No. S095076

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RICHARD PENUNURI, Defendant and Appellant.	LOS ANGELES COUNTY SUPERIOR COURT Superior Court Case No. BA189633

ON AUTOMATIC APPEAL
FROM A JUDGMENT AND SENTENCE OF DEATH

Superior Court of California, County of Los Angeles
The Honorable Robert W. Armstrong, Judge Presiding

APPELLANT'S REPLY BRIEF

Stephen M. Lathrop (Cal. Bar No. 126813)
Certified Appellate Law Specialist
State Bar of Cal. Board of Legal Specialization
904 Silver Spur Rd. #430, Rolling Hills Est., CA 90274
Email: stephen.lathrop@cox.net
Tel. (310) 237-1000, ext. 3; Fax (310) 237-1010

Attorney for Defendant and Appellant
RICHARD PENUNURI

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INTRODUCTION

Appellant Richard Penunuri respectfully submits this reply to respondent's brief. Appellant replies to contentions by respondent that necessitate an answer in order to present the issues fully to this Court. Appellant does not reply to arguments that are adequately addressed in his opening brief. The absence of a

reply to any particular argument, sub-argument or allegation made by respondent, or of a reassertion of any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects his view that the issue has been adequately presented and the positions of the parties fully joined.

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ARGUMENT

JURY SELECTION

I.

THE DISMISSAL FOR CAUSE OF PROSPECTIVE JUROR STEVEN METCALF REQUIRES REVERSAL OF THE DEATH JUDGMENT BECAUSE HE COULD FAIRLY AND IMPARTIALLY RETURN A VERDICT FOR EITHER LIFE OR DEATH.

Appellant explained in his opening brief that Prospective Juror Steven Metcalf stated that he could follow the law, he could return a verdict of death in an appropriate case, and his personal views of capital punishment, including religious beliefs, would not prevent or substantially impair his ability to return a verdict of death. (Appellant's Opening Brief ("AOB") 65-90.)

Respondent agrees that counsel's failure to object to Metcalf's removal did not forfeit the claim. (Respondent's Brief ("RB") 28; *People v. Cleveland* (2004) 32 11 Cal.4th 704, 734-735.)

Respondent argues that substantial evidence supports the trial court's implicit finding that Metcalf could not fairly consider the death penalty as a sentencing option. (RB 24-32.) Respondent is mistaken. Metcalf's written responses to the questionnaire, and his responses during voir dire, reveal that he could fairly and impartially decide the case and return a verdict for either life or death. (CT 8:2169-2184; RT 7:713-752.)

Metcalf stated in the questionnaire that his view of the death penalty was "in flux–away from its use" (CT 8:2181), and that over the past decade he was "[l]ess likely to be in favor" of the death penalty. (CT 8:2182.) But Metcalf affirmed he would fairly apply the law and would not automatically vote for life in prison. (CT 8:2181.)

During voir dire, Metcalf equivocated, stating he "should probably" be included in the group of people that could not return a verdict of death. (RT 7:722.) But moments later when asked for a show of hands from anyone unable to apply the law and return either a verdict of death and/or life, Metcalf did not raise his hand, implicitly affirming he could fairly apply the law and return a verdict of death in an appropriate case. (RT 7:721-723.)

Metcalf's single equivocal response during voir dire, as noted in the preceding paragraph, does not provide substantial evidence of impairment because both before and after that response he continued to affirm that he could fairly apply the law and return a verdict of death. (CT 8:2169-2184; RT 7:713-752.)

The moving party bears "the burden of demonstrating to the trial court that the [*Witt*] standard [is] satisfied as to each of the challenged jurors." (*People v. Stewart* (2004) 33 Cal.4th 425, 445.) "As with any other trial situation where an adversary wishes to exclude a juror because of bias, . . . it is the adversary

seeking exclusion who must demonstrate through questioning that the potential juror lacks impartiality . . . . It is then the trial judge's duty to determine whether the challenge is proper." (*Wainwright v. Witt* (1985) 469 U.S. 412, 423.)

To the extent that Metcalf's single equivocal response during voir dire suggested a need for individual voir dire and/or further questioning of him, the prosecutor's failure to engage Metcalf in voir dire shows that the prosecution failed to meet its burden of demonstrating to the trial court that the *Witt* standard was satisfied. (See *People v. Stewart, supra*, 33 Cal.4th at p. 445 [moving party bears the burden of demonstrating to the trial court that the *Witt* standard is satisfied as to each of the challenged jurors]; *Wainwright v. Witt, supra*, 469 U.S. at p. 423.)

Respondent argues substantial evidence supports the trial court's removal order because "Metcalf clearly expressed strong beliefs against the death penalty." (RB 29.) Respondent is mistaken. Although Metcalf's personal view of the death penalty was "in flux–away from its use" (CT 8:2181), he consistently expressed an ability to follow the court's instructions on capital punishment and apply the law, regardless of his personal views. (CT 8:2180-2182.) In fact, when asked whether he "entertain[ed] such a conscientious opinion concerning the death penalty that you would automatically in every case vote for a verdict of life

imprisonment without the possibility of parole and under no circumstances vote for a verdict of death?," Metcalf responded, "I don't think so." (CT 8:2181.)

Respondent's emphasis on Metcalf's personal views of the death penalty is misplaced because Metcalf repeatedly stated he would fairly apply the law and impose a sentence of death in an appropriate case, demonstrating a willingness to temporarily set aside his own beliefs in deference to the rule of law. Metcalf was *not* firmly opposed to the death penalty (CT 8:2181-2182), but even if he had been that alone would not have been a basis to exclude him from appellant's jury. (*People v. Martinez* (2009) 47 Cal.4th 399, 427.)

> It is important to remember that *not all who oppose the death penalty are subject to removal for cause in capital cases*; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that the are willing to temporarily set aside their own beliefs in deference to the rule of law.

(*Lockhart v. McCree* (1986) 476 U.S. 162, 176, italics added.)

In effect, when those opposed to capital punishment are excluded from the venire, the state "crosse[s] the line of neutrality" and "produce[s] a jury uncommonly willing to condemn a man to die," thereby violating the Sixth and Fourteenth Amendments. (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 520-521.) "[A] sentence of death cannot be carried out if the jury imposing or recommending it was chosen by excluding veniremen for cause simply because

they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Id.* at p. 522 [fn. omitted].)

As the high court has made clear, a prospective juror's personal views concerning the death penalty do not necessarily afford a basis for excusing the juror for bias.

> . . . . Because "[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State," . . . [it follows that] "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty."

(*Uttecht v. Brown* (2007) 551 U.S. 1, 6, citing *Witherspoon v. Illinois, supra*, 391 U.S. at pp. 522-523, fn. 21.)

Respondent also points to the deference owed to the trial court's implicit finding of substantial impairment, stating that "'a trial judge who observes and speaks with a prospective juror and hears that person's responses . . . gleans valuable information that simply does not appear on the record.'" (RB 32, citing *People v. Stewart, supra*, 33 Cal.4th at p. 451.) Respondent's argument is misplaced because here the record shows that Metcalf could apply the law and return a death verdict in an appropriate case; the trial court also never spoke with Metcalf, entirely failing to question him during voir dire. (See RT 713-752; *Uttecht v. Brown, supra*, 551 U.S. at p. 19 ["The need to defer to the trial court's

ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment."].)

The trial court exceeded its discretion in excusing Metcalf because his responses to the questionnaire, and his responses during voir dire, do not support reasonable grounds for a finding of substantial impairment. (Cf. *People v. Heard* (2003) 31 Cal.4th 946, 966; *Ross v. Oklahoma* (1988) 487 U.S. 81, 88.)

Reversal of the death judgment is required.

/ / /

GUILT PHASE

II.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A FINDING THAT APPELLANT WAS A PRINCIPAL IN THE MURDERS OF BRIAN MOLINA AND MICHAEL MURILLO, REQUIRING REVERSAL OF COUNTS 4 AND 5, RESPECTIVELY.

Appellant explained in his opening brief that his convictions for the first-degree murders of Brian Molina and Michael Murillo (counts 4 and 5, respectively) should be reversed for insufficient evidence that he perpetrated the killings. (AOB 91-106.) Although appellant was in the vicinity of the residence on Hornell Street hours before the murders, the gunman was never positively identified. (AOB 95-106.) The verdicts rested on testimony and circumstances revealing a suspicion that appellant was involved in the killings, which is insufficient to sustain the verdicts on appeal. (AOB 94-106.)

The standard of review for sufficiency of the evidence is applied in a capital case *with greater scrutiny*, a matter respondent does not dispute. (AOB 93; RB 32-38; see *Beck v. Alabama* (1980) 447 U.S. 625, 627-646 [recognizing a heightened reliability requirement in the guilt phase of a capital trial]; *Gardner v. Florida* (1977) 430 U.S. 349, 357 [death is different, which requires greater scrutiny of capital guilt determinations]; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Ford v. Wainwright* (1986) 477 U.S. 399, 411.)

Respondent argues that there is sufficient evidence of premeditation and deliberation, applying the factors set forth in *People v. Anderson* (1968) 70 Cal.2d 15. (RB 34-35, 38-39.) Respondent misconstrues appellant's argument. Appellant asserts there is insufficient evidence identifying him as the gunman who killed Molina and Murillo, not that the unidentified gunman lacked premeditation and deliberation. (AOB 94-106.)

Luke Bissonnette saw appellant earlier on Hornell Street hours before the murders, and so when he heard the gunshots and looked out the window of the Goodhue Street residence he thought to himself, "fucking Dozer" (i.e., appellant). (RT 10:1189-1192.) Aside from Luke's admitted consumption of drugs, impairing his ability to accurately observe the events (RT 10:1232-1233, 1237-1238), Luke never saw the gunman; he only saw the face of a person running away. (RT 10:1059-1066.) In the two seconds that he saw the person's face, Luke could not tell what the person was wearing because it was too dark outside. (RT 10:1059-1066.) Luke had seen appellant earlier that night, and thus assumed the person running away was appellant. (RT 10:1059-1066.)

Respondent argues that Luke's eyewitness identification of appellant constitutes substantial evidence in support of the verdicts because weaknesses in the identification testimony of a witness is to be evaluated by the jury, not the

reviewing court. (RB 35, citing *In re Gustavo M.* (1989) 214 Cal.App.3d 1485 and *People v. Elwood* (1988) 199 Cal.App.3d 1365.) Respondent is mistaken.

Although the reviewing court typically resolves conflicts in the evidence or inferences in favor of the People (*People v. Johnson* (1980) 26 Cal.3d 557, 576), the reviewing court must determine if a reasonable trier of fact could have found a defendant guilty. (*Id.* at p. 578). To that end, the reviewing court must discern if the evidence is "substantial," i.e., "reasonable, credible, and of solid value." (*Ibid.*)

The cases cited by respondent are inapposite. In *In re Gustavo M., supra*, 214 Cal.App.3d 1485, the victim twice positively identified the defendant at trial as her assailant. (*Id.* at p. 1496.) In *People v. Elwood, supra*, 199 Cal.App.3d 1365, in the context of convictions for auto theft, two witnesses identified the defendant as the driver of the stolen vehicles. (*Id.* at p. 1368, 1372.) Here, Luke's testimony reveals that he did not positively identify the gunman, but only had a suspicion that appellant was involved, which is insufficient to sustain the verdicts. (See *People v. Reyes* (1974) 12 Cal.3d 486, 500 ["Evidence which raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction."], citing *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

The identification made by Luke, suggesting that appellant was the shooter, was thus too unreliable to sustain convictions for first degree murder in a

capital case because it fails to meet the substantial evidence test and it fails to meet the heightened verdict reliability requirement at the guilt phase of a capital trial. The most that can be said is that Luke suspected that appellant might be the gunman, and thus the jury could not reasonably infer from Luke's testimony that appellant perpetrated the killings.

