SUPREME COURT COPY

SUPREME COURT No. S090499 **DEATH PENALTY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent,

v.

DAVID JAMES LIVINGSTON,

Defendant/Appellant.

Los Angeles Co.
Superior Court
No. TA100812-01

SUPREME COURT
FILED
JAN 18 2012
Frederick K. Ohlrich Clerk
Deputy

Automatic Appeal from the Judgment of the Superior Court of the State of California for the County of Los Angeles, The Honorable Jack W. Morgan, Presiding

APPELLANT'S REPLY BRIEF

Robert Wayne Gehring
Attorney at Law
19091 SW York Street
Beaverton, Oregon 97006
Tel: (503) 848-9068
E-mail: gehrlaw@hotmail.com

Attorney for Appellant
David James Livingston

DEATH PENALTY

TOPICAL INDEX

TABLE OF AUTHORITIES

CALIFORNIA CASES **Page**

Page

Page

UNITED STATES CONSTITUTION

CALIFORNIA CONSTITUTION

CALIFORNIA CODES

	Page
No. 2.06	94
No. 2.10	130
No. 2.20	67, 74, 75, 76, 77, 79, 80, 81, 83, 84, 87
No. 2.21.1	85
No. 2.21.2	85, 109, 110
No. 2.22	78, 85, 109, 111, 112, 113
No. 2.23	85
No. 2.27	15, 78, 86, 109, 114
No. 2.28	97
No. 2.51	91, 92, 93, 94, 95, 96, 108
No. 2.52	96
No. 2.61	98, 100
No. 2.90	58, 67, 71, 72, 91, 97, 98, 101 102, 106, 107 108, 112, 113
No. 2.91	98
No. 2.92	86
No. 3.02	98
No. 4.50	99
No. 6.50	99
No. 8.67	99

SUPREME COURT No. S090499 **DEATH PENALTY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)
	)
Plaintiff/Respondent,	)
	) Los Angeles Co.
v.	) Superior Court
	) No. TA100812-01
DAVID JAMES LIVINGSTON,	)
	)
Defendant/Appellant.	)
	)

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles,
The Honorable Jack W. Morgan, Presiding

APPELLANT'S REPLY BRIEF

INTRODUCTION

This brief incorporates and reaffirms the arguments used in Appellant's Opening Brief, unless otherwise stated, and replies to Respondent's Brief. Failure to address a matter raised in Respondent's Brief is not a concession, but a reflection of counsel's belief the subject has been adequately addressed in the opening brief, and no additional argument is necessary.

ARGUMENT

I

THE TRUE FINDINGS OF GANG ENHANCEMENTS ON COUNTS ONE THROUGH FIVE ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE. THE ERROR DENIED MR. LIVINGSTON DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, REQUIRING REVERSAL OF THOSE TRUE FINDINGS AND OF THE VERDICTS ON THOSE COUNTS.

A. INTRODUCTION

In the Opening Brief, Mr. Livingston argued that the evidence was insufficient to sustain a finding of the second element under Penal Code section 186.22, subdivision (b)(1)[1], that there must be specific intent to "promote, further, or assist in any criminal conduct by gang members...." At issue was whether this Court accepted the interpretation of the Ninth Circuit that the criminal conduct furthered must be conduct other than the charged offense, or rejected that interpretation. After Appellant's Opening Brief and Respondent's Brief were filed, this Court published *People v. Albillar* (2010) 51 Cal.4th 47, rejecting the Ninth Circuit's interpretation. This Reply Brief will consider that decision.

The Opening Brief further argued that the lack of evidence supporting the gang enhancements also requires reversal of their underlying

---

[1] All statutory references shall be to the Penal Code unless otherwise stated. Statutory citations shall also follow the form "186.22(b)(1)" unless the more prolonged form is needed to avoid confusion or impart emphasis.

charges because the extensive gang evidence introduced tainted the entire proceedings, denying Mr. Livingston due process of law.

Respondent argues that substantial evidence supported the gang enhancements, and that the Ninth Circuit erred in its interpretation of section 186.22(b)(1). In its argument, Respondent went even beyond the theory presented to the jury by the prosecution -- that the crimes were committed in association with other gang members[2] -- to argue additionally that the crimes were committed for the benefit of a criminal street gang. (Resp.Br. p. 30.)

Respondent also argues that reversal of the gang enhancements, if required, does not require reversal of the underlying counts because of the strength of the evidence identifying Mr. Livingston as the perpetrator in counts one through five.

This brief will address *People v. Albillar* and will explain that even the decisions relied upon by Respondent highlight the lack of supporting evidence in the instant case, and that the gang evidence so tainted the entire proceeding that reversal of the underlying counts is required.

---

[2] After quoting from the instruction as to the first element, the prosecutor argued to the jury: "THESE TWO INDIVIDUALS, I THINK IT IS UNDISPUTED, ARE MEMBERS OF PARK VILLAGE CRIPS, AND THEY DID THE CRIME TOGETHER. THEY COMMITTED A CRIME TOGETHER. THAT IS IN ASSOCIATION WITH.

OKAY. ELEMENT 2:" (14 RT 2648-2649.)

B. *PEOPLE v. ALBILLAR* (2010) 51 Cal.4th 47.

Mr. Livingston's Opening Brief argued, *inter alia*, that the specific intent of the second element must be to further other criminal conduct, beyond the crime currently committed. (AOB, pp. 49-54.) The opinion in *Albillar* rejects that the specific intent element excludes the current offense. (*People v. Albillar*, 51 Cal.4th at p. 66.) In *Albillar* it sufficed that each of the defendants, all gang members, were assisting one another in the commission of the charged felonies.

In *Albillar*, this Court stated that the second prong of section 186.22 (b)(1) was "unambiguous" (*People v. Albillar,* 51 Cal.4th at p. 66), but did not present any detailed analysis of this element of the statutory language. The phrase "any criminal conduct" does contain ambiguity. As explained in Appellant's Opening Brief, pages 52-54, "any criminal conduct" may be intended to include misdemeanors and infractions within its scope rather than to include the charged offense, In contrast, subdivision (a) limits its focus to "any felonious criminal conduct." This argument is supported by legislative history summarized in *Albillar* for other purposes. The original version of section 186.22 (Senate Bill No 1555, 1987-1988 Reg. Sess.)) referred to "any . . . felony, misdemeanor, or infraction...", but was amended in subsequent years to create two subdivisions, subdivision (a) for any felonious criminal conduct, and subdivision (b)(1) for any criminal

conduct. (*People v. Albillar*, 51 Cal.4th at pp. 56-57. In that passage of *Albillar* the Supreme Court's focus was primarily on section 186.22(a).)

While the Supreme Court recognizes the value of legislative history as an extrinsic source to determine the meaning when a statute is ambiguous (*People v. Albillar*, 51 Cal.4th at p. 423), it stated the scienter requirement of section 186, subdivision (b)(1), was not ambiguous. (*Id.*, at p. 66.) This determination was reached without analysis of the statutory language presented above and in Appellant's Opening Brief. While the issue of ambiguity was mentioned, it was not fully considered and need not be considered a "holding." (*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 65-66.) Because the charged crime for the enhancement must be a felony, if the criminal conduct a defendant must intend to promote may be a felony, misdemeanor, or infraction, the necessary conclusion is the criminal conduct intended to be promoted must be conduct other than the underlying felony.

In the instant case, Mr. Livingston was convicted as the only perpetrator firing shots. The role of Mr. Sanders on January 3, 1999, or the driver on October 8, 1998, could at most be aider and abettor. In the context of "pattern of criminal activity," this Court has held that the actions of a perpetrator and an aider and abettor are but a single offense. (*People v. Zermeno* (1999) 21 Cal.4th 927, 931-932.) In other words, Mr. Livingston

did not help Mr. Sanders commit a criminal offense. Assistance was solely Mr. Sander's part. Nor does it make sense to argue Mr. Livingston was helping himself to commit a criminal act. The same may be argued regarding the drive-by shooting. In each case, but for the shooting of which Mr. Livingston was convicted, there would be no criminal offense by the actions of either Mr. Sanders on 3 January 1999 or the driver on 8 October 1998. While it may be said that the "look out" actions of Mr. Sanders or the driving of the third person furthered the actions of which Mr. Livingston was convicted, his actions did not further criminal acts by them.

To rule to the contrary is to rewrite the statute to create an enhancement whenever a felony is committed by someone who also happens to be a gang member. If that had been the Legislature's intent, section 186.22(b)(1) would have been written in much simpler language.

C. SUBSTANTIAL EVIDENCE IS LACKING OF A SPECIFIC INTENT TO "PROMOTE . . . CRIMINAL CONDUCT. . . ."

1. Respondent's Argument the Murders Were Committed to Benefit a Gang Is Both Forfeited Since the Prosecution Did Not Argue It at Trial and Lacking in Substantial Evidence.

At trial the prosecutor's sole contention regarding element 1 of section 186.22(b)(1) was that Livingston committed that enhancement by committing the crimes with Mr. Sanders, another Crips member, and thereby "in association." (14 RT 2648-2649.) Respondent's Brief seeks to

add that the crimes were committed for the benefit of a street gang because Mr. Livingston's tattoos were presumably visible during the shootings on January 3, 1999, and thus visible to convey to the security guards that a gang was involved in the attack against them, even though Mr. Bombarda, the security guard who testified, said nothing about seeing them. Also, Detective Richardson testified that a common goal of street gangs is to terrorize the public by committing crimes, including murders. (Resp. Br. p. 30.) Detective Richardson was not asked and offered no opinion that the shooting was committed for the benefit of a street gang.

Appeal is too late for Respondent to add a new theory to support a conviction when that theory was not argued in the trial court. (*People v. Culbertson* (1985) 171 Cal.App.3d 508, 512-513. See also, *People v. Smith* (1983) 34 Cal.3d 251, 270-271, text & fn. 12 [suppression motion]; *Cramer v. Morrison* (1979) 88 Cal.App.3d 873, 886-887 [motion in limine].)

If the prosecution at trial had sought to argue a "benefit" theory to support conviction, trial defense counsel would have been on notice to expose how weak such a theory was. Respondent overlooks that the apparent intention of the shootings was not to terrorize the guards but to kill them. Whether neck tattoos were visible to them was therefore irrelevant.

In this argument Respondent engages in a syllogism which works only if one assumes the fact to be proven, that Mr. Livingston was the

shooter. As Respondent reasons, Mr. Bombarda testified that he knew Mr. Livingston had tattoos on his neck and that the shooter was wearing a T-shirt; therefore, Respondent reasons the shooter's neck tattoos must have been visible. If tattoos had been visible on the shooter's neck, the prosecutor should have produced evidence of it at trial. Respondent should be estopped from asking the reviewing court to presume evidence of benefit that the prosecutor should have presented at trial if he had it.

Respondent also supports his argument with evidence that Mr. Livingston and Mr. Sanders fled in the same direction after the shooting stopped. (Resp. Br. p. 30, citing CT Supp. III at 31, 33.) During the police interrogation cited by Respondent, Ms. Grant's testimony was remarkably inconsistent in just a few pages.[3] That may be why the prosecutor chose to rely on Ms. Grant's testimony at trial (9 RT 1837, 1838) and argue she saw them go in different directions. (14 RT 2676.) Since the prosecutor at trial

---

[3] The reference is to Ms. Grant's statement of Jan. 14, 1999. (CT Supp. III, 11 et. seq.) During that statement Ms. Grant said when she saw Goldie he was walking out the gate, and he was the only person she saw. (*Id.* at 20-23.) As the interrogation continued, she saw him standing at the front door and heard gun shots. (*Id.* at 24.) On the next page of the interrogation, she saw Mr. Sanders. (*Id.* at 25.) As the interrogation continued, she saw Mr. Livingston before the shooting. (*Id.* at 28.) Soon, she saw him walking in from the exit gate and to the front door of the guard shack. (*Id.* at 29-30.) Finally, the interrogation gets to the point cited by Respondent when Ms. Grant says she saw Mr. Sanders and Mr. Livingston running together towards the park. (*Id.* at 31.) By this point Mr. Livingston was no longer the only person she saw and he was no longer walking slowly out the gate.

chose to rely upon Ms. Grant's testimony at trial, Respondent should not now be permitted to choose a contrary version from over a year earlier.

Additionally, the shootings occurred during early morning, in the dark of night, when presumably no witnesses would be around to carry the information that the Park Village Crips had committed a terrifying crime. The prosecution did not claim that the perpetrator cried out the gang name or other identifying slogans or displayed any tattoos, nor that fresh graffiti was added to the scene to attribute the crimes. Detective Richardson did not attribute murders to the Park Village Crips as a signature crime. In short, Respondent's new theory is unsupported by evidence, which is perhaps why the prosecution at trial did not rely upon it.

2. Substantial Evidence Is Also Lacking to Support the Second Element of Section 186.22(b)(1): Specific Intent to "Promote . . . Criminal Conduct. . . ."

Respondent argues that the evidence Mr. Livingston committed the crimes with Mr. Sanders, a fellow gang member, is alone sufficient to satisfy the specific intent element. (Resp. Br. p. 31.) As additional evidence on this element, however, Respondent points to the threat months earlier to kill former security guard Chavers, the argument a few hours before the shooting between one of the guards later killed and two men in Mr. Livingston's company, and Detective Richardson's testimony that the area was in a territory marked with PVC graffiti and the area was "claimed"

by the PVC, and that as the only white member of the PVC, Mr. Livingston had to act exceptionally tough. (Resp. Br., pp. 31-32.) Each of Respondent's arguments and its supporting citations will be addressed in turn.

a. "Association" alone does not prove specific intent.

Respondent cites three decisions to support the proposition that "association" alone proves specific intent. (Resp. Br. p. 31, citing *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198; and *People v. Romero* (2006) 140 Cal.App.4th 15, 20.) None support the proposition Respondent advances, at least under the facts of this case.

Both defendant Villalobos, a gang member, and his girlfriend and co-defendant Osika, not a gang member (*Villalobos*, 145 Cal.App.4th at pp. 313-314, 315), were convicted of charges including robbery, as well as gang enhancement. Osika entered a motel room where the victim was staying, ostensibly to smoke methamphetamine with him. Five minutes later, she opened the motel room door to admit Villalobos and an unidentified man, and exited herself. The two men then robbed the victim. On appeal, non-gang member Osika alleged insufficient evidence to support the gang enhancement finding as to her. Analysis of the second

prong of section 186.22(b)(1) was limited to asserting "[c]ommission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further, or assist gang members in the commission of the crime," citing *Morales*, and referring to the evidence supporting that girlfriend Osika was aware of Villalobos's gang membership. (*People v. Villalobos*, 145 Cal.App.4th at p. 322.) The validity of Respondent's contention hence depends upon *Morales*.

Morales involved an appeal by Morales who was convicted of committing robberies with two fellow gang members, and also suffered a true finding of gang enhancements to the robberies. Morales challenged the sufficiency of the evidence to support the gang enhancements. In rejecting the challenge to the first prong of section 186.22(b)(1), the opinion in *Morales* stated that "the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members." (*People v. Morales*, 112 Cal.App.4th at p. 1198.) This language, however, addressed the challenge to the first prong of section 186.22(b)(1), not the second prong as it was used in *Villalobos* and as Respondent seeks to use it in this case. For the second prong, the opinion in *Morales* concluded that "there was sufficient evidence that defendant intended to aid and abet the robberies [ ] and [ ]

actually committed. It was fairly inferable that he intended to assist criminal conduct by his fellow gang members." (*Ibid.*) The "association" was not sufficient to satisfy the second prong. It was pertinent only insofar as it showed Morales was aware his confederates were gang members. Equally indispensable to such knowledge was his own acts to aid and abet those other robberies.

Romero is similar to *Morales*, upon which the opinion relies. (*People v. Romero*, 140 Cal.App.4th at pp. 19-20.) Romero was the driver in a drive-by shooting and was convicted of murder and attempted murder, with gang and firearm enhancements. In rejecting Romero's challenge to the second prong of section 186.22(b)(1), the opinion referred to the "ample evidence that appellant intended to commit a crime, that he intended to help Moreno commit a crime, and that he knew Moreno was a member of his gang." (*People v. Romero*, 140 Cal.App.4th at p. 20.) Again, the defendant must know that the perpetrator is a gang member, but satisfaction of the second prong also requires evidence supporting a specific intent to help that gang member commit a crime. "Association" alone does not satisfy the second element.

In the instant case, there is the additional difficulty that Mr. Livingston was convicted of being the perpetrator. There is no evidence that Mr. Sanders even possessed a weapon, much less participated in the

shooting. Mr. Sander's alleged role was limited to lookout, an aider and abettor. Consequently, Mr. Livingston could satisfy the second element of section 186.22(b)(1) only if a specific intent to assist himself in committing the shootings would satisfy the second element. That imposes an enhancement solely for gang membership, which this Court rejected early in its interpretations of section 186.22(b)(1). (*People v. Gardeley* (1996) 14 Cal.4th 605, 623-624.)

b. Respondent's other contentions also fail to provide evidence supporting the second element.

Respondent refers to the allegation that Mr. Livingston threatened to kill Mr. Chavers but fails to mention that the alleged threat, even by the prosecution evidence, was conditional upon Mr. Chavers returning to the security shed, and that it was two months before the shooting. (Resp. Br. p. 31.) Mr. Chavers never returned (7 RT 1390), and as a frequent visitor to the Wilmington Arms, Mr. Livingston had to know that.

Respondent also refers to an argument of two men, allegedly in Mr. Livingston's presence, with one of the security guards. (Resp. Br. p. 31.) If Mr. Livingston was present during that argument, he presumably realized at that time that Mr. Chavers was not present. Respondent points to no evidence that the two men involved in the argument were members of Mr.

Livingston's gang, nor that an argument in which Mr. Livingston was not a participant provided any other reason for him to shoot the guards.

Respondent refers to these incidents occurring within territory "claimed" by PVC and marked by their graffiti. Respondent refers to no evidence that the guards had removed, washed away, or painted over any of the neighborhood graffiti, nor any other reason why the presence of the graffiti of their own gang gave any gang member, much less Mr. Livingston, a reason to kill the guards.

Finally, Respondent points to no evidence why Mr. Livingston's need to "act tough" relates to an attack at that time in that place upon the security guards. Nor does Respondent point to any evidence that Mr. Livingston or any other gang member sought to claim respect for Mr. Livingston within the gang or for the gang itself because of the attack upon the security guards. In short, Respondent offers only speculation to support the contentions, and "[s]peculation is not substantial evidence." (*People v. Ramon* (2009) 175 Cal.App.4th 843, 851.) "An appellate court cannot affirm a conviction based on speculation, conjecture, guesswork, or supposition." (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 663.)

D. THE GANG EVIDENCE SO TAINTED THE REMAINDER OF THE PROCEEDINGS AS TO DENY DUE PROCESS AND REQUIRE REVERSAL OF THE REMAINING CONVICTIONS.

Mr. Livingston's Opening Brief argued that the gang evidence so tainted the remainder of the proceedings as to deny due process and require reversal of all their underlying counts. Respondent argues (1) overwhelming evidence supports Mr. Livingston's identity as the shooter in the offenses on both 3 January 1999 and 8 October 1998 (Resp. Br. pp. 42-46), (2) even without the gang allegations, the gang evidence would have been admissible to explain witness fear and possible witness bias during testimony, and (3) Mr. Livingston admitted his gang membership during his own testimony. (Resp. Br. pp. 46-48.) Each contention will be addressed in turn.

1. In Claiming "Overwhelming Evidence," Respondent Applies the Standards Used to Evaluate a Challenge to Sufficiency of the Evidence Rather than the Standard to Evaluate Federal Constitutional Error for Harmlessness.

Respondent asserts that security guard Bombarda's testimony, "*standing alone*, was sufficient to sustain appellant's convictions for the attempted murders and murders of the security guards," citing *People v. Panah* (2005) 35 Cal.4th 395, 489; *People v. Allen* (1985) 165 Cal.App.3d 616, 623; CALJIC No. 2.27 (7th ed. 2005); and *United States v. Arrington* (4th Cir. 1983) 719 F.2d 701, 705. (Resp. Br. pp. 43-44.)

The issue before this Court in *Panah* was the sufficiency of the evidence. "Defendant argues that his conviction of oral copulation was not

supported by substantial evidence...." (*People v. Panah* (2005) 35 Cal.4th 395, 489.)

In *Allen*, "[b]oth defendants challenge the eyewitness identifications of them as the perpetrators. . . . and we are therefore urged by defendants to reverse the convictions on grounds of insufficient evidence." (*People v. Allen* (1985) 165 Cal.App.3d 616, 622-623.)

Arrington also involved an issue of substantial evidence. Following a jury verdict of guilty, the District Court acquitted the defendant for lack of sufficient evidence, and the Government appealed contending there was substantial evidence. (*United States v. Arrington* (4th Cir. 1983) 719 F.2d 701, 702.) The Fourth Circuit explained, in terms remarkably parallel to the language in California when evaluating a challenge to the sufficiency of the evidence: "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." (*Id.*, 719 F.2d at p. 704.) "We, of course, do not weigh the evidence or review the credibility of witnesses in resolving the issue of substantial evidence." (*Ibid.*) "The uncorroborated testimony of one witness may be sufficient to sustain a verdict of guilty." (*Id.*, 719 F.2d at p. 705.)

This section of the Mr. Livingston's Opening Brief, however, involves not an issue of sufficient evidence, but rather assumes that the enhancement findings must be reversed for lack of substantial evidence,

and inquires regarding what further remedy is required under the circumstances of this case. That is, did the quantity and nature of the gang evidence admitted, lacking any evidence on a requisite element, so taint the proceedings as to require reversal of the underlying counts as well. In other words, was due process denied and, if so, does that additional constitutional violation require reversal. The standard for harmless error analysis for a federal constitutional violation is very different from that used by Respondent.

That inquiry begins with *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705], holding that a finding of federal constitutional error requires reversal unless the government can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Id.*, 386 U.S. at p. 24.) This is not a question of whether a reasonable jury may have returned the same verdict even without the constitutional error, but "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [113 S.Ct. 2078, 124 L.Ed.2d 182] [emphasis in original].)

No authority has been found that appellate review may be shortcut through the use of such presumptions as aid a review for the sufficiency of the evidence. Rather the reviewing court "reviews the record de novo in

order to determine an error's harmlessness." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 295 [113 L.Ed.2d 302, 111 S.Ct. 1246].) "To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt* (1991) 500 U.S. 391, 403 [111 S.Ct. 1884, 114 L.Ed.2d 432], disapproved in nonpertinent part, *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4 [112 S.Ct. 475, 116 L.Ed. 2d 385.) The reviewing court "must ask what evidence the jury actually considered in reaching its verdict." (*Yates v. Evatt*, 500 U.S. at p. 404.) There is no limitation to only that evidence most favorable to the government and rejecting from consideration all evidence regarding credibility that was before the jury.

