. (See RB 181 [noting Gomez was not convicted of killing Escareno].) Gomez contends that in addition to prejudicing the jury's consideration of the other counts at the guilt phase, the error was prejudicial

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[44] Indeed, *Chapman* itself involved *Griffin* error. (See *Chapman v. California, supra,* 386 U.S. at pp. 19-20, 24-26.)

[45] Respondent contends that the jury was instructed "that appellant had the 'constitutional right . . . to elect to testify in the guilt phase only' and that the jury was 'instructed not to consider or discuss the fact that the defendant elected not to testify in the penalty phase. That is a matter that must not in any way affect your verdict as to the penalty.'" (RB 182.) In support, respondent cites the guilt phase instructions at 3CT 876. This page of the Clerk's Transcript does not contain the instruction respondent quotes.

with respect to the penalty phase, where jurors who believed Gomez guilty of the Escareno murder were permitted to consider it in deciding whether he should be sentenced to death. (AOB 393-397.)

Respondent does not satisfy its burden of proving the error harmless beyond a reasonable doubt with respect to the death sentences. The Escareno murder constituted serious aggravating evidence. (See AOB 396-397.) The prosecution has not, by its conclusory statement that the evidence at the penalty phase was "overwhelming," sustained its burden of proving that the death sentences were "surely unattributable" to this error. (RB 181; see *Sullivan v. Louisiana* (1993) 408 U.S. 275, 279; see *People v. Pearson, supra,* 56 Cal.4th at p. 463.) Reversal of the death sentences is required.

XVIII.

The trial court erred in denying Mr. Gomez's Penal Code section 1118.1 motion regarding the Escareno case, and evidence of Mr. Gomez's guilt of the murder of Jesus Escareno was insufficient; the trial court thus erred and violated Mr. Gomez's constitutional rights when it instructed jurors that those who believed Mr. Gomez guilty of murdering Escareno could consider that murder at the penalty phase.

A. The trial court erred in denying Mr. Gomez's Penal Code section 1118.1 motion regarding the Escareno case; the evidence of Mr. Gomez's guilt of the murder and robbery of Jesus Escareno was insufficient.

Respondent contends that substantial evidence supported Gomez's guilt of the crimes against Jesus Escareno. (RB 182.) Respondent acknowledges that Witness #1's accomplice testimony had to be corroborated. (RB 183-184.) Respondent cites three items of evidence which it contends corroborate Witness #1's testimony. (RB 184-187.) For the reasons set forth below and in appellant's opening brief, none of these items of evidence corroborated Witness #1.

First, respondent contends, Gomez's statement to Detective Winter, and the particular circumstances under which it was made, corroborated Witness #1's testimony that Gomez killed Escareno. (RB 184-186.) Respondent contends that "appellant deliberately displayed bravado and taunted the police about unsolved murders in the area." (RB 185.) Respondent provides no record citation for its assertion that in speaking to

Winter, Gomez displayed bravado or taunted her. (RB 185.) Review of Winter's testimony about Gomez's statement does not reveal any evidence about Gomez's attitude or tone of voice. (13RT 2044.) More, respondent offers no authority to support the notion that bravado or taunting are sufficient to corroborate accomplice testimony.

And no matter what attitude Gomez displayed when he spoke to Winter, nothing he said revealed knowledge of the Escareno killing that had not been revealed to the general public. (See AOB 402-412.) Respondent contends that the jury could have drawn the inference that Gomez's statement connected him with Escareno's murder because he was "aware the victims' wallets had been stolen, but this information had not been released to the press." (RB 185.)

But respondent ignores Gomez's argument, in his opening brief, that Winter's paraphrase of Gomez's statement did not specifically identify the homicide on Western Avenue (where Escareno's body was found) as one in which a wallet was taken. (AOB 404; see AOB 403, fn. 128.) And respondent also ignores the facts, mentioned in appellant's opening brief, that Witness #1's testimony was that he himself had removed Escareno's wallet at a time when Gomez was not present, and that Witness #1 did not testify that he gave Gomez the wallet or even told Gomez that he took it.

(AOB 405-406; 19RT 2949-2954; 22RT 3270.) And crucially, respondent ignores the fact that the defense introduced a newspaper article about the Escareno case, which quoted a detective as saying that Escareno appeared to have been robbed. (AOB 410, Defense Exhibit M; see also Defense Exhibit L.)

Respondent also appears to contend that it does not matter that Gomez could have learned of the murders through the press or word of mouth. (RB 185.)[46] That argument amounts to the contention that knowledge of a crime is sufficient corroborating evidence — for under respondent's reasoning, a jury may always infer that that knowledge was obtained by committing the crime. As set forth in appellant's opening brief, if presence at the scene, or opportunity are not sufficient to corroborate an accomplice, mere knowledge that a crime has occurred can hardly be sufficient. (AOB 406-407.)

Respondent further contends that "appellant's decision to willfully and rudely refuse to come to court . . . raised the inference that he had a consciousness of guilt." (RB 186.) As set forth in Argument VII above and

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[46] The prosecution did not take this position at trial; rather, it contended that the statement to Winter corroborated Witness #1 because it contained information not released to the press. (AOB 403; see 25RT 3643-3645; 27RT 3835-3838; see also 13RT 2045.)

in appellant's opening brief, this Court has made clear that a defendant's absence from court is not relevant and may not be considered by the jury. (AOB 198-200; see *People v. Sully*, *supra,* 53 Cal.3d at p. 1241; *People v. Medina*, *supra,* 11 Cal.4th at pp. 735, 739-740; *Taylor v. United States*, *supra,* 414 U.S. at pp. 17-18.) Respondent ignores these authorities. (RB 186.)

Respondent also notes that the jury was instructed on consciousness of guilt based on flight and contends that flight may be considered as corroborative of accomplice testimony. (3CT 876; see RB 186.) Respondent does not, however, attempt to explain how the flight at issue in this case (which occurred after the Dunton and Acosta homicides) has anything to do with the Escareno case. Indeed, nothing suggests that it does. Thus, Gomez's purported "double display of a consciousness of guilt" (RB 186) was irrelevant on both counts.