Although inferences may constitute substantial evidence in support of a judgment, they must be the probable outcome of logic applied to direct evidence; mere speculative possibilities or conjecture are infirm. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633; *Louis & Diederich, Inc. v. Cambridge European Imports, Inc.* (1987) 189 Cal.App.3d 1574, 1584-1585; *People v. Berti* (1960) 178 Cal.App.2d 872, 876.)

> . . . "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact." . . . . "To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier must therefore have reasonably rejected all that undermines confidence."

(*People v. Reyes, supra*, 12 Cal.3d at p. 500, citations omitted.)

Respondent argues that "there was other evidence linking appellant to the shooting[,]" including that "appellant was in the neighborhood at the time of the shootings[,]" he was seen with Alejandro Delaloza in Delaloza's white Cadillac earlier that night, and "immediately after hearing the shots that killed Molina and

Murillo, neighbors saw two young Hispanic men get into a white Cadillac and drive away." (RB 36.) But this evidence merely shows that appellant was with Delaloza earlier that night and that he had some prior connection with Delaloza's white Cadillac. The evidence does not establish that appellant was the gunman; nor does it prove that appellant was one of the young Hispanic men departing the scene of the shooting in the white Cadillac.

Respondent argues that "Delaloza's testimony established that he [i.e., appellant] was either running away at the time of the shooting or running right after the shots were fired." (RB 36, citing *People v. Marquez* (2000) 78 Cal.App.4th 1302, 1305-1307.) Delaloza never testified at trial. Instead, his tape-recorded statement to the police was played to the jury (RT 12:1443-1444; CT Supp. IV:109-142), which respondent now concedes violated appellant's constitutional rights. (RB 73 ["Here, Delaloza's statements were taken during police interrogation and were not subject to cross-examination since he refused to testify, and therefore the admission of his statements was a violation of his [i.e., appellant's] Sixth Amendment rights."]; see § X, *post.*) Delaloza stated he was sitting in the car, heard gunshots, and then saw appellant running. (RT 12:1443-1444; CT Supp. IV:109-142.) Delaloza did not see the shooting and he did not identify appellant as the gunman. (RT 12:1443-1444; CT Supp. IV:109-142.)

Nor does respondent's citation to *People v. Marquez, supra*, 78 Cal.App.4th 1302 assist her. (RB 36.) There, in the context of a robbery at a restaurant, the victim "identified defendant as the robber in a photographic lineup. During the trial she also positively identified defendant as the robber." (*People v. Marquez, supra*, 78 Cal.App.4th at p. 1305.) Here, Delaloza's statement to the police did not identify appellant as the gunman. (RT 12:1443-1444; CT Supp. IV:109-142.)

Respondent argues that "substantial evidence supported the jury's conclusion that appellant had used the 9-millimeter firearm in the killings of Molina and Murillo." (RB 37.) But respondent confuses Delaloza with appellant. Prosecution firearm examiner Richard Catalani testified on cross-examination that the 9-millimeter bullet recovered from Delaloza's residence and the 9-millimeter shell casings found at the Goodhue Street location had been *cycled through the same firearm* (RT 13:1685, 1693-1695), thereby suggesting similar ammunition recovered from Delaloza's residence was used in the shooting. (Cf. *People v. Conner* (1983) 34 Cal.3d 141, 149 [substantial evidence is evidence that "maintains its credibility and inspires confidence that the ultimate fact it addresses has been justly determined"].)

Respondent also argues the fact that "no gunshot residue particles were found on the jacket in his [i.e., appellant's] residence" does not undermine the

sufficiency of the evidence. (RB 37-38.) But in addition to the lack of gunshot residue linking appellant to the shooting, the physical evidence points to Delaloza as the likely perpetrator of the Molina and Murillo homicides, not appellant. Delaloza admitted being at the scene of the shootings. Delaloza was wearing clothing similar to that of the shadowy figure seen by Luke, and thus could have been the shadowy figure running away from the scene. (RT 9:988-989, 11:1361-1367; 19:2878-2880.) A black jacket and two sweatshirts, both with hoods, were found at Delaloza's residence. (RT 19:2873-2878.) The 9-millimeter ammunition found at Delaloza's residence matched the 9-millimeter ammunition from the crime scene. (RT 13:1692-1695.) No gunshot residue particles were found on the black jacket found in appellant's residence. (RT 19:2832-2833; People's Exh. 5.) Yet, with eleven rounds being fired from a 9-millimeter handgun, gunshot residue would be found on any jacket the shooter was wearing. (RT 19:2840-2841.)

Accordingly, there is no solid, credible evidence that appellant was the gunman, thereby requiring reversal of appellant's convictions on counts 4 and 5. (Cf. *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [a conviction unsupported by substantial evidence denies a defendant due process of law]; *People v. Reyes, supra*, 12 Cal.3d at p. 500.)

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III.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN FINDINGS THAT APPELLANT AGREED OR CONSPIRED TO MURDER JAIME CASTILLO AND THAT HE HAD THE SPECIFIC INTENT TO KILL CASTILLO, REQUIRING REVERSAL OF COUNT 6 (CONSPIRACY TO COMMIT MURDER).

Appellant explained in his opening brief that his conviction for conspiracy to commit murder of Jaime Castillo (count 6) should be reversed because there is insufficient evidence to sustain findings that he agreed or conspired to commit murder and that he had the specific intent to kill Castillo. (AOB 107-120.)

The prosecution's sole theory of conspiracy to commit murder, and the trial court's instructions thereon, required findings that appellant harbored dual specific intents–i.e., the specific intent to agree or conspire to commit an offense and the specific intent to murder Castillo. (RT 24:3762-3769, 3777-3778; see *People v. Cortez* (1998) 18 Cal.4th 1223, 1238-1239; *People v. Jurado* (2006) 38 Cal.4th 72, 120.) The mental state for conspiracy to murder is identical to premeditation and deliberation. (*People v. Cortez, supra*, 18 Cal.4th at pp. 1238-1239.)

The prosecution's case rested on the testimony of Jesus Marin, Tracie McGuirk and Carmen Miranda recounting portions of several telephone conversations initiated by appellant from county jail. (AOB, pp. 31-39; RT 18:2698-2700, 2711-2723, 2727; People's Exhs. 80 & 92.) Their testimony

reveals that appellant was concerned Castillo might provide some unspecified testimony against him. (RT 15:2033-2034.) But their testimony is woefully insufficient to sustain findings that appellant agreed or conspired to commit murder and that he had the specific intent to kill Castillo. (RT 18:2698-2700, 2711-2723, 2727.)

Respondent acknowledges that "in in the context of a conspiracy to commit murder," the prosecution was required to prove appellant harbored dual specific intents–i.e., "the participants must agree to commit that offense and possess the specific intent to kill." (RB 39, citing *People v. Cortez, supra*, 18 Cal.4th at p. 1228.)

Respondent states that appellant "instructed Castro and Bermudez to kill Castillo." (RB 40.) Respondent also states that appellant 'then specifically asked fellow gang members for help in killing Castillo." (RB 41.) But neither statement is immediately followed by citation to the record. Indeed, the record is devoid of any statement by appellant indicating an intent to kill Castillo. Contrary to respondent's assertions, there is no statement by appellant instructing and/or specifically asking anyone to kill Castillo.

Instead, respondent points to several jail telephone calls initiated by appellant and referring to Castillo. (RB 40-41.) In one telephone call, respondent states that Castro was overheard [by Miranda] stating, "'Oh. You

want us to - you want us to get rid of him. Yeah. Me and Artie [Bermudez] will get rid of 'em.'" (RB 40, citing RT 17:2465-2468.) But respondent omits the salient fact that moments later Miranda clarified her testimony, stating that she had actually heard Castro state, "Oh. He's gonna testify against you in your case? Oh. Don't worry. We're gonna get rid of him. Me and Artie's gonna get rid of him." (RT 17:2468.) In other words, Miranda only overheard Castro telling appellant they were "gonna get rid of him." She did *not* overhear Castro stating that appellant requested that they get rid of him. Nor did Miranda testify to any statement that might have suggested appellant's response, if any, to Castro's statement. Miranda thus did not overhear any statement from which it could be inferred that appellant solicited and/or encouraged a killing or that appellant intended a killing.

Asserting that appellant "then specifically asked fellow gang members for help in killing Castillo" (RB 41), respondent argues that "Castro and Bermudez approached Tapia, a close friend of Castillo, and demanded that he had to 'do it or else they were going to fuck him up, too, so that Freddie had to shut up Jaime.' They would 'blast' Castillo." (RB 41, citing RT 15:2035-2040.) But appellant was not privy to any discussion about blasting, shooting, or killing Castillo. The conversations cited by respondent did not occur during a telephone call with appellant. Instead, the conversations occurred at some unspecified time at

Marin's apartment while appellant was in county jail. (RT 15:2035-2052.) Marin testified that Castro and Bermudez–not appellant–"initiated this plan" to kill Castillo. (RT 15:2035.)

Respondent asserts, "not only did appellant demand that his cohorts get rid of Castillo, there was not the slightest evidence appellant communicated any rejection or repudiation of the continuing conspiracy." (RB 42.) Respondent is mistaken. Respondent's assertion that "appellant demand[ed] that his cohorts get rid of Castillo" is not supported by citation to the record, nor could it be, as the record is devoid of any statement by appellant indicating an intent to kill Castillo.

There also is no evidence in the record that the plan to kill Castillo was communicated to appellant. (RT 15:2035-2036.) And thus appellant could not be criminally liable for the actions of those who killed Castillo because appellant never joined in the conspiratorial agreement to kill Castillo. (Cf. *People v. Cortez, supra*, 18 Cal.4th at pp. 1238-1239 [conviction for conspiracy to commit murder requires that the defendant be one of the participants who harbored the specific intent to kill]; *People v. Jurado, supra*, 38 Cal.4th at p. 123; *People v. Swain* (1996) 12 Cal.4th 593, 600.)

Respondent notes, as appellant did in his opening brief, that the jury did not find true the first overt act alleged by the prosecution–i.e., "that on and between January 1, 1998 and January 14, 1998, Richard Penunuri, Joe Castro,

Arthur Bermudez, and Alfredo Tapia, *discussed a plan to murder Jaime Castillo . . .*" (RB 42, italics added; AOB 119.) Appellant was not part of any discussion of a plan to kill Castillo. (RT 15:2035-2036.) The jury's refusal to find the first overt act true is consistent with an implicit finding that the plan to kill Castillo was not discussed with appellant.

Finally, respondent asserts, "'The crime of conspiracy can be committed whether the conspirators fully comprehended its scope, whether they acted together or in separate groups, or whether they used the same or different means known or unknown to them.'" (RB 43, citing *People v. Cooks* (1983) 141 Cal.App.3d 224, 312.) But this general statement of the law does not lessen the requirement for the prosecution to prove that appellant both agreed to commit the offense of murder and harbored the specific intent to kill Castillo (Cf. *People v. Cortez, supra*, 18 Cal.4th at pp. 1238-1239; *People v. Jurado, supra*, 38 Cal.4th at p. 123.) In other words, in the context of a charge of conspiracy to commit murder, as here, the prosecution was required to prove that appellant was a conspirator who fully comprehended the scope of the conspiracy. (Cf. *People v. Morante* (1999) 20 Cal.4th 403, 416 ["[a] conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense"].)

Appellant's conviction for conspiracy to commit murder of Jaime Castillo (count 6) must be reversed. (Cf. *Jackson v. Virginia, supra*, 443 U.S. at p. 318; *People* v. *Bean*, *supra*, 46 Cal.3d at p. 932.)