2. Applying the Federal Constitutional Standard for Evaluating the Harmlessness of Constitutional Error, the Prosecution Evidence is Less Than Overwhelming. It Cannot Be Said Beyond a Reasonable Doubt that the Error Did Not Contribute to the Verdict.

Respondent places great reliance upon the testimony of security guard Bombarda. While Mr. Bombarda was quite certain in his identification of Mr. Livingston as the perpetrator, his testimony was not as definitive as Respondent would like, once the "sufficiency of evidence" presumptions are rejected.

The factors which render Mr. Bombarda's testimony less than "overwhelming" in its identification of Mr. Livingston were analyzed in the Opening Brief at pages 140-144 and are adopted and incorporated in this discussion.

Respondent also relies upon the testimony of Kim Grant with a similarly selective summarization of her testimony. (Resp. Br. p. 44.) The jury was exposed to her entire testimony, including several earlier statements to investigators and the prosecutor. Thus, the jurors had available for their consideration her numerous and changing versions of what happened that early morning. The analysis of Ms. Grant's testimony and statements included in the Opening Brief at pages 144-160 are adopted and incorporated in this Reply Brief. A sampling replying to Respondent's Brief follows.

Respondent relies upon the prior conversation Ms. Grant alledgely overheard between Mr. Livingston and Mr. Sanders. (Resp. Br. p. 44.) Respondent does not identify when the conversation occurred, perhaps because of Ms. Grant's conflicting statements. At trial she testified that the conversation occurred a few days or a week before the shooting. (9 RT 1839, 1846.) In her statement of January 14, 1999, she told police that it occurred three weeks before the shooting. (CT Supp III 46, 47.) During her March 8, 2000, interview with the prosecutor, she said the conversation

was January 2, the day before the shooting. (3 CT 815-816.) That statement, however, was inconsistent with her trial testimony that she had been gone for three days (9 RT 1783) and only returned to the complex about three or four in the morning of the shooting (9 RT 1782) or shortly before the shootings. (9 RT 1781.)

Respondent also relates that after hearing some noises she walked towards the guard shack, saw Mr. Livingston two or three feet from the guard shack and saw him run away, saw Mr. Sanders standing outside the shack and, after the shots, run away, and then Ms. Grant continued to the guard shack, saw two dead guards and heard a third guard plead for help. (Resp. Br. p. 44.) The careful selection of citations is the only feature which permits some consistency to Ms. Grant's recollections.

In Ms. Grant's first description to the police on January 14, 1999, shortly after arriving back to her house at about five a.m., she heard a noise, went to check her boyfriend's car, saw them [unidentified] come out [from where unidentified] and she ran back inside her house. (CT Supp. III 12.) During her trial she testified that while outside checking her boyfriend's van, she heard a clicking sound like cars make going out the gate, but there were no cars. (9 RT 1748-1749.) Later at trial, she testified she heard the clicking while inside her house, went to her bedroom window where she

heard someone screaming "somebody help me," and then went out her front door. (9 RT 1788, 1815.)

During this section Respondent abandons its earlier claim that Mr. Livingston and Mr. Sanders ran off together (Resp. Br. p. 30), and now cites portions of Ms. Grant's testimony showing them going opposite directions, Mr. Livingston walking slowly out the gate (9 RT 1764) and Mr. Sanders running in and towards the back of the apartments. (9 RT 1766-1767.)

Respondent's argument that Ms. Grant's testimony substantially corroborates Mr. Bombarda's testimony (Resp. Br. p. 44) is not sustained.

Respondent also relies upon the discovery in the open garage of Mr. Livingston's girlfriend of a magazine which, among other weapons, could also fit in the unrecovered weapon chosen by the prosecution as one of the types that could have been used the morning of January 3. The magazine contained cartridges by the same manufacturer as the casings found outside the guard shack. (Resp.Br. pp. 44-45.) Respondent fails to note that no fingerprints were found on the magazine or any of the rounds it contained. No were any fingerprints found on any of the casings found at the guard shack. This additional evidence was also before the jury.

The prosecution case against Mr. Livingston for the shooting on October 8, 1998, was even weaker. As related by Respondent, it depends upon the in-court testimony of a single witness, not the victim who was

seated facing the road from which the shots came, the hearsay statement of an unidentified person who slightly earlier that evening saw "Goldie" as a Cadillac passed them, assisted by the testimony of a security guard who saw Mr. Livingston in his Cadillac enter the Wilmington Arms complex later that evening, not an uncommon event for Mr. Livingston, who visited the complex frequently. (Resp. Br. pp. 45-46.)

On the other hand, the gang evidence against Mr. Livingston was extensive, both in terms of time required to present it and the number of exhibits admitted before the jury. (AOB, pp. 58-67.)

Given the uncertainties of the testimony of Mr. Bombarda and Ms. Grant, and the lack of forensic evidence connecting Mr. Livingston to the shooting on January 3, the prosecution case against him cannot be characterized as so "overwhelming," nor the role of the gang evidence in his conviction as so trivial, that the latter failed beyond a reasonable doubt to contribute to the verdict.

3. Without the Gang Enhancement Allegations, Most of the Gang Evidence and Witness Fear Evidence Would Not Have Been Admissible.

Respondent's argument that the gang evidence would have been admitted even without the gang enhancement allegations relies upon three decisions, *People v. Harris* (1985) 175 Cal.App.3d 944, *People v. Olguin* (1994) 31 Cal.App.4th 1355, and *People v. Gonzalez* (2006) 38 Cal.4th

932.) Each of those decisions involve foundational circumstances missing from Mr. Livingston's case.

In *People v. Harris*, the court of appeal held that evidence of gang membership was relevant on possible threats to prosecution witnesses, resulting in obvious bias during testimony, when one witness "took the stand and essentially refused to testify, either failing to respond to questions or stating that he could not remember the answers. Although he testified that he was afraid of no one, he had earlier told the detectives that he was afraid to testify because the defendants would shoot up his mother's house if he did." (*People v. Harris*, 175 Cal.App.3d at p. 957.) The definite threat to the witness's mother was relevant to assessing his credibility.

In *People v. Olguin*, the court of appeal ruled: "A witness who testifies despite fear of recrimination of any kind by anyone is more credible because of his or her personal stake in the testimony. Just as the fact a witness expects to receive something in exchange for testimony may be considered in evaluating his or her credibility (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 777), the fact a witness is testifying despite fear of recrimination is important to fully evaluating his or her credibility." (*People v. Olguin*, 31 Cal.App.4th at p. 1368.)

Important in *Olguin* is that a witness had received a threat, not necessarily from the defendant but from someone who sympathized with

the defendant's position. (*Ibid.*) A mere generalized fear of testifying did not suffice. This is consistent with the decision upon which *Olguin* relied, *Calvert v. State Bar* (1991) 54 Cal.3d 765. At issue in *Calvert* was the hearing officer's refusal to allow the defendant to cross-examine the complaining witness about the witness's financial interest in the outcome of the complaint proceedings, which could benefit the complaining witness's malpractice action. (*Id.*, 54 Cal.3d at p. 777.) There, a precise and identifiable financial interest could have biased the testimony of the complaining witness. In *Olguin*, the language of the opinion makes clear it is addressing a similar, concrete threat as a factor in a witness's credibility.

In *Gonzalez*, in the context of admitting gang expert testimony about gang culture and psychology, this Court addresses specific witnesses whose trial testimony changed from earlier statements identifying the defendant as a perpetrator to denials or failure of memory, and found the expert testimony was admissible for that purpose. (*People v. Gonzalez*, 38 Cal.4th at p. 945.)

In the instant case, however, we lack both types of evidence. We lack the gang expert testimony explaining gang culture and when it manifests in efforts to intimidate witnesses. We also lack testimony for most witnesses relating the general evidence about gangs to their testimony. In those cases where a witness, upon questioning by the prosecutor,

admitted to feeling fear, the prosecution introduced no evidence relating that fear to gang culture and particularly to the events of this case.

A few witnesses deserve specific discussion. Kim Grant testified about an incident when a Samoan-looking individual invaded her home and advised her that she was lucky her son was a homey. (9 RT 1772-1775.) Nothing said was a direct threat. If a threat is read into those words, even conditional, nothing related it to the events of either January 3, 1999, or October 8, 1998, nor did not anything relate the home invasion to either Mr. Livingston or his co-defendant Mr. Sanders.[4]

Security guard Chavers related a threat he had received indirectly from Mr. Livingston following the police seizure of Mr. Livingston's automobile the evening of October 8. The threat relayed to Mr. Chavers was that he should never return to the Wilmington Arms, and he never did. (7 RT 1390.) Nothing about the threat relates to the events of January 3, 1999, nor any possible testimony. Nor did the threat involve any gang action, merely possible action by Mr. Livingston himself.

The prosecutor argued whenever he was disappointed by the trial testimony of witnesses who were or had been gang members, that his

---

[4] Kim Grant testified that her family members still living in the area had received threats relating to her testimony, but those members were not identified by name, nor was the nature of the threats stated, nor from whom the threats were received. (9 RT 1715.) In short, an objection should have been made to the prosecutor's question as calling for inadmissible hearsay.

disappointment was due to the risk of retaliation by the rival gang members, since Mr. Livingston had been in custody since January 8, 1999. However, the prosecutor introduced no evidence to support this conjecture, nor even gang expert opinion to that effect. A prosecutor's argument that disappointing testimony must be the effect of gang culture does not constitute evidence to that effect, and is improper without supporting evidence.

Finally, the prosecutor asked many witnesses he called whether they were uncomfortable testifying and whether they had moved from the Wilmington Arms since the events of January 3, 1999. Again the implication was that gang intimidation forced the move, and therefore implicated Mr. Livingston because of his gang membership. But the prosecutor brought out no threats the witnesses had received.

In short, gang evidence and fear evidence is admissible in cases of obvious bias (*Calvert v. State Bar, supra)* and changes in trial testimony from earlier statements following a threat to the witness or his family (*People v. Harris, supra)* to aid the jury in deciding whether to believe the earlier statements or the trial testimony. (*People v. Harris*, *supra; People v. Gonzalez*, *supra.*) The evidence against Mr. Livingston lacks any of the overt and concrete threats or other inducements for bias found in the decisions upon which the prosecution relies.

Nor is this a case in which, like *Olguin*, *supra*, a witness testifies despite a threat of recrimination and deserves the added credibility such resolve may bring. Instead we have a case in which the prosecutor introduces extensive gang evidence and in both examination and argument raises the specter of gang intimidation, but never introduces evidence to support that conjecture. Instead, he relies upon the jurors' imagination to conjure up what that missing evidence might have proved.

Having to rely upon the prosecutor's questions, conjecture, and argument, Respondent has failed to prove beyond a reasonable doubt that this denial of due process had no effect upon the outcome of the underlying charges.

II

THE TRUE FINDINGS OF "LYING IN WAIT" FOR COUNTS ONE AND TWO ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, A DENIAL OF DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, REQUIRING DISAPPROVAL OF THOSE FINDINGS.

A. INTRODUCTION AND SUMMARY OF ARGUMENTS.

Mr. Livingston's Opening Brief argued (1) a "cognizable interruption" existed between the end of any period of watchful waiting (AOB, 74-77), (2) no substantial evidence supported a period of watchful waiting or attack from a position of advantage (AOB, 77-79), and (3) therefore, the special circumstance must be reversed and dismissed (AOB, 79-80).

Respondent's brief (1) asserts there is no cognizable interruption so long as the culpable statement of mind is not interrupted (Resp.Br., 50), (2) asserts that evidence supports a period of watchful waiting (Resp.Br., 51-53, (3) equates surprise with position of advantage (Resp.Br., 53), and (4) finds a temporal nexus, not if the lethal acts begin at and flow continuously from the moment watchful waiting ends, but from the moment the surprise attack begins (Resp.Br., 54). Each contention will be addressed in turn.

B. COGNIZABLE INTERRUPTION REFERS TO A GAP BETWEEN THE END OF WATCHFUL WAITING AND THE BEGINNING OF

THE ATTACK, NOT TO THE DURATION OF A CULPABLE STATE OF MIND.

Respondent argues that "[i]f there was 'no lapse of time in the culpable state of mind between the homicide and the period of watchful waiting,' lying in wait is established. (*People v. Berberena* (1989) 209 Cal.App.3d 1099, 1107....)" (Resp.Br., 50.) In *Berberena* the defendant was found guilty of first degree murder by lying in wait. The issue in the section of the opinion cited by Respondent concerned whether the jury should have been instructed that the lying in wait itself, as opposed to the killing, must have been done with the intention to murder or seriously injure. (*Id.*, 209 Cal.App.3d at p. 1105.) After lengthy analysis and extensive quotation from two opinions by Justice Traynor, the *Berberena* court concluded: "Thus, a 'murder by means of lying in wait' is one which occurs so immediately following a period of watching and waiting that there can be no lapse in the culpable state of mind between the homicide and the period of watchful waiting." (*Id.*, 209 Cal.App.3d at p. 1107.)

Respondent's quotation from *Berberena* omits the first half of the quoted sentence, and thus fails to recognize that the focus of the *Berberena* court was not upon the duration of the culpable state of mind but upon the impossibility of a gap between the end of the watchful waiting and the homicide if lying in wait was to be found. The issue is not whether there

was a lapse in the premeditation of the perpetrator, which is fortunate for the prosecution since the jury was not instructed to determine whether such a lapse ever occurred. Rather the focus is whether the time from the end of the watchful waiting to the homicide was so short that there "**can be no lapse.**"

Thus, both the language and the concern in *Berberena* are consistent with that expressed in *Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, even though *Berberena* involved a first degree murder by means of lying in wait, while *Domino* involved an appeal from the denial of a section 995 challenge to the special circumstance of murder while lying in wait. (*Domino v. Superior Court*, 129 Cal.App.3d at p. 1003.)[5] As in the instant case, the People in *Domino* argued that the death penalty should be imposed regardless of whether the killing took place while the defendant was lying in wait. (*Id.*, 129 Cal.App.3d at p. 1010.) Rejecting that argument, the court of appeal stated: "'While' is defined as 'during the time that' or 'during which time: and during the same time: and meanwhile.' (Webster's Internat. Dict. (3d ed. 1961) p. 2604.) Thus, the killing must take place during the period of concealment and watchful waiting or the lethal acts

---

[5] Because of the lesser standard of evidence required to reject a 995 challenge as compared to a challenge to the sufficiency of the evidence (*People v. Superior Court (Jurado)* (1992) 4 Cal.App.4th 1217, 1227), the language of *Domino v. Superior Court* is even more striking.

must begin at and flow continuously from the moment the concealment and watchful waiting ends. If a cognizable interruption separates the period of lying in wait from the period during which the killing takes place, the circumstances calling for the ultimate penalty do not exist." (*Domino v. Superior Court*, 129 Cal.App.3d at p. 1011.)

Characterizing the *Domino* court's interpretation as "restrictive" (Resp.Br., 50), Respondent implies it would like this Court to interpret "while" sufficiently broadly to permit a substantial interruption, the 10 to 20 minute gap existing under Kim Grant's testimony most favorable to the prosecution, as still close enough to the end of the watchful waiting. The definition of "while," however, has not changed from that found by the *Domino* court, quoting from a 1961 dictionary.

In section 190.2(a)(15) "while" joins the two parts of the sentence: "The defendant intentionally killed the victim while lying in wait." In Wikipedia, "while" used as a conjunction indicates that "two separate clauses occur at the time time." (http://www.wikipedia.org/wiki/While.) The Oxford Dictionaries Online give as its first meaning "during the time that; at the same time as." (http://oxforddictionaries.com/definition/while.)

The same result is found in print sources. A 1981 dictionary includes "during the time that," and "at the same time that...." (Am. Heritage Dict. of the Engl. Language (1981) p. 1459.) The second edition

of the very comprehensive Compact Oxford English Dictionary, for use of "while" as a conjunction and preposition, includes "during the time that." (The Compact Oxford Eng. Dict. (2d ed. 1999, micrograph) p. 2304.) Moving further out, Bartlett's Roget's Thesaurus includes "while" as an adverb under the heading"Same Time." (Bartlett's Roget's Thesaurus (1st ed. 1996) "No. 649 Same Time" p. 579.)

The language of the special circumstance was changed in 2000 by initiative to substitute "by means of" for "while." That such a change was felt necessary itself implies that "while" was considered as restrictive as it is found to be in standard dictionaries. This Court is requested not to reinterpret that common word to depart from its common understanding.

In the instant case the most favorable testimony to the prosecution has Mr. Livingston's last instance of periodic surveillance of the guard house ending ten or 20 minutes before the attack when he last drove his car out the gate. (Kim Grant's testimony, 9 RT 1715-1716, 1722-1723, 1748, 1826-1827.) In the intervening ten to 20 minutes, Mr. Livingston must have parked his car elsewhere. When he returned, he was walking (Kim Grant, CT Supp. III 29-30), and he left on foot. (Kim Grant, 9 RT 1837, 1839.)

Even if Mr. Livingston's periodic entries and departures from the complex, normal behavior for him (12 RT 2304), are interpreted as

instances of "watchful waiting," an interruption of ten to 20 minutes before commencing the attack is not "during the time," or "at the same time" as the "watchful waiting." There was a cognizable interruption between the "lying in wait" and when the killing took place. (*Domino*, 129 Cal.App.3d at p. 1011.)

C. SUBSTANTIAL EVIDENCE IS LACKING TO SUPPORT A SUBSTANTIAL PERIOD OF WATCHFUL WAITING.

Respondent argues a pre-planned ambush (Resp.Br. p. 51) followed hours of Mr. Livingston driving in and out of the complex. (Resp.Br. p. 52.) What the evidence may be construed to show is several driving entries by Mr. Livingston, each of which required the security guards to recognize him and permit his entry. Whether the lights were off in Mr. Livingston's car and a license plate was missing was immaterial. His Cadillac was well known to the guards, as was he. Security guards Bombarda (8 RT 1590, 1602; 9 RT 1673), Arcia (9 RT 1690-1692), and Chavers (7 RT 1373, 1378, 1395), testified as to Mr. Livingston's frequent entries by car to the complex during the period they had worked as security guards at the complex. No one testified that his entries on January 2 or the morning of January 3 were unusual in their number. If his entries on January 2 or the morning of January 3 were to be characterized as "watchful waiting," it was

the prosecution's burden to prove how they differed from Mr. Livingston's normal behavior, which the prosecution did not do.

D. SUBSTANTIAL EVIDENCE IS LACKING TO SUPPORT ATTACK FROM A POSITION OF ADVANTAGE.

Respondent argues a pre-planned ambush (Resp.Br. p. 51) occurred because Mr. Livingston's entries were by his car rather than by walking (Resp.Br., 53), and he did not alert any of the guards as to the time and location of the attack. (Resp.Br., 53.)

That the attack was a surprise was accepted in Appellant's Opening Brief. (AOB, 78.) Respondent cites no precedent holding that surprise necessarily infers attack from a position of advantage. The evidence supports that the perpetrator walked to the guardhouse with large windows or a door on all sides. Inside were the four armed guards. On the buildings of the complex were powerful lights covering all approaches to the guardhouse. No traffic was distracting the guards. The perpetrator stood in the doorway within reach of two of the armed guards sitting at or near the entrance, shouted "m---f---," waited two seconds, and then began firing.

Surprise was achieved, but not by any active concealment or disguise of the perpetrator, but by the lack of attention and lack of reaction by the guards. Pre-planning, in the sense of premeditation, obviously occurred. But there was no waiting for victims to enter a killing zone; there

was no luring of victims to an isolated location. In short, there was no ambush. There was no attack from a position of advantage.

E. THE TEMPORAL NEXUS REQUIRED IS THAT THE LETHAL ACTS BEGIN AT AND FLOW CONTINUOUSLY FROM THE MOMENT THE WATCHFUL WAITING ENDS, NOT FROM THE MOMENT THE ATTACK BEGINS.

After criticizing the opinion in *Domino v. Superior Court* for a restrictive interpretation of the special circumstance provision, Respondent implies even that restrictive interpretation is satisfied if the "lethal acts flowed continuously from the moment he commenced his surprise attack." (Resp. Br. p. 54.)

To support its criticism of *Domino*, Respondent offers as a comparison *People v. Guzman* (1988) 45 Cal.3d 915, 949-952. (Resp. Br. p. 54.) The passage cited from *Guzman* involved interpretation of the special circumstance at section 190.2, subdivision (a)(17), involving murder committed while a defendant was engaged in committing, attempting to commit, or immediate flight after committing or attempting to commit any of a list of specified felonies. As the Supreme Court observed, the issue was "whether the relationship between a robbery and another crime is sufficiently close to justify an enhanced punishment." (*Id.*, 45 Cal. 3d at p. 951.) "Lying in wait," from subdivision (a)(15) of section 190.2 was not even raised as an example during the discussion in *Guzman*. Nor

does a "lying in wait" special circumstance involve the relationship between two separate crimes, as "lying in wait" is not a crime in itself, only a means by which first degree murder may be committed or a special circumstance enhancing the punishment of first degree murder.

It is of interest that the Supreme Court did find that the words "during" [from the preceding statute] and "while" "reasonably appear to mean the same thing," but that observation was limited to the context before the Court at the time. (*People v. Guzman*, 45 Cal.3d at pp. 950, 953.) More recently in a lying in wait special circumstance case, the Supreme Court referred to its past interpretation of "while lying in wait" as "requiring 'that the killing take place during the period of concealment and watchful waiting.'" (*People v. Lewis* (2008) 43 Cal.4th 415, 512, quoting *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1149.) "During" was interpreted as "meaning 'at some point in the course of.' (Webster's 3d New Internat. Dict. (2002) p. 703.)" (*Lewis*, 43 Cal.4th at p. 513.) In *Lewis*, the Supreme Court found the killings did not occur in the course of lying in wait, and vacated the lying in wait special circumstances. (*People v. Lewis*, 43 Cal.4th at pp. 513, 540.)

Respondent's argument that *Domino* supports finding "lying in wait" if the "lethal acts flowed continuously from the moment he commenced his surprise attack" (Resp. Br. p. 54) is an erroneous interpretation of *Domino*.