Finally, respondent contends that "appellant's involvement in the other charged murders tends to show he also committed the Escareno murder." (RB 186-187.) Respondent fails to address Gomez's argument that evidence of the other crimes was neither admitted nor admissible with respect to the Escareno crimes. (AOB 408-409; see also AOB 127-135.)

Thus, nothing corroborated Witness #1's testimony; the evidence of

his guilt of the Escareno crimes was not substantial.

B. Witness #1's testimony, whether corroborated or not, was not substantial evidence.

Respondent ignores Gomez's arguments that Witness #1's testimony, whether corroborated or not, was insufficient under state and federal law. (AOB 412-415.)

C. Because the evidence of Mr. Gomez's guilt of the murder and robbery of Jesus Escareno was insufficient, the trial court erred in allowing those jurors who believed Mr. Gomez guilty of the Escareno crimes to consider them at the penalty phase; the death sentences cannot stand.

In appellant's opening brief, Gomez contended that because evidence of his guilt of the Escareno crimes was insufficient, the trial court erred in instructing jurors that those who believed him guilty of those crimes could consider them at the penalty phase. (AOB 416-420.) He further contended that this error requires reversal of his death sentences. (AOB 420-424.) Respondent contends only, as set forth above, that because substantial evidence showed Gomez was guilty of the Escareno crimes, the jury was properly instructed. (RB 187.) For all the reasons stated in appellant's opening brief, the Court's penalty phase instructions regarding the Escareno crimes were erroneous and unconstitutional, and Gomez's death sentences must be reversed. (AOB 416-424.)

XIX.

The trial court not only erred by failing to instruct the penalty phase jurors that they could not consider the murder of Jesus Escareno as aggravation unless they found that Witness #1's testimony was corroborated by independent evidence linking Mr. Gomez to the crime, but also by instructing jurors to disregard guilt phase instructions that were not repeated at the penalty phase.

A. There is a reasonable likelihood that the penalty phase jurors understood the court's penalty phase instructions to mean that they could consider the Escareno crimes without regard to the accomplice corroboration requirement.

At the penalty phase, the trial court told jurors that guilt phase instructions no longer applied, unless they were repeated in penalty phase instructions. (31RT 4594-4595, 4617-4618; 13CT 3440.) Indeed, it told jurors to "disregard" instructions given at the guilt phase. (31RT 4595; 13CT 3440.)

And in its penalty phase instructions, the trial court did not include the accomplice corroboration requirement. (31RT 4594-4617; 13CT 3437-3448.) More, jurors were told that they should give the testimony of a single witness whatever weight they thought it deserved and that "[t]estimony by one witness which you believe concerning any fact is sufficient for the proof of that fact." (31RT 4603; 13CT 3443.) Respondent concedes that Penal Code section 1111, which requires the corroboration of accomplice testimony, applies at the penalty phase. (RB 189.)

This Court has made clear that "penalty jurors cannot reasonably be expected to apply guilt phase instructions on credibility where they are categorically told to disregard them and no reinstruction is given. Under [these] circumstances . . . error occurs. [citations]." (*People v. Contreras* (2013) 58 Cal.4th 123, 167.)

Respondent contends, however, that the trial court's penalty phase instructions made clear that "only those jurors who already found appellant guilty of the Escareno murder at the guilt phase, necessarily based on the proper accomplice instructions given at the guilt phase, could consider these crimes as aggravating evidence." (RB 189.) (Of course, no jurors had "found Gomez guilty" of the Escareno crimes at the guilt phase; the jury did not reach a verdict. (29RT 4338-4440.))

Respondent's brief quotes only snippets of the instructions regarding the Escareno crimes, omitting the portions that suggested that jurors could consider the Escareno murder at the penalty phase if they now believed Gomez guilty of it. To be sure, the court did, when it initially spoke to the jurors about the Escareno murder at the penalty phase, explain that "those jurors who concluded beyond a reasonable doubt that the defendant was guilty of the murder of Mr. Escareno are permitted to consider that as an aggravating factor . . . . The other jurors that did not find that to be true

beyond a reasonable doubt cannot consider that as an aggravating factor." (31RT 4562-4563.) In the course of this explanation, however, the court also at times lapsed into the present tense, instructing jurors "those of you that believe that the evidence established beyond a reasonable doubt that Mr. Gomez murdered Jesus Escareno can consider that as an aggravating factor . . . ." (31RT 4563.)

And crucially, the final penalty phase instructions contained no limitation suggesting that only jurors who had believed at the guilt phase that Gomez was guilty of the Escareno crimes could consider them at the penalty phase. The final instructions were as follows:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts: . . . Murder of Mr. Escareno . . . *Before a juror may consider* any criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did, in fact, commit the criminal acts. . . . If any juror *is convinced* beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation.

(31RT 4609-4610; 13CT 3445-3446.)

The final instructions thus suggested that if any juror, upon considering the evidence that had been presented at the guilt phase, believed beyond a reasonable doubt that Gomez had killed Escareno — without regard to the accomplice corroboration requirement — he or she could

consider this murder at the penalty phase. The only requirement these instructions imposed for considering the Escareno murder was a prior determination that Gomez was guilty beyond a reasonable doubt. The instructions said nothing at all to indicate that that prior determination had to have been made at the guilt phase; indeed, they indicated that the prior determination could be made at any time before the juror weighed the Escareno crimes as aggravation.

To make matters worse, the court included the "single witness" instruction, which stated, in part: "You should give the testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact is sufficient for proof of that fact." (13CT 3443; 31RT 4603.) This instruction, combined with the instruction that jurors were to determine the facts "from the evidence received during the entire trial, unless you are instructed otherwise" (31RT 4595; 13CT 3441; see also 31RT 4605; 13CT 3444), allowed jurors to consider Witness #1's testimony about the Escareno crimes without regard to whether it was corroborated.