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IV.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN FINDINGS THAT APPELLANT EITHER PERPETRATED THE KILLING OF JAIME CASTILLO, AIDED AND ABETTED THE KILLING, OR ENTERED INTO A CONSPIRATORIAL AGREEMENT TO KILL, REQUIRING REVERSAL OF COUNT 7 (MURDER).

Appellant explained in his opening brief that the evidence is insufficient to sustain a finding that appellant either directly perpetrated the killing of Castillo, aided and abetted the killing, or joined in a conspiratorial agreement to kill with the specific intent to kill Castillo. (AOB 121-129.)

Respondent acknowledges that appellant was in county jail when Castillo was killed, and thus did not directly perpetrate the killing. (RB 44-45; RT 9:1065-1067, 22:3439-3440.) Respondent contends that there was sufficient evidence appellant aided and abetted the killing and sufficient evidence of a conspiratorial agreement to kill Castillo. (RB 44.)

As explained in section III., *ante*, which is incorporated herein by reference, the evidence is insufficient as a matter of law to sustain a finding that appellant participated in a conspiracy to murder Castillo (count 6).

Respondent points to the same evidence regarding a conspiratorial agreement to kill Castillo in support of its argument on aiding and abetting liability. (RB 45-46.) But this same evidence, which is woefully insufficient to prove appellant's participation in a conspiracy to commit murder (§ III., *ante*),

also is insufficient as a matter of law to sustain a finding that appellant aided and abetted the murder of Castillo.

An aider and abettor's mental state must be at least that required of the direct perpetrator, and thus to sustain a conviction for first degree premeditated murder, as here, the evidence must be sufficient to prove that "the defendant aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission." (*People v. Chiu* (June 2, 2014, S202724) __ Cal.4th __ [p. 13]; cf. *Rosemond v. United States* (2014) 572 U.S. __, __ [134 S.Ct. 1240, 1248].)

> . . . . An aider and abettor who knowingly and intentionally assists a confederate to kill someone could be found to have acted willfully, deliberately, and with premeditation, having formed his own culpable intent. Such an aider and abettor, then, acts with the mens rea required for first degree murder.

(*People v. Chiu, supra*, __ Cal.4th __ [p. 14].)

Respondent states that "appellant alone encouraged Castro and Bermudez to kill Castillo to prevent him from testifying against him at trial." (RB 45.) But as explained in appellant's opening brief and in section III, *ante*, the record is devoid of any statement by appellant indicating an intent to kill Castillo. Contrary to respondent's assertions, there is no statement by appellant encouraging Castro and Bermudez to kill Castillo. (AOB 111-120; § III, *ante*.)

Appellant was concerned that Castillo might testify against him, but he never instructed anyone to kill Castillo. (See RT 16:2341, 2343-3447; RT 17:2461-2468, 2475, 2496.) McGuirk testified to a conversation in which she overheard Castro say that Castillo was going to testify against appellant and that appellant should not worry about it as Castro would take care of it. (RT 16:2341, 2343-3447.) Yet there was no testimony that during this conversation either appellant and/or Castro intended to harm Castillo. (AOB 108-120.) Appellant previously asked Castro to talk to Castillo (RT 15:2031), and thus the only reasonable inference is that Castro was telling appellant he would "take care of it" *by talking to Castillo*, not by killing him.

Miranda testified to a conversation in which she overheard Castro state, "Oh. He's gonna testify against you in your case? Oh. Don't worry. We're gonna get rid of him. Me and Artie's gonna get rid of him." (RT 17:2468.) Miranda only overheard Castro telling appellant they were "gonna get rid of him." She did not overhear Castro stating that appellant requested that they get rid of him. Nor did Miranda testify to any statement that might have suggested appellant's response, if any, to Castro's statement. Miranda thus did not overhear any statement from which it could be inferred that appellant encouraged a killing.

Respondent then cites the general legal principle that "circumstantial evidence may be sufficient to connect the defendant to a crime and prove his guilt

beyond a reasonable doubt . . . ." (RB 46, citing *People v. Stanley* (1995) 10 Cal.4th 764, 793.) Unquestionably, circumstantial evidence can be as powerful, if not more powerful, than direct evidence. But inferences, whether circumstantial or direct, may constitute substantial evidence in support of a judgment only if they are the probable outcome of logic applied to direct evidence; mere speculative possibilities or conjecture are infirm. (*Kuhn v. Department of General Services, supra*, 22 Cal.App.4th at p. 1633; *Louis & Diederich, Inc. v. Cambridge European Imports, Inc., supra*, 189 Cal.App.3d at pp. 1584-1585; *People v. Berti, supra*, 178 Cal.App.2d at p. 876.) "A legal inference cannot flow from the nonexistence of a fact; it can be drawn only from a fact actually established." (*Eramdjian v. Interstate Bakery Corp.* (1957) 153 Cal.App.2d 590, 602; accord, *People v. Stein* (1979) 94 Cal.App.3d 235, 239.) A doubtful or uncertain fact must inure to the detriment of the party with the burden of proof on the issue. (*Reese v. Smith* (1937) 9 Cal.2d 324, 328; *People v. Tatge* (1963) 219 Cal.App.2d 430, 436.)

In the absence of evidence that appellant instructed and/or encouraged the Castillo murder, as here, there can be no reasonable inference that appellant aided and abetted a first degree murder of Castillo. Appellant's murder conviction on count 7 must be reversed for insufficient evidence. (Cf. *Jackson v. Virginia, supra*, 443 U.S. at p. 318; *People* v. *Bean, supra*, 46 Cal.3d at p. 932.)

V.

THE TRUE FINDING ON THE WITNESS-KILLING SPECIAL CIRCUMSTANCE MUST BE SET ASIDE FOR INSUFFICIENT EVIDENCE, THEREBY RENDERING THE DEATH JUDGMENT UNCONSTITUTIONAL.

A. THE TRUE FINDING ON THE WITNESS-KILLING SPECIAL CIRCUMSTANCE MUST BE SET ASIDE FOR INSUFFICIENT EVIDENCE.

Appellant explained in his opening brief that the true finding on the witness-killing special circumstance must be set aside because the evidence is insufficient to sustain a finding that appellant either directly perpetrated the killing, aided and abetted the killing that was perpetrated by codefendant Castro, or joined in a conspiratorial agreement to kill Castillo. (AOB 130-132; see §§ III & IV, *ante*.)

Respondent argues that the evidence is sufficient because "appellant made several collect calls to Marin's house in order to speak with Castro and Bermudez. These telephone calls established that (1) appellant was afraid Castillo would 'rat him out' and testify against him; and (2) appellant told Castro and Bermudez to get 'rid of [Castillo].'" (RB 47-48.) Respondent is mistaken. There is no evidence that Castillo was a witness to the Goodhue double murders, and respondent points to none. (See RB 46-50; AOB 19-42 [statement of facts].)

Nor is there evidence that "appellant told Castro and Bermudez to get 'rid of [Castillo].'" (RB 48.) Miranda testified that one week before Castillo was

killed she was with Castro and Bermudez when she overheard a telephone conversation between appellant and Castro and/or Bermudez, which was initiated by appellant from jail; she only heard the Castro-Bermudez side of the conversation, and did not hear appellant. (RT 17:2461-2467, 2475, 2496.) She heard either Castro or Bermudez mention Castillo's name. (RT 17:2467.) She heard Castro say, "Oh. You want us to – you want us to get rid of him –." (RT 17:2466.) She then heard Castro say, "Yeah. Me and Artie [Bermudez] will get rid of 'em." (RT 17:2466, 2468.) However, when the prosecutor asked Miranda to recount the precise substance of the conversation, she clarified her previous testimony, stating, "Um, I heard that, 'Oh. He's gonna testify against you in your case? Oh. Don't worry. We're gonna get rid of him. Me and Artie's gonna get rid of him." (RT 17:2468.) The prosecutor then asked, "Did you hear anything that sounded like the voice of Artie reacting to what Joe [Castro] was saying regarding Cartoon [i.e., Castillo]?" (RT 17:2468.) Miranda responded, "Just laughing." (RT 17:2468.) In other words, Miranda only overheard Castro telling appellant they were "gonna get rid of him." She did not overhear Castro stating that appellant requested that they get rid of him.

Nor did Miranda testify to any statement that might have suggested appellant's response, if any, to Castro's statement. (See RT 17:2461-2468.) Miranda thus did not overhear any statement from which it could be inferred that

appellant solicited a killing or that appellant intended a killing. The conversation neither suggests, nor gives rise to a reasonable inference of, an agreement to kill or a directive by appellant to kill Castillo. (See *People v. Jurado, supra*, 38 Cal.4th at p. 123; *United States v. Sacerio* (5th Cir. 1992) 952 F.2d 860, 862-866; *People v. Parrish* (1948) 87 Cal.App.2d 853, 855-856; *People v. Bonner* (2000) 80 Cal.App.4th 759, 764.)

B. THE INVALID WITNESS-KILLING SPECIAL CIRCUMSTANCE RENDERS APPELLANT'S SENTENCE UNCONSTITUTIONAL.

Appellant further explained in his opening brief that the invalid witness-killing special circumstance renders appellant's sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process because none of the other sentencing factors enabled the jury to give aggravating weight to the same facts and circumstances as the invalid sentencing factor. (AOB 133-136; see *Brown v. Sanders* (2006) 546 U.S. 212, 220.)

Respondent acknowledges that even where "another special circumstance made the defendant eligible for the death penalty, the defendant may still have suffered prejudice if the jury's penalty verdict was influenced by evidence pertaining to the invalid special circumstance that was not otherwise admissible. (RB 49, citing *Brown v. Sanders, supra*, 546 U.S. at p. 220 and *People v. Castaneda* (2011) 51 Cal.4th 1292, 1354.)

Respondent argues that there was no prejudice by virtue of the invalid witness-killing special circumstance because "the evidence that appellant conspired to murder Castillo—was properly considered by the jury as 'circumstances of the crime.'" (RB 50, citing Pen. Code, § 190.3, subd. (a).) Respondent's argument is flawed by circular reasoning. The witness-killing special circumstance is invalid because, in part, the evidence is insufficient as a matter of law to sustain a finding that appellant conspired to murder Castillo, and thus this very same insufficient evidence cannot somehow support a finding that the jury properly considered, as an aggravating factor, the murder of Castillo, which murder appellant neither perpetrated, nor aided and abetted, nor conspired to commit. (AOB 107-129 [§§ III & IV]; *People v. Ledesma* (2006) 39 Cal.4th 641, 726 ["The special circumstance requires that the defendant physically aid or commit the act causing death and that the killing be intentional, deliberate, and premeditated."].)

Respondent's citation to *Brown v. Sanders, supra*, 546 U.S. 212 is unavailing. (RB 49.) There, the jury found true four special circumstances (robbery-murder, burglary-murder, witness-killing, and "heinous, atrocious, or cruel" murder), each of which independently rendered him eligible for the death penalty. (*Id.* at pp. 214, 223-224.) The jury then weighed a list of sentencing factors, including the circumstances of the crime, and sentenced defendant to

death. (*Ibid.*) On appeal, this Court declared two of the special circumstances invalid (burglary-murder and "heinous, atrocious, or cruel" murder). (*Id.* at pp. 214-215, 223.) The burglary-murder special circumstance was set aside under the merger doctrine because the instructions permitted the jury to find a burglary (and thus the burglary- murder special circumstance) based on defendant's intent to commit assault, which was an element of homicide. (*Id.* at p. 223.) The "heinous, atrocious, or cruel" murder special circumstance was set aside because it was unconstitutionally vague. (*Id.* at p. 223.) This Court upheld the death judgment, in part, because the facts and circumstances admissible to establish the "heinous, atrocious, or cruel" murder and burglary-murder special circumstances were also properly adduced as aggravating facts bearing upon the "circumstances of the crime" sentencing factor. (*Id.* at pp. 214-215, 223.) Following reversal by the Ninth Circuit Court of Appeals, the high court reversed, stating:

> [T]he jury's consideration of the invalid eligibility factors in the weighing process did not produce constitutional error because all of the facts and circumstances admissible to establish the "heinous, atrocious, or cruel" and burglary-murder eligibility factors were also properly adduced as aggravating facts bearing upon the "circumstances of the crime" sentencing factor. They were properly considered whether or not they bore upon the invalidated eligibility factors.