The court of appeal in *Domino* was not concerned with whether the lethal acts flowed immediately and continuously from the surprise attack, but from the end of the watchful waiting. (*Domino v. Superior Court*, 129 Cal.App.3d at p. 1011.) That was why the court of appeal concluded "[i]f a cognizable interruption separates the period of lying in wait from the period during which the killing takes place, the circumstances calling for the ultimate penalty do not exist." (*Ibid.*) As the court of appeal observed: "We are bound by the plain meaning of the words used." (*Domino v. Superior Court*, 129 Cal.App.3d at p. 1011, fn. 2.)

In the instant case, Respondent, and the prosecution at trial, pointed to nothing that distinguished Mr. Livingston's entries by automobile into the Wilmington Arms on January 2 and 3 from his conduct on any other day, that is nothing which could characterize his normal behavior as "watchful waiting." Even if it was surveillance, it was only periodic and not a period of "watchful waiting." Even if it was "watchful waiting," however, there was a cognizable interruption between the last time he left the complex in his car and sometime thereafter returned on foot. Substantial evidence is lacking to supporting the finding of this special circumstance.

III

THE LYING-IN-WAIT CIRCUMSTANCE, GENERALLY AND AS APPLIED IN THIS CASE, FAILS TO PROVIDE A MEANINGFUL BASIS FOR DISTINGUISHING BETWEEN CAPITAL AND NONCAPITAL CASES IN VIOLATION OF THE EIGHTH AMENDMENT.

All arguments in Respondent's Brief were anticipated and addressed in Appellant's Opening Brief, pp. 71-80. That discussion is incorporated in this Reply Brief, and need not be repeated.

IV

THE TRIAL COURT ADMITTED TESTIMONIAL STATEMENTS WITHOUT THE OPPORTUNITY FOR CROSS-EXAMINATION IN VIOLATION OF MR. LIVINGSTON'S RIGHT TO CONFRONTATION UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. INTRODUCTION AND SUMMARY OF ARGUMENTS.

Mr. Livingston's Opening Brief argued that both the videotape and transcript of deceased witness Markuis Walker, and the trial testimony of Captain Reginald Wright about three unidentified witnesses identifying Mr. Livingston's automobile as the car involved in the October 8 drive-by shooting, denied Mr. Livingston's right to confrontation under the Sixth and Fourteenth Amendments to the United States Constitution. Mr. Livingston also argued that the Walker statement failed to satisfy the requirements of Evidence Code, section 1370.

By not contesting that the Walker statement violated Mr. Livingston's trial right to confrontation and failed to satisfy the requirements of section 1370 for the admissibility of hearsay, Respondent apparently concedes those arguments, but does argue the error was harmless because Mr. Walker's statement was merely cumulative of other evidence. (Resp. Br. pp. 62-65.) Respondent does not mention Detective Richardson's testimony about Mr. Walker's identification of Mr. Livingston's photograph, so presumably Respondent also implicitly agrees

that Detective Richardson's testimony on this subject as well violated Mr. Livingston's federal right to confrontation, subject to the same argument that it was harmless because it was cumulative.

Upon further review of the record, it was found that Mr. Perry, on direct examination, did testify that he was taken to the Wilmington Arms and there identified the car from which the shots were fired. (6 RT 1203-1204.) Respondent also points this out. (Resp.Br. p. 67.) Consequently, Appellant withdraws the challenge to the admissibility of Captain Wright's testimony insofar as Mr. Perry is concerned, but continues the argument with respect to the two unidentified witnesses described by Captain Wright.

B. ADMISSION OF THE WALKER VIDEOTAPE, JURY USE OF THE TRANSCRIPT, AND TESTIMONY ABOUT THE INTERVIEW WAS NOT HARMLESS BECAUSE IT WAS CUMULATIVE.

The Walker videotape was extremely supportive of the prosecution case. On the videotape, Mr. Walker explained that he gestured with a Piru gang sign toward the driver of the green Cadillac as it passed his group the first time. (Supp. IV CT 5.) After the Cadillac passed them again and Mr. Walker heard shots, without seeing who was doing the shooting, Mr. Walker knew the shots were coming from that car and had to be fired by the person Mr. Walker described in a way that matched Mr. Livingston. (Supp.

IV CT 7-12.) In the videotape, Mr. Walker also identified a photograph of Mr. Livingston as the shooter. (Supp. IV CT 12-13.) In the videotape, Mr. Walker also identified the photograph of another person as the driver of the Cadillac, whom Detective Richardson identified as a member of the Park Village Crips. (Supp. IV CT 13-14.) Mr. Walker selected a photograph of the Cadillac as the car involved in the shooting, and also stated that after the shooting, Captain Wright took him to view the Cadillac, which Mr. Walker identified as the car involved in the shooting. (Supp. IV CT 14-15.)

The encounter occurred at night. (7 RT 1275-1276, 1395.) There was no testimony as to the street lighting during the various encounters with the green Cadillac. All identified witnesses, except Damien Perry, had been smoking phencyclidine (PCP) that night before the encounter. (7 RT 1269-1270, 1275-1276.) While an unidentified person said "That was Goldie" when the Cadillac was stopped at the red light, there was no testimony at trial or on videotape that any of the witnesses had known Livingston before the incident.[6] Nonetheless the police had suspicions as to

---

[6] When the prosecutor apparently began to ask witness Damien Perry if had known or seen Mr. Livingston before that day, he withdrew the question.

Q: "NOW, THIS GREEN CADILLAC, HAD YOU SEEN THAT GREEN CADILLAC THE DAY BEFORE THIS CERTAIN DAY?

A NO.

Q DID YOU SEE THE DRIVER -- WITHDRAW THAT." (6 RT 1190.)

the identity of the shooter and his usual whereabouts. They arrived at the Wilmington Arms in search of the car only ten minutes after the Cadillac entered those gates. (7 RT 1395.) There was no testimony they were following the lead of some witness who saw the Cadillac enter that gate. Having identified a potential suspect, however, they allowed the investigation to slide until January 1999, after the shooting of guards in the sentry shed in which Mr. Livingston was also implicated. Then they interviewed the witnesses they had identified immediately after shooting on October 8, 1998. The investigation was obviously designed to confirm initial suspicions, not to completely and thoroughly investigate a drive-by shooting.

Only a single witness, Mr. Perry, identified Mr. Livingston at trial. The value to the prosecution of a detailed recitation of events, such as presented in the Walker videotape, not compromised by recantations or failure of memory at trial of the other October 8 percipient witnesses, is clear. At trial Mr. Hebrard testified he did not see the shooting or person who did the shooting (7 RT 1258-1259.) He had selected Mr. Livingston's photograph as the shooter when shown it during his earlier police interview. (7 RT 1327.) Mr. Nunley was unable to identify anyone in the car and identified the shots as coming from a white, rather than green, Cadillac. (7 RT 1287) During his earlier police interview, he had selected the

photograph of someone other than Mr. Livingston as the shooter. (7 RT 1327.)

The prosecution's heavy reliance upon the Walker videotape at trial to persuade the jury that the burden of proof was met was apparent during the prosecution's opening statement, and again during argument. Not counting the prosecution's explanation for dropping the charges which included assault upon Mr. Walker, the prosecution referred to Mr. Walker's statement on ten occasions (6 RT 1142, 1143; 14 RT 2619, 2622, 2660, 2765), including a comment about Mr. Walker's "extremely good recall" (14 RT 2765), a commendation not given any other witness.

Respondent argues that any Sixth Amendment violation is harmless beyond a reasonable doubt if there exists in the record other evidence to the same effect, making the wrongly admitted evidence cumulative. To require more would require a reviewing court to "reweigh the evidence on appeal." (Resp. Br. pp. 62, 64.) The cases Respondent cites to support this proposition all address challenges to the sufficiency of the evidence, not the prosecution's burden of proof of harmlessness following constitutional error. (*People v. Young* (2005) 34 Cal.4th 1149, 1181; *People v. Maury* (2003) 30 Cal.4th 342, 403; *People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)[7]

---

[7] All cited at Respondent's Brief, page 64.

Respondent's burden to prove constitutional error harmless beyond a reasonable doubt is not so easily satisfied.

Review by the standard of *Chapman v. California* requires that the reviewing court consider "not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. . . . . The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [113 S.Ct. 2078, 124 L.Ed.2d 182] [emphasis in original].)

When applying this standard to a denial of the right to confrontation, "[t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course,

the overall strength of the prosecution's case." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684 [106 S.Ct. 1431, 89 L.Ed.2d 674]; see also, *United States v. Norwood* (9th Cir., 2010) 603 F.3d 1063, 1068-1069; *People v. Villatoro* (2011) 194 Cal.App.4th 241, 261-262.) Nowhere does the Supreme Court limit pertinent factors to cumulativeness alone.

The Walker videotape was critical to the prosecution's case regarding the October 8 drive-by shooting, as illustrated by the prosecutor's comment that Mr. Walker's testimony on the videotape demonstrated "extremely good recall" (14 RT 2765), a unique commendation by the prosecution for any witness. Mr. Walker's statement provided a motive for the shooting, the Piru gang sign gesture Mr. Walker made towards the driver of the car. (Supp. IV CT 5.) On the videotape Mr. Walker identified Mr. Livingston's photograph as the shooter. (Supp. IV CT 12-13.) Unlike other witnesses, he did not recant or forget at trial. On the videotape he related Captain Wright taking him that night to view the Cadillac and identifying it as the car involved in the shooting (Supp. IV CT 14-15), thus corroborating Captain Wright's trial testimony.

The only witness at trial whose videotaped statement and testimony at trial both identified Mr. Livingston as the shooter was Damien Perry. He did not testify that he knew Mr. Livingston before the shooting. His identification was of a shooter for an incident that occurred at night from a

passing car. As he testified, the shots were fired at "Droopy," who was "quite a distance" from him. (6 RT 1211.) To argue that the Walker videotape, commended by the prosecution for Mr. Walker's excellent recall, played no role in the jury's decision is both illogical and contrary to the evidence.

V

IN ALLOWING DAMIEN PERRY TO TESTIFY THAT SOMEBODY IDENTIFIED "GOLDIE" AS IN THE CADILLAC, THE COURT DENIED MR. LIVINGSTON DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. SUMMARY OF ARGUMENTS.

In the Opening Brief, Mr. Livingston argued that the statement was hearsay, but not a testimonial statement. Hence its admission was reviewed not under the Confrontation Clause of the Sixth Amendment, but for denial of due process under the Fifth and Fourteenth Amendments. Since the witness who made the statement was never identified, and hence not subject to cross-examination, reliability of the statement was totally absent, and due process was denied. In view of the weakness of other identifications of Mr. Livingston as the shooter in the car, the admission of this statement was not harmless beyond a reasonable doubt. (AOB, pp. 109-118.)

Respondent argues (1) that the statement was properly admitted, over the defense objection, as offered to explain witness Perry's conduct after hearing the statement (Resp. Br. pp. 70-71), (2) that the statement's admission should not be reviewed for denial of due process because it was not hearsay since it was admitted to explain conduct (Resp. Br., pp. 71-72), (3) that any error was harmless because there was other overwhelming evidence identifying Mr. Livingston as the shooter (Resp. Br., p. 72), and

(4) it was harmless because the jury was instructed not to consider the statement for its truth and is presumed to follow that instruction. (Resp. Br. p. 72.) Each contention will be addressed in turn.

B. THE STATEMENT WAS NOT USED TO EXPLAIN CONDUCT, BUT TO ARGUE IDENTITY.

Respondent argues that statement was used to explain the subsequent conduct of Perry and his companions running across the street against a red light. (Resp. Br., p. 70.) There are two difficulties with that explanation.

First, that is not how the prosecution used the statement at trial. Instead, it was used in the prosecutor's opening statement and again in closing argument as evidence that Mr. Livingston was the shooter. In his opening statement, the prosecutor stated, "I believe that more -- more than one -- possibly only one of the people in the car knows this car, knows-- knows who is in it, knows it's a Park Village Crip gang member named Goldie." (6 RT 1137.) In closing, the prosecutor argues: "[T]hey are at Compton Boulevard and they see the vehicle there. Some of them do. It is an easily recognizable vehicle with an easily recognizable person who drives the vehicle." (14 RT 2765.)

Nowhere did the prosecutor argue seeing the Cadillac cross through the red light was motivation for Mr. Perry and his companions to do the same. More importantly, nowhere does the prosecutor argue that seeing

Mr. Livingston in the Cadillac motivated Mr. Perry and his companions to run through the red light. Nor does Mr. Perry ever so state during his testimony. Rather Mr. Perry explained that they crossed to get the clothes and stuff out of the car that they were transporting to his friend's apartment. (6 RT 1193.)

Second, whether Mr. Perry and his companions crossed the street against the red light, waited for the green, or jaywalked in the center of the block, was not relevant to any contested issue in the trial. The statement that "Goldie" was in the car was relevant only to the contested issue of whether Mr. Livingston was present and participated in the shooting. It was relevant for that purpose if its truth could be considered. And that is how the prosecutor used it. That makes it hearsay.

As best explained by this Court in an earlier decision, "Past cases make it clear that an out-of-court statement is not made admissible simply because its proponent states a theory of admissibility not related to the truth of the matter asserted. As this court recently observed, '[a] hearsay objection to an out-of-court statement may not be overruled simply by identifying a nonhearsay purpose for admitting the statement. The trial court must also find that the nonhearsay purpose is relevant to an issue in dispute.'" [Citation omitted.] (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1204. [Cited at Resp. Br., p. 70 for different proposition.])

C. SINCE THE STATEMENT WAS HEARSAY, ITS ERRONEOUS ADMISSION IS REVIEWABLE FOR DENIAL OF DUE PROCESS.

Respondent does not deny that if the statement was hearsay, it should be reviewed for denial of due process. (Resp. Br., 71-72.) Consequently, Mr. Livingston stands on that portion of the argument made previously. (AOB, pp. 114-117.)

D. EVIDENCE BEYOND THE HEARSAY STATEMENT THAT MR. LIVINGSTON WAS IN THE CADILLAC WAS WEAK AND NOT OVERWHELMING.

At trial, only Mr. Perry identified Mr. Livingston as the shooter.[8] (6 RT 1198-1199.) This identification, made at night of a shooter from a passing car, needed corroboration to be persuasive. Mr. Perry's own credibility was somewhat suspect. He was arrested on the night of March 23, 1999, for failure to comply with a subpoena, and at the prosecutor's request remained confined on $50,000 bail pending the trial. (1 RT 248.) He testified on April 3, 2000, and explained his understanding that he would be released that day after he finished his testimony. (6 RT 1206.) His interest in satisfying the prosecution and gaining his release could have influenced his testimony.

---

[8] Mr. Perry also identified as the shooter a photograph of Mr. Livingston from a sixpack during his police interrogation on January 6, 1999. (6 RT 1201-1202.)

Antwone Hebrard was also present the night of October 8, 1998. At trial he testified that he was in his friend's home and did not see the shooting.[9] (7 RT 1271, 1275.) The victim, Mr. Nunley (Hunter), did not identify Mr. Livingston as the shooter. (7 RT 1287.)

Neither witness's trial testimony corroborated Mr. Perry's identification. Mr. Walker's videotape provided corroboration, but as discussed previously, its admission violated the Confrontation Clause of the Sixth Amendment. (See § IV.) Consequently, it cannot be proved beyond a reasonable doubt that Mr. Perry's testimony as to the hearsay statement identifying Mr. Livingston had no effect on the guilty verdict to the charges from October 8, 1998.

E. THE INSTRUCTION TO THE JURY COULD NOT SUFFICE TO INSULATE THE TRIAL FROM HARM.

The cautionary admonition to the jury did not stop the prosecution from twice arguing the statement for its truth, both in his opening statement

---

[9] To impeach Mr. Hebrard (7 RT 1264), the court permitted the prosecution to play a videotape of Mr. Hebrard's police interrogation from January 7, 1999. The court denied the defense request to cross-examine Mr. Hebrard concerning the videotape before it was played. (7 RT 1264.) After it was played and following cross-examination, the defense objected to Mr. Hebrard's entire testimony, including the videotape, as hearsay, based upon Mr. Hebrard's testimony that most of what he had told the police during that interrogation was what others had told him, and that the videotape exceeded the scope of impeachment. (7 RT 1270-1271, 1278.) The court denied the objection, the motion to strike, and the request for an admonition. (7 RT 1280.)

and again in his closing argument. A similar cautionary admonition to the jury in *People v. Bunyard* (45 Cal.3d at p. 1204) did not stop this Court from finding the admission was error. (*Ibid.*) A similar admonition was unavailing in *People v. Scalzi* (1981) 126 Cal.App.3d 901, 905. (Cited by Respondent at Resp. Br., pp. 70-71, for a different proposition.) It should not preclude finding in this case that the constitutional error was not harmless beyond a reasonable doubt. As this Court has stated: "If the trained legal mind of the prosecutor could not limit the declarations to the limited purpose allowed by law, how was the jury to accomplish this almost impossible bit of mental gymnastics? [Par.] That the prosecuting attorney was, to be charitable, confused as to the significance of these declarations is also demonstrated by his closing argument. . . . . [Par.] Either the prosecuting attorney was deliberately flaunting the limitations placed by the court on the evidence and was deliberately trying to convince the jury of the truth of the [statements], or he found it impossible to indulge in the mental maneuvers required by the limiting instruction. In either event it was error, and error of a most serious nature." (*People v. Hamilton* (1961) 55 Cal.2d 881, 899-900.)

VI

INSTRUCTIONS IN THE TRIAL COURT PROVIDED A LOWER BURDEN OF PROOF FOR CIRCUMSTANTIAL EVIDENCE TO PROVE SPECIFIC INTENT OR MENTAL STATE THAN FOR USE OF CIRCUMSTANTIAL EVIDENCE GENERALLY, AND AGAIN FOR USE OF CIRCUMSTANTIAL EVIDENCE TO PROVE THE REQUIRED MENTAL STATE FOR SPECIAL CIRCUMSTANCES THAN FOR PROVING SPECIAL CIRCUMSTANCES GENERALLY.

THIS DENIED MR. LIVINGSTON HIS RIGHTS TO TRIAL BY JURY AND DUE PROCESS, AND TO HEIGHTENED RELIABILITY, UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND UNDER ARTICLE ONE, SECTIONS 15 AND 16 OF THE CALIFORNIA CONSTITUTION.

A. INTRODUCTION AND SUMMARY OF ARGUMENTS.

The Opening Brief argued that the omission from CALJIC Nos. 2.02 and 8.83.1 of the proviso that "*each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt,*" found in Nos. 2.01 and 8.83, permitted finding the facts underlying the required mental states on less than a reasonable doubt; that this denied Mr. Livingston his constitution rights under both the federal and state constitutions; and the error required reversal. (AOB, pp. 121-128.)

This is not a claim that appellant has found addressed in any previous decisions of this Court. It is apparently an issue of first impression.

In rejecting this claim, Respondent argues:

a. the claim is forfeited by failure to object or request clarifying instructions at trial (Resp. Br., pp. 76);

b. the claim is foreclosed as invited error (Resp. Br., p. 77);

c. the claim must be rejected because this Court has rejected many other claims of error to these instructions (Resp. Br., pp. 77-78); and

d. there is no reasonable likelihood that the jury misunderstood and misapplied Nos. 2.02 and 8.83.1 as Mr. Livingston argues (Resp. Br., pp. 78-79).

Each contention will be addressed in turn.

B. FAILURE TO OBJECT DID NOT FORFEIT MR. LIVINGSTON'S RIGHT TO CLAIM ERROR ON APPEAL BECAUSE THE INSTRUCTIONAL ERRORS AFFECTED HIS SUBSTANTIAL RIGHTS.

Respondent argues that Mr. Livingston's claim, not raised in the trial court, is forfeited because a claim of error to "an instruction, correct in law, should have been modified 'is not cognizable . . . because defendant was obligated to request clarification and failed to do so.'" (Resp. Br., p. 76.) Respondent, however, quotes the wrong portion of *People v. Guerra* (2006) 37 Cal.4th 1067, 1134.

Mr. Livingston does not claim that Nos. 2.02 and 8.83.1 only required some minor modification or clarification, and were otherwise correct in law. Rather, Mr. Livingston claims that Nos. 2.02 and 8.83.1, are

wrong because they affect the burden of proof, reducing it below a reasonable doubt for those facts underlying elements requiring a prescribed mental state or specific intent, on the murder charges, the special circumstances, and the gang enhancements. When a claim of error affects the burden of proof, it affects a defendant's substantial rights. (*People v. Guerra*, 37 Cal.4th at p. 1134. See also, *People v. Cleveland* (2004) 32 Cal. 4th 704, 750.)

C. THE ERROR WAS NOT "INVITED."

Respondent further claims that when the trial court stated his tentative decision to instruct the jurors with CALJIC No. 2.02, trial defense counsel's indication that he had no objection constituted invited error. (Resp. Br., p. 77.) Reading the record, however, the trial court focused the discussion upon whether No. 2.02 should be applied to the lesser included offenses, section 245. Since that is a general intent offense, the court decided to apply No. 2.02 only to the enumerated counts, which did include specific intent elements. (13 RT 2489-2494.) Trial defense counsel (Mr. Martin) stated he had no objection to that. (13 RT 2494.)

Even assuming that the defense counsel's stated position of no objection applied generally to giving No. 2.02, however, that still would not constitute "invited error." For an instructional error to be invited by the action of a trial counsel, the counsel must state a "conscious, deliberate, or

tactical reason" for the action. (*People v. Collins* (1992) 10 Cal.App.4th 690, 694-695.) Respondent cites to no reason given by defense counsel for not objecting to No. 2.02, nor does any appear in the record.

D. THIS COURT HAS NOT PREVIOUSLY ADDRESSED THAT THE OMISSION OF A REASONABLE DOUBT STANDARD FROM CALJIC NOS. 2.02 AND 8.83.1 LESSENS THE PROSECUTION'S BURDEN OF PROOF.

The Opening Brief raised a conflict between the more general instructions on circumstantial evidence and the more specific instructions on the use of circumstantial evidence to prove elements involving mental state and specific intent. The conflict centered on the requirement of the more general instructions for proof beyond a reasonable doubt of the facts upon which any inference rests, and the omission of any similar requirement for proof of the facts underlying inferences leading to mental state or specific intent.