Even if the instructions were ambiguous as to whether jurors were locked in to the conclusion they had reached at the guilt phase, there is a reasonable likelihood that jurors applied the instructions in an erroneous

and unconstitutional manner, concluding that if they at that point believed beyond a reasonable doubt that Gomez had murdered Escareno, they could consider that murder in deciding whether to sentence him to death. (*Estelle v. McGuire, supra,* 502 U.S. at p. 72.) Of course, Gomez need not establish that it is more likely than not that the jury applied the instruction in an erroneous or unconstitutional manner. Rather, he need only show more than a mere possibility. (*Boyde v. California* (1990) 494 U.S. 370, 380-381.)

It is *unlikely* that jurors concluded that they were locked into the conclusion they had reached in the guilt phase because the trial court's instructions failed to specify what conclusion jurors would be bound by. As noted above, respondent refers to jurors who "found [Gomez] guilty" of the Escareno crimes at the guilt phase (RB 189), but of course no juror found him guilty; no verdict was reached. While the foreperson told the court that the last vote was six-six, he told the court that previous votes had been five-seven and ten-two. (29RT 4339.) Nothing indicates that the last vote of six-six was taken immediately prior to the report of deadlock. (29RT 4338-4339.) Thus, jurors who voted for guilt might nonetheless have changed their vote if deliberations continued after the final vote was taken — or vice versa.

The trial court's instructions contained no indication whether jurors

would be bound by their vote at the time the last vote was taken, or whether they would be bound by what they personally thought about whether guilt had been proven beyond a reasonable doubt when the guilt phase concluded and the court declared a mistrial on the Escareno counts. Because of this lack of specificity, it is unlikely that jurors would have interpreted the court's instructions to mean they were bound by their guilt phase conclusions — for what, precisely, were they to understand they were locked into? Rather, given the final instructions' clarity — "*Before a juror may consider* any criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did, in fact, commit the criminal acts. . . . If any juror *is convinced* beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation" (31RT 4609-4610, emphasis added; 13CT 3445-3446) — it is likely that jurors would feel free to consider the Escareno murder as long as they concluded, at some point, that they were convinced beyond a reasonable doubt of Gomez's guilt.

Given the difficulty jurors would have had in applying the instructions as respondent suggests, given that the court's final instructions were expressly phrased in the present tense, it is indeed more than reasonably likely that jurors interpreted them to mean that jurors were to

consider the Escareno murder or not depending on their current conclusion about it at the penalty phase. And, of course, their penalty phase conclusions would be reached without regard to the accomplice corroboration instruction, which no longer applied.

Finally, it is important to note that the jurors had the written instructions with them in the jury room; the portions of the court's explanation that respondent relies on, on the other hand, were not part of the written packet of penalty phase instructions. (31RT 4618 [jurors were provided with individual copies of packet of penalty phase instructions]; 13CT 3437-3448 [written packet of penalty phase instructions]; 13CT 3445-3446 [instruction on factor (b) evidence, including murder of Escareno].) Indeed, to the extent there is a discrepancy between oral and written instructions, the written instructions provided to the jury control. (See, e.g., *People v. Wilson*, *supra,* 44 Cal.4th at pp. 802-803; *People v. Osband* (1996) 13 Cal.4th 622, 717; *People v. Crittenden* (1994) 9 Cal.4th 83, 138; *People v. McLain* (1988) 46 Cal.3d 97, 111, fn. 2, 115.)

In sum, at the penalty phase, the court told jurors guilt phase instructions no longer applied, and that they must disregard them. (31RT 4594-4595; 13CT 3440.) The court, in an oral explanation delivered to jurors before the penalty phase began, used the past tense when it told jurors

that those who did not believe Gomez was guilty of the Escareno crimes could not consider them at the penalty phase. But it is unlikely that jurors believed they were bound by any conclusion reached at the guilt phase because the court's final instructions lacked any indication of the point at which jurors' guilt phase conclusions about the Escareno case would be binding on them at the penalty phase. And the final instructions the court delivered to the jury and which were provided in written form to jurors in the jury room made clear that there was no accomplice corroboration requirement at the penalty phase; that the testimony of a single witness was sufficient for proof of any fact; and that jurors could consider the Escareno murder as factor (b) evidence as long as they were "first . . . satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal acts." (13CT 3445-3446; see 31RT 4618.) The court's penalty phase instructions thus erroneously failed to include the accomplice corroboration requirement and allowed jurors to consider the Escareno crimes without regard to whether Witness #1's testimony was corroborated.

B. This error was not harmless.

Respondent contends that any error was harmless under any standard because "[t]he Escareno crimes were just one set of many violent crimes committed by appellant." (RB 190.) To the contrary, the Escareno case was

different in kind from the other aggravating evidence presented at the penalty phase: Escareno was killed. More, the evidence regarding the Escareno killing was much more graphic and detailed than the evidence presented at the penalty phase regarding assault and battery on correction officers and a robbery. (See AOB 421-424.)

Respondent further contends that "it is very doubtful that jurors who did not find appellant guilty of the Escareno crimes at the guilt phase somehow based their penalty phase verdicts on the Escareno crimes . . . ." (RB 190.) "Very doubtful" does not describe the standard respondent must meet. Nor does the standard ask whether jurors "based their penalty phase verdicts" on the Escareno crimes. Rather, respondent must prove beyond a reasonable doubt that this error did not contribute to the verdict. (*Chapman v. California, supra,* 386 U.S. at pp. 24-26.) For all the reasons set forth in appellant's opening brief, respondent has failed to meet its burden. (AOB 420-424, 431-433.)

Even if the error is a matter of state law alone, the standard is not "very doubtful" and does not ask whether the jurors "based their penalty phase verdicts on" the error. (RB 190.) Rather, the question is whether there is a reasonable possibility that, in the absence of the error, at least one juror would have declined to impose the death penalty. (*People v. Brown, supra,*

46 Cal.3d at p. 448.)[47] This Court has stated that the "reasonable possibility" standard is the same in substance and effect as the *Chapman* standard. (*People v. Prince*, *supra,* 40 Cal.4th at pp. 1299-1300.) For all the reasons set forth above and in appellant's opening brief, the prosecution cannot establish that there is no reasonable possibility that this error affected the penalty verdicts.