(*Brown v. Sanders, supra*, 546 U.S. at p. 224.)

The striking of two special circumstances in *Brown v. Sanders, supra*, did not involve findings that the evidence was insufficient. *Brown v. Sanders, supra*,

involved only the judge's determination of the applicability of a legal theory to the facts, not the facts themselves, which were then available to the jury during the penalty phase as bearing upon the "circumstances of the crime" under Penal Code section 190.3, subdivision (a). (*Ibid.*) Here, the witness-killing special circumstance must be set aside because the evidence is insufficient to sustain a finding that appellant either directly perpetrated the killing, aided and abetted the killing that was perpetrated by codefendant Castro, or joined in a conspiratorial agreement to kill Castillo. (AOB 130-132; see §§ III & IV, *ante*.)

The jury found true two special circumstances–witness-killing and multiple-murder. (CT 12:3456, 3459; RT 25:3826-3827, 3834.) For purposes of this argument (see, *post*, § VI [invalid multiple-murder special circumstance]), although the invalid witness-killing special circumstance still leaves one eligibility factor (i.e., the multiple-murder special circumstance), reversal of the death judgment is required because the facts and circumstances admissible to establish the witness-killing special circumstances (i.e., among other things, that appellant was responsible for the murder of Castillo) were *not* properly adduced as aggravating facts bearing on any other sentencing factor. (Cf. *Brown v. Sanders, supra*, 546 U.S. at p. 220.)

When the witness-killing special circumstance is removed from consideration, so too are the facts and circumstances admitted at trial in support

thereof (i.e., that appellant perpetrated the intentional killing of Castillo, a victim who witnessed a crime), including the penalty phase aggravation evidence relating to the killing of Castillo and the victim impact evidence admitted in connection therewith. Accordingly, the invalid sentencing factor renders appellant's sentence unconstitutional, in violation of due process, because none of the other sentencing factors enables the sentencer to give aggravating weight to *the same facts and circumstances*. (Cf. *Brown v. Sanders, supra*, 546 U.S. at p. 220.)

The witness-killing special circumstance must be set aside and the death judgment reversed.

/ / /

VI.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE TRUE FINDING ON THE MULTIPLE-MURDER SPECIAL CIRCUMSTANCE, REQUIRING REVERSAL OF THE DEATH JUDGMENT.

Appellant explained in his opening brief that the true finding on the multiple-murder special circumstance must be set aside because the evidence is insufficient to sustain a finding that appellant was a principal in the commission of murders of either Brian Molina and/or Michael Murillo in counts 4 and 5, respectively. (AOB 137-141.)

Respondent argues that the true finding should be affirmed based on the "finding that appellant committed the murders of Molina and Murillo." (RB 51.) Respondent incorporates by reference section II of respondent's brief, making no additional argument as to the sufficiency of the evidence. (RB 51.)

As explained in section II, *ante*, which is incorporated herein by reference, the evidence is insufficient to sustain a finding that appellant was a principal in the commission of the murders of Molina and Murillo, counts 4 and 5, respectively. With the reversal of appellant's convictions on counts 4 and 5, there remains no substantial evidence that appellant stands convicted of murder in the first degree and also has been convicted of at least one additional count of murder in the same proceeding. (See *People v. Marshall* (1997) 13 Cal.4th 799, 852 [the multiple-murder special circumstance requires a finding that appellant

has been convicted of murder in the first degree and also has been convicted of at least one additional count of murder in the same proceeding]; Pen. Code, § 190.2, subd. (a)(3).)

Citing *Brown v. Sanders, supra*, 546 U.S. 212, respondent argues that there was no prejudice here by virtue of the invalid multiple-murder special circumstance because "evidence pertaining to the Goodhue murders would be properly considered by the jury as 'circumstances of the crime' under § 190.3, subdivision (a)." (RB 51.) Respondent's argument is flawed by the same circular reasoning identified in the section V.B, *ante*. The multiple-murder special circumstance is invalid because, in part, the evidence is insufficient to sustain a finding that appellant was a principal in the commission of either the murder of Molina or the murder of Murillo, and thus this very same insufficient evidence cannot somehow support a finding that the jury properly considered, as an aggravating factor, the murders of Molina and Murillo, which murders appellant did not perpetrate. (AOB 91-106 [§ II]; *People v. Ledesma, supra*, 39 Cal.4th at p. 726.)

The invalid multiple-murder special circumstance renders appellant's sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process because none of the other sentencing factors enabled the jury to give aggravating weight to the *same facts and*

circumstances as the invalid sentencing factor–i.e., the intentional killing of Molina and Murillo, including the penalty phase aggravation evidence relating to the killings of Molina and Murillo and the victim impact evidence admitted in connection therewith. (AOB 139-142; cf. *Brown v. Sanders, supra*, 546 U.S. at p. 220.)

The multiple-murder special circumstance must be set aside and the death judgment reversed.

/ / /

VII.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION FOR ASSAULT WITH A FIREARM ON CARLOS ARIAS, REQUIRING REVERSAL OF COUNT 3.

Appellant explained in his opening brief that his conviction on count 3 for assault with a firearm on Carlos Arias (Pen. Code, § 245, subd. (a)(2)) should be reversed for insufficient evidence because pointing a gun at another person, without any attempt to actually fire the handgun or without evidence that it is loaded, constitutes misdemeanor brandishing, not assault with a firearm. (AOB 142-151.)

Respondent acknowledges, as she must, that "'an assault is not committed by a person's merely pointing an (unloaded) gun in a threatening manner at another person.'" (RB 52, citing *People v. Rodriguez* (1999) 20 Cal.4th 1, 11, fn. 3.) Respondent also acknowledges that a "threat to shoot with an unloaded gun is not an assault, since the defendant lacks the present ability to commit violent injury." (RB 52, citing *People v. Fain* (1983) 34 Cal.3d 350, 357, fn. 6.)

Respondent argues that sufficient evidence supports a finding that the firearm was loaded, citing *People v. Hall* (1927) 87 Cal.App. 634 and asserting, without citation to the record, that the "jury heard evidence that appellant had used the same loaded gun immediately before and after the assault on Arias." (RB 53.) Respondent is mistaken. The jury never heard any evidence that the

same gun was used by appellant before and/or after the incident involving Arias. (See AOB 7-42 [statement of facts]; RB 2-17.)

The handgun displayed in the Arias incident, which was only described by Arias as black, was never recovered. (CT Supp. Vol. IV-1, pp. 160- 165.) The handgun previously used in the Ralphs parking lot incident also was never recovered, but was described as a black 9-millimeter gun. (RT 9:980-981, 987-988.) The handgun subsequently used in the murders of Molina and Murillo was never recovered, but the bullets recovered from the scene were fired from a 9-millimeter firearm (RT 13:1674-1678), and the markings from one of those bullets matched a live round of ammunition found at Delaloza's residence. (RT 13:1685, 1692-1695.) Accordingly, the jury never heard any evidence that the same gun was used both before and/or after the incident involving Arias.

Nor does respondent's citation to *People v. Hall, supra*, 87 Cal.App. 634 support an argument that the gun used in the Arias incident was loaded. There, in connection an incident involving an armed robbery of several men, who were forced to hold up their arms, were lined up against a wall, and then were searched, the appellate court held that the "defendant's acts and the language used by him in the commission of the robbery constituted an admission by conduct, an implied assertion that the gun was loaded." (*Id.* at p. 636.) Significant to the court's decision was the fact that this was a robbery in which

the victims were relived of their property at gunpoint. The court stated that robbers "do not usually arm themselves with unloaded guns when they go out to commit robberies." (*Id.* at pp. 635-636.) In contrast, the Arias incident did not involve either a robbery or an attempted robbery.

The evidence is insufficient to sustain a finding of assault with a firearm on Arias because the prosecution failed to adduce substantial evidence that the manner in which the handgun was used (i.e., pointing it at Arias) was *likely* to result in the infliction of serious bodily injury. The prosecution's evidence showed that despite ample opportunity to fire the handgun or strike Arias, or attempt to strike him, the gunman did not do so. (AOB 17-18; RB 5-7.) The gunman also did not make a verbal threat to fire the handgun at Arias. (AOB 17-18; RB 5-7.) The evidence is susceptible of only one inference and conclusion–i.e., the gunman was merely attempting to frighten Arias by displaying the handgun. (See *People v. Fain, supra*, 34 Cal.3d at p. 357, fn. 6 [an assault is not committed by merely pointing an unloaded gun in a threatening manner at another person].)

Respondent's argument that there is sufficient evidence to show that the handgun was loaded is a misguided invitation for this Court to make speculative inferences about unfounded possibilities. (See *Eramdjian v. Interstate Bakery Corp., supra*, 153 Cal.App.2d at p. 602 ["A legal inference cannot flow from the

nonexistence of a fact; it can be drawn only from a fact actually established."]; accord, *People v. Stein, supra*, 94 Cal.App.3d at p. 239; *People v. Samarjian* (1966) 240 Cal.App.2d 13, 18 ["The People must prevail on their own evidence, not on a vacuum created by rejection of a defense"]; *Reese v. Smith, supra*, 9 Cal.2d at p. 328 [a doubtful or uncertain fact must inure to the detriment of the party with the burden of proof on the issue].)

Reversal of appellant's conviction for assault with a firearm in count 3 is warranted for lack of substantial evidence. (Cf. *Jackson v. Virginia, supra*, 443 U.S. at p. 318; *People* v. *Bean, supra*, 46 Cal.3d at p. 932.)

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VIII.

THE TRIAL COURT PREJUDICIALLY ERRED BY DENYING THE MOTION FOR MISTRIAL AFTER THE PROSECUTOR ELICITED INADMISSIBLE TESTIMONY THAT APPELLANT WAS ACTING UNDER THE JURISDICTION OF THE MEXICAN MAFIA, THAT HE SHOWED ALLEGIANCE TO THE MEXICAN MAFIA, AND THAT HE PAID TAXES TO THE MEXICAN MAFIA, REQUIRING REVERSAL OF APPELLANT'S CONVICTIONS.

Appellant explained in his opening brief that the prosecutor committed misconduct by eliciting inadmissible testimony from prosecution expert witness Detective Curt Levsen on defendant's gang affiliation, including testimony that appellant used the number 13, which shows

> . . . allegiance to the Mexican Mafia, because 13 is the -- represents the 13th letter of the alphabet, which is M, which is their way of showing their allegiance to the Mexican Mafia.
>
> Not saying these individuals are members of that Mexican Mafia, but just they're under the jurisdictional rule of the Mexican Mafia. In other words, they are Surenos in Southern California, and they pay taxes to the Mexican Mafia. [RT 18:2784.]