Respondent addresses this conflict neither in direct argument nor in any of the cases cited in Respondent's Brief. Instead, Respondent cites to *People v. Maury* (2003) 30 Cal.4th 342, 428 as a case in which "this Court considered an argument similar to the one appellant raises here." (Resp. Br., p. 77.) As disclosed in Respondent's own quotation from *Maury*, however, the claim of error then raised before this Court involved the language from the instruction referring to a "reasonable" interpretation of

the evidence. (Resp. Br., p. 78.) As set forth in Mr. Livingston's Opening Brief and above in this Brief, Mr. Livingston's claim is not that Nos. 2.01 and 8.83 are error for including the "reasonable" interpretation proviso, but that Nos. 2.02 and 8.83.1 are erroneous for omitting the reasonable doubt standard. "[A]n opinion is not authority for a proposition not therein considered." (*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 65-66. See also *People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.)

Each of the decisions cited by Respondent suffer this same irrelevance. Each involves the same argument over the language about "reasonable" interpretation of the evidence. (See *People v. Hughes* (2002) 27 Cal.4th 287, 346 [In *Hughes*, 27 Cal.4th at p. 347, appellant raised as a separate error the trial court's failure to instruct per Nos. 2.02 and 8.83.1]; *People v. Osband* (1996) 13 Cal.4th 622, 679; *People v. Ray* (1996) 13 Cal. 4th 313, 347-348; *People v. Friend* (2009) 47 Cal.4th 1, 53 [only refers to "similar challenges," citing *People v. Nakahara*, *infra*, and *People v. Guerra*, *supra* and *infra*, and declines to change position]; *People v. Nakahara* (2003) 30 Cal.4th 705, 713-714; *People v. Cook* (2007) 40 Cal. 4th 1334, 1361 [does not specify the claim raised, but refuses to reconsider since rejected "identical argument" in *People v. Crittenden*, *infra*]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144; *People v. Guerra* (2006) 37 Cal.4th 1067, 1138-1139.) All these decisions are cited in Respondent's Brief at

page 78. Respondent cites no decision addressing the claim of error raised in Mr. Livingston's Opening Brief, and addresses no argument to that claim of error.

Since Respondent never directly addressed the claim of error asserted in Mr. Livingston's Opening Brief, we will stand on our discussion at AOB, pages 121-124.

E. THE ERROR REQUIRES REVERSAL.

Respondent correctly observes that a claim of constitutional instructional error must be considered in light of the entire charge to the jury and a constitutional violation be found only if is a reasonable likelihood that the jurors misunderstood or misapplied these instructions. (Resp. Br., pp. 78-79.)

Where Respondent's analysis fails is its assumption that when the reasonable doubt standard is correctly stated elsewhere, that precludes a reasonable likelihood that the jurors would follow the erroneous instructions rather than the correct instructions. Thus, CALJIC No. 2.90 defines reasonable doubt and the burden of proof, but does not stipulate that the burden applies to each element of an offense, or when circumstantial evidence comes into play, to the facts underlying any inferences drawn to support the finding of an element. When the court instructed the jurors as to the elements of the offenses charged, contrary to Respondent's assertion

(Resp. Br., p. 79), nowhere did the court instruct the jurors that each element must be found beyond a reasonable doubt, the standard required by *In re Winship* (1970) 397 U.S. 358. And even if the court had properly instructed the jurors that each element, not merely offense, must be found beyond a reasonable doubt, that still would not address the situation addressed by the circumstantial evidence instructions.

Nos. 2.01 and 8.83 each instruct the jurors that "before an inference essential to establish guilt may be found to be have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt." (14 RT 2554-2555, 2592.) This instruction goes below the element itself to the facts from which the specific intent or other mental state is inferred. Even if the court had instructed the jurors that each element must be proved beyond a reasonable doubt, that would not address the underlying facts when the element is inferred from circumstantial evidence.

An analogous situation was previously addressed by the United States Supreme Court in *Francis v. Franklin* (1985) 471 U.S. 307 [105 S.Ct. 1965, 85 L.Ed.2d 344]. In *Francis v. Franklin* the Supreme Court found two instructions created a mandatory rebuttable presumption, in violation of *Sandstrom v. Montana* (1979) 442 U.S. 510 [99 S.Ct. 2450, 61 L.Ed.2d 39]. To the state's argument that other, constitutionally proper

instructions stated the law correctly, the Supreme Court answered: "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." (*Francis v. Franklin*, 471 U.S. at p. 322.) The Court further stated "The Court today holds that contradictory instructions as to intent -- one of which imparts to the jury an unconstitutional understanding of the allocation of the burdens of persuasion -- create a **reasonable likelihood** that a juror understood the instructions in an unconstitutional manner, unless other language in the charge *explains* the infirm language sufficiently to eliminate this possibility." (*Francis v. Franklin*, 471 US. at p. 322, fn. 8. [Italics in original. Bold added.])

Mr. Livingston does not maintain that Nos. 2.02 and 8.83.1 establish mandatory presumptions. But the two specific instructions do contradict the general instructions on circumstantial evidence, Nos. 2.01 and 8.83. The latter require proof beyond a reasonable doubt for the facts underlying inferences from circumstantial evidence; Nos. 2.02 and 8.83.1 do not when proving specific intent or other mental state. While other instructions discuss reasonable doubt, none require proof beyond a reasonable doubt for the facts underlying offense elements of mental state or specific intent,

when those underlying facts depend upon circumstantial evidence. In the words of *Francis v. Franklin*, no other instructions *explain* the infirmity. This constitutes a reasonable likelihood that the jurors applied Nos. 2.02 and 8.83.1 to reduce the prosecution's burden of proof below a reasonable doubt.

Given the scope of this error and the number of verdicts and true findings which it affected (AOB, pp. 124-127), this lessening of the burden of proof upon the prosecution was a structural error requiring reversal of all affected counts. If not structural, its breadth of impact is so broad it cannot be proved harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

VII

THE COURT'S INSTRUCTIONS DISTINGUISHING THE TREATMENT OF DIRECT AND CIRCUMSTANTIAL EVIDENCE DENIED DUE PROCESS AND RIGHT TO TRIAL BY JURY UNDER THE STATE AND FEDERAL CONSTITUTIONS.

A. SUMMARY OF ARGUMENT.

In this Opening Brief, Mr. Livingston observed that the instructions generally applicable to circumstantial evidence required "each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt" (CALJIC Nos. 2.01 & 8.83, 14 RT 2554-2555, 2591-2592; 24 CT 6211, 6264), but that no similar requirement was expressed to the jury for direct evidence. This dissimilar treatment occurred despite that both types of evidence, direct and circumstantial, rely upon inferences. This disparity in treatment reduced the prosecution's burden to prove beyond a reasonable doubt with respect to direct evidence. This denied due process and the right to trial by jury under both federal and state constitutions, requiring reversal. (AOB, pp. 129-160.)

Respondent argues (1) this claim is forfeited because no objection was raised at trial and no request for modification of instructions was made (Resp. Br., pp. 80-81); (2) the claim is meritless because similar claims addressing CALCRIM instructions have been rejected in the Court of Appeal (Resp. Br., pp. 81-83); and (3) there is no reasonable likelihood the

jury misunderstood and misapplied CALJIC No. 2.00 as suggested. (Resp. Br., p. 83.)

Respondent misconstrues the claim of error in one respect. Mr. Livingston was not claiming error specifically in CALJIC No. 2.00, but in the charge as a whole for not presenting to the jurors a reasonable doubt requirement for direct evidence comparable to that presented for circumstantial evidence. If Respondent intends to suggest that CALJIC No. 2.00 would be the appropriate place for language informing the jurors that the reasonable doubt rule applies to direct evidence as well as circumstantial evidence, Appellant would not object. However, appropriate language could be placed in many other instructions as well, or a completely new instruction be drafted and required when the circumstantial evidence instructions are given. Alternatively, the federal practice, discussed at AOB, pages 133-135, could be adopted. That would have the advantage of adopting an instructional practice already approved by the United States Supreme Court. (See *Holland v. United States* (1954) 348 U.S. 121, 139-140 [75 S.Ct. 127, 99 L.Ed. 150].)

Each of Respondent's arguments will be addressed in turn.

B. THE ERROR IN THE INSTRUCTIONS WAS NOT FORFEITED BY FAILURE TO OBJECT OR REQUEST A MODIFICATION.

Respondent claims the error was waived by failure to object to CALJIC No. 2.00 or to request its modification. (Resp. Br., p. 80.) Mr. Livingston makes no claim of error in CALJIC No. 2.00 specifically. Rather Mr. Livingston claims that nowhere in the instructions does there appear any recognition that constitutional due process and the right to jury trial require that the standard of proof beyond a reasonable doubt apply to the finding and use of direct evidence as it does to circumstantial evidence. Instructions which dilute the reasonable doubt standard required for any criminal conviction affect a substantial right not requiring objection at trial. (Penal Code, § 1259; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7 [Holding that failure to object to an instruction did not preclude review for constitutional error, this Court quoted Penal Code, section 1259: "The appellate court may ... review any instruction given, ... even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."]

Respondent apparently argues that section 1259 permits review without objection at trial only if the instructional error amounts to a structural error. (See Resp. Br., pp. 80-81, citing *People v. Flood*, *supra*, 18 Cal.4th at pp. 499-500.) That portion of the opinion in *Flood*, however, is discussing not whether a claim of instructional error is forfeited, but whether the per se rule applies requiring reversal for the constitutional

error. With no argument beyond an inapposite citation, Respondent's contention need not be addressed further.

C. RESPONDENT'S ARGUMENT, AND THE CASES IT CITES, FAIL TO CONSIDER THE FULL ARGUMENT ADVANCED IN APPELLANT'S OPENING BRIEF. HENCE, THEY ARE NOT REASON FOR REJECTING IT.

1. The Instructions in the Charge to the Jury.

Both circumstantial evidence and direct evidence rely upon underlying inferences before a juror accepts them as leading to a conclusion on an element of the offenses charged. CALJIC Nos. 2.00, 2.01 and 8.83 make this clear for circumstantial evidence. The latter two instructions further explain that "each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or inference on which the inference necessarily rests must be proved beyond a reasonable doubt."

Direct evidence is defined in No. 2.00 as "evidence that directly proves a fact. It is evidence which by itself, if found to be true, establishes that fact." That appears an acceptable summary of the definition given in the Evidence Code, section 410: "'[D]irect evidence' means evidence that

directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact."

What is too often forgotten are the inferences underlying any decision to believe the testifying witness. As explained in JONES ON EVIDENCE:

"A witness' testimony can be relevant to an issue in a trial only if we make four basic testimonial inferences, involving perception, memory, communication, and veracity. To say the same thing more elaborately, testimony has probative value as evidence of the fact directly testified to only if the factfinder is satisfied that the witness accurately perceived the objects, events, or conditions about which he is testifying; that the witness remembers those objects or events accurately; that he is communicating accurately what he perceived and remembers, i.e., that the words he uses in his testimony mean the same to him as they do to the factfinder; and that he is not consciously lying or subconsciously shadowing the truth." (2 JONES ON EVIDENCE: Civil and Criminal (7th ed., Fishman & McKenna, 1992), § 11:6, p. 268. As Wigmore explains, "Aside from autoptic proference [demonstrative evidence], then, all evidence must involve an inference from some fact to the proposition to be proved." (1A WIGMORE, EVIDENCE (Tillers Rev. Ed. 1983), § 25, p. 952.)

CALJIC No. No. 2.20 lists some factors for the jurors to consider in deciding whether to believe a witness. (14 RT 2559; 24 CT 6218.) But nothing in the entire charge applies the same reasonable doubt standard as is expressly applied to circumstantial evidence to the inferences drawn from the CALJIC No. 2.20 factors the jurors may consider in determining whether to believe a witness.

CALJIC No. 2.90 certainly does not accomplish this feat. It requires a juror to have an overall feeling of guilt beyond a reasonable doubt, but contains no language applying that standard not only to the overall impression from the evidence, but to each element of every count or allegation. (14 RT 2566-2567; 24 CT 6232.)

In listing the elements of each crime or allegation, the instructions do not inform the jury that **each element** must be proved beyond a reasonable doubt: murder and attempted murder [14 RT 2578 -2586]; multiple murder special circumstance [14 RT 2588]; lying in wait special circumstance [14 RT 2589]; assault and related enhancements [14 RT 2598-2600]; felon in possession of firearm [14 RT 2601-2603]; personal use of firearm [14 RT 2606-2608]; great bodily injury or death [14 RT 2608-2609]; personal infliction of great bodily injury during crimes [14 RT 2609]; gang enhancement [14 RT 2818-2820]; armed in commission of crime [14 RT 2820].)

Those few instances in which reference to reasonable doubt is found just draw an even more stark contrast with those instances listed above in which the reference is missing. Reasonable doubt is applied specifically to the identity of a perpetrator (14 RT 2568) even though it is almost always not specifically instructed as applying to the elements of the offense. Reasonable doubt is applied to the elements of some of the offenses charged against co-defendant Sanders -- robbery [14 RT 2572]; murder and attempted murder by Sanders [14 RT 2573-2574] -- though not to the offenses charged against Mr. Livingston.

For attempted murder, the court instructed the jurors to find the allegation that the murder was "willful, deliberate, and premeditated" not true if they had a reasonable doubt as to that allegation. (14 RT 2586.) When instructing the jurors as to a defendant's right not to testify, the court stated "the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the people to prove beyond a reasonable doubt every essential element of the charge against him." (14 RT 2564.) Since Mr. Livingston did testify in his own defense, while co-defendant Sanders did not, this instruction did not appear to apply in Mr. Livingston's case. Please note as well that Mr. Sanders was found guilty only of second degree murder, not first degree. (15 RT 2849-2850.)

To reiterate, no instruction required the jurors to apply the same reasonable doubt standard to the the evidence and inferences underlying direct evidence as they were required to apply to circumstantial evidence.

2. The Decisions Cited by Respondent, and More Recent Decisions by this Court Fail to Consider the Inferences The Jurors Must Draw Before Deciding to Believe Any Direct Evidence.

The two decisions upon which Respondent primarily relies are *People v. Anderson* (2007) 152 Cal.App.4th 919, 931 (quoted from and cited at Resp. Br., pp. 82-83), and *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1186-1187 (quoted at Resp. Br., pp. 81-82.) Both these decisions involve CALCRIM Nos. 223 and 224, which replace CALJIC Nos. 2.00 and 2.01, used in Mr. Livingston's case, with notably modified language. However, the reason *Anderson* and *Ibarra* do not apply in the instant case also illustrates the defect in Respondent's reasoning.

The court in *Ibarra* reasoned: "[D]irect evidence stands on its own. So as to direct evidence no need ever arises to decide if an opposing inference suggests innocence." (*People v. Ibarra*, 156 Cal.App.4th at p. 1187, citing *People v. Anderson* (2007) 152 Cal.App.4th 919, 931, quoted at Resp. Br., p. 82.) The portion from *Anderson* leading to the selection cited by *Ibarra*, and also the selection following it, is concerned with whether the "reasonable conclusion" language from CALCRIM No. 224 should be

applied to direct evidence as well as to circumstantial evidence. Thus, the court in *Anderson* was focusing on the procedure for using circumstantial evidence after jurors determine it represents reality, that it is "true."

Mr. Livingston's challenge, however, is to the process **before** either direct evidence or circumstantial evidence is determined to represent reality, that is to be "true." CALJIC No. 2.01 makes clear to the jury that the evidence underlying determining any particular piece of circumstantial evidence to be "true," must also be proved beyond a reasonable doubt. As discussed above, inferences also underlie all items of direct evidence. The jurors should also be determining they prove the item of direct evidence beyond a reasonable doubt before relying upon that item of evidence to support a conclusion of guilt. Respondent's answer addresses the wrong part of the decision process, that later decision on how to use the item of evidence, rather than the earlier determination of whether the item of evidence is "truth."

Since Mr. Livingston's Opening Brief was filed, this Court has decided two cases addressing challenges to CALJIC Nos. 2.01 and 2.02: *People v. Solomon* (2010) 49 Cal.4th 792, and *People v. Moore* (2011) 51 Cal.4th 1104. The opinion in *Moore* merely refers to the opinion in *Solomon* and finds no reason to revisit that earlier conclusion. (*People v. Moore*, 51 Cal.4th at p.1134.)

In *Solomon*, among the challenges raised by the defendant was that "because the instructions omitted any reference to direct evidence, jurors would have believed that a fact essential to guilt that was based on direct, rather than circumstantial, evidence need not be proved beyond a reasonable doubt." (*People v. Solomon*, 49 Cal.4th at p. 826.) This argument reads as similar to that raised by Mr. Livingston, but this Court's opinion in *Solomon* does not summarize the defendant's argument supporting that contention. This Court rejected the argument, referring to CALJIC No. 2.90 and the directive to "'consider the instructions as a whole and each in light of the others," as "fully appris[ing] the jury that the reasonable doubt standard applied to both forms of proof." (*Ibid.*)

As discussed above, however, CALJIC No. 2.90 informs the jurors that the prosecution has the burden of proving the defendant guilty beyond a reasonable doubt, but lacks any language informing them that this burden includes proving guilt beyond a reasonable doubt for each element of the offenses and special allegations alleged. (*In re Winship* (1970) 397 U.S. 358, 364 [25 L.Ed.2d 368, 90 S.Ct. 1068]; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 477.) That elements must be proved beyond a reasonable doubt is expressly required only with respect to the examples set forth above. Except in

CALJIC Nos. 2.01 and 8.83, a reasonable doubt standard is never applied to the inferences underling evidence findings.

D. THE DILUTED REASONABLE DOUBT STANDARD IS REVERSIBLE EITHER PER SE OR UNDER THE HARMLESS ERROR STANDARD FOR CONSTITUTIONAL ERROR.

Respondent focuses on CALJIC No. 2.00, alleging the error claimed is failure to incorporate in No. 2.00 the reasonable doubt standard found in No. 2.01. Respondent then concludes there was no reasonable likelihood that the jurors misunderstood and misapplied No. 2.00. (Resp. Br., p. 83.) As stated above, the claim of error goes to the entire charge for nowhere incorporating for direct evidence the reasonable doubt standard applied to determining circumstantial evidence. Not in CALJIC No. 2.90, not in the listing of elements under the offenses charged against Mr. Livingston, nor in some separate generally applicable instruction were the jurors ever informed that not only must any guilty verdict be based upon a finding beyond a reasonable doubt, but that the reasonable doubt standard applies to finding direct evidence items "truthful" as well as finding the same for circumstantial evidence items.

In the past this Court has held that the omission of required instructions about reasonable doubt on some counts when explained on others justified the jurors concluding that reasonable doubt was required where stated and not required where not stated. (See *People v. Dewberry*

(1959) 51 Cal.2d 548, 557 [concerning instruction of effect of reasonable doubt between included offenses]. See also *People v. Salas* (1976) 58 Cal.App.3d 460, 474-475.)

The United States Supreme Court has held "contradictory instructions as to intent -- one of which imparts to the jury an unconstitutional understanding of the allocation of the burdens of persuasion -- create a **reasonable likelihood** that a juror understood the instructions in an unconstitutional manner, unless other language in the charge *explains* the infirm language sufficiently to eliminate this possibility." (*Francis v. Franklin* (1985) 471 US. at p. 322, fn. 8. [Italics in original. Bold added.])

The dilution of the reasonable doubt standard with respect to direct evidence creates a reasonable likelihood that jurors misunderstood the absence of the standard in an unconstitutional manner, particularly since no other instruction explained that absence. This is structural error reversible per se. (*Sullivan v. Louisiana* (1967) 308 U.S. 275, 580.)

If this Court holds this error is not structural, then Mr. Livingston stands upon the discussion of the evidence and potential effect of the instructional error found in AOB, pp. 140-160. It is noted that Respondent did not choose to contest that discussion.

VIII

BY FAILING IN ITS SUA SPONTE DUTY TO INSTRUCT THE JURORS ON HOW TO EVALUATE THE EXTRAJUDICIAL STATEMENTS ENTERED INTO EVIDENCE, THE COURT VIOLATED MR. LIVINGSTON'S RIGHTS TO TRIAL BY JURY AND DUE PROCESS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 15 AND 16 OF THE CALIFORNIA CONSTITUTION.

A. SUMMARY OF ARGUMENTS.

While giving several instructions to the jurors explaining the use of testimonial evidence and the limitations on that use (AOB, p. 161, fn. 83), the court gave no equivalent instructions concerning the use of out-of-court statements entered into evidence. This failure denied Mr. Livingston due process and his right to trial by jury by not giving the jurors clear standards applicable to the use of extrajudicial statements, thereby reducing the prosecution's burden of proof below a reasonable doubt when using the extrajudicial statements.

Respondent asserts (1) this claim of error presents only a need to modify CALJIC No. 2.20 to provide a pinpoint instruction, which was forfeited by not requesting it in the trial court (Resp. Br., p. 84); (2) that the standards for use of extrajudicial statements are not recognized as a general principle of law and instructions on them are therefore not required by any prior decisions (Resp. Br., pp. 84-86); (3) that CALJIC No. 2.20 does not

apply to extrajudicial statements because No. 2.20 refers to the physical characteristics of the witness, which cannot be evaluated by the jurors when the witness is not in court (Resp. Br., p 86); (4) there was no reasonable likelihood that the jurors were misled into thinking the factors of No. 2.20 did not also apply to the extrajudicial statements (*ibid.*); (5) the extrajudicial statements were made by witnesses who also testified in court so that Mr. Livingston's trial counsel had the opportunity to cross-examine them about the statements (*ibid.*); (6) Mr. Livingston was not prejudiced by failure to modify No. 2.20 because witnesses Bombarda, Grant, Richardson, and Aguirre had no motive to falsely implicate Mr. Livingston, and witnesses Perry and Hebrard could be cross-examined about the statements they made to the police. (Resp. Br., pp. 86-87.) Each contention will be addressed in turn.

B. THE ERROR CLAIMED WAS NEITHER SPECIFICALLY TO NO. 2.20 NOR A PINPOINT INSTRUCTION.

Without analysis, Respondent argues the failure to instruct amounted to a "pinpoint" instruction, which is forfeited if not requested, citing *People v. Mayfield* (1997) 14 Cal.4th 668, 778-779. (Resp. Br., p. 84.) At Respondent's citation in *Mayfield*, but earlier on page 778, this Court defined a "pinpoint" instruction as one which "relates particular facts to an element of the charged crime and thereby explains or highlights a defense

theory." (*People v. Mayfield*, 14 Cal. 4th at p. 778.) In *Mayfield*, this Court was addressing CALJIC No. 8.73, which explains provocation as it impacts on the elements of premeditation and malice aforethought. (*People v. Mayfield*, 14 Cal.4th at p. 778.) The *Mayfield* Court, at p. 778, cited *People v. Saille* (1991) 54 Cal.3d 1103, 1119, involving convictions for murder and attempted murder, and whether intoxication was a partial defense. This Court held that evidence of intoxication was akin to a "pinpoint" instruction in that it was "proffered in an attempt to raise a doubt on an element of a crime which the prosecution must prove beyond a reasonable doubt." (*People v. Saille*, 54 Cal.3d at p. 1120.)