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[47] Respondent contends that any error "was harmless under either the *Watson* or *Chapman* standard." (RB 190.) The *Watson* standard is inapplicable at the penalty phase. Even if the error is a matter of state law, the "reasonable possibility" standard discussed above — not the *Watson* standard — applies. (*People v. Prince, supra,* 40 Cal.4th at p. 1299.)

XX.

The prosecutor's elicitation, and the trial court's admission, over objection, of evidence regarding the ethnic background of two jail guards Mr. Gomez was accused of assaulting, evidence which the prosecutor then employed in arguing for death, requires reversal.

The prosecutor, over objection, elicited the ancestry (Mexican-American) of a jail guard Gomez was accused of assaulting. He then elicited the ancestry of a second jail guard, also Mexican-American. And he used this evidence in summation to argue for a death sentence, suggesting that because Gomez assaulted individuals who shared his ethnicity, he was more deserving of a death sentence.

Respondent cites no authority for the proposition that this kind of race-based argument is proper, and appellant is unaware of any such authority. In fact, the law holds the opposite: violence that springs from racial animus may be aggravating and may support a finding of future dangerousness. (See, e.g., *Barclay v. Florida* (1983) 463 U.S. 939, 949.) The fact that violence does not spring from racial animus, thus, can hardly be aggravating.

For all the reasons set forth below and in appellant's opening brief, this error requires reversal of the death sentences.

A. The constitutional claim is not forfeited.

Respondent contends that appellant objected exclusively on the

ground that the admission of the deputies' ancestry was irrelevant at the penalty phase, and that this objection did not preserve any federal constitutional claims. (RB 192.) Respondent claims that appellant has "forfeited all federal constitutional claims by failing to raise these concerns in the trial court." (RB 192.)

Respondent cites *People v. Partida*, *supra,* 37 Cal.4th at p. 438, fn. 3, for the proposition that counsel's objection did not preserve any federal constitutional claims. It is unclear why respondent cites *Partida*; *Partida* establishes the opposite. Where a defendant has objected, at trial, on state law grounds, and the trial court has overruled the objection, the defendant may argue on appeal that the trial court's error had the legal effect of violating the Federal Constitution. (See *People v. Partida, supra,* 37 Cal.4th at p. 439; see also *People v. Gutierrez*, *supra,* 45 Cal.4th at pp. 809, 812-813 [state law objection preserved claims that error violated due process, Confrontation Clause, and right to fair trial]; *People v. Boyer* (2006) 38 Cal.4th 412, 441 & fn. 17.)

Defense counsel objected, at trial, to the elicitation of irrelevant evidence of the race of the jail deputies Gomez was accused of assaulting. (30RT 4449.)[48] The court's error in admitting this irrelevant evidence had

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[48] Defense counsel objected when the prosecutor asked Millan his (continued...)

the legal consequence of violating Gomez's federal constitutional rights. This Court's precedents cited above make clear that Gomez may make these federal constitutional claims on appeal.

B. The evidence of and argument relating to the ethnic background of Montoya and Millan violated state law and the California and Federal Constitutions.

Abundant authority, set out in appellant's opening brief and unaddressed in respondent's brief, makes clear that race is a constitutionally impermissible matter that is totally irrelevant to sentencing. (AOB 435-440.)

Respondent, however, attempts to justify the prosecutor's use of ethnic background as a permissible argument about future dangerousness. Respondent has it backwards. Racial or ethnic animus may bear on future dangerousness and may constitute aggravation. (*Dawson v. Delaware* (1992) 503 U.S. 159, 166; *Barclay v. Florida*, *supra,* 463 U.S. at p. 949.) A lack of racial or ethnic animus, however, is not aggravating. Likewise, evidence that the defendant has assaulted members of his own racial or

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[48](...continued)
ancestry. (30RT 4449.) The court overruled the objection. (30RT 4449.) After the court overruled the objection, it would have been futile to object when Deputy Montoya took the stand and the prosecutor again asked about his ethnic background. (30RT 4467; see AOB 434, n. 142.) Indeed, respondent does not contend otherwise; respondent's only claim of forfeiture is, as noted above, that Gomez forfeited the federal constitutional claim. (RB 192.)

ethnic group is not aggravating.

Respondent contends that "the deputies' ancestry was relevant to whether appellant was a potential danger to *all* jail staff or inmates." (RB 192.) Respondent appears to argue that Gomez's lack of racial or ethnic animus is aggravating because if he acted with ethnic animus, assaulting only those who did not share his ancestry, he would pose a danger to fewer people. (RB 194.)[49] Respondent cites no authority suggesting that such an argument is proper, and appellant has found none. Indeed, it flies in the face of what the United States Supreme Court has said. (See *Barclay v. Florida, supra,* 463 U.S. at p. 949.) And it flies in the face of California law, which establishes, as a special circumstance making a defendant eligible for the death penalty, that the victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin. (See Pen. Code § 190.2(a)(16).)

That the prosecutor cloaked his argument in future dangerousness terms does not excuse it. Of course, the prosecutor in this case did not

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[49] Respondent appears to contend that the prosecution's argument was proper because "[t]he prosecutor did not assert that appellant acted with racial animus during any of the murders, or during the attacks on the three deputies." (RB 193.) Again, this is backwards. If the prosecutor had made such an argument (and if there were evidence to support it), it would have been entirely proper.

contend that Gomez poses a greater danger because he is Mexican-American. But respondent is wrong to the extent it contends that "[t]he prosecution in no way asked the jury to consider *appellant*'s race to determine the penalty." (RB 193.) The prosecutor's argument was that assaults on Mexican-American guards were somehow more aggravated because Gomez and two of the guards he was accused of assaulting were all Mexican-American — because Gomez was accused of attacking people who shared his ethnic background. (31RT 4571.) The argument thus asked the jurors to consider the ethnic background of all involved — Gomez and the jail deputies.