The trial court granted the defense motion to strike references to the Mexican Mafia, ruling that the testimony was entirely inappropriate and irrelevant, and would have been excluded if the prosecutor had given advance notice of an intent to present the evidence. (RT 19:2802, 2807-2808.) The court denied the motion for mistrial and admonished the jury. (RT 18:2784, 2795, 19:2806-2807, 19:2816-2818.) The admonition failed to cure the prejudice appellant suffered by being associated with the Mexican Mafia as evidenced by

the fact that after the admonition the trial jurors expressed concerned for their personal safety, suggesting fear of the Mexican Mafia. (RT 31:4518-4519.) The admonition also failed to cure the prejudice appellant suffered by being associated with the Mexican Mafia because the Mexican Mafia is known for witness killings, and appellant was defending against charges of murder and conspiracy to commit murder of a witness, and he was defending against a witness-killing special circumstance allegation. (AOB 162-172.)

Immediately prior to the offending testimony, the court held an Evidence Code section 402 hearing on the admissibility of gang testimony, explicitly cautioning the prosecutor to limit his questions of Levsen to appropriate matters. In connection with gang testimony, the court ruled, in part:

> This is what my concern is, Mr. Camacho [i.e., the prosecutor]. We've been in trial now, this is our 11th day of actual trial. And in my opinion, you tried a very clean case up to this time. I think that the evidence has been admissible, and you've created enough fact situation for you to appropriately argue this to the jury.
>
> Now, if we go beyond the line here and muddy the water at this time -- and I rule in this court not with my eye on the Supreme Court, but in a capital case, I can't help but glance that way occasionally. *And I just feel that there's so much chance of reversible error creeping in with a person expressing these kinds of opinions which might have an undue influence on the jury, more so than others.*
>
> Because going back to the questionnaires that the jury have, there's a general disapproval of gangs. We have that built in. We knew that when we sat the jury. And I don't know the I can't recite

> the individual questionnaires of the jurors that are sitting here, but I think that as I recall reading the majority of the juror's questionnaires there was a disapproval of gangs. And there wasn't anyone who felt favorably of them certainly. [RT 18:2758-2759 (emphasis added).]

Nonetheless, the trial court ruled that Levsen could testify in a limited manner about the defendants' gang affiliation and the nature of the gang signs shown in certain photographs. (RT 18:2759-2760.)

Respondent argues that there was no prosecutorial misconduct in asking Levsen about the significance of the number 13 "because the prosecutor simply asked a proper follow-up question" (RB 59)–i.e., "What's the significance of displaying a Roman numeral of 13?" (RT 18:2784.) But in view of the court's ruling during the Evidence Code section 402 hearing, and the prosecutor's knowledge that the question would elicit inadmissible testimony about the Mexican Mafia–a matter the prosecutor chose not to disclose to the court during the hearing on the scope of Levsen's testimony–this was <u>not</u> a proper question. From the Delaloza trial the prior year, the prosecutor knew that the question would elicit testimony about the Mexican Mafia; yet the prosecutor did not disclose the proffered testimony about the Mexican Mafia during the Evidence Code section 402 hearing in this case. (RT 19:2801-2802, 2807-2808; AOB 159-163.) Moreover, in view of the trial court's expressed concern during the 402 hearing about limiting the gang testimony, and in view of the inappropriate and

irrelevant nature of the testimony about the Mexican Mafia, the prosecutor should have known that the court would rule that testimony about the Mexican Mafia was inadmissible. The prosecutor's tactic here–which succeeded in placing before the jury irrelevant and highly prejudicial testimony–was reprehensible.

Respondent argues that "[a] prosecutor simply is not guilty of misconduct when he questions a witness in accordance with the trial court's ruling." (RB 59, citing *People v. Rich* (1988) 45 Cal.3d 1036, 1088.) But the prosecutor was not acting in accordance with the trial court's rulings. Those rulings did not permit the prosecutor to introduce irrelevant and inappropriate testimony. (RT 19:2801-2802, 2807-2808 [trial court states that the testimony is irrelevant and inappropriate; *People v. Bonin* (1988) 46 Cal.3d 659, 689 ["It is, of course, misconduct for a prosecutor to 'intentionally elicit inadmissible testimony.'"].)

The record reveals that the prosecutor was on notice this testimony would be objectionable. Prior to limiting Levsen's testimony, the court expressed reluctance in permitting any testimony about gang signs, and explicitly cautioned the prosecutor about going "beyond the line here and muddy (sic) the water . . . ." (RT 18:2759.) The court further stated,

> And I just feel that there's so much chance of reversible error creeping in with a person expressing these kinds of opinions which might have an undue influence on the jury, more so than others." [RT 18:2759.]

The prosecutor withheld information about the Mexican Mafia from the court when the parties were discussing whether testimony would be permitted about gang signs. (RT 18:2750-2760.) The court ruled that Levsen's testimony would be limited to defendant's gang affiliation and the nature of the gang signs shown in certain photographs. (RT 18:2759-2760.) The prosecutor then promptly and intentionally elicited testimony about the Mexican Mafia from Levsen, catching the defense and the court by surprise. (RT 18:2783-2784.) The record thus reveals that the prosecutor engaged in reprehensible conduct to present inadmissible testimony linking appellant to the feared Mexican Mafia.

Respondent's citation to *People v. Rich, supra*, 45 Cal.3d 1036 is unavailing. (RB 59.) There, this Court held that the prosecutor properly elicited rebuttal testimony of a prosecution expert witness about a report written by a defense expert witness who had testified about the report, finding that the questions on rebuttal were entirely consistent with the trial court's rulings, and thus no prosecutorial misconduct was shown. (*Id.* at p. 1089.) In *Rich*, the prosecutor did not elicit inadmissible testimony. (*Ibid.*) Here, by contrast, the prosecutor engaged in reprehensible conduct to present testimony linking appellant to the Mexican Mafia, which testimony the trial court held was both inappropriate and irrelevant. (RT 19:2801-2802, 2807-2808.)

Respondent argues that the reference to the Mexican Mafia was brief and "no other mention of it had occurred during trial" (RB 59), and cites *People v. Woodberty* (1970) 10 Cal.App.3d 695, apparently to suggest that since the reference to the Mexican Mafia occurred late in the trial the judge was better able to assess the prejudicial impact of the testimony. (RB 59.) Respondent is mistaken, and *People v. Woodberty, supra*, is inapposite.

Levsen's testimony linking appellant to the Mexican Mafia was made in powerful words. Levsen was the prosecution's sole witness to testify that appellant was affiliated with the Mexican Mafia. (RT 18:2783-2784.) By the time Levsen testified, the prosecution had already adduced testimony that appellant and his codefendants were members of the East Side Whittier Cole Street gang. (RT 12:1499-1514.) The highlight of Levsen's testimony was linking appellant's membership in the East Side Whittier Cole Street gang with an affiliation to the Mexican Mafia. This was profound testimony that could not escape the minds of those who heard it.

In *People v. Woodberty, supra*, 10 Cal.App.3d 695, the defense moved for a mistrial after prosecution witness Terrell refused to answer further questions on defense cross-examination. (*Id.* at pp. 708-709.) The appellate court held that the trial court did not abuse its discretion when denying the motion because by the time Terrell refused to answer further questions "appellant had been afforded

considerable opportunity to cross-examine" him. (*Id.* at p. 709.) The appellate court noted that there was a transcript of Terrell's prior testimony at defendant's first trial, and thus the trial judge was aware of "what further was likely to unfold." (*Ibid.*) The appellate court also noted that "the motion was made only after the trial was well along, permitting the judge to view the situation from retrospective advantage." (*Ibid.*) *Woodberty* simply states that in some instances a court is better able to assess prejudice of an error having heard more of the evidence, and that was particularly true there because of the ability of the trial court to look at witness Terrell's prior testimony. *Woodberty* has no particular application to the instant case.

Respondent argues that assuming prosecutorial misconduct appellant has made an insufficient showing of prejudice because the jury was told to disregard the offending testimony. (RB 60, citing *People v. Holloway* (2004) 33 Cal.4th 96 and *People v. Osband* (1996) 13 Cal.4th 622.) But in view of the feared nature of the Mexican Mafia,[1] the fact that the charges in this case included a witness killing, the link Levsen drew between appellant and the Mexican Mafia, and the concern the trial jurors expressed for their personal safety (RT 31:4518-4519),

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[1] The Mexican Mafia conjures immediate fear because the Mexican Mafia is one of the most notorious and dangerous gangs, and is known for retaliatory conduct, including the murder of prosecution witnesses. (Cf. *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1128-1129.

there is no realistic possibility that appellant's jury could put this matter out of their minds, and thus appellant was deprived of the due process right to a fundamentally fair trial. (AOB 163-172; cf. *Darden v. Wainwright* (1986) 477 U.S. 168, 181.)

> . . . . It does not reflect in any degree upon the intelligence, integrity, or the honesty of purpose of the juror that matters of a prejudicial character find a permanent lodgment in his mind, which will, inadvertently and unconsciously, enter into and affect his verdict. The juror does not possess that trained and disciplined mind which enables him either closely or judicially to discriminate between that which he is permitted to consider and that which he is not. Because of this lack of training, *he is unable to draw conclusions entirely uninfluenced by the irrelevant prejudicial matters within his knowledge.*

(*People v. Albertson* (1944) 23 Cal.2d 550, 577, citations omitted, italics added.)

Respondent's citations to *People v. Holloway, supra*, and *People v. Osband, supra*, are unavailing because neither case involved testimony about the feared Mexican Mafia. (See *People v. Holloway, supra*, 33 Cal.4th at p. 151 [motion for mistrial relating to testimony that defendant preferred the conditions on death row to those he would face if confined on a life sentence, but "not that he preferred dying to serving a life sentence"]; *People v. Osband, supra*, 13 Cal.4th at p. 714 [holding that the trial judge had no duty to investigate jury misconduct where there was no evidence that potentially improper conduct by an alternate juror contaminated the seated jurors].)

Finally, respondent argues that the testimony about the Mexican Mafia "must be considered in the context of the examination of the gang expert." (RB 60, citing *People v. Cox* (1999) 20 Cal.4th 936[2] (sic) and *People v. Smithey* (1999) 20 Cal.4th 936.) Levsen testified as the prosecution's gang expert witness about the gang affiliation of appellant and his codefendants. (RT18:2775-2792.) At the time Levsen testified, the prosecution had already adduced testimony that appellant and his codefendants were members of the East Side Whittier Cole Street gang. (RT 12:1499-1514.) Levsen confirmed their gang membership, but he was the only witness to identify appellant's association with the Mexican Mafia. (RT 18:2783-2784.) In context of Levsen's entire testimony, the testimony about appellant's affiliation with the Mexican Mafia formed the cornerstone of his testimony.

Nor does respondent's citation to *People v. Smithey, supra*, 20 Cal.4th 936, support her argument. *Smithey* involved an isolated question by the prosecutor on cross-examination seeking to elicit inadmissible expert opinion testimony regarding defendant's capacity to form the intent necessary for the charged crimes. (*Id.* at pp. 958, 961.) *Smithey* is distinguishable from the instant

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[2] Respondent's citation to *People v. Cox, supra*, is actually a citation to *People v. Smithey, supra*, 20 Cal.4th 936 (RB 60), and thus adds nothing to respondent's argument.

case because it did not involve the type of highly inflammatory expert testimony at issue here linking the defendant to the Mexican Mafia.