The error in this case was the trial court's failure to instruct on the standards by which the jury should evaluate extrajudicial statements. This goes not to evidence offered by the defense to raise doubt as to a particular element of a particular offense, but to evidence offered by the prosecution to prove all its counts. This is not a "pinpoint" instruction, and raising the error on appeal is not forfeited under "pinpoint" instruction rules.

Nor is it forfeited generally by failure to raise it in the trial court. Contrary to Respondent's assertion, there was no claim in the AOB that the error was in CALJIC No. 2.20, nor any other particular instruction. A number of instructions told the jurors how to evaluate the testimony of witnesses (AOB, p. 161, fn. 83), while no instruction at all gave similar

advice on the use and restrictions on use of extrajudicial statements. Given the number of instructions dealing with live testimony, to avoid the question whether appropriate language for extrajudicial statements should be included in each of those instructions, the better course would be a separate instruction addressing extrajudicial statements and the particular issues involved in determining whether to believe them.

C. INSTRUCTION ON THE STANDARDS FOR USE OF EXTRAJUDICIAL STATEMENTS SHOULD BE RECOGNIZED AS A GENERAL PRINCIPLE OF LAW, THOUGH THE ISSUE HAS NOT BEEN RAISED IN PRIOR DECISIONS.

The requirement to instruct the jurors in all criminal trials with the applicable paragraphs from CALJIC No. 2.20 stems from this Court's decision in *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883. In *Rincon-Pineda* the trial judge had refused to give the jury the "Hale" instruction, which he regarded as too demeaning to the victim of the alleged rape. The Hale instruction was required under existing decisions, so this Court had to decide whether the error was prejudicial. Although this Court found the omission was not prejudicial in the case before it, the Court mandated that in all future cases jurors be instructed with applicable paragraphs of CALJIC No. 2.20. (*People v. Rincon-Pineda*, 14 Cal.3d at pp. 883-884.)

In *Rincon-Pineda* the Court was faced solely with how to instruct the jurors on evaluation of testimony of a witness before them. The Court

cautioned, however, that "[n]othing we say in this opinion should be construed as precluding the development of new instructions designed to enhance juries' consideration of particular types of evidence...." (*People v. Rincon-Pineda*, 14 Cal.3d at p. 882, fn. 6.) The Court also ordered a change in CALJIC No. 2.22 [Weighing Conflicting Testimony] and the use of a new instruction [now CALJIC No. 2.27: Sufficiency of Testimony of One Witness]. (*People v. Rincon-Pineda*, 14 Cal.3d at pp. 884-885.)

The Court distinguished these instructions it was requiring from "procedural resources available" to the defendant and trial court to request "an instruction 'relating particular facts to any legal issue' [citation omitted] . . . . [which] may "pinpoint" the crux of a defendant's case, such as mistaken identification or alibi." (*People v. Rincon-Pineda*, 14 Cal.3d at p. 885.)

From *Rincon-Pineda*, we may conclude this Court remains open to new instructions on general principles of law intended to "enhance juries' consideration of particular types of evidence" -- in this case, extrajudicial statements -- and that such a general principle is not a "pinpoint" instruction. Since such an instruction has not been denied in any decision found, albeit not requested, the fact that no cases have been found requiring it does not preclude its recognition as a general principle of law.

Like the testimony involved in *Rincon-Pineda*, extrajudicial statements are a broad category of evidence. Prior consistent or inconsistent statements of a testifying witness were admissible only on his or her credibility until 1965 when the enactment of sections 1235 and 1236 of the Evidence Code also permitted their use as substantive evidence of the matter stated, if the other conditions for their admissibility are satisfied. (Law Revision Commission comments following sections 1235 and 1236.)

Since the use of prior extrajudicial statements as substantive evidence has been permitted since 1965, it is about time that the jurors be informed of standards for evaluating them.

"The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.) In *St. Martin*, the Court held that substantial evidence before the trial court required that it instruct the jurors on the issue of provocation. (*Ibid.*) That illustrates that "general principles" are not merely those issues present in all criminal trials, but are also those principles raised by the evidence in the particular case. The same may be seen by this Court's comment in *Rincon-Pineda* that the trial court may omit those paragraphs of No. 2.20 which are not applicable under the evidence. (*People v. Rincon-Pineda*, 14 Cal.3d at p. 884.)

Consideration of the evidence admitted at trial is indispensable in determining the general principles about which the jurors must be instructed sua sponte.

In the instant trial, as set forth in the AOB, pages 162-165, the prosecution's case rested heavily upon the introduction of many extrajudicial statements of testifying witnesses. An instruction tailored to the factors pertinent in the jurors' consideration of those statements, which were permitted to be considered as evidence of the matters stated therein, should have been given to the jurors.

D. RESPONDENT'S CLAIM THAT CALJIC NO. 2.20 CANNOT APPLY TO OUT OF COURT STATEMENTS IS NOT PERTINENT TO THIS CLAIM OF ERROR, BUT NO. 2.20 DOES HIGHLIGHT SOME CONCERNS WHICH SHOULD BE INCLUDED IN AN INSTRUCTION PERTAINING TO EXTRAJUDICIAL STATEMENTS.

Respondent argues both that Mr. Livingston claims the court should have modified No. 2.20 to inform the jurors that it was also pertinent to the extrajudicial statements, and that No. 2.20 is limited to the physical characteristics of the witnesses ascertainable only while the witnesses are testifying live in the courtroom. (Resp. Br., p. 86.) The error in Respondent's characterization of Mr. Livingston's argument has been discussed above.

That No. 2.20 is limited to a witness testifying in the courtroom is true, not because of the factors listed therein, but by the choice of language limiting consideration of the factors to a person testifying before the jurors in the courtroom. That such factors, if not limited by the language of the court, may be applied to prior statements as well as to in-court testimony is illustrated by an examination of CALJIC No. 2.20 in its present and expanded incarnation as CALCRIM No. 105.

Virtually all of CALCRIM No. 105 with slight modifications could be included in an instruction for extrajudicial statements. The following factors from CALCRIM No. 105 are not dependent upon a witness's presence in the courtroom, but are also pertinent to determining the credibility of the extrajudicial statement:

- "How well could the witness see, hear, or otherwise perceive the things about which the witness testified?
- "How well was the witness able to remember and describe what happened?
- "What was the witness's behavior while testifying?
- "Did the witness understand the questions and answer them directly?
- "Was the witness's [statement] influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?

- "What was the witness's attitude about the case or about testifying?
- "Did the witness make other statements in the past [or at trial] that are consistent or inconsistent with his or her testimony?
- "How reasonable is the statement when you consider all the other evidence in the case?
- "Did other evidence prove or disprove any fact about which the witness [made a statement]?
- "Did the witness admit to being untruthful?
- "What is the witness's character for truthfulness?
- "Has the witness been convicted of a felony?
- "Has the witness engaged in conduct that reflects on his or her believability?
- "Was the witness promised immunity or leniency in exchange for his or her statement?" (CALCRIM No. 105 [Summer 2011 ed.].)

Of course, not all factors would pertain to all extrajudicial statements, just as they do not apply to all in court testimony. If the extrajudicial statements were presented in the form of a videotape, as was the case for many in this case, that would enhance the jurors' determinations. In other instances, evidence of the extrajudicial statement was limited to a written transcript or summary, or the memory of a police officer or other testifying witness.

In all cases, the jurors should also be cautioned as to the differences between an extrajudicial statement and in-court testimony and its impact upon their evaluation. The jurors should be advised that the person making the statement was not subject to cross-examination at the time the statement was made, and that their memory may have changed or other factors arisen affecting their testimony by the time they testify in court. Cross-examination a year after a statement is given cannot be the same as a contemporary cross-examination. When appropriate, the jurors should be advised that the prior statement was not made under oath. The juror should be advised of the psychological tendency in some cases for a person to reiterate on later occasions what was said on an earlier occasion just to maintain consistency, sometimes thought to be an appearance of truthfulness, rather than because that remains their memory.

CALJIC No. 2.20, when made mandatory in 1975, was the distillation of the experience of the courts with various instructions over the years, during most of which prior consistent or inconsistent extrajudicial statements were admissible only as evidence relevant to the credibility of the witness, not to prove the truth of the matters covered therein. The above discussion is not intended to suggest the text of the instruction which should have been given, but to explain that an instruction is not only necessary, but quite feasible.

E. THERE WAS NO REASONABLE LIKELIHOOD THAT THE JURORS BELIEVED THE FACTORS OF CALJIC NO. 2.20 DID APPLY TO EXTRAJUDICIAL STATEMENTS.

After arguing that No. 2.20 does not apply to extrajudicial statements because its factors are limited to physical characteristics of witnesses observable while testifying in a courtroom (Resp. Br., p. 86), Respondent next argues that there was no reasonable likelihood that the jurors were misled into thinking the No. 2.20 factors did not also apply to extrajudicial statements. (Resp. Br., p. 86.) It is assumed Respondent intends these adjacent but inconsistent arguments as alternatives.

To believe the factors of No. 2.20 applied to extrajudicial statements, the jurors would have to disregard the explicit language of the instructions they were given. No. 2.20 begins with "Every person who testifies under oath [or affirmation] is a witness." (14 RT 2559; 24 CT 6218.) The instruction continues addressing only the credibility of a witness, a person who testifies under oath. (*Ibid.*) Almost every factor given includes the language limiting its application to a "witness." Where it addresses prior statements, it is only in the context of determining the credibility of the witness's in-court testimony, not the credibility of the prior statement as substantive evidence. (14 RT 2559-2560; 24 CT 6218.)

As the United States Supreme Court explained in reviewing a claim of constitutional error, the charge as a whole must be examined, though

mere contradictory language in another instruction, even if correct, does not absolve an infirmity unless it explains the constitutional infirmity. (*Francis v. Franklin* (1985) 471 U.S. 307, 318-319, 322 [105 S.Ct. 1965, 85 L.Ed.2d 344].) This coincides with the advice given to the jurors. (CALJIC No. 1.01; 14 RT 2550; 24 CT 6205.) So we must examine the following instructions on use of witness testimony to see if they resolve this constitutional infirmity.

CALJIC No. 2.21.1 on Discrepancies in Testimony (14 RT 2560; 24 CT 6219) specifically addresses only witness testimony.

CALJIC No. 2.21.2 [Witness Willfully False] (14 RT 2560-2561; 24 CT 6220) addresses the falsity of a witness, not the falsity of prior statements.

CALJIC No. 2.22 [Weighing Conflicting Testimony] (14 RT 2561; 24 CT 6221) addresses conflict between testimony of witnesses, not between witnesses and prior statements, whether their own prior statements or those of others.

CALJIC No. 2.23 [Believability of Witness -- Conviction of a Felony] (14 RT 2561-2562; 24 CT 6222) addressed the believability of a witness, not the credibility of a prior statement.

CALJIC No. 2.27 [Sufficiency of Testimony of One Witness] (14 RT 2562; 24 CT 6223) addresses the sufficiency of testimony of witnesses, not the sufficiency of extrajudicial statements.

CALJIC No. 2.92 [Factors to Consider in Proving Identity by Eyewitness Testimony] (14 RT 2567-2569; 24 CT 6234-6235) addresses the factors affecting a witness's testimony about an identification. It does not relate those factors to evaluating a prior statement's identification.

To summarize, we do not find elsewhere in the instructions, guidance to the jurors to compensate for the absence of standards for evaluating prior extrajudicial statements, merely further examples of guidance for use of in-court testimony.

F. THE OPPORTUNITY TO CROSS-EXAMINE IN COURT THE WITNESSES WHOSE PRIOR STATEMENTS WERE ALSO OFFERED DID NOT MAKE UP FOR THE INSTRUCTIONAL DEFICIT.

First, it may be noted that in many cases the testimony of in-court witnesses differed from a prior statement they may have given. In Ms. Grant's case, in-court testimony differed from earlier statements in court as well as from prior statements.

More importantly, the opportunity for cross-examination does not relieve the court of the obligation to instruct the jurors on the standards to apply when evaluating the credibility of prior statements offered not only to

impeach or bolster credibility, but as substantive evidence of the matters covered in the statements. That an in-court witness may be cross-examined does not excuse the court from instructing the jurors on factors to use in evaluating that testimony and how it may be used. There is CALJIC No. 2.20 and the following instructions listed above. Other examples may also be given. When the prosecution relies in whole or in part upon the prior statements of an accomplice, this Court has directed that "statements" be substituted for "testimony" in the appropriate instructions. (*People v. Andrews* (1989) 49 Cal.3d 200, 215, fn. 11.)

The difference is that between apples and oranges. The jurors determine the facts, and both examination and cross-examination is crucially important for the jurors in this role. But the court determines the law (14 RT 2549; 24 CT 6203), which includes guidance as to factors and standards to use in determining the credibility of testimony and other evidence, such as extrajudicial statements. Unfortunately, the trial court omitted standards and factors for guidance in determining the credibility and use of extrajudicial statements.

G. WHETHER ANY PARTICULAR WITNESS HAD A MOTIVE TO FALSIFY THEIR TESTIMONY DOES NOT DETERMINE WHETHER THERE WAS PREJUDICE FROM THE COURT'S FAILURE TO INSTRUCT THE JURY ON FACTORS AND STANDARDS FOR USING EXTRAJUDICIAL STATEMENTS AS EVIDENCE.

Respondent argues any error was harmless because witnesses Bombarda, Grant, Richardson, and Aguirre lacked any motive to falsely implicate Mr. Livingston, and witnesses Perry and Hebrard could be cross-examined about their statements to the police. (Resp. Br., pp. 86-87.)

As argued in the AOB, this error diluted the standard of proof, requiring reversal per se. (AOB, p. 173.)

If this Court holds a showing of prejudice is required, it is a matter for the prosecution to prove beyond a reasonable doubt that there was no prejudice. (*Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705].)) Respondent's argument cannot do that.

Even if Respondent's argument were factually accurate, it would be legally inaccurate. Many factors beyond motive to falsify are considered in determining whether a statement is credible for establishing an underlying fact. What were the conditions for observation for the person giving the statement? How well could he or she see, hear, or otherwise perceive at the time and place? What was the condition of the witness's memory at the time of giving the statement? How much time and what other intervening factors may have affected the memory between the time of observation and the time of the statement. What was the witness's state of mind when giving the statement, remembering, in most cases, the statement was not given under oath. Was the witness impatient to get it over and be on to

other business? How probing was the interviewer in seeking to elicit all information and details? All of these factors and more can influence whether the statement is the truth, the whole truth, and nothing but the truth, even if the person giving the statement has no motive to falsify.

There is the uncertainty over whether Mr. Bombarda was wearing his reading glasses during the episode, and when he fired a shot at the perpetrator but missed. If he was wearing his reading glasses, how much would they have interfered with his vision when focusing not on pages in front of him, but on a person standing in backlit shadows the entire distance of the guard shack away from him? With regard to falsity, no evidence raises such a motive for Mr. Bombarda's testimony; his sincerity is not at issue, only his ability to observe and accurately remember.

For Ms. Grant, there is the uncertainty resulting from the wide variance in her different accounts, never explained in a consistent manner. For Ms. Grant, even her truthfulness is an issue. Detective Aguirre testified that Maribel Garcia (Lopez) told him she heard a female say "Get the gun," and then saw Kim Grant, two or three minutes after Ms. Garcia called 9-1-1. (11 RT 2087.) This was before the detective interviewed Ms. Grant. If Ms. Garcia's memory shortly after the episode was accurate, Ms. Grant had a motive to direct attention away from herself.

With regard to Detectives Aguirre and Richardson, no motive to falsify appears in the record, beyond the common desire to have a case closed with the discovery of someone named a perpetrator and get on to the next case. But they were not percipient witnesses of the events, only subsequently involved investigators.

With regard to Mr. Perry and Mr. Hebrard, Respondent appears to acknowledge their status as members of a gang rival to Mr. Livingston's makes their testimony suspect, but assumes the ability to cross-examine them alleviates any need to properly instruct the jurors on standards for evaluating out-of-court statements when used not only on credibility but as substantive evidence. As explained earlier, there appears no need to assume that the proper evaluation of statements given out of court is any easier for the jury, and less subject to error, than for testimony of witnesses provided in court. Nor does Respondent suggest any.

Respondent has failed to sustain its burden of proving the trial court's failure properly to instruct the jurors on factors and standards applicable in weighing extrajudicial statements was not prejudicial beyond a reasonable doubt.

IX

THE COURT'S INSTRUCTION PER CALJIC NO. 2.51 ON MOTIVE PERMITTED THE JURY TO INFER MR. LIVINGSTON'S GUILT FROM EVIDENCE OF MOTIVE ALONE, DENYING DUE PROCESS AND THE RIGHT TO TRIAL BY JURY UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND UNDER ARTICLE ONE, SECTIONS 15 AND 16, OF THE CALIFORNIA CONSTITUTION.

A. SUMMARY OF ARGUMENTS.

The Opening Brief argued that CALJIC No. 2.51 permitted finding guilt upon evidence of motive alone, considering No. 2.51 only among evidentiary instructions omitted the standard qualification that evidence of "[motive] alone is not sufficient by itself to prove guilt."

Respondent argues: (1) the claim is forfeited because Mr. Livingston did not object at trial to No. 2.51, nor did he request a modification of the instruction; (2) there was no error because this Court has several times rejected the argument that No. 2.51 shifts the burden of proof from the prosecution or lessens the prosecution's burden; (3) considering the charge as a whole, especially No. 2.90, a reasonable juror would not misunderstand No. 2.51 as affecting the reasonable doubt standard; and (4) any error was harmless as it is not reasonably probable a more favorable verdict would have resulted had the jury not been instructed with No. 2.51. (Resp. Br., pp. 87-89.) Each contention will be addressed in turn.

B. THE CLAIM WAS NOT FORFEITED BECAUSE IT AFFECTS MR. LIVINGSTON'S SUBSTANTIAL RIGHTS.

The argument Respondent raises, that this claim of error was forfeited by failure to object or seek a modification of the standard instruction, has already been decided. This Court has already held that a claim of error that the motive instruction affects the burden of proof is a cognizable claim because, if correct, it affects a defendant's substantial rights. (*People v. Cleveland* (2004) 32 Cal.4th 704, 750.)

Mr. Livingston's argues that No. 2.51, when considered along with other instructions in the charge, permits the jurors to find guilt based upon evidence of motive alone, rather than the constitutionally required proof beyond a reasonable doubt of each and every element of the counts alleged against him. (*Patterson v. New York* (1977) 432 U.S. 197, 210 [97 S.Ct. 2319, 53 L.Ed.2d 281]; *In re Winship* (1970) 397 U.S. 358, 364 [25 L.Ed.2d 368, 90 S.Ct. 1068].) Such a violation, if accurate, of the Fifth, Sixth, and Fourteenth Amendments, affects a defendant's substantial rights. That excuses any failure to object to the instruction as given. (Penal Code, § 1259.)

C. THAT PRIOR DECISIONS OF THIS COURT HAVE REJECTED PAST CLAIMS OF ERROR IN CALJIC NO. 2.51 IS NOT PRECEDENT FOR REJECTING THIS CLAIM OF ERROR, WHICH IS BASED ON ARGUMENT APPARENTLY NOT MADE IN THOSE PRIOR DECISIONS.

For prior decisions rejecting challenges to CALJIC No. 2.51, Respondent cites *People v. Tate* (2010) 49 Cal.4th 635, 699; *People v. Friend* (2009) 47 Cal.4th 1, 53; *People v. Cleveland* (2004) 32 Cal.4th 704, 750; and *People v. Snow* (2003) 30 Cal.4th 43, 97-98. (Resp. Br., p. 88.) However, "it is axiomatic that cases are not authority for propositions not considered." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176 & citations therein.)

None of the decisions cited address the argument raised in the Appellant's Opening Brief. The single paragraph addressing this claim in *Tate*, 49 Cal. at p. 699, merely states the conclusion of defendant that No. 2.51 lessens the prosecution's burden of proof and allows the jury to find guilt based upon motive alone. The paragraph does not summarize the reasons defendant advanced for this argument. Since nothing in *Tate* indicates the argument raised there was the same as Mr. Livingston raises, *Tate* is not precedent for resolving Mr. Livingston's claim. Respondent's use of *People v. Friend* suffers from the same disability. (*People v. Friend*, 47 Cal.4th at p 53.)

In both *Snow* (30 Cal.4th at p. 97) and *Cleveland* (32 Cal.4th at p. 750) the defendant argued No. 2.51 erred in not instructing that motive alone is insufficient to prove guilt, and the defendant in *Cleveland* contrasted the language of No. 2.51 to the instruction on attempts to

suppress evidence (No. 2.06) which does contain the cautionary language. In *Snow*, however, the defendant apparently did not contrast No. 2.51 with other instructions given the same jury, whereas the force of the argument requires such a contrast.

In *Cleveland*, this Court separated the argument on absent language from the burden of proof argument, and held the absent language was more a matter of clarification and therefore not cognizable since no request for modification had been made at trial. (*People v. Cleveland*, 32 Cal.4th at p. 750.) It is the language missing from No. 2.51, when contrasted to other instructions as outlined in the AOB and below, that would lead jurors to apply No. 2.51 other than as intended, contrary to the constitutionally required burden of proof.

The discussions in the two Court of Appeal opinions cited by Respondent (*People v. Estep* (1996) 42 Cal.App.4th 733, 738-739, and *People v. Wade* (1995) 39 Cal.App.4th 1487, 1496. Cited at Resp. Br., p. 88) suffer from disabilities similar to *Snow*. The defendants in both *Estep* and *Wade* were not raising the absence of language found in other instructions, that motive alone was not sufficient to prove guilt. Since the argument Mr. Livingston raises was not raised in *Estep* and *Wade*, they also are not precedents.