Respondent further contends that "[t]he prosecution did not ask the jury to consider . . . the deputies' race or ethnicity, as a reason in and of itself to impose the death penalty." (RB 193.) Of course, the prosecutor's argument was more nuanced than that. But that does not make it permissible. Courts have found that similarly nuanced racial arguments violate the Constitution. (See, e.g., *State v. Monday* (Wash. 2011) 257 P.3d 551, 557-558 [prosecutor argued that African American witnesses would not incriminate an African American]; *McFarland v. Smith* (2d Cir. 1979) 611 F.2d 414, 416-419 [prosecutor argued that a black police officer was more likely to be truthful when testifying against a black defendant]; see

also *People v. Cudjo* (1993) 6 Cal.4th 585, 625-626 [even neutral, nonderogatory references to race are improper absent compelling justification]; *Cudjo v. Ayers* (9th Cir. 2012) 698 F.3d 752, 769-770 [considering prejudicial effect of improper racial comment in relation to erroneous exclusion of defense evidence, and granting habeas corpus petition].)

C. Respondent misstates the applicable harmless error standard and cannot prove beyond a reasonable doubt that this error did not contribute to the verdict.

As the District of Columbia Circuit wrote over two decades ago: "It is much too late in the day to treat lightly the risk that racial bias may influence a jury's verdict in a criminal case." (*United States v. Doe* (D.C. Cir. 1990) 903 F.2d 16, 21-22 (footnotes omitted).) With respect to prejudice, however, respondent offers only one paragraph, devoid of legal or record citation, dismissing the error as "completely benign," and arguing that "appellant has failed to establish a reasonable likelihood that he would have been sentenced to life without parole absent the alleged error." (RB 194.)

First, the erroneous invocation of race or ethnicity in an argument in support of the death penalty is not, and cannot be, "completely benign." (RB 194.) Respondent cites no case supporting such a notion, and indeed

cases from a wide range of jurisdictions, including the United States Supreme Court, consistently hold that the use of race is "odious," "offensive," "insidious," "invidious," and "constitutionally impermissible or totally irrelevant." (See *United States v. Doe*, *supra,* 903 F.2d at pp. 21-22 ["odious"]; *United States v. Webster* (5th Cir. 1998) 162 F.3d 308, 356 ["offensive," "invidious," "odious"]; *State v. Monday*, *supra,* 257 P.3d at p. 557 ["insidious"]; *Zant v. Stephens* (1983) 462 U.S. 862, 885 ["constitutionally impermissible or totally irrelevant"].) As the Second Circuit has explained, "[e]ven a reference that is not derogatory may carry impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted nor intended." (*McFarland v. Smith*, *supra,* 611 F.2d at p. 417; see also *State v. Monday*, *supra,* 257 P.3d at p. 557 ["Not all appeals to racial prejudice are blatant. Perhaps more effective but just as insidious are subtle references."].)

Second, respondent misstates the harmless error standard applicable at the penalty phase. There is no burden on Gomez to "establish [a] reasonable likelihood that he would have been sentenced to life without parole" absent the error. (RB 194.) Rather, federal constitutional violations are subject to the *Chapman* standard of harmless error review; the prosecution bears the burden of proof and must prove such errors harmless

beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Even if the error does not violate the Federal Cconstitution, however, penalty phase error is subject to the state law "reasonable possibility" standard (not the "reasonable likelihood" standard respondent suggests) — a standard that this Court has said is in effect the same as the *Chapman* standard. (*People v. Prince, supra,* 40 Cal.4th at pp. 1299-1300; *People v. Brown, supra,* 46 Cal.3d at p. 448.)

The prosecution has made no attempt to sustain its heavy burden, nor could it. The alleged assaults on jail deputies were the centerpiece of the prosecution's penalty phase case. The defense case, as well, focused on the question of future dangerousness, attempting to show the conditions under which Gomez would be held if he were sentenced to life without parole. (See 31RT 4586-4587 [defense summation]; 31RT 4501-4528 [testimony of Michael Pickett].) The penalty phase was extremely short, with prosecution evidence taking less than a day (30RT 4380, 4479; see 30RT 4399-4479) and defense evidence taking only a morning and spanning only 45 pages of transcript (31RT 4501-4545). In that light, the prosecution's elicitation of the ethnic background evidence and its summation argument drawing on it cannot be deemed insignificant.

The question before jurors at the penalty phase was essentially

whether Gomez is one of the "worst of the worst," deserving of death. The prosecution was permitted to suggest that he fell in that category because he even attacked people of his own ethnic group — an argument that "invoked race for a purpose that is . . . illogical" and did so at a "distinct risk of stirring racially prejudiced attitudes." (*McFarland v. Smith, supra,* 611 F.2d at p. 419.) Respondent has not sustained, and cannot sustain its burden of proving beyond a reasonable doubt that this error did not contribute to the death sentences.

Ruben Gomez respectfully asks this Court to reverse the death sentences.

XXI.

The trial court erroneously and unconstitutionally told penalty phase jurors that they were forbidden to "refer to biblical references," requiring reversal.

The trial court erroneously instructed the penalty phase jurors that they were not permitted to "refer to biblical references." (31RT 4593.) It told the jurors it wanted to "emphasize" this point. (31RT 4593.) This Court has made clear that it is not improper for jurors to share their beliefs with other jurors during penalty phase deliberations, "either through conversation or prayers." (*People v. Lewis* (2001) 26 Cal.4th 334, 390.) More, it is constitutionally essential that jurors be permitted to bring to bear their personal religious values and beliefs, to ensure a sentencing decision by a jury reflecting the "conscience of the community on the ultimate question of life or death." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 519.) And in this case, where a plea for mercy was the crux of defense counsel's summation, it was all the more necessary that jurors whose values were informed by the Bible be permitted to rely on or resort to biblical references — and the trial court's prohibition of such references was all the more prejudicial.

For all the reasons set forth below and in appellant's opening brief, reversal of the death sentences is required.