Considering the dearth of the evidence to support appellant's convictions on counts 4, 5, 6, and 7, and the special circumstance true findings of multiple-murder and witness-killing (*ante*, §§ II, III, IV, V & VI)–arguing the evidence was insufficient to support the convictions and true findings–this was a close case. The highly inflammatory nature of the testimony about the Mexican Mafia, especially in a multiple murder case involving a witness killing, rendered the trial court's admonition inadequate to cure the prejudicial impact of the jury hearing this evidence. This is particularly the case here, where the jury expressed fear that the defendants might learn of their identity (RT 31:4518-4519), reinforcing the fact that testimony about the Mexican Mafia, which suggested appellant's dangerousness to the jury, could not be set aside by the jury. (See *People v. Naverrette* (2010) 181 Cal.App.4th 828, 833-834 [police officer's blurting out prejudicial statement not cured by admonition to disregard testimony]; *People v. Allen* (1978) 77 Cal.App.3d 924, 934-935; *People v. Schiers* (1971) 19 Cal.App.3d 102, 107-108 [the admission and subsequent striking of evidence relating to a lie detector test was so prejudicial that defendant was denied a fair trial]; *People v. Ozuna* (1963) 213 Cal.App.2d 338, 342 [reversible error, and admonition insufficient, when the defendant was called an "ex-convict"].)

It is reasonably probable that the effect of the prosecutor's misconduct caused an erroneous result. Reversal of appellant's convictions and death judgment is required.

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IX.

ARIAS'S OUT-OF-COURT STATEMENTS AND HIS PRIOR TESTIMONY–THE VAST MAJORITY OF WHICH RESPONDENT AGREES WERE ERRONEOUSLY ADMITTED INTO EVIDENCE–REQUIRE REVERSAL OF APPELLANT'S CONVICTIONS ON COUNTS 3, 4 AND 5 BECAUSE THE STATEMENTS AND PRIOR TESTIMONY PREJUDICIALLY IMPLICATED APPELLANT IN THE ASSAULT ON ARIAS AND THE MURDER OF MOLINA AND MURILLO.

Appellant explained in his opening brief that the erroneous admission of out-of-court statements and prior testimony of nontestifying witness Carlos Arias–identifying appellant as the person who assaulted him with a firearm an hour prior to the murder of Molina and Murillo–requires reversal of appellant's convictions on counts 3, 4 and 5 because the prosecution sought to prove these charges, in material part, with Arias's prior testimony and out-of-court statements. (AOB 173-209.)

A. APPELLANT HAS NOT FORFEITED THE CONFRONTATION CLAUSE CLAIM MADE IN CONNECTION WITH ARIAS'S TAPE-RECORDED STATEMENTS TO THE POLICE; ALTERNATIVELY, THE FAILURE TO RAISE THE CONFRONTATION CLAUSE OBJECTION RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL.

Respondent argues that "appellant has waived any confrontation clause claim as to taped statements to the police for failure to object on those grounds." (RB 61; see RB 63-64.) At issue here is the testimonial out-of-court statements that Arias made to the police in a tape-recorded interview on October 24, 1997.

(RT 14:1912-1917.) There has been no waiver or forfeiture of the confrontation clause claim.

Trial defense counsel objected to the admission of Arias's prior testimony (given at the trial of Delaloza) on the ground that Arias was not subject to "cross-examination" by appellant's counsel. (RT 12:1532-1533.) Counsel for codefendant Bermudez joined in the objection, which he characterized as "the confrontation problem . . . ." (RT 12:1533.) Trial defense counsel also objected as hearsay to admission of Arias's out-of-court tape-recorded statements to the police. (RT 14:1910) Trial defense counsel thus made a sufficient objection to preserve for appeal the issue whether admission of Arias's prior testimony and out-of-court statements deprived appellant of the federal constitutional right to confrontation under the Sixth and Fourteenth Amendments.

As respondent notes, generally a defendant forfeits his right to claim error under the Sixth Amendment's confrontation clause on appeal by failing to object below. (RB 63-64; *People v. Lewis* (2006) 39 Cal.4th 970, 1028, fn. 19.) Appellant did not forfeit the confrontation clause claim because at the time of trial in 2000 it would have been futile to have raised it. (*People v. Harris* (2013) 57 Cal.4th 804, 840 [failure to raise a *Crawford* claim in a pre-*Crawford* trial is excusable].)

At the time of trial, the admission of extrajudicial hearsay statements of unavailable witnesses did not violate the confrontation clause if those statements, as here, fell within a firmly rooted hearsay exception or contained particularized guarantees of trustworthiness. (See *Ohio v. Roberts* (1980) 448 U.S. 56, 66, overruled by *Crawford v. Washington* (2004) 541 U.S. 36.) In *Crawford*, the United States Supreme Court held that "[w]here testimonial statements are at issue, . . . the Sixth Amendment demands what the common law required; unavailability and a prior opportunity for cross-examination." (*Id.* at p. 68.)

Until 2004, when the United States Supreme Court decided *Crawford* v. *Washington*, *supra*, the scope of a defendant's Confrontation Clause rights was delineated by *Ohio v. Roberts* (1980) 448 U.S. 56, which "conditions the admissibility of all hearsay evidence on whether it falls under a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness." (*Crawford v. Washington, supra*, 541 U.S. at p. 60 [internal quotation marks omitted].) Any out-of-court statement was constitutionally admissible so long as it fell within an exception to the hearsay rule or, if that exception was not firmly rooted, the court found that the statement was likely to be reliable. (See *White v. Illinois* (1992) 502 U.S. 346, 366 (Thomas, J., concurring in part and concurring in the judgment) [noting that the *Roberts* line of cases tended to "constitutionalize the hearsay rule and its exceptions"]; *Lilly v. Virginia* (1999)

527 U.S. 116, 140 (Breyer, J., concurring) ["The Court's effort to tie the Clause so directly to the hearsay rule is of fairly recent vintage ...."].)

Crawford abrogates *Roberts* with respect to prior *testimonial* statements by holding that such statements may never be introduced against the defendant unless he or she had an opportunity to cross-examine the declarant, regardless of whether that statement falls within a firmly rooted hearsay exception or has particularized guarantees of trustworthiness. (*Crawford v. Washington*, *supra*, 541 U.S. at pp. 61, 68.)

Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later "changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change. [Citations.]" (*People v. Turner* (1990) 50 Cal.3d 668, 703; *People v. Kitchens* (1956) 46 Cal.2d 260, 262-263 [no objection necessary if the objection not supported by the then-current law].) The rule announced in *Crawford* is such a rule, and it consistently has been applied retroactively to cases, such as the instant one, pending on appeal. (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1208; *People v. Song* (2004) 124 Cal.App.4th 973, 982; *People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1400; *People v. Saffold* (2005) 127 Cal.App.4th 979, 984 [no waiver of confrontation challenge to hearsay evidence of a proof of service to establish service of a summons or notice, because "[a]ny objection

would have been unavailing under pre-*Crawford* law"]; see *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411, fn. 2 ["failure to object was excusable, since governing law at the time of the hearing afforded scant grounds for objection"].)

In a footnote, respondent notes the burden to establish ineffective assistance of counsel, and summarily asserts that "appellant fails to do so here and subsequently in the brief." (RB 63, fn. 13.) Appellant has shown ineffective assistance of counsel on this record because defense counsel objected to admission of the tape-recorded statements as hearsay, thereby revealing that counsel intended to seek exclusion of the evidence. (RT 14:1910)

If the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance "unless counsel was asked for an explanation and failed to provide one, *or unless there simply could be no satisfactory explanation.*" (*People v. Pope* (1979) 23 Cal.3d 412, 426, italics added; *People v. Majors* (1998) 18 Cal.4th 385, 403 ["the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission"].)

Here, there could be no satisfactory explanation or rational strategic reason for counsel's failure to explicitly raise the confrontation clause objection because counsel objected to admission of the tape-recorded statements on hearsay grounds. Any failure to adequately raise the confrontation claim amounted to

ineffective assistance of counsel because there was a sound basis for the objection. (See *People v. Cudjo* (1993) 6 Cal.4th 585, 616; *People v. Fosselman* (1983) 33 Cal.3d 572, 581-582.)

Defense counsel's deficient representation prejudiced appellant because admission of Arias's prior testimony and out-of-court statements strongly and directly linked appellant to the assault with a firearm on Arias (count 3) and also to the killings of Molina and Murillo (counts 4 & 5, respectively). (AOB 197-209.) Reversal of appellant's convictions on counts 3, 4 and 5 thus is warranted on the ground appellant was denied the state and federal constitutional rights to effective assistance of counsel.

B. ARIAS'S STATEMENTS TO LUKE BISSONNETTE WERE NOT ADMISSIBLE AS SPONTANEOUS STATEMENTS.

Respondent argues that Arias's statements to Luke were properly admitted as spontaneous statements under Evidence Code section 1240. (RB 64-66.) Respondent is mistaken. The statements did not qualify as spontaneous statements, and thus were inadmissible hearsay. (AOB 192-197.)

The statements at issue here involved Luke's testimony that after seeing appellant on Hornell Street he ran to the house at 15171 Goodhue Street, where he met Arias on the back patio. (RT 10:1167-1172.) Luke testified, over defense hearsay objection, that Arias told him that he (Arias) "almost got killed" that

night because "Richard Penunuri had pulled out a gun and put it to his head." (RT 10:1181-1182.)

In support of the argument that Arias made the statements while under the stress of the event, respondent states that "Luke described Arias as 'exhausted from running' and '[r]eally tired' and '[s]till breathing heavy' when he saw Arias at the Goodhue residence . . . ." (RB 65, citing RT 10:1180.) But respondent describes facts unrelated to the startling event which was the subject of the out-of-court statements–i.e., the gunman pointing the gun at Arias. Instead, Arias was exhausted from running and breathing heavily because he ran from Hornell Street to Goodhue Street. (RT 10:1167-1172.) At least twenty minutes elapsed between the time that Arias saw Luke on Hornell Street and when they reunited on Goodhue Street. (CT Supp. Vol. IV-1, p. 160.)

> "The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is . . . the mental state of the speaker. The nature of the utterance-how long it was made after the startling incident and whether the speaker blurted it out, for example-may be important, but solely as an indicator of the mental state of the declarant."

(*People v. Raley* (1992) 2 Cal.4th 870, 892-893, quoting *People v. Farmer* (1989) 47 Cal.3d 888, 903-904.)

Before the statements were made, Luke saw Arias on the back patio speaking with Luke's sister, Laura. (RT 10:1167, 1180.) Luke, Arias and Laura were on the back patio for an additional 20 minutes, and it was sometime during

that 20-minute period that the statements were made. (RT 10:1176-1177, 1180-1182.)

The statements were made after Arias had left the area where the event occurred, after he had reached a place of safety at a new location where other people were present, and after he was seen speaking with another person (i.e. Laura). There was nothing spontaneous about the statements as they were made during a discussion with Laura and Luke. Under these circumstances, and in view of the fact Arias's heavy breathing and exhaustion were unrelated to the startling event, Arias's statements were made under circumstances evidencing ample opportunity to reflect. The statements thus do not qualify as spontaneous statements because they were the product of "processing information in a deliberative manner." (See *People v. Gutierrez* (2000) 78 Cal.App.4th 170, 181.)

Respondent's citation to *People v. Brown* (2003) 31 Cal.4th 518 is unavailing. (RB 65.) There, Julie Bender's testimony that she heard her brother-in-law, Mark Bender, implicate defendant in a murder was admissible as a spontaneous statement because "the declarant, Mark Bender, was crying, shaking and visibly upset when he made the statement" implicating defendant. (*People v. Brown, supra*, 31 Cal.4th at p. 541.) Here, in contrast, Arias was not crying and shaking. Instead, he was having a conversation with Luke's sister on the patio long after the incident with the gunman had passed. (RT 10:1167-1172,

1180.) Arias ran to the house on Goodhue Street, and thus he was not exhausted and breathing heavily from the incident with the gunman. Instead, Arias "was *exhausted from running*. Really tired. Still breathing heavy [from running]." (RT 10:1180, italics added.)

The trial court's finding that Arias's statements qualified as a spontaneous declaration is not supported by substantial evidence. (AOB 192-196.)