Appellant did find one Court of Appeal decision not cited by Respondent, but in which the appellant raised an argument similar to Mr. Livingston's in this case. In *People v. Petznick* (2004) 114 Cal.App.4th 663, the appellant challenged CALJIC No. 2.51 for the absence of the cautionary language found in other instructions given to the jury in Mr. Petznick's case. (114 Cal.App.4th at p. 685.) In rejecting that argument, the Sixth District observed that No. 2.51 also differed from the others in instructing the jury that motive is not an element, and then generally referred to the balance of the instructions that for guilt all the elements must be proved. (*Ibid.*)

That No. 2.51 differed from other evidence instructions in explaining that motive is not an element does nothing to explain why absence of cautionary language suffices for instruction on the use of evidence of motive while cautionary language is required for instructing on the use of other evidence, which also are not elements. That the balance of instructions does not solve this problem is illustrated in the following discussion.

D. CONSIDERING THE CHARGE AS A WHOLE ILLUSTRATES A REASONABLE LIKELIHOOD THAT JURORS APPLIED CALJIC NO. 2.51 IN A WAY THAT VIOLATES THE CONSTITUTION.

Unlike the defendants' arguments summarized by their reviewing courts in the opinions cited by Respondent, Mr. Livingston's argument is

based upon the language of CALJIC No. 2.51 taken in the context of the other instructions included in the charge.

As the charge was read to the jury, No. 2.51 was immediately followed by No. 2.52, which included the cautionary language: "The flight of a person immediately after the commission of a crime, or after he is accused of a crime, *is not sufficient in itself to establish his guilt....*" Notably, the italicized language, or anything like it, was absent from the rules on motive expressed in No. 2.51.

Like motive, flight is not an element of any offense charged. Like flight, motive is not sufficient in itself to establish guilt. Unlike flight, however, jurors were not instructed that motive is not sufficient in itself to establish guilt.

The differing treatment for two matters of evidence, neither of which is an element, highlighted by one following the other, can lead the jurors to conclude the "insufficient" language regarding flight does not apply to motive. The conclusion of such reasoning is that motive can be sufficient, in itself, to establish guilt beyond a reasonable doubt. That risk of omission has been recognized by this Court for other instructions. (See *People v. Dewberry* (1959) 51 Cal.2d 548, 557; see also *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 [conc. opn. of Brown, J.]; *People v. Salas* (1976) 58 Cal.App.3d 460, 474.)

Illustrative of this point is the evolution of CALJIC No. 2.28 [Failure to Timely Disclose Evidence]. In *People v. Bell* (2004) 118 Cal.App.4th 249, the First District, Division 3, reversed because of problems with the version of No. 2.28 given to the jury. In its analysis, the Court of Appeal, among other problems, observed that other "conscious of guilt" instructions made clear that such deceptive or evasive conduct was not sufficient of itself to prove a defendant's guilt, but that cautionary language was missing from No. 2.28. (118 Cal.App.4th at p. 256, text & fn. 6. See also, *People v. Thomas* (2011) 51 Cal.4th 449, 483-484, using much of the analysis of *Bell* for a similar version of No. 2.28.) Discussing other "conscious of guilt" instructions, this Court has declared: "The cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224.) The current edition of No. 2.28 provides "this conduct is not sufficient by itself to prove guilt...."

Respondent argues that CALJIC No. 2.90 cures all errors. (Resp. Br., p. 89.) No. 2.90, however, merely explains that the jurors must be convinced of guilt beyond a reasonable doubt, and then defines reasonable doubt. Nothing in No. 2.90 precludes jurors being convinced beyond a reasonable doubt by evidence of motive rather than a conviction that each

and every element has been proved beyond a reasonable doubt. That is because nothing in No. 2.90 explains that for conviction each count requires proof beyond a reasonable doubt of each element of the crimes of which convicted.

The phrase "reasonable doubt" appears 25 times in the charge to the jury. The only occasion in which "reasonable doubt" appears with respect to the proof of elements is in CALJIC No. 2.61 [for a defendant not testifying], advising the jurors that a "defendant may choose to rely . . . . upon the failure, if any, of the people to prove beyond a *reasonable doubt* every *essential element* of the charge against him." (14 RT 2563; 24 CT 6227.) (No instruction informed the jurors that, for a defendant who does testify, the prosecution still must prove every element beyond a reasonable doubt.) Nowhere else does "reasonable doubt" even appear in the same sentence as "element." As related above, the word "element" does not even appear in CALJIC No. 2.90. (14 RT 2566-2567; 24 CT 6232.)

"Reasonable doubt" does appear with respect to underlying facts in two of the circumstantial evidence instructions, CALJIC Nos. 2.01 (14 RT 2554-2555; 24 CT 6211) and 8.83 (14 RT 2591-2592; 24 CT 6264.) Beyond that, "reasonable doubt" appears only with respect to entire crimes, not in references to individual elements, CALJIC Nos. 2.91 [Identity proved by eyewitnesses] (14 RT 2567; 24 CT 6233), 3.02 [Principal's

liability for natural and probable consequences, for co-defendant Sanders] (14 RT 2570-2574; 24 CT 6238-6241), 4.50 [Alibi] (14 RT 2576; 14 CT 6245), 6.50 [Gang enhancement] (14 RT 2576-2578; 24 CT 6246-6247), 8.67 [Attempted murder] (14 RT 2583-2585; 24 CT 6255-6256), 8.71 [First or second degree murder] (14 RT 6586; 24 CT 6258), 8.75 [Partial verdict - Homicide] (14 RT 2586-2589; 24 CT 6259-6260), and 17.10 [Conviction of lesser included offense] (14 RT 2602-2603; 24 CT 6281). Except for the instructions on gang enhancement (No. 6.50) and attempted murder (No. 8.67), "reasonable doubt" does not even appear in the instructions on the elements of the offenses of enhancements, nor the special circumstances, charged against Mr. Livingston and of which he was convicted.

The absence of instructions to Mr. Livingston's jurors that all elements must be proved beyond a reasonable doubt may be contrasted with federal practice. If we look at the Ninth Circuit Model Jury Instructions for offenses comparable to those of which Mr. Livingston was convicted [No. 8.65 UNLAWFUL POSSESSION OF FIREARM BY CONVICTED FELON; No. 8.107 MURDER - FIRST DEGREE; No. 8.111 ATTEMPTED MURDER], the introductory paragraph of each instruction concludes with the words: "the government must prove each of the following elements beyond a reasonable doubt." (Ninth Circuit Model Criminal Jury Instructions under Library at the Ninth Circuit website:

"www.ca9.uscourts.gov".) Equivalent language is found in none of the instructions to the jurors addressing the charges against Mr. Livingston.

As related above, the only instruction which informed jurors of the prosecution's burden to prove *every element* beyond a reasonable doubt was No. 2.61 [Defendant May Rely on State of Evidence]. (14 RT 2563; 24 CT 6227.) While Mr. Livingston testified in his own defense, Mr. Sanders did not. The jurors found Mr. Sanders guilty not of murder in the first degree, but murder in the second degree, illustrating the impact of an instruction requiring proof beyond a reasonable doubt on every essential element. Any denial that this constitutionally infirm instruction affected that outcome of the trial cannot be supported beyond a reasonable doubt.

X

THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT.

A. SUMMARY OF ARGUMENTS.

Mr. Livingston's Opening Brief challenged a series of instructions for contradicting or undermining the reasonable doubt standard set forth for the jury in CALJIC No. 2.90. Each instruction or set of instructions will be addressed in turn as it was in the Opening Brief. As a preliminary note, Respondent's two initial contentions -- that this argument is forfeited for lack of objection at the trial court and that CALJIC No. 2.90 has been upheld against challenge innumerable times -- will be addressed.

1. Claims that the Constitutionally-Required Standard of Reasonable Doubt Was Denied or Undermined Are Not Forfeited by Failure to Object in the Trial Court.

Respondent argues that because all the instructions challenged in this section of the Opening Brief are correct in law, Mr. Livingston's substantial rights are not affected; therefore, the failure to object at trial forfeited any claim that the instructions are erroneous. (Resp.Br., pp. 89-90.) Respondent's argument would nullify Penal Code, section 1259, by permitting the mere assertion the instructions are correct in law to preclude any examination of the truth of that claim. This Court has already recognized the fallacy of that argument and rejected it. In *People v.*

Cleveland (2004) 32 Cal.4th 704, 750, this Court has held that a claim of error that an instruction affects the burden of proof is a cognizable claim because, if correct, it affects a defendant's substantial rights.

2. Defense of the Language of CALJIC No. 2.90 is Irrelevant to the Arguments Raised by Mr. Livingston.

Respondent defends the language of CALJIC No. 2.90 by citing the numerous decisions which have approved it. (Resp. Br., pp. 90-91.) While interesting, the argument is irrelevant because nowhere in section X of Appellant's Opening Brief did Mr. Livingston raise the wording of CALJIC No. 2.90 as a claim of error. Our argument rather is that application of CALJIC No. 2.90 is undermined by the language of numerous other instructions.

B. THE INSTRUCTIONS ON CIRCUMSTANTIAL EVIDENCE UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT (CALJIC Nos. 2.90, 2.01, 2.02, 8.83, and 8.83.1.)

These instructions tell the jury to accept a reasonable interpretation of evidence over an unreasonable interpretation. The Opening Brief argued that this undermined the reasonable doubt standard explained in No. 2.90 and was a constitutionally-prohibited mandatory presumption. (AOB, pp. 188-192.) Respondent finds a new argument, not presented in the Opening Brief, based upon the word "appears," as it is used in the instructions. (Resp. Br., p. 91.) Appellant's actual argument, however, was addressed to

the substitution of reasonable-unreasonable for the standard of proof beyond a reasonable doubt.

A reasonable-unreasonable dichotomy embodies a binary standard of proof. If a proposition is not reasonable, it is unreasonable. While that bears a facile resemblance to the ultimate choice each juror must make between guilty and not guilty, it ignores the federal constitutional due process reasoning under the reasonable doubt standard. Proof is not an either-or proposition, but a position on a long spectrum of possibilities.

The reasonable doubt standard is the far end of the spectrum of proof applicable in different types of cases. As explained by the United States Supreme Court, "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." (*Addington v. Texas* (1979) 441 U.S. 418, 423 [99 S.Ct. 1804, 60 L.Ed.2d 323] [quoting *In re Winship* [Harlan, J., concurring].) Discussing the "three standards or levels of proof" produced "across a continuum," the Supreme Court observed, "[i]n a criminal case . . . the interests of the defendant are of such magnitude that

historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt." (*Id.*, 441 U.S. at pp. 423-424.) Later in the same opinion, the Supreme Court cautioned, "we must be mindful that the function of legal process is to minimize the risk of erroneous decisions." (*Id.*, 441 U.S. at p. 425.)[10]

By diverting the jurors' attention from the reasonable doubt standard to a "reasonable-unreasonable" dichotomy, there is introduced a standard which usually requires less than even the civil preponderance of evidence standard. For example, a "reasonable suspicion" is less than "probable cause," which is itself less than a preponderance of the evidence. An example how low a standard "reasonable" may be is found in *Kiareldeen v. Ashcroft* (3d Cir., 2001) 273 F.3d 542. There an alien's petition for habeas corpus challenging his detention pending the resolution of his removal proceedings was granted, and he moved for attorney fees and costs. The

---

[10] For a discussion of the continuum or spectrum of proof in a civil context, see *Pafford v. Secretary of HHS* (Fed. Cl., 2005) 64 Fed.Cl. 19, 28 ["[D]irect evidence tends to move the physician and fact-finder towards the "scientifically certain" end of the **spectrum of proof**, which far exceeds a mere preponderance legal standard." [Emphasis added.]

motion was granted, and the government appealed. The standard was whether the government's position was "substantially justified." The Third Circuit explained that substantial justification is not based upon the outcome in the district court proceeding, or whether the government met its burden of proof. "[T]he government's position need not be 'correct,' or even 'justified to a high degree.'" (*Id.*, 273 F.3d at p. 554.) The usual formulation required only that the government show "(1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory it propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced." (*Id.*, 273 F.3d at p. 554, fn. 5.)

Given the looseness of the term "reasonable," allowing the instructions to focus the jurors' attention upon a reasonable-unreasonable dichotomy, rather than upon proof beyond a reasonable doubt, does not satisfy the admonition of the United States Supreme Court "that the function of legal process is to minimize the risk of erroneous decisions." (*Addington v. Texas*, 441 U.S. at p. 425.)

The Opening Brief argued that the language of the instructions -- "if . . . one interpretation of [the] evidence appears to you to be reasonable and the other interpretation to be unreasonable, you **must** accept the reasonable interpretation and reject the reasonable" (14 RT 2555, 2556, 2592, 2593; 24 CT 6212, 6213, 6214, 6265 [emphasis added]) --

undermined the standard of reasonable doubt and created a mandatory presumption. (AOB, pp;. 190-191.) Respondent does not analyze but only cites prior decisions of this Court which have rejected this argument. Those decisions rely principally upon *People v. Wilson* (1992) 3 Cal.4th 926, which, in turn, relies principally upon an opinion of the Fourth District, Division One, *People v. Magana* (1990) 218 Cal.App.3d 951.

The opinion in *Wilson* draws upon the long line of authority that "the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson*, 3 Cal.4th at p. 943.) Mr. Livingston has no quarrel with this proposition.

The opinion in *Wilson* then draws upon arguments from the opinion in *Magana*. Reference, as always, is made to CALJIC No. 2.90.

> "[A] reasonable juror would understand that, taken in context, the relevant language of CALJIC No. 2.01 (and the corresponding language of CALJIC Nos. 8.83 and 8.83.1) must be considered in conjunction with the "reasonable doubt" standard. Thus, the jury properly can find the prosecution's theory as to the interpretation of the circumstantial evidence "reasonable" and alternate theories favorable to the defense "unreasonable," within the meaning of these instructions, only if the jury is convinced beyond a reasonable doubt of the accuracy of the prosecution's theory. (*People v. Magana, supra,* 218 Cal.App.3d at p. 956.) The paragraph criticized by defendant therefore "does not tell the jury to reject interpretations of circumstantial evidence favorable to the defense simply because they are unusual or bizarre, [but] merely tells them to reject interpretations of circumstantial evidence that are so incredible or so devoid of logic that they can, beyond a reasonable doubt, be

> rejected." (*Ibid.*) Accordingly, when the instructions are viewed as a whole, the disputed language does not undermine the instructions on the presumption of innocence and the standard of proof beyond a reasonable doubt, and does not impermissibly create a mandatory conclusive presumption of guilt." (*People v. Wilson*, 3 Cal.4th at p. 943.)

The opinion in *Magana, Wilson*, and all decisions resting upon them, assume that any reasonable juror shares at least the training and analytical experience of the average trial lawyer. This assumption is not shared by the United States Supreme Court, at least when dealing with burdens of proof. (See paragraph beginning "Candor suggests . . . ." in *Addington v. Texas*, 441 U.S. at pp. 424-425.) That is why that Court cautions "we must be mindful that the function of legal process is to minimize the risk of erroneous decisions." (*Addington v. Texas*, 441 U.S. at p. 425.)

The assumption that correct language in one instruction will offset contrary language in another instruction was addressed and rejected in *Francis v. Franklin* (1985) 471 U.S. 307, 322. ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity."] The opinion in *Wilson*, adopted from *Magana*, includes language which, if found in the instructions, would satisfy this *Addington/Francis* criticism. If "unreasonable" was defined in similar terms to those used in *Magana* and *Wilson* -- i.e., that is, an interpretation of evidence so incredible or so devoid of logic that it is

beyond a reasonable doubt, such an interpretation of the evidence may be rejected -- such language would connect the circumstantial evidence instructions to CALJIC No. 2.90, and convey to the jurors what standard should be applied in determining whether a particular interpretation of the evidence should be rejected. The language of those opinions, however, is not found in the instructions.

Nor does the charge as a whole resolve this issue. As explained in the preceding argument (IX.D concerning CALJIC No. 2.51), information for the jurors that each guilty verdict requires a finding beyond a reasonable doubt on each and every element of the charge in that count is remarkably sparse in the entire charge. That paucity of the most constitutionally critical information for the jurors merely aggravates the misunderstanding of the proper standard for conviction found in the instructions addressed in this argument.

C. THE OTHER INSTRUCTIONS WHICH ALSO VITIATED THE REASONABLE DOUBT STANDARD (CALJIC Nos. 2.21.2, 2.22, 2.27).

1. CALJIC No. 2.21.2 - Willfully False Witnesses.[11]

---

[11] Because the text of CALJIC No. 2.21.2 was omitted from the AOB, for ease of reference it is reproduced here.

"A witness, who is willfully false in one part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars." (14 RT 2560-2561; 24 CT 7220.)

Mr. Livingston argued that this instruction raises his burden from merely a reasonable doubt to a probability of the truth if the jury disbelieved any part of his testimony. Respondent presents no analysis but cites decisions of this Court which have rejected similar arguments. Tracing the line of decisions back from those cited by Respondent leads to *People v. Beardslee* (1991) 53 Cal.3d 68, apparently the last time this Court set forth its reasons for rejecting a similar attack upon CALJIC No. 2.21.2. The opinion in *Beardslee* described No. 2.21.2 as only a "statement of the obvious-that the jury should refrain from rejecting the whole of a witness's testimony if it believes that the probability of truth favors any part of it." (*People v. Beardslee*, 53 Cal.3d at p. 95.)

The analysis in *Beardslee*, however, failed to consider the first sentence of the instruction. If a jury believes a witness is willfully false in any part of his testimony, the jury is **directed** to distrust other parts of his testimony. From that distrust follows the second sentence explaining the jury may reject his whole testimony unless the jury is convinced "the probability of truth favors his testimony in other particulars."

In essence, No. 2.21.2 mandates the jury to distrust a witness if it finds any part of his testimony was willfully false. Then the jury may believe any other part of his testimony only if a probability of its truth is established. The burden of persuasion is placed upon the proponent of the

evidence. Since a defendant cannot constitutionally be required to satisfy any standard of proof, No. 2.21.2 unconstitutionally shifts a burden to the defendant for any witness of which the defense is the proponent.

Mr. Livingston was the primary witness for the defense. Once the prosecution set up the defendant with repetitious questioning of whether each prosecution witness was lying, and was the defendant the victim of a conspiracy, which could provide the jury with gist for finding some portion of the defendant's testimony to be willfully false, prejudice was established.[12]

2. CALJIC No. 2.22 - Convincing Force.

The Opening Brief argued that this instruction substituted a comparative, more convincing standard for the constitutionally-mandated standard of proof beyond a reasonable doubt. (AOB, pp. 198-200.)

---

[12] As Respondent appropriately observes (Resp. Br., p. 94), at trial there was no objection made to the prosecutor's question and no request for an admonition to the jury. Nor was there any objection to that portion of the prosecutor's argument. That is why the material contained in footnote # 91 in the AOB was placed in a footnote rather than raised as a separate claim of error under a separate heading or subheading, as required by the California Rules of Procedure, rule 8.204(a)(1)(B).

That the misconduct was not raised as a separate claim of error, however, does not preclude it from being considered as evidence of the prejudice resulting from the instruction here challenged. It is the conduct of the prosecutor, rather than its legal characterization, which determines prejudice. No rule of procedure nor appellate decision requires each item of prejudice which exploits a particular claim of error to be separately indexed and highlighted.

Respondent cites decisions rejecting this argument, quoting from one that this instruction only describes the weighing process as part of determining whether the prosecution has met its burden beyond a reasonable doubt. (Resp. Br., p. 93.)

The decisions cited, both California Supreme Court and Court of Appeal, all trace back to the Fifth District decision in *People v. Salas* (1975) 51 Cal.App.3d 151. There the Court of Appeal reasoned that "[a]ppellant's argument would have considerable weight if this instruction stood alone." (*Id.*, 51 Cal.App.3d at p. 156.) However, the court continued, CALJIC No. 2.90 accurately instructed on the burden of proof, and in *People v. Mohammed* (1922) 189 Cal. 429, 431, the Supreme Court had instructed that instructions are to be considered as a whole. Considering both No. 2.90 and this judicial rule of interpretation, " it is apparent that the jury was instructed to weigh the relative convincing force of the evidence (CALJIC No. 2.22) only as part of the process of determining whether the prosecution had met its fundamental burden of proving appellant's guilt beyond a reasonable doubt as required by CALJIC No. 2.90." (*People v. Salas*, 51 Cal.App.3d at pp. 156-157.)

This, and its adoption by this Court, would be decisive except that the law has changed since 1975. When dealing with a federal constitutional challenge to a particular instruction, the interpretation of the instruction

under analysis is not the interpretation adopted by a state's highest court, but whether there is a reasonable likelihood that the jury applied the challenged instruction to undermine the reasonable doubt standard of proof. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4 [112 S.Ct. 475, 116 L.E. 2d 385].)

In *Francis v. Franklin* (1985) 471 U.S. 307 the Supreme Court recognized that "[t]he jury charge taken as a whole might have explained the proper allocation of burdens with sufficient clarity that any ambiguity in the particular language challenged could not have been understood by a reasonable juror as shifting the burden of persuasion." (*Id.*, 471 U.S. at pp. 318-319.) The State argued that "sufficient clarifying language" existed in the instructions of that case. (*Ibid.*) As explained by the Supreme Court, however, "that instruction did no more than contradict the instruction in the immediately preceding sentence. A reasonable juror could easily have resolved the contradiction in the instruction by choosing to abide by the mandatory presumption and ignore the prohibition of presumption. Nothing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. **Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity."** (*Francis v. Franklin*, 471 U.S. at p. 322. [Emphasis added].)

Francis v. Franklin applies directly to CALJIC No. 2.22. Nothing in CALJIC No. 2.90 indicates that its application requires finding beyond a reasonable doubt each and every element of any count of conviction. Nothing in No. 2.90 or No. 2.22 states the predominance of No. 2.90 in each instruction intended to aid jurors in their evaluation of a particular type of evidence. While it may be apparent to reviewing courts that No. 2.22 instructs the jurors "to weigh the relative convincing force of the evidence . . . only as part of the process of determining whether the prosecution had met its fundamental burden of proving appellant's guilt beyond a reasonable doubt . . ." (*People v. Salas*, 51 Cal.App.3d at p. 157), nothing in the language of the instructions makes that apparent to the jurors. Language similar to CALJIC No. 1.01, which incorporates the admonition of *People v. Mohammed,* was assumed by the Supreme Court in *Francis v. Franklin*, but found inadequate when two instructions could be considered to conflict on a constitutional requirement. (471 U.S. at p. 318-319.)

3. CALJIC No. 2.27 - Single Witness.

The Opening Brief argued that this instruction could lead jurors to believe some burden rested upon Mr. Livingston to prove he was not guilty. (AOB, pp. 200-202.) Respondent cites decisions finding that No. 2.27, in conjunction with other instructions, would not have misled the jury, and

application of the instruction against the prosecution alone would accord defense witnesses an unwarranted aura of veracity. (Resp. Br., pp. 93-94.)