A. This claim is reviewable on appeal.

Penal Code section 1259 allows a defendant, on appeal, to challenge any instruction that violated his substantial rights, without objection having been made at trial. Gomez asserts that the trial court's instruction on biblical references was error. His contention is not that it should have been clarified; his contention is that the instruction as given was error. Even where a court does not have a sua sponte duty to instruct on a particular topic, when it does choose to instruct, it must do so correctly. (*People v. Castillo, supra,* 16 Cal.4th at p. 1015.)

To be sure, as respondent contends, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested clarifying instructions. (RB 195-196.) But Gomez's argument is not that the court's instruction on biblical references was too general or incomplete; his argument is that it was incorrect. Respondent concedes that there is no forfeiture when the trial court gives an instruction that is an incorrect statement of the law. (See *People v. Capistrano, supra,* 59 Cal.4th at p. 875, fn. 11.)

B. The court's instruction was incorrect and unconstitutional.

Respondent suggests that the court's instruction merely barred the

"use of religious texts during deliberations." (RB 197.) That is not the case. There is a reasonable likelihood, to say the least, that jurors interpreted the court's instruction to mean what it said: that jurors were not allowed to refer to biblical references. (*Estelle v. McGuire, supra,* 502 U.S. at p. 72; *Boyde v. California, supra,* 494 U.S. at pp. 380-381.)[50] The court told jurors they may not "refer to biblical references." (31RT 4593.)

Respondent contends that "the trial court's admonition not to refer to biblical references was, within the context of the general prohibition [of extrinsic material], merely a common example of improper extrinsic material." (RB 198.) That is not a reasonable reading of the court's instruction. Had the court merely meant to say that jurors may not bring the

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[50] While citing the reasonable likelihood standard, respondent also contends that instructions should be interpreted to support the judgment rather than defeat it if they are reasonably susceptible to that interpretation. (RB 199, citing *People v. Martin* (2000) 78 Cal.App.4th 1107, 1111-1112.) *Martin* relies on *People v. Laskiewicz* (1986) 176 Cal.App.3d 1254, 1258, a case decided before *Estelle v. McGuire, supra,* 502 U.S. 62 (1991). *Martin* conflicts with *Estelle*'s "reasonable likelihood" standard, which both the United States Supreme Court and this Court have embraced for interpretation of jury instructions. Under *Estelle*, if there is a "reasonable likelihood" the jury construed the instructions to misstate the law, error occurred — whether or not a proper construction also might have been reasonable. (*Estelle v. McGuire, supra,* 502 U.S. at p. 72; see also *Calderon v. Coleman* (1991) 525 U.S. 141, 147; *People v. Kelly* (1992) 1 Cal.4th 495, 525; *People v. Clair* (1992) 2 Cal.4th 629, 663.) *Martin* also conflicts with the *de novo* standard of review this Court applies to jury instructions. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

Bible into the deliberation room, it could have merely said so. Indeed, it did say that; it told jurors not to bring the Bible in. But it also — erroneously — told jurors that they could not "refer to biblical references. . . . don't refer to those." (31RT 4593.) Respondent's reading of the instruction renders the portion about "biblical references" mere surplusage.[51]

Respondent also contends that the court's penalty phase instruction on the Bible should be read in light of the court's prior guilt phase instruction. (RB 198-199.) At the guilt phase, the court told jurors, "some jurors seem to think it will be great to bring in a religious text of some kind, a Bible or something like that. Cannot refer to those. That's outside information. Don't refer to outside information in deciding this case." (29RT 4174-4175.)

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[51] Respondent also appears to contend that the instruction was proper because "reliance on religious authority 'supporting or opposing the death penalty' is objectionable because '[t]h[e] penalty determination is to be made by reliance on the legal instructions given by the court, not by recourse to extraneous authority.'" (RB 198, quoting *People v. Sandoval* (1992) 4 Cal.4th 155, 194.) As set forth in appellant's opening brief, *Sandoval* makes clear that *even in the context of closing argument by counsel,* "all reference to religion or religious figures" is not ruled out, "so long as the reference does not purport to be a religious law or commandment." (*Id.* at p. 194; see also *People v. Tully, supra,* 54 Cal.4th at pp. 1050-1051.) In any event, this Court has since made clear, in *People v. Lewis*, *supra,* 26 Cal.4th at p. 390, that it is neither unusual nor improper for jurors, during deliberations, to share their religious beliefs, either through conversation or prayer.

To the extent respondent suggests that the guilt phase instruction made it more likely that jurors would interpret the penalty phase instruction as simply prohibiting jurors from bringing copies of the Bible into the jury room (RB 198-199) — as opposed to prohibiting all reference to Biblical passages — respondent is wrong. It is not reasonably likely that the jurors, upon hearing the court's penalty phase instruction on biblical references, would have remembered the precise phrasing of the guilt phase instruction, and concluded, based on the phrasing of the earlier oral instruction, that when the court said that jurors could not "refer to biblical references," and repeated, "don't refer to those," in the penalty phase it merely meant that they could not bring a copy of the Bible into the deliberation room. (31RT 4593.)[52]

Respondent also appears to argue that the guilt phase instructions made it clear that all religious texts — not just the Bible — were banned

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[52] Respondent notes that while the jury, at the penalty phase, was instructed to disregard all guilt phase instructions, the trial court's express reference to the guilt phase instruction on religious texts "manifested the court's intention to have this instruction read [sic] in conjunction with its penalty phase counterpart." (RB 198-199, fn. 57.)

It bears noting that these instructions were not included in the written instructions; they were supplemental instructions orally delivered by the judge. It thus would have been impossible for jurors to "read" the penalty phase instructions on biblical references in light of the guilt phase instructions.

during deliberations. (RB 198-199.) Gomez contended in his opening brief that the court's instruction improperly singled out the Bible. (AOB 447.) But to the extent the instruction banned references to the precepts of any religion, it was nonetheless erroneous and unconstitutional. While singling out the Bible was improper and unconstitutional, instructing the jury not to refer to sayings or passages from any religious text is improper and unconstitutional as well. (*Witherspoon v. Illinois, supra,* 391 U.S. at p. 519; *People v. Danks* (2004) 32 Cal.4th 269, 311.)