C. RESPONDENT AGREES THAT ADMISSION OF ARIAS'S TESTIMONIAL OUT-OF-COURT STATEMENTS MADE TO THE POLICE AND ADMISSION OF HIS PRIOR TESTIMONY AT THE DELALOZA TRIAL VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONTATION.

Respondent agrees that Arias's prior testimony at the Delaloza trial, which was admitted for the truth of the matter asserted (RT 12:1532-1533, 14:1840-1907; CT 12:3362), is testimonial under *Crawford* because it is prior testimony. (RB 66-67; AOB 180-185.) Respondent further agrees that Arias's prior testimony was admitted in violation of appellant's right to confrontation because appellant was not a party to the Delaloza trial where Arias's former testimony was given, and he did not otherwise have the opportunity to cross-examine Arias. (RB 66-67; AOB 180-185.)

Respondent agrees that Arias's out-of-court statements to the police, which were admitted for the truth of the matter asserted (RT 10:1181-1182, 14:1912-1917), are testimonial under *Davis v. Washington* (2006) 547 U.S. 813

because the statements were made under circumstances objectively indicating that the primary purpose of the interrogation was to establish or prove past events potentially relevant to later criminal prosecution (i.e., the statements were made during a formal police interview at the police station). (RB 66-67; AOB 180-185; *Davis v. Washington, supra*, 547 U.S. at p. 822.) Respondent further agrees that Arias's out-of-court statements to the police were admitted in violation of appellant's right to confrontation. (RB 66-67; AOB 180-185.)

D. RESPONDENT AGREES THAT ARIAS'S PRIOR TESTIMONY AT THE DELALOZA TRIAL AND HIS OUT-OF-COURT STATEMENTS TO THE POLICE WERE NOT PROPERLY OFFERED FOR ANY NONHEARSAY PURPOSE.

Appellant explained in his opening brief that after finding that Arias was an unavailable witness, the trial court admitted Arias's prior testimony and his testimonial out-of-court statements to the police on the grounds that his prior testimony was sworn testimony and that his out-of-court statements to the police were prior inconsistent statements. (RT 1:192-193, 12:1532-1533, 1535-1538, 14:1806, 1910-1911.)

Respondent agrees that admission of both the prior testimony and out-of-court statements to the police violated the hearsay rule because they were statements made other than by a witness while testifying at appellant's trial and were offered to prove the truth of the matter asserted. (RB 69-71; AOB 189-192;

cf. Evid. Code, § 1200, subd. (a); *People v. Lewis* (2008) 43 Cal.4th 415, 497-498.)

Respondent further agrees that the prior testimony and out-of-court statements to the police were not properly offered for any nonhearsay purpose. (RB 69-71; AOB 189- 192.) Specifically, respondent agrees Arias's statements were not admissible as prior inconsistent statements under Evidence Code sections 770 and 1235. (RB 69-71.) Respondent agrees Arias's statements were not admissible as prior testimony under Evidence Code section 1291 or statements of an unavailable witness under Evidence Code section 1294. (RB 69-71.)

E. THE JURY'S CONSIDERATION OF ARIAS'S OUT-OF-COURT STATEMENTS AND PRIOR TESTIMONY REQUIRE REVERSAL OF APPELLANT'S CONVICTIONS ON COUNTS 3, 4 AND 5.

Three categories of statements by Arias were erroneously admitted at trial:

(1) nontestimonial out-of-court statements that Arias purportedly made to Luke Bissonnette (RT 10:1181-1182);

(2) prior testimony that Arias gave at the trial of Alejandro Delaloza (RT 12:1532-1533, 14:1840-1907); and,

(3) testimonial out-of-court statements that Arias made to the police in a tape-recorded interview on October 24, 1997 (RT 14:1912-1917).

Respondent agrees that the second and third categories of statements identified above were erroneously admitted in violation of appellant's federal constitutional rights. (*Ante*, § IX, subds. C & D.)

Respondent acknowledges that "to avoid reversal of appellant's convictions [on counts 3, 4 and 5], it is the People's burden to establish beyond a reasonable doubt that the error in admitting Delaloza's (sic) [Arias's] testimony and statements did not contribute to the verdicts . . . ." (RB 67, citing *People v. Mower* (2002) 28 Cal.4th 457, 484 and *Neder v. United States* (1999) 527 U.S. 1, 15; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684 [applying *Chapman*[3] analysis to Confrontation Clause violation].)

Under *Chapman*, "reversal is unwarranted *not* when the record is devoid of evidence that the error had an adverse effect, but *only* when the state has shown beyond a reasonable doubt that the error *did not* have an adverse effect." (*People v. Jackson* (2014) 58 Cal.4th 724, 778 (conc. & dis. opn. of Liu, J.), italics in original; see *Gamache v. California* (2010) 562 U.S. __ [131 S.Ct. 591, 593] (statement of Sotomayor, J.).)

Respondent argues that the error in admitting Arias's prior testimony and out-of-court statements was harmless as to the assault with a firearm (count 3) "because any information gleaned from them were (sic) already known from

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[3] *Chapman v. California* (1967) 386 U.S. 18, 24.

what he told Luke right after running away from appellant, which was properly admitted at trial as an excited or spontaneous statement." (RB 68.) Respondent is mistaken.

Respondent's argument relies on this Court finding no error in the admission of Arias's statements to Luke Bissonnette (i.e., the first category identified above), and thus respondent implicitly concedes that count 3 should be reversed if this Court finds, as it should, that Arias's out-of-court statements to Luke Bissonnette were not admissible as spontaneous statements. (See Arg. IX.B, *ante.*; AOB § IX.G., pp. 197-209.)

Even if this Court finds no error in the admission of Arias's statements to Bissonnette, the admission of those statements does not cure the prejudice appellant suffered from the erroneous admission of Arias's prior testimony and taped statements to the police (i.e., the second and third categories identified above, respectively). Respondent argues that "any reliance on the taped statements and prior testimony was unnecessary for the jury to convict appellant" because Luke testified that Arias told him that appellant pulled out a gun a put it to his head. (RB 68.) First, the premise of respondent's statement is erroneous. Whether or not the jury's reliance on the erroneously admitted evidence was *unnecessary for the jury to convict appellant*, it is the prosecution's burden to prove beyond a reasonable doubt that the erroneously admitted evidence did not

contribute to the verdict, or else suffer a reversal of the conviction. (See *People v. Robertson* (1989) 48 Cal.3d 18, 62; see *Chapman v. California, supra*, 386 U.S. at pp. 20-21.)

Second, the record reveals that Arias's prior testimony did contribute to the verdict because during guilt phase deliberations the jury requested and received readback of Arias's entire prior testimony from the Delaloza trial. (RT 25:3802-3803, 3808-3809; CT 12:3332 ["Would like the Carlos Arias testimony from the De La Loza [sic] trial read back."]; see *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 490 [when considering the prejudicial nature of the error, "we consider whether the jury asked for a rereading of the erroneous instruction or of related evidence"].)

Moreover, a significant factor bearing on the prejudice analysis is the importance of the witness' testimony to the prosecution's case. (*Delaware v. Van Arsdall, supra*, 475 U.S. at p. 684.) The trial court stated that Arias was an "essential witness" for the prosecution. (RT 12:1537.) The fact that the prosecutor sought and obtained admission of Arias's prior testimony and out-of-court statements reflect the prosecutor's view that Arias was an essential witness. The jury's request for readback of Arias's prior testimony confirmed that he was an important witness. (RT 25:3802-3803, 3808-3809; CT 12:3332.) Luke Bissonnette–the only other eyewitness to count 3–left the area prior to the

purported assault on Arias, and thus Luke did not testify to an assault on Arias. (RT 9:1133-1138, 10:1156-1157.) The record thus establishes that Arias's prior testimony and recorded statement to the police were very important to the prosecution's case. Arias's prior testimony and recorded statement to the police likely strongly influenced the jury because this was the only evidence produced by the prosecution where Arias gave a first-hand account of the events. (AOB 197-209.)

Respondent argues that the error in admitting Arias's prior testimony and statements to the police was harmless as to the murders of Molina and Murillo (counts 4 and 5) because the prior testimony and statements "merely reaffirmed that appellant was in the neighborhood when shots were fired." (RB 69.) Respondent is mistaken.

Arias was the only witness who purportedly saw appellant with a gun in his hand. (RT 9:1135-1138, 14:1849; AOB 17-19.) Luke never saw appellant with a firearm. (RT 9:1111-1138, 10:1156-1157.) Arias's prior testimony and statements to the police thus provided the only evidence that appellant was in the neighborhood and *armed with a firearm*. Arias told the police that an hour after seeing appellant with a handgun on Hornell Street, Arias heard gunshots while inside the Goodhue Street residence. (CT Supp. Vol. IV-1, pp. 171.) He looked outside the bedroom window and saw someone running. (CT Supp. Vol. IV-1,

pp. 171-172.) Arias identified the person as wearing the same jacket with a hood as the gunman on Hornell Street was wearing. (CT Supp. Vol. IV-1, pp. 160-161, 172.)

In both opening and rebuttal arguments, the prosecutor told the jury that the People had proven that appellant was the gunman in connection with the double homicide because Arias's prior testimony and statements to the police established that appellant was in the neighborhood and *armed with a firearm.* (RT 22:3404-3405, 3419, 3432; RT 24:3687, 3699.) The prosecutor's reliance in closing argument on erroneously admitted evidence, as here, strongly indicates prejudice. (See *People v. Guzman* (1988) 45 Cal.3d 915, 963; *People v. Roder* (1983) 33 Cal.3d 491, 505; *Depetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1063 [prosecutor's reliance on error in closing argument is indicative of prejudice].)

Arias's prior testimony and out-of-court statements were non-cumulative and uniquely incriminating evidence linking appellant to the murders of Molina and Murillo (counts 4 and 5). In view of the importance of Arias to the prosecution's case, in view of the jury's request for readback of Arias's prior testimony, and in view of the fact that the prosecutor explicitly relied on Arias's prior testimony and out-of-court statements during closing argument, the prosecution is unable to prove that the guilty verdicts actually rendered in this

trial was surely unattributable to the error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *People v. Sakarias* (2000) 22 Cal.4th 596, 625.)

Appellant's convictions on counts 3, 4 and 5 must be reversed.

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X.

ALEJANDRO DELALOZA'S STATEMENTS TO THE POLICE, WHICH RESPONDENT AGREES WERE ERRONEOUSLY ADMITTED INTO EVIDENCE, REQUIRE REVERSAL OF APPELLANT'S CONVICTIONS ON COUNTS 1, 2, 4 AND 5 BECAUSE THE STATEMENTS PREJUDICIALLY IMPLICATED APPELLANT IN THE RALPHS PARKING LOT INCIDENT AND THE MURDER OF MOLINA AND MURILLO.

Appellant explained in his opening brief that the erroneous admission of Alejandro Delaloza's statements to the police–implicating appellant in the Ralphs parking lot incident and the murder of Molina and Murillo–requires reversal of appellant's convictions on counts 1, 2, 4 and 5 because the prosecution sought to prove these charges, in material part, with Delaloza's statements. (AOB 210-235.)

Respondent agrees that appellant's federal constitutional right of confrontation was violated by admission into evidence of Delaloza's statements, which included (1) an audiotape of Delaloza's interrogation by the Los Angeles County Sheriff's Department relating to the murder of Molina and Murillo (counts 4 & 5) and (2) Detective Mary Hanson's testimony about statements Delaloza made to her during an interrogation relating to the Ralphs parking lot incident (counts 1 & 2).[4] (RB 71, 73.)