Respondent does not analyze the instructions in the instant case, nor do the cases cited go into detail as to the instructions given in the trial before them. Respondent's argument relies primarily upon *People v. Montiel* (1993) 5 Cal.4th 877, and *People v. Turner* (1990) 50 Cal.3d 668. Neither opinion's discussion of No. 2.27, with respect to other instructions, went beyond a perfunctory allusion to other unspecified instructions which "made clear that the prosecution had the burden of proving every element of any criminal offense beyond a reasonable doubt." (*People v. Montiel*, 5 Cal.4th at p. 941.) The opinion in *Turner* explained that "the jury was instructed at length that the People must prove all elements of each charged offense beyond a reasonable doubt, including defendant's specific mental state where relevant. The jury was expressly told that it must acquit defendant of any charge, and find the special circumstance untrue, if it had a reasonable doubt that all elements of the offense or special circumstance had been established." (*People v. Turner*, 50 Cal.3d at p. 697.)

In contradistinction, and as previously addressed, the instructions in this case lacked comparable information for the jurors that they must find beyond a reasonable doubt each and every element of any count of conviction. (See Argument IX.D.)

D. PREJUDICE FROM THESE INSTRUCTIONS AND REQUEST FOR THIS COURT TO REVIEW ITS PRECEDENTS UPHOLDING THESE INSTRUCTIONS.

While Respondent contests Appellant's arguments on these instructions, Respondent did not contest the prejudice resulting from these instructions if Appellant's arguments are accurate. Mr. Livingston requests this Court to revisit any of its precedents holding to the contrary.

XI

THE UNADJUDICATED CRIMES PRESENTED AS AGGRAVATION AND SO INSTRUCTED TO THE JURY LACKED SUFFICIENT EVIDENCE FOR ANY JURY TO FIND GUILT BEYOND A REASONABLE DOUBT, DENYING DUE PROCESS, THE RIGHT TO TRIAL BY JURY, AND A RELIABLE SENTENCING DETERMINATION, UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. SUMMARY OF ARGUMENTS AND CLAIMS WERE NOT FORFEITED.

As recited in the heading of this argument, Mr. Livingston argued in the Opening Brief that the unadjudicated crimes presented as aggravation during the sentencing phase of the trial lacked sufficient evidence for any juror to find beyond a reasonable doubt that he had committed any of the unadjudicated crimes.[13] (AOB, pp. 208-216.)

Before addressing this claim, Respondent chooses to argue that claims that the evidence was improperly admitted and that there was

---

[13] Though both the heading and the text in the AOB only claimed error regarding the unadjudicated crimes, Respondent devotes considerable time to the adjudicated offense from 1991 to which Mr. Livingston pled guilty. (Resp. Br. p. 100.) Though Respondent does not present the 1991 offense in the argument that the errors were harmless, the record does provide extenuating evidence that is relevant if that was Respondent's intent. Marine Shull was six feel tall and a muscular 200 pounds, injured with a Marine's "K-Bar" knife. (15 RT 2999-3000, 3002, 3007.) At that time Mr. Livingston was 17 years old, five-seven or five-eight, and weighed 140 or 145 pounds.

instructional error were forfeited for failure to raise these claims at trial.[14] (Resp. Br. pp. 99, 103-105.) Respondent then supports this assertion with argument and citations to decisions that find forfeiture when the admission of evidence is challenged on appeal unless there was objection at trial. (Resp. Br. pp. 103-105.)

While interesting, this argument does not pertain to Mr. Livingston's argument that the evidence presented is not sufficient to support a finding beyond a reasonable doubt of any of the asserted crimes, a requirement before any individual juror can consider them as aggravating matter. (*People v. Robertson* (1982) 33 Cal.3d 21, 53.) Each of Respondent's citations pertain to challenges to the admissibility of evidence, not its sufficiency to support finding guilt beyond a reasonable doubt.

Respondent quotes lengthily from *People v. Montiel* (1993) 5 Cal.4th 877, 928, fn. 23 (Resp. Br., pp. 103-104). In *Montiel*, however, this Court was addressing a defendant's claim that the evidence of earlier uncharged violence "was inadmissible." (*People v. Montiel*, 5 Cal.4th at p. 928.)

---

[14] No claim of instructional error was raised in this section of the AOB. The lack of instructions to the jury explaining the elements of any criminal offense each individual juror had to find beyond a reasonable doubt before that juror could consider the evidence as aggravation was pointed out. (AOB, p. 212.) Giving those instructions would have helped the jurors see that the evidence did not support a guilty finding of any criminal offense. But the failure of the evidence to be sufficient remains whether or not instructions on elements were given.

In *People v. Carpenter* (1999) 21 Cal.4th 1016, 1059 (Resp. Br. p. 104) the real issue was whether evidence of uncharged crimes entered during the guilt phase could be properly considered on sentencing without being reentered.

The language in *People v. Hamilton* (2009) 45 Cal.4th 863, 933-934 (Resp. Br. p. 104), is ambiguous, but the citations of authority upon which it relies makes clear that again the issue addressed by this Court was the admission of evidence, not its sufficiency to support a guilty finding. Those citations were Evidence Code, section 353, and *People v. Benavides* (2005) 35 Cal.4th 69, 92. Section 353 forbids setting aside a judgment "by reason of the erroneous admission of evidence unless" an objection, motion to exclude or to strike the evidence, based upon the specific ground, was made at trial. In *Benavides*, this Court was again addressing a claim challenging the admission of evidence, unpreserved by an objection at trial.

Finally, as stated in the words of this Court in *People v. Lewis* (2006) 39 Cal.4th 970, 1052 (Resp. Br. p. 104), "Oliver challenges the admission of certain aggravating evidence under section 190.3, factor (b). . . ."

Nowhere does Respondent present authority for the proposition that failure to contest the admission of evidence represents a concession that the evidence supports a finding of guilty beyond a reasonable doubt of uncharged crimes. Nor is it likely such authority could be found. Such a

proposition reduces the prosecution's burden of proof beyond a reasonable doubt to a mere burden of coming forward with some evidence.

Nor did the defense accept at trial that the evidence supported a finding beyond a reasonable doubt. On both the prison fist fights and the Weatherspoon incident, the defense counsel in argument questioned what crimes, if any, were proven beyond a reasonable doubt. (16 RT 3291, 3292.)

B. THE WEATHERSPOON ASSAULT.

In the Opening Brief, Mr. Livingston argued that the evidence admitted of the Weatherspoon assault was not sufficient to support a finding beyond a reasonable doubt that Mr. Livingston committed the assault. (AOB, pp. 214-216.) In line with its forfeiture argument, Respondent claims that admission of the evidence under section 190.3, factor (b), resolves all claims that the evidence was insufficient to prove guilt beyond a reasonable doubt. (Resp. Br. p. 105.) Again, however, the claim of error is not that admission of the evidence was error, but that the evidence is not sufficient for any individual juror to find Mr. Livingston guilty beyond a reasonable doubt of committing the assault upon Mr. Weatherspoon.

The issue is not whether any assault occurred, but whether Mr. Livingston was the perpetrator. To support the conclusion that Mr. Livingston is the perpetrator, Respondent alters the evidence from that

appearing in the Reporter's Transcript in a way to point directly toward Mr. Livingston. To quote Respondent's Brief "Deputy Salazar testified that Weatherspoon described his attacker as the 'White guy' in 'Charley 11.' . . . . Weatherspoon said the 'White Crip' cut his throat with a razor blade." (Resp. Br. p. 107.)

Comparison with the actual transcript discloses the liberties Respondent has taken with the record. After a brief interlude in which the court referred to an earlier overruling of an objection to that which Deputy Salazar was about to testify, the Deputy continued:

"INMATE WEATHERSPOON, WHO WAS THE VICTIM AT THIS TIME, HE -- HE SAID IT WAS THE WHITE GUY. HE'S IN CHARLEY 11. HE'S IN CHARLEY 11. WE SAID, "WHO DID THIS TO YOU?" HE SAID, "WHITE GUY. A WHITE CRIP." SO MY PARTNER THEN ASKED HIM, YOU KNOW, WHAT DID HE DO IT WITH? HE SAID HE DID IT WITH A RAZOR BLADE. HE CUT MY THROAT." (15 RT 2948-2949.)

By changing the use of quotation marks from that appearing in the Reporter's Transcript, Respondent's narrative implies that Mr. Weatherspoon identified his assailant as "the white guy," "the white Crip," in "Charley 11." The reporter on the scene, however, taking down the testimony verbatim as the jurors were listening to it, placed quotation marks for Mr. Weatherspoon's words only around "white guy. A white Crip." Deputy Salazar knew a white Crip, Mr. Livingston, was the only white inmate of four inmates in cell C-11. Deputy Salazar transformed a "white

guy. A white Crip" into **the** white Crip. Deputy Salazar only knew of one white Crip, Mr. Livingston in cell C-11. Respondent's use of quotation marks changes the meaning of the testimony to provide evidence directly linking Mr. Livingston to the attack, which evidence was not present during the actual trial.

At trial Mr. Weatherspoon appeared, but did not testify. No evidence of any lineup or other identification of the perpetrator by Mr. Weatherspoon was entered into evidence. No forensic evidence, either blood tests, DNA, or fingerprints were introduced. The only evidence linking Mr. Livingston as the perpetrator is Respondent's adjustment of quotation marks and use of "the" rather than "a" in altering the record. Deputy Salazar, not a witness to the assault, identified Mr. Livingston as the perpetrator. Mr. Livingston was not identified by either Mr. Weatherspoon or by any eyewitness to the assault.

Consequently, we argue that there was not sufficient evidence to support a finding beyond a reasonable doubt that Mr. Livingston committed the assault upon Mr. Weatherspoon.

C. THE PRISON FIST FIGHTS.

In the Opening Brief, Mr. Livingston described the evidence presented of four fist fights over seven years in which Mr. Livingston has been a participant, and for which, entries had been made in his prison

record. (AOB, pp. 210-214.) Evidence entered under section 190.3, factor (b), must show conduct that is "criminal in fact" to be "valid penalty evidence." (*People v. Lancaster* (2007) 41 Cal.4th 50, 93 [citations omitted].) Whether any of these amounted to a criminal offense, as opposed to merely violating prison regulations, was not entered into evidence.

Respondent summarizes these incidents in a paragraph at Respondent's Brief, page 102. Other than introducing the term "conviction," which does not appear in the reporter's transcript, and which is not supported by any court documents showing a conviction, Respondent makes no further comment. From the lack of comment, it is assumed that Respondent does not disagree with our argument as to these incidents.

D. THE ERRORS WERE NOT HARMLESS.

Respondent argues that the underlying offenses of which Mr. Livingston was convicted would have so convinced the jurors that Mr. Livingston was a brutal man that the aggravating evidence could not have enhanced that perception still more. (Resp. Br. p. 110.)

Respondent does not offer any explanation why, if the choice between death or life without parole was so clearcut, the jurors required four days of deliberation. (16 RT 3322-3329.) Taking evidence, arguments and instructions on sentence only occupied three days. (24 CT 6345-6350.)

Nor does Respondent explain why the prosecutor, with such an easy case, devoted three pages of his opening statement in the penalty phase to the assault upon Mr. Weatherspoon (15 RT 2926-2928), followed up with reference to Mr. Livingston's fights in prison. (*Ibid.*) In his closing argument, the prosecutor again discussed whether Mr. Livingston was an evil man and again referred to Mr. Weatherspoon's injuries. (16 RT 3283.) The prosecutor did not appear quite so confident about the sentence as does the Respondent now defending it.

XII

THE TRIAL COURT'S DENIAL OF THE POSSIBILITY OF DEADLOCK WHEN INSTRUCTING THE JURORS ON PENALTY DEPRIVED MR. LIVINGSTON OF DUE PROCESS AND OF EQUAL PROTECTION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND VIOLATED THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. SUMMARY OF ARGUMENTS.

The guilt phase instructions informed the jurors that "each of you must consider the evidence for the purpose of reaching a verdict, **if you can do so**." (CALJIC No. 17.40, 14 RT 2609; 24 CT 6293.) In the penalty phase instructions CALJIC No. 17.40 was not repeated, and the jurors were instructed to disregard the unrepeated instructions from the guilt phase. (16 RT 3265; 24 CT 6373.) Along with other instructions discussed in the Opening Brief, this change in instructions deprived Mr. Livingston of the full benefit of each juror's individual consideration of the evidence when determining penalty. (AOB, pp. 219-230.)

Respondent argues (1) this argument was forfeited by trial counsel's failure to object at trial or request that CALJIC No. 17.40 be repeated at sentencing (Resp. Br. pp. 111-113); (2) (a) that this Court has considered and rejected a similar argument (Resp. Br. pp. 113-115), and (b) that this claim of error is not similar to an "Allen" charge (Resp. Br. pp. 115-117);

and (3) any error was harmless under the *Watson* standard. (Resp. Br. pp. 117-118.) Each contention will be addressed in turn.

It should be noted that while Respondent claims the argument is forfeited, or that the error is harmless because other instructions given at the penalty phase contained essentially the same information, Respondent never denies that the principles expressed in CALJIC No. 17.40 should govern the jury during penalty deliberations.

B. THE ARGUMENT HAS NOT BEEN FORFEITED.

To support the proposition that trial counsel's failure to request that CALJIC No. 17.40 be repeated in the penalty phase forfeits any argument that its omission was error, Respondent cites, *inter alia*, *People v. Ervine* (2009) 47 Cal.4th 745, 804, and *People v. Wilson* (2008) 43 Cal.4th 1, 30. (Resp. Br. p. 112.) *Ervine* relies upon *Wilson*. The facts of both cases are similar with regard to the omission of CALJIC No. 17.40.

In both cases, as here, CALJIC No. 8.84.1 was read to the jurors, including the admonition to "[d]isregard all other instructions given to you in other phases of this trial." (*Ervine*, 47 Cal.4th at p. 803; *Wilson*, 43 Cal. 4th at p. 27.) The Use Note which follows CALJIC No. 8.84.1 reminds trial courts to reinstruct the jurors with CALJIC Nos. 1.01 through 8.88. In *Ervine* and *Wilson*, however, the trial courts did not reinstruct the jurors with those instructions. (*Ervine*, *supra*; *Wilson*, 43 Cal.4th at p. 28.)

On appeal in both cases, the defendants argued that the trial court's failure to give the omitted instructions, as well as No. 17.40 and other instructions, was prejudicial error. (*Ervine*, *supra*; *Wilson*, *supra*.)

In *Ervine* this Court found, under the facts of that case, that it was "dubious" that "the jury was unaware that it should apply the written instructions it had been given from the guilt phase...." (*Ervine*, 47 Cal.4th at p. 803.) The Court pointed out evidence in the record from which the jurors would likely have understood that the instructions from the guilt phase remained relevant to their penalty deliberations. Shortly before the "disregard" sentence in No. 8.84.1, for example, the jurors in *Ervine* had also been instructed to "'disregard any jury instruction given to you in the guilt determination of the trial *which conflicts with these princip [les]*'...." (*Ibid.* [Emphasis added.]) The Court also cited another instruction which referred the jurors to an instruction given them during the guilt phase. Additionally, the Court pointed out the jurors were given a written set of the guilt phase instructions for use during their deliberation on sentence. (*Ervine*, 47 Cal.4th at p. 804.) Finally, citing *Wilson*, 43 Cal. 4th at p. 30, the Court added that defendant had forfeited any claim by failing to request the instructions at trial. (*People v. Ervine*, 47 Cal.4th at p. 804.)

In Mr. Livingston's case, in contrast, no earlier or later instruction modified the intent of the "disregard" admonition from CALJIC No. 8.84.1. Nor did other instructions refer to guilt phase instructions the jurors were otherwise told to disregard. Nor does it appear from Mr. Livingston's record that the jurors were given a set of the instructions from the guilt phase to use during their penalty deliberations.

In *Wilson*, this Court found that the jurors had, in fact, been instructed to disregard the guilt phase instructions but analyzed the evidence in the penalty phase and concluded the defendant was not prejudiced by the omission of the evidentiary instructions. (*Wilson*, 43 Cal. 4th at pp. 28-30.) This Court rejected the defendant's claim of error with regard to the failure to repeat CALJIC Nos. 17.30 through 17.50 because (1) the Use Note following CALJIC No. 8.84.1 does not refer to these instructions, (2) the defendant provided no authority that the trial court had a sua sponte duty to instruct with them, (3) the defendant did not argue that their omission prejudiced him. Consequently, the Court held "by failing to request such instructions at trial, defendant has waived this claim." (*Wilson*, 43 Cal.4th at p. 30.)

Much more similar in its facts to Mr. Livingston's case, is this Court's decision in *People v. Moon* (2005) 37 Cal.4th 1. Without objection of the defense counsel and at the request of the prosecutor, the guilt phase

instructions were collected from the jurors. Additionally, at defense counsel's request, the trial court instructed the jurors not to look at the guilt phase instructions if they had taken them home. Subsequently, however, the trial court failed to instruct the jury regarding the consideration and evaluation of evidence during the penalty phase. (*Moon*, 37 Cal.4th at pp. 35-36.) This Court rejected respondent's argument that defense counsel had invited the error. "Because counsel did not specifically ask the trial court to refrain from reinstructing the jury with the applicable guilt phase instructions," the Court wrote "counsel's actions did not absolve the trial court of its obligation under the law to instruct the jury on the 'general principles of law that [were] closely and openly connected to the facts and that [were] necessary for the jury's understanding of the case.'" (*Moon*, 37 Cal.4th at p. 37 [citation omitted].) *Moon* did not involve CALJIC No. 17.40, but the principle that the error in omitting the applicable guilt phase instructions from the penalty phase is equally applicable here. The instructional error in this case was not forfeited.

The error affected Mr. Livingston's substantial rights. (Penal Code, § 1259.) Mr. Livingston's Opening Brief provided ample authority and argument that once the jury had been instructed with CALJIC No. 17.40 with its recognition of the possibility of deadlock, the omission of that instruction accompanied by the express instruction to disregard any guilt

phase instructions not repeated in the instructions on sentence, prejudiced Mr. Livingston. An instructional omission, reinforced by an express instruction to disregard the instruction from an earlier phase, and which can influence the outcome of the trial, certainly affects Mr. Livingston substantial rights; therefore, this issue is preserved for review. (Penal Code, § 1259 ["The appellate court may also review any instruction given, refused or ***modified***, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."].)

Respondent's other authorities for forfeiture also may be distinguished. In *People v. Riggs* (2008) 44 Cal.4th 248, 292, fn. 21 (Resp. Br. p. 112), the defendant claimed for the first time on appeal that the trial court erred in not sua sponte fashioning an instruction to ameliorate prejudice from the showing of a televised reconstruction of the charged crime to the jury. This Court held that claim was forfeited for failure to request it at trial, and also found that any error was harmless. Mr. Livingston, however, seeks review not of an instruction never given to the jurors, but of the effect of an instruction given to the jurors to consider during the guilt phase, but expressly denied from their consideration during the penalty phase.

People v. Boyer (2006) 38 Cal.4th 412, 465, cited at Respondent's Brief, page 112, is distinguishable for similar reasons. On appeal, Mr.

Boyer claimed error for the trial court's failure to instruct the jurors per CALJIC No. 2.10 on the proper use of defendant's statements to defense experts. No request for that instruction had been made at trial, and California law required the instruction only upon request. Hence the argument was forfeited. (*Boyer*, 38 Cal.4th at p. 465.) Again, Mr. Livingston seeks review of an instruction given to the jurors in the guilt phase, but expressly removed from their consideration during the sentencing phase, to the detriment of his substantial rights.

Respondent also claims forfeiture with respect to Special Instruction E, requested by trial defense counsel and used as an example in the Opening Brief, page 220.[15] Mr. Livingston did not argue in his Opening Brief that Special Instruction E was error, however, just as he did not claim error in CALJIC Nos. 8.84 and 8.88, also quoted on the same page. Rather, the point of those references was that those instructions illustrated the impact of the omission of CALJIC No. 17.40 from the instructions read to the jurors, and the deletion of reference to the responsibilities of the individual juror to counterbalance other instructions, such as Nos. 8.84, 8.88, and Special Instruction E, which only referred to the jurors as a corporate body. The doctrine of invited error does not apply in that context.

---

[15] Respondent notes the correct citation in the Clerk's Transcript is page 6381. (Resp. Br. p. 112, fn. 40.)

Finally, Respondent seizes upon the analogy to the effects of the "Allen charge" (AOB, p. 221) to argue again that failure to object to the instruction forfeits the argument. (Resp. B. p. 112.) Whether failure to object to an "Allen charge" would forfeit an appellate argument is not a question that needs be resolved in this case, since the analogy in the Opening brief was to the effects of an "Allen charge" rather than the language itself.

Moreover, the authority Respondent cites for its forfeiture argument does not resolve the question itself. In *People v. Neufer* (1994) 30 Cal.App. 4th 244, 254, the trial court had sent the jury back for more deliberations when, "after slightly more than one day of deliberation," a jury note indicated they were hung. (30 Cal.App.4th at p. 253.) In denying appellant's claim the subsequent guilty verdict had been coerced, the court of appeal first said the claim was waived by failure to object. (*Neufer*, 30 Cal.App.4th at p. 254.) As authority for waiver, the court of appeal cited Evidence Code, section 353, and *People v. Saunders* (1993) 5 Cal.4th 580, 589-591.

Section 353, however, only addresses failure to object on evidentiary matters, not matters of procedure. In *Saunders*, forfeiture was found when the defendant failed to call the trial court's attention to the statutory error in discharging a jury before it had determined the truth of the defendant's

prior conviction. (*Ibid.*) Neither *Neufer* nor *Saunders* involved a claim of forfeiture for not objecting to instructional error, a subject within the scope of Penal Code, section 1259.

C. EXPRESS REMOVAL OF THE POSSIBILITY OF DEADLOCK UNDERMINES THE CONSTITUTIONAL REQUIREMENT FOR EACH JUROR TO MAKE AN INDIVIDUALIZED DETERMINATION AS TO PENALTY.

Respondent relies extensively upon this Court's decision in *People v. Hawthorne* (1992) 4 Cal.4th 43 (Resp. Br. pp. 113-114) in arguing against this claim of error. Respondent's argument, however, ignores the difference between the instructions given by the trial court in *Hawthorne* and by the trial court in Mr. Livingston's case. These instructional differences undermine *Hawthorne's* utility as a precedent for the instant case.