Respondent also contends that "[t]he court did address an individual's 'moral reasoning,' and using common sense in other instructions, and jurors would have understood that they could use their moral reasoning during deliberations, but had to leave extrinsic evidence outside the deliberation room door." (RB 197.) Respondent does not provide a citation to the instruction on moral reasoning it invokes. The court did instruct jurors that they were "free to assign whatever moral or sympathetic value [they] deem appropriate to each and all of the various factors [they are] permitted to consider." (13CT 3448; 31RT 4616.)

Of course, in interpreting jury instructions, the specific prevails over the general. (*LeMons v. Regents of the University of California* (1978) 21 Cal.3d 869, 878 ["[W]here two instructions are inconsistent, the more

specific charge controls the general charge."]; *People v. Coddington* (2000) 23 Cal.4th 529, 631-632 [reasonable jurors would understand first, specific instruction as controlling];[53] *Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

The general instruction on "moral or sympathetic value" did not cure the court's error; it referred to "factors you are permitted to consider" (13CT 3448; 31RT 4616), which, read in conjunction with the court's instruction on "biblical references" (31RT 4593), would *not* include Bible-based reasons to impose a life without parole sentence rather than the death penalty.

Indeed, in delivering its instruction that jurors could not consider biblical references, the court explained: "You'll be guided by your own conscience and the law." (31RT 4593.) When later presented with the general instruction about weighting the aggravating and mitigating factors with "moral or sympathetic value," jurors would have understood that such weighting was to be guided by their own conscience and the law — and not

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[53] *Coddington* has been overruled on other grounds (*Price v. Superior Court, supra,* 25 Cal.4th 1046, 1069 & fn. 13), superseded by statute on other grounds (see *People v. Zamudio* (2008) 43 Cal.4th 327, 355-356; *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1097 & fn. 4), and disapproved on other grounds (*People v. Knoller* (2007) 41 Cal.4th 139, 155-156.)

by biblical passages.

Respondent contends that there is no reasonable likelihood that jurors believed based on the instructions as a whole "that moral reasoning rooted in the Bible was fundamentally different from other sources of moral reasoning and could not be considered as to the penalty decision." (RB 200.) Respondent's argument ignores that the trial court's instruction — which it said it wanted to emphasize — singled out the Bible and biblical references, thus signaling that there *was* something fundamentally different about moral reasoning rooted in the Bible. Even where an instruction is legally correct — and here, it was not — it may be error to "unduly overemphasize [an] issue[] . . . . either . . . by singling [it] out or making [it] unduly prominent . . . ." (*Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1678.) Here, the court's instruction was both legally incorrect and singled out a particular source of moral reasoning — the Bible — and informed jurors that they could not refer to it.

Respondent further points out that defense counsel did not exhort the jury to rely on biblical passages or religious views to decide punishment. (RB 202.) Gomez does not contend that he did. Rather, as explained in appellant's opening brief, defense counsel focused on the moral decision before the jury. (31RT 4579-4593.) And his argument that the summation

might be better delivered by a priest, minister, or rabbi suggested that the moral decision before the jury could be informed by religious values. (30RT 4580.) In light of that, it was crucial for jurors to be able to bring to bear, on that decision, their personal values, whether biblical, religious, philosophical, or secular.[54]

C. This error was not harmless beyond a reasonable doubt.

Respondent again misstates the applicable harmless error standard. (See Argument XX.C., above.)

Respondent claims that in *People v. Rogers* (2006) 39 Cal.4th 826, 904, this Court applied the *Watson* harmless error standard where the trial court erroneously omitted an instruction at the penalty phase. (RB 203.) That is incorrect. In *Rogers*, this Court applied the "reasonable possibility" standard — a standard entirely different from *Watson*'s "reasonable

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[54] Respondent asserts that it is irrelevant that the court delivered this instruction forbidding reference to the Bible immediately after defense counsel's summation. (RB 201-202.) To be sure, jurors were instructed the order of the instructions they were given had no significance as to their relative importance. (31RT 4596.) It is well recognized, however, that the *timing* of instructions can be significant. (See, e.g., *People v. Engelman, supra,* 28 Cal.4th at p. 440 [instructing jury, immediately before it retires to deliberate, that jurors should police the reasoning and arguments of fellow jurors, threatens to distort deliberations].) Here, immediately after a defense summation devoted in large part to a plea for mercy, the trial court delivered an instruction effectively forbidding jurors to refer to one common and, to many, powerful, source of arguments for mercy.

probability" standard and indeed similar in application to the *Chapman* standard, which requires the prosecution to prove the error harmless beyond a reasonable doubt. (See *People v. Rogers*, *supra,* 39 Cal.4th at p. 904 ["there is no *reasonable possibility* the outcome of the penalty phase would have differed"]; *People v. Prince, supra,* 40 Cal.4th at pp. 1299-1300 [reasonable possibility standard for penalty phase error is the same as *Chapman* standard for federal constitutional error].)

The prosecution cannot prove this error harmless beyond a reasonable doubt. The trial court made a point of stating that its instruction about biblical references was something it wanted to "emphasize again." (31RT 4593.) Jurors, of course, "are ever watchful of the words that fall from" the judge (*Bollenbach v. United States* (1946) 326 U.S. 607, 612), and when the court specifically emphasizes an instruction, as the court did here, it is all the more likely to make an impression.

The defense case for life was predicated in large part on a plea for mercy. There are a multitude of "biblical references" that jurors might have used to make a compelling case for mercy — for example, "blessed are the merciful, for they shall obtain mercy." (Matthew 5:7; see also, e.g., Luke 6:36 ["Be ye therefore merciful, as your Father is also merciful."]; Micah 6:8 ["He hath shewed thee, O man, what is good; and what doth the Lord

require of thee, but to do justly, and to love mercy, and to walk humbly with thy God?"]; Proverbs 11:17 ["The merciful man doeth good to his own soul . . . ."].)[55] The court's instruction, however, forbade jurors from referring to such passages.