In *Hawthorne*, as in Mr. Livingston's case, CALJIC No. 17.40 was not repeated in the penalty phase after it had been presented in the guilt phase. (*People v. Hawthorne*, 4 Cal.4th at p. 74.) In its immediately preceding discussion of the claim of error from the failure of the *Hawthorne* trial court's failure to repeat in the penalty phase several instructions on the evaluation of evidence, the *Hawthorne* court explained it was "unpersuaded that the lapse of time between the guilt and penalty phases impaired the jurors' memories or otherwise undermined the reliability of their deliberations." (*Ibid.*) This sentiment continued into this

Court's discussion of the nonrepetition of CALJIC No. 17.40. (*Ibid.*) In both discussions, the Court clearly assumed tacitly that the mere failure to repeat an instruction in the penalty phase need not, and will not, necessarily be interpreted by the jurors as a direction to disregard it.

In Mr. Livingston's case, however, the jurors were also instructed with CALJIC No. 8.84.1 with its express admonition: "Disregard all other instructions given to you in other phases of this trial." (14 RT 2365.) In Mr. Livingston's case, therefore, unlike *Hawthorne*, the jury was faced not with a mere failure to repeat, but an express admonition to disregard unrepeated instructions from earlier in the trial.

The jurors in Mr. Livingston's case also lacked the advice given in *Hawthorne* that "**each juror** is free to assign whatever moral or sympathetic value that the juror deems appropriate...." (*Ibid.* [emphasis added]) The equivalent instruction to Mr. Livingston's jury lacked the emphasis upon the individual juror's determination. (14 RT 3274.)

There are some references to the jurors as individuals in Mr. Livingston's penalty phase instructions.

> "Each of you may consider as a mitigating factor any lingering or residual doubt that you may have as to the guilt of the defendant."

(From Special Instruction C, 14 RT 3269; 24 CT 6379.)

> "To determine the penalty to be imposed, you must assume that the penalty that each of you choose will in fact be carried out."

(From Special Instruction L, 14 RT 3272; 24 CT 6386.)

> "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole."

(From CALJIC No. 8.88, 14 RT 3274; 24 CT 6389-6390.)

While these instructions do imply individualized determination by the jurors, unlike CALJIC No. 17.40 given to the jurors during the guilt phase, they do not recognize any possibility of deadlock. Nothing in the penalty phase instructions implies that the the individual juror should carry their individual determination to the point of preventing consensus unless the individual juror has been persuaded to adopt the majority's viewpoint.

Respondent's quotations from the instructions (Resp. Br. pp. 114-115), except for the "lingering doubt" instruction repeated above, are all phrased in the corporate "you" applying to the jury as a corporate body. Lacking the reference to "each of you" or similar individualized reference, they are of no assistance to the individual juror deciding how far to follow his own conscience. This is particularly true after the juror has been instructed by the court that deadlock is not longer a legal alternative.

During the deliberations in the guilt phase, the individual responsibility of each juror was officially recognized in CALJIC No. 17.40 recognizing deadlock as an alternative. That official recognition sufficed to convey to each juror that his or her conscience prevailed over any

insistence of the majority upon unanimity. Once that official recognition was not only removed, but removal accompanied by an admonition from the judge not to consider in penalty deliberations that and other nonrepeated instructions, an individual juror could reasonably conclude that deadlock was no longer a legally acceptable outcome. At some point, any dissenting jurors would be expected to abandon their conscience and follow the majority.

Respondent argues that there is no duty to provide repetitive instructions. (Resp. Br. p. 115, citing *People v. Mincey* (1992) 2 Cal.4th 408, 437.) The instant argument, however, concerns not repetitive instructions, but the removal and express admonition to disregard CALJIC No. 17.40, recognizing the possibility of deadlock on merits deliberations while removing that possibility from sentence deliberations. No remaining instruction recognized deadlock as an alternative.

To the analogy to the prohibited "*Allen* charge" (AOB, P. 221, 223-224), Respondent argues that no *Allen* charge was given, and the prerequisite deadlock never developed. (Resp. Br. pp. 115-117.)

Among the factors concerning this Court in *People v. Gainer* (1977) 19 Cal.3d 835 was the insertion of "an extraneous factor into the[] [jurors'] deliberations, i.e., the position of the majority of the jurors at the moment." (*People v. Gainer*, 19 Cal.3d at p. 848.) The insertion of such

"illegitimate considerations into the jury debates" would be objectionable even it were demonstrated to be without appreciable effect upon the dissenters. (*Id.*, 19 Cal.3d at p. 849.)

This same problem appears in the instructions in Mr. Livingston's case. During their guilt phase deliberations, the jurors were aware that the possibility of deadlock was legally recognized because of CALJIC No. 17.40. There was no "illegitimate" factor compelling agreement during those deliberations. The removal, and express admonition to disregard, the possibility of deadlock during penalty deliberations introduced that awareness of majority versus minority absent during the earlier deliberations. That no deadlock was ever reported to the judge may indicate nothing other than the change in governing rules for the sentencing phase was effective. The extraneous factor worked.

D. DENIAL OF EQUAL PROTECTION.

The Opening Brief also argued that the court's express instruction to disregard CALJIC No. 17.40 among other guilt phase instructions was also a denial of equal protection. If codefendant Sanders had been proceeding to the penalty phase as well, the applicable instruction, CALJIC No. 8.88, would have recognized the possibility of deadlock. Thus, the instructions would differ in recognizing or not recognizing deadlock as an alternative, depending upon whether the sentence jury was determining the fate of a

single defendant or multiple defendants. No state interest justifies this different treatment.

Since Respondent did not address this argument, Mr. Livingston will stand on its presentation in the Opening Brief.

E. THIS DENIAL OF CONSTITUTIONAL RIGHTS REQUIRES REVERSAL OF THE PENALTY AND REMAND FOR A NEW PENALTY HEARING.

The Opening Brief argued that the right denied was an error in the trial mechanism which defied analysis for harmless error; it was structural. Withdrawing legal recognition of the possibility of a deadlock introduced extraneous pressure to accede to the majority. Since the lack of deadlock can mean either that the extraneous pressure was successful or that no deadlock would have occurred in any event, there is no way to analyze for harmless error. Reversal is required. (*Arizona v. Fulminante* (1991) 499 US. 279, 309 [111 S.Ct. 1246, 113 L.Ed.2d 302]; *United States v. Noushfar* (9th Cir. 1996) 78 F.3d 1442, 1445.) The fact that the jury required four days to determine the penalty, one more day than was required to introduce the evidence, indicates that the penalty decision was not as easy or inevitable as Respondent alleges. (Resp. Br. p. 117.)

Even if the error is not regarded as structural, however, Respondent errs in arguing the proper test is the *Watson* standard. (*Ibid.*) This Court has ruled that "[u]nder the state standard, an error at the penalty phase of a

capital trial is prejudicial if 'there is a reasonable possibility the error affected the verdict.' [Citation omitted.] This test is effectively the same as that under *Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, which asks whether the error is harmless beyond a reasonable doubt. [Citation deleted.] While we focus on the "reasonable possibility" test, our conclusion applies equally to *Chapman*'s "reasonable doubt" test." (*People v. Wilson* (2008) 43 Cal.4th 1, 28 [error claimed in trial court's failure to reinstruct the jury at the penalty phase with applicable guilt phase instructions, including CALJIC No. 17.40].)

XIII

BY INSTRUCTING THE JURY NOT TO CONSIDER THE IMPACT OF MR. LIVINGSTON'S SENTENCE UPON HIS FAMILY, THE TRIAL COURT VIOLATED MR. LIVINGSTON'S RIGHTS UNDER THE EIGHTH AMENDMENT AND DENIED HIM DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS UNDER CALIFORNIA LAW.

A. SUMMARY OF ARGUMENTS.

The Opening Brief highlighted that portion of CALJIC No. 8.85 which, inter alia, instructed the jurors that "Sympathy for the family of the defendant is not a matter that you may consider in mitigation." This was contrasted with the evidence and argument concerning the impact upon the families of those who died. Both Eighth Amendment parity and Fourteenth Amendment Due Process require that when victim impact evidence is entered for the jury's consideration, jurors should also be permitted to consider sentence impact evidence. Under California law, sentence impact evidence concerning the effect upon a defendant's family may be considered in noncapital cases. To deny similar consideration for capital defendants denies equal protection under the Fourteenth Amendment. (AOB, pp. 231-259.)

Respondent argues this claim is forfeited, has been rejected by this Court in its decisions, and, if error, was harmless. (Resp. Br. pp. 118-121.)

Respondent does not claim that other instructions corrected or compensated for the challenged language in No. 8.85.

Each contention of Respondent will be considered in turn.

B. THE ARGUMENT IS NOT FORFEITED.

Contrary to Respondent's argument, the error was not invited merely by defense counsel's entering no objection to the instruction. (Resp. Br. p. 118.) When counsel has not specifically asked for a particular instruction or asked the court to refrain from instructing on it, the trial court is not absolved from its responsibility to instruct accurately on the general principles of law closely and openly connected to the facts in the case. (*People v. Moon* (2005) 37 Cal.4th 1, 37.)

Nor has the claim been forfeited by failure to object at trial. The argument on appeal is that the instruction violated the Eighth Amendment, and denied due process and equal protection under the Fourteenth Amendment. Under the law of California, instructional error that affects substantial rights may be reviewed in the absence of an objection. (Penal Code, § 1259). Furthermore, constitutional rights are substantial rights for which no trial objection is required. (§ 1259; *People v. Cleveland* (2004) 32 Cal.4th 704, 750.)

The court of appeal decisions cited by Respondent do not require a contrary conclusion. In *People v. Campos* (2007) 156 Cal.App.4th 1228,

1236 (Resp. Br. p. 119), the instructional challenge on appeal went only to the clarity or completeness of instructions otherwise correct in law and responsive to the evidence. In *People v. Gonzalez* (2002) 99 Cal.App.4th 475, 483 (Resp. Br. p. 119), the instructional challenge was found forfeited on the same grounds as in *Campos*.

Mr. Livingston argues that CALJIC No. 8.85 is erroneous under the United States Constitution and Penal Code, section 190.3.

C. PRIOR DECISIONS OF THIS COURT.

Respondent relies upon *People v. Bemore* (2000) 22 Cal.4th 809, 856 (quoted from at Resp. Br. pp. 119-120), which in turn relies upon *People v. Ochoa* (1998) 19 Cal.4th 353, 454-456. The two cases differ in that the *Bemore* jury was instructed not to consider sympathy for the defendant's family or friends (*Bemore*, *supra*, 22 Cal.4th at p. 855) while no prohibitive instruction was given in *Ochoa*, but the trial court refused a defense-proffered instruction inviting the jury to consider in mitigation sympathy for the defendant's family. (*Ochoa*, *supra*, 19 Cal.4th at p. 456.)

The opinion in *Ochoa*, after quoting from section 190.3 that evidence may be presented "as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, ..." declared "what is ultimately relevant is a defendant's background and character--not the distress of his or her family." (*People v. Ochoa*, *supra*, 19 Cal.4th at p.

456.) In terms of the Eighth Amendment and due process clause of the Fourteenth Amendment, the Court supported this conclusion by quoting from *Penry v. Lynaugh* (1989) 492 U.S. 302, 318, that "[A] State [may] not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty." (*Ochoa*, *supra*, 19 Cal. 4th at p. 456.)

At issue in *Penry* was whether the trial court's instructions precluded the jurors from considering in mitigation evidence of the defendant's organic brain damage and mental retardation. No issue was raised as to whether the jurors could consider the impact of Mr. Penry's execution upon his family or friends. As this Court has frequently noted, "it is axiomatic that cases are not authority for propositions not considered. [Citations omitted]." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.)

At issue in *Ochoa* was this Court's determination of relevance, since section 190.3 explicitly does not limit the matters admissible on aggravation, mitigation, and sentence to those listed. Other matters held proper for the jurors' consideration, even though not included in the list of section 190.3, include future dangerousness. (*People v. Thomas* (2011) 52 Cal.4th 336, 364.) Moreover, future dangerousness may be considered not

just in terms of the character of the defendant, but also in terms of the impact upon the surviving families of any future victims. (*People v. Boyette* (2002) 29 Cal.4th 381, 446-447.)

When permitting jury consideration of the possible families of possible future victims if a defendant is sentenced to life, in the event of crimes not yet committed, certainly the very clear impact upon the existing family and friends of Mr. Livingston is also within the bounds of relevance of section 190.3. Consequently, CALJIC No. 8.85 is erroneous in directing the jurors not to consider sympathy for them.

Of the more recent decisions of this Court, the most directly pertaining to the instant issue is *People v. Bennett* (2009) 45 Cal.4th 577, 602, where the Court explains its reasons for rejecting use of sections 1170 and 1203 when interpreting "mitigation" from section 190.3. The opinion in *Bennett* explains that section 190.3 "identifies examples of matters relevant to aggravation, mitigation, and sentence" even though section 190.3 also states relevant matters are not limited to those examples. Though unstated, the implication is that any unstated matters, to be relevant, must be within whatever boundaries may be inferred by the examples given.

Why that limitation must be placed upon mitigation to be considered by the jurors is not explained. The United States Supreme Court has

explained that "the jury must be given an effective vehicle with which to weigh mitigating evidence so long as the defendant has met a 'low threshold for relevance,' which is satisfied by 'evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" (*Smith v. Texas* (2004) 543 U.S. 37, 43 [125 S.Ct. 400, 160 L.Ed.2d 303] [Citations omitted].)

This judicial limitation of section 190.3 is inconsistent with the reasoning of *Smith v. Texas*.

D. THE ERROR IS NOT HARMLESS.

Mr. Livingston stands by the argument for vacation of the sentence advanced in the Opening Brief, pages 254-259.

XIV

THE STANDARD CALJIC No. 8.88, AS GIVEN BY THE TRIAL COURT, CONTRASTS MORAL AND SYMPATHETIC VALUES, ALIGNING "MORAL" WITH AGGRAVATING FACTORS. THIS DENIED MR. LIVINGSTON DUE PROCESS, THE RIGHT TO A JURY TRIAL, AND A RELIABLE SENTENCING DETERMINATION UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. SUMMARY OF ARGUMENTS.

The Opening Brief explained that the disjunctive "or" separating "moral" and "sympathetic" in CALJIC No. 8.88 informed jurors that the adjectives did not overlap but were exclusive alternatives. Because "sympathy" is associated exclusively with mitigation, when "moral" is presented as a contrasting adjective, it can be associated only with aggravating factors. But associating "moral" only with aggravating factors is inconsistent with past decisions of this Court and of the United States Supreme Court.

Respondent argues that (1) this argument is forfeited as invited error or for lack of objection (Resp. Br. p. 122); (2) the argument is meritless because No. 8.88 has been repeatedly approved by this Court (Resp. Br. pp. 122-123) and that the jury was not confused (Resp. Br. p. 123), and (3) any error was harmless. (Resp. Br. p. 124). Each contention will be addressed in turn.

B. THE CLAIM IS NOT FORFEITED.

Respondent's argument that the error was forfeited is defeated by statutory law. "The appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (Pen. Code, § 1259.) Respondent points to no evidence in the record that defense counsel invited error by requesting the challenged words to be included in CALJIC No. 8.88. Lacking such a request, the trial court is not absolved from its responsibility to instruct accurately on the general principles of law closely and openly connected to the facts of the case. (*People v. Moon* (2005) 37 Cal.4th 1, 37.) Unlike *People v. Katzman* (1968) 258 Cal.App.2d 777, 792 (Resp. Br. p. 122), No. 8.88 was proffered by the prosecutor (15 RT 2887), and is a general principle instruction, not made necessary solely by evidentiary questions or objections raised by defense counsel.

Counsel once failed to object when the court asked whether counsel had any objections to the instructions. (15 RT 2887.) On the second occasion referred to by Respondent (16 RT 3242) the court asked whether counsel had any objections to the modifications the court had made in the standard instruction. Since the words challenged are part of the standard

CALJIC No. 8.88 and not a modification by the trial court, the query on that instance did not apply to the language now challenged.

Respondent attempts to avoid the clear language of section 1259 by characterizing Appellant's claim of error as merely arguing the challenged language from No. 8.88 was confusing and required clarification, and that failure to object forfeits such a claim. (Resp. Br. p. 122.) Contrary to the decisions cited by Respondent (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1236, and *People v. Gonzalez* (2002) 99 Cal.App.4th 475, 483) (Resp. Br. p. 122), Mr. Livingston argues that the language challenged from No. 8.88 is wrong under the United States Constitution and inconsistent with the past decisions of this Court and the United States Supreme Court. Thus, the argument affects Mr. Livingston's substantial rights under Penal Code, section 1259. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1315, fn. 43.)

C. THE CLAIM HAS MERIT.

Respondent correctly observes that this Court has sustained CALJIC No. 8.88 against many challenges. (Resp. Br. pp. 122-123.) None of the decisions cited by Respondent, and none found by Appellant, however,

raise the same challenge as this argument.[16] This is apparently a case of first impression.

The Opening Brief argued that the disjunctive "or" casts "moral" and "sympathetic" as exclusive alternatives, while decisions of this Court and of the United States Supreme Court, to the contrary, do not associate "moral" exclusively with aggravating evidence. (AOB, pp. 262-267.) Respondent argues that one or the other or both of these claims must be rejected because the jury was not confused. (Resp. Br. p. 123.) This is because jurors do not parse instructions "in the same way that lawyers

---

[16] In *People v. Butler* (2009) 46 Cal.4th 847, 874 (Resp. Br. pp. 122-123) this Court held that No. 8.88 "properly advised the jury of its responsibility to make an individualized moral assessment of the appropriate penalty."

In *People v. Lewis* (2009) 46 Cal.4th 1255, 1316 (Resp. Br. p. 123) this Court described the weighing process under No. 8.88 as "merely a metaphor" for the juror's personal determination that death is the appropriate penalty.

In *People v. Page* (2008) 44 Cal.4th 1, 56 (Resp. Br. p. 123), against a challenge that the language of the instruction was impermissibly vague and ambiguous, this Court held the instructions as a whole adequately conveyed to the jury "the appropriate manner of performing its task...."

In *People v. Smith* (2005) 35 Cal.4th 334, 370-371 (Resp. Br. p. 123) this Court rejected defense challenges (1) the language of No. 8.88 was unconstitutionally vague, (2) No. 8.88 referred to a death penalty as "warranted" rather than "appropriate," (3) No. 8.88 failed to convey to the jury that a life sentence is mandatory if aggravation does not outweigh mitigation, (4) No. 8.88 implied death is the only appropriate sentence if aggravation outweighs mitigation, and (5) No. 8.88 failed to inform the jury of the burden of persuasion.

None of these cases raised the challenge Mr. Livingston does.

might." (Resp. Br. pp. 123-124, quoting *Boyde v. California* (1990) 494 U.S. 370, 380-381 [110 S.Ct. 1190, 108 L.Ed.2d 316].)

While jurors are not expected to parse language in the same manner as either a lawyer or a lexicographer, there must be some basis for understanding how jurors will interpret the language of instructions given them. Respondent offers no alternative to the dictionary meanings offered in the Opening Brief other than speculation that jurors will not interpret the instructions in accordance with the common use of the language, but only in a way favorable to upholding the instruction.

D. THIS ERROR REQUIRES REVERSAL OF THE SENTENCE.

Appellant stands by the argument presented in the Opening Brief, pages 267 through 271.

XV

OMNIBUS ARGUMENT: CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

As Respondent points out (Resp. Br. pp. 124-127), and as Appellant observed in the Opening Brief, page 275, this Court has considered and rejected each of the subheadings in this argument.

Mr. Livingston requests this Court to reconsider the separate arguments gathered under this heading, and stands by the arguments presented in the Opening Brief.

XVI

CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT.

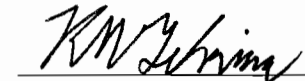
Appellant stands on the discussion of cumulative error presented in the Opening Brief, pages 318-320.

CONCLUSION

For all of the reasons stated above, both the judgment of conviction and sentence of death in this case must be reversed.

DATED: 30 December 2011.

Respectfully submitted,



ROBERT WAYNE GEHRING
Attorney for Appellant
David James Livingston

WORD COUNT CERTIFICATE

I, Robert Wayne Gehring, counsel for David James Livingston, certify pursuant to the California Rules of Court, that the word count for this document is 34,911 words, excluding the tables, this certificate, and any attachment permitted under Rule 8.630(b)(4). This document was prepared in Pages '09, and this is the word count generated by that program for this document. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Aloha, Oregon 97006, on 30 December 2011.

Robert Wayne Gehring
Attorney for Appellant

ATTORNEY'S CERTIFICATE OF SERVICE BY MAIL
{CCP § 1013a, subd. (2)}

I am, and at all times mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is 19091 SW York Street, Beaverton, OR 97006.

I served Appellant's Reply Brief in the case of People v. David James Livingston, No. S090499, Los Angeles County Superior Court No. TA 100812, by placing a true copy of the document in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Frederick K. Ohlrich
Court Administrator
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

(Original and 13 copies sent by certified, priority U.S. mail)

Clerk of the Court
For The Hon. Allen J. Webster, Judge
Superior Court
200 West Compton Blvd.
Compton, CA 90220

California Appellate Project
Attn: CAP Docketing Clerk
101 Second St., Suite 600
San Francisco, CA 94105

Phillip R. Stirling
Deputy District Attorney
210 W. Temple, 17th Floor
Los Angeles, CA 90012

Clive S. Martin, Attorney
6318 Marina Pacifica Dr N
Long Beach, CA 90803
(Trial attorney for Defendant)

David J. Livingston
P. O. Box E-96628
San Quentin State Prison
San Quentin, CA 94974

John B. Schmocker, Attorney
4017 Long Beach Blvd.
Long Beach, CA 90807
(Trial attorney for Defendant)

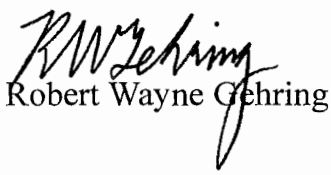
Daniel C. Chang
Deputy Attorney General
300 S. Spring St., Ste. 1702
Los Angeles, CA 90013

Each envelope was then sealed and with postage thereon fully prepaid deposited in the United States mail by me at Aloha, Washington County, Oregon, on 31 December 2011.

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

Executed on 31 December 2011 at Aloha, Washington County, Oregon.

Dated: 31 December 2011.



Robert Wayne Gehring