Respondent notes that "the jury deliberated for about two days before rendering a verdict and, during that time, the jury did not raise any concern regarding misconduct or religious views." (RB 203, citing 13CT 3424-3428.) It is unclear why respondent deems this significant. The court had instructed jurors not to refer to biblical passages, and it had also instructed them that jurors were expected to police one another's reasoning and arguments during deliberations. (CALJIC No. 17.41.1; see *People v. Engelman, supra,* 28 Cal.4th at p. 440.) Given that, one would expect, as courts normally do, that jurors followed the court's instructions — thus demonstrating prejudice.

The prosecution cannot prove beyond a reasonable doubt that this error, which went to the heart of the jurors' consideration of the defense case for life, did not contribute to the verdicts. Gomez respectfully asks this Court to reverse the death sentences.

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[55] The biblical quotations above are taken from the King James version.

XXII.

A sentence of death should not be permitted absent a jury finding that the defendant is guilty beyond all possible doubt.

In appellant's opening brief, Gomez contended that a sentence of death should not be permitted absent a jury finding that the defendant is guilty beyond all possible doubt. (AOB 453-462.)

Gomez acknowledged that in *People v. Lewis* (2009) 46 Cal.4th 1255, 1290 & fn. 23, this Court rejected an assertion that evidence of guilt must be stronger in a capital case than in a noncapital case. (AOB 455.)

In *Lewis*, the Court stated as follows:

> Defendant, claiming a requirement of heightened reliability in capital cases, asserts that evidence of guilt must be stronger in a capital case than in a noncapital case. The cases he cites do not support his assertion. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637–638, 100 S.Ct. 2382, 65 L.Ed.2d 392 [procedural rule barring instruction on a lesser included offense diminished the reliability of the guilt determination with respect to the capital offense and thereby diminished the reliability of the capital sentencing determination]; *People v. Marshall* (1997) 15 Cal.4th 1, 34–35, 61 Cal.Rptr.2d 84, 931 P.2d 262 [the court applied the substantial evidence standard established in *Jackson v. Virginia, supra,* 443 U.S. at pp. 318–319, 99 S.Ct. 2781].)

(*People v. Lewis, supra,* 46 Cal.4th at p. 1290, fn. 23.)

Gomez's argument did not rely on *Beck* and *Marshall,* the cases this Court addressed in *Lewis.* Rather, Gomez, relying on recent studies revealing an alarmingly high wrongful conviction rate in capital cases,

asked this Court to exercise its supervisory power to require jury certifications of guilt beyond all possible doubt in capital cases. (AOB 453-461.)

Without analysis of appellant's arguments, respondent notes the Court's statement in *Lewis* and states that "appellant has not provided new and valid reasons to reconsider the issue." (RB 205.) Because respondent's brief does not contain any analysis of Gomez's argument, there is no need for further reply.

XXIII.

Because the robbery and kidnaping special circumstances in this case permitted the jury to impose death for an accidental or unforeseeable killing, the death penalty is unconstitutional.

In appellant's opening brief, Gomez contended that California's death penalty is unconstitutional because the robbery and kidnaping special circumstances permit the jury to impose death for an accidental or unforeseeable killing. (AOB 463-474.) Gomez acknowledged that this Court has rejected this claim. Respondent answers the argument by noting that this Court has rejected the claim, without substantial additional analysis. (RB 205-206.) The issue is therefore joined and there is no need for further reply.

XXIV.

California's death penalty statute, as interpreted by this court and applied at Mr. Gomez's trial, violates the United States Constitution.

In appellant's opening brief, Gomez contended that the California death penalty violates the United States Constitution. (AOB 475-497.) Gomez acknowledged that this Court has consistently rejected this claim. (AOB 475.) Respondent notes Gomez's concession and, without substantial analysis, asks this Court to reject Gomez's claims. The issues are therefore joined and there is no need for further reply.

XXV.

The cumulative effect of the errors at Mr. Gomez's trial undermines the reliability of the criminal judgment, requiring reversal.

In appellant's opening brief, Gomez contended that the cumulative effect of the errors were prejudicial, and deprived Gomez of his right to due process and to reliable guilt and penalty determinations. (AOB 498-505.) In response, respondent contends that there was no error, and that to the extent there was error, "appellant has failed to demonstrate prejudice." (RB 207.)

As noted above, respondent repeatedly misstates the harmless error standard applicable to federal constitutional error and state law penalty phase error. With respect to those errors, Gomez bears no burden. Rather, the burden is on the prosecution to prove such errors harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Prince, supra,* 40 Cal.4th at pp. 1299-1300.) For all the reasons stated above and in appellant's opening brief, Gomez contends that the prosecution has failed to sustain this burden with respect to each error individually, and with respect to the cumulative prejudice from all the errors in this case, in any combination.

In any event, the errors were not harmless under any standard. Without their cumulative effect, there is a reasonable probability that at least one juror would have reached a different conclusion, and the result

would have been more favorable to Gomez. (*People v. Bowers*, *supra,* 87 Cal.App.4th at p. 736; *People v. Soojian, supra,* 190 Cal.App.4th at pp. 520-524; *People v. Watson*, *supra,* 46 Cal.2d at p. 836.)

Ruben Gomez respectfully asks this Court to reverse the judgment.

Conclusion

For the reasons set forth above and in appellant's opening brief, Mr. Gomez respectfully asks this Court to reverse the judgment.

Dated: December 15, 2014

Lynne S. Coffin

Laura S. Kelly

Word count certification

I, Laura S. Kelly, associate counsel for Ruben Perez Gomez, certify pursuant to the California Rules of Court that the word count for this document is 38,426 words, excluding the cover, the tables, and this certificate. I prepared this document on my computer using Corel Word Perfect, and this is the word count generated by that program for this document.

Executed at Irvine, California, on December 15, 2014.

Laura S. Kelly

Declaration of service

People v. Ruben Perez Gomez, S087773

On December 17, 2014, I served the within

Reply brief

on each of the following, by placing true copies thereof in envelopes addressed respectively as follows, and depositing them in the United States mail at Irvine, California:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 17, 2014, at Irvine, California.

_____
Laura S. Kelly