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[4] In view of respondent's concession that admission of Delaloza's statements violated appellant's federal constitutional right of confrontation, appellant does not address herein whether there was an abuse of discretion in admitting Delaloza's statements under state law (Evid. Code, § 1230) (RB 75-78)

Respondent acknowledges that because the error is of federal constitutional dimension "to avoid reversal of appellant's convictions, it is the People's burden to establish beyond a reasonable doubt that the error in admitting Delaloza's testimony (sic) did not contribute to the verdicts . . . ." (RB 73; see *Delaware v. Van Arsdall, supra*, 475 U.S. at p. 684.)

Respondent argues that the error in admitting Delaloza's statements was harmless as to the Ralphs parking lot incident (counts 1 & 2) "because any information gleaned from his statements to the police was already made known to the jury through other witnesses' testimony." (RB 74.) Respondent also argues that "Delaloza's statement was not crucial in establishing appellant as the perpetrator" because he was independently identified by Kreisher and Cordero. (RB 74.) Respondent is incorrect because Delaloza was an important witness for the prosecution, strongly and directly linking appellant to the robbery of Kreisher and Cordero (counts 1 & 2, respectively).

Delaloza was an important witness for the prosecution as shown by the prosecutor's statement to the court that Delaloza's "admissions to Detective Mary Hanson . . . *implicate Penunuri in the Whittier robbery.*" (RT 13:1742, italics added.) Delaloza's statements to Detective Hanson did implicate appellant in the robbery. (AOB 213-214, 227-228; RT 13:1749-1753.)

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because the issue is fully addressed in appellant's opening brief. (AOB 220-226.)

Delaloza's statements provided the prosecution with important evidence of appellant's involvement because the identifications made by Kreisher and Cordero were impeached with evidence of misidentification, inconsistencies, and fabrication. Kreisher's testimony was impeached with evidence that when first shown a photographic array by Detective Hanson he not only failed to identify appellant, but he identified someone else as the perpetrator. (RT 9:1090-1091.) Cordero's testimony was impeached with evidence that he described the person he identified as appellant as being "about 175 to 180 pounds" (RT 9:988-989), whereas appellant was much larger man, weighing 250 pounds. (RT 9:1067-1068, 19:2819; CT 13:3633; CT Supp. Vol. IV-7, p. 1519.) Cordero's testimony also was impeached with evidence that he was previously convicted of forgery–a crime of moral turpitude–and he lied at the preliminary hearing in this case. (RT 9:996-998, 1005-1008, 1020-1022.)

Respondent argues that the error in admitting Delaloza's statements was harmless as to the murders of Molina and Murillo (counts 4 and 5) because "Delaloza's account to the police merely reaffirmed that both appellant and Delaloza were in the neighborhood when shots were fired, and appellant was running towards the car at the time." (RB 75.) Respondent is mistaken. Delaloza's statements strongly and directly linked appellant to the killing of Molina and Murillo (counts 4 & 5, respectively). (AOB 211-212, 228-235.)

Delaloza's statements to the police placed appellant at the scene of the killings precisely when gunshots were fired. (RT 12:1443-1444; CT 12:3280-3281; CT Supp. IV:109-142.) Further incriminating appellant, Delaloza stated that immediately after the shooting appellant returned to the vehicle and demanded that they flee the scene, stating, "let[']s go man . . . ." (CT Supp. IV:119.) Appellant's jury was instructed, in part:

> *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, but is a fact which, if proved, *may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty.* . . . [CT 12:3370, italics added.]

Respondent's harmless error argument ignores the powerfully incriminating nature of an accomplice's statement implicating a defendant. (See *Bruton v. United States* (1968) 391 U.S. 123, 126-137.)

Delaloza's statements also excluded Delaloza himself as a possible gunman, undercutting appellant's defense to the charges that pointed to Delaloza as the likely gunman. (See AOB 43-52.) Firearm examiner Catalani testified that the shell casings found at the scene of the murders matched those found in a subsequent search of Delaloza's residence, revealing that the same gun fired the shell casings found at both locations. (RT 13:1692-1695.) A black jacket and two sweatshirts, both with hoods, were found at Delaloza's residence. (RT 19:2873-2878.) Delaloza was wearing clothing similar to that of the shadowy

figure seen by Luke Bissonnette–consistent with the clothing found at his residence–and thus he could have been the shadowy figure running away from the double homicide. (RT 9:988-989, 11:1361-1367; 19:2878-2880.) Further, the prosecution's expert testified that if appellant was the gunman the jacket worn by him would contain gunshot residue. (RT 19:2832-2833, 2840-2841.) But there was no gunshot residue on the black jacket recovered in the search of appellant's residence. (RT 19:2832-2833, 2840-2841.)

In view of the powerfully incriminating nature of Delaloza's statements to the police, the prosecution is unable to prove beyond a reasonable doubt that the guilty verdicts in this case on counts 1, 2, 4 and 5 were surely unattributable to the error in admitting the statements. (Cf. *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) Appellant's convictions on those counts must be reversed.

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XI.

IN CONNECTION WITH ALEJANDRO DELALOZA'S STATEMENTS, THE TRIAL COURT PREJUDICIALLY ERRED BY FAILING TO INSTRUCT THE JURY ON THE RULES RELATING TO ACCOMPLICE TESTIMONY, THEREBY LOWERING THE PROSECUTION'S BURDEN OF PROOF AND REQUIRING REVERSAL OF COUNTS 1, 2, 4 AND 5.

Appellant explained in his opening brief that Alejandro Delaloza was an accomplice as a matter of law. When the audiotape of Delaloza's interrogation was played to the jury, he already had been convicted of the robbery of Shawn Kreisher and Randy Cordero (Pen. Code, § 211) and the first degree murders of Michael Murillo and Brian Molina (Pen. Code, §§ 187, subd. (a), 189).[5] (AOB 236-260.)

The trial court failed to instruct the jury on the rules relating to accomplice testimony with respect to Delaloza's statements. (AOB 243-247.) Prior to playing the audiotape to the jury, the court stated that Delaloza was an accomplice in connection with counts 4 and 5 (murder of Molina and Murillo, respectively), but then the court withdrew that statement, instructing the

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[5] Respondent repeatedly refers to Delaloza's statements as *testimony*. (RB 78 ["Testimony of Delaloza"], 81 ["Delaloza's Testimony"], 82 ["testimony of Delaloza"], 83 ["Delaloza's testimony"], 84 ["Delaloza's testimony"].) But Delaloza did not testify in this case, nor was any prior testimony admitted into evidence. Instead, the court admitted Delaloza's custodial statements to Detective Hanson and the audiotape of his police interrogation. (RT 12:1427; CT 12:3280-3281 [People's Exh. 37 [audiotape]; CT Supp. IV:109-142 [People's Exh. 38 [transcript].)

jury,"*That's for the jury to decide what the position of each of these parties were.*" (RT 12:1443, italics added.) In connection with counts 4 and 5, the court failed to instruct that Delaloza was an accomplice as a matter of law. (RT 12:1442-1443.) The court also failed to instruct that the testimony of an accomplice must be viewed with "care and caution" (CALJIC No. 3.18). (RT 12:1442-1443.) The court's brief statement did not even mention counts 1 and 2 (robbery of Kreisher and Cordero, respectively). (RT 12:1442-1443.)

Respondent fails to address whether Delaloza was an accomplice in connection with counts 1 and 2. (See RB 81-84.) Respondent's failure to address the issue constitutes a concession of appellant's position. (See *People v. Bouzas* (1991) 53 Cal.3d 467, 480 [omission of response to appellant's argument implies concession to that argument].)

Nor can it be disputed that Delaloza was an accomplice as a matter of law in connection with counts 1 and 2. When the audiotape of Delaloza's interrogation was played to the jury Delaloza had been convicted of the robbery of Kreisher and Cordero. Delaloza thus was liable to prosecution for the *identical offense* charged against appellant. (Pen. Code, § 1111; see *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 104 ["Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed."].)

In connection with counts 4 and 5, respondent argues that "the trial court was not bound to conclude that Delaloza was an accomplice as a matter of law." (RB 82.) Respondent is mistaken. There can be no dispute that Delaloza was an accomplice as a matter of law in connection with counts 4 and 5 because when the audiotape of Delaloza's interrogation was played to the jury Delaloza had been convicted of the first degree murders of Murillo and Molina. Delaloza thus was liable to prosecution for the *identical offense* charged against appellant. (Pen. Code, § 1111; see *People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 104.)

Respondent argues that "in light of *all* the accomplice instructions given, the trial court's omission was nonprejudicial." (RB 82, italics in original.) Respondent notes that the jury was instructed with "CALJIC Nos. 3.10 [accomplice defined], 3.11 [corroboration], 3.12 [sufficiency of evidence to corroborate an accomplice], 3.13 [one accomplice cannot corroborate another], [and] 3.18 [care and caution]." (RB 82-83.) But these instructions do not prove respondent's argument because the instructions entirely failed to identify Delaloza, as respondent acknowledges. (RB 83.) Moreover, the court's instructions limited the definition of an accomplice to "a person who is subject to prosecution for the identical offense charged in *Counts six and seven* against the defendant on trial by reason of aiding and abetting or being a member of a

criminal conspiracy." (RB 80; CT 12:3386.) The instructions thus removed Delaloza as a possible accomplice because he was not subject to prosecution for the offenses charged in counts 6 and 7 (conspiracy to commit murder of Jaime Castillo and murder of Jaime Castillo, respectively).

The accomplice instructions cited by respondent related solely to Jesus Marin, an accomplice as a matter of law in connection with counts 6 and 7. (RT 24:3759-3760.) Delaloza was not subject to prosecution for any offense relating to Castillo. (RT 12:1477; CT Supp. VI, pp. 1172-1184.)

Respondent argues that the instructional error was harmless under state law because it is not "reasonably probable that such error affected the verdict." (RB 82, citing *People v. Guiton* (1993) 4 Cal.4th 1116, 1129-1130.) Respondent is mistaken.

Preliminarily, respondent fails to address appellant's arguments that in view of the importance of Delaloza's statements to the prosecution's case on counts 1, 2, 4 and 5, the instructional error violated appellant's federal constitutional rights to due process and jury trial, thereby requiring the prosecution to prove beyond a reasonable doubt that the error did not contribute to the verdicts. (AOB § XI.D., pp. 246-250.) Respondent's failure to address the issue constitutes a concession of appellant's position. (See *People v. Bouzas,*

supra, 53 Cal.3d at p. 480 [omission of response to appellant's argument implies concession to that argument].)

Respondent argues that the instructional error was harmless for three reasons. (RB 82-85.) Respondent first argues that "the trial court's failure to instruct that Delaloza was an accomplice as a matter of law was mitigated by its recitation" of CALJIC Nos. 3.10, 3.11, 3.12, 3.13, and 3.18, identified above. (RB 82-83.) Respondent argues, "While the court did not explicitly identify Delaloza in giving these instructions, they more than adequately conveyed the essence of accomplice testimony and how the jury was to handle such testimony." (RB 83.) But as explained above, these instructions limited the definition of an accomplice to Marin in connection with counts 6 and 7, and thus entirely excluded Delaloza as an accomplice.

Respondent next argues that the instructional error was harmless because "there was information apart from the jury instruction which cast suspicion on Delaloza's testimony." (RB 83.) Respondent notes that the purpose of Penal Code section 1111 is to compel the jury to treat accomplice testimony with distrust and suspicion. (RB 83, citing *People v. Miranda* (1987) 44 Cal.3d 57, 101, overruled on other grounds in *People v. Marshall* (1990) 50 Cal.3d. 907, 933, fn. 4.) Respondent argues that the jury would have treated Delaloza's testimony and statements with distrust and suspicion in view of "Delaloza's

status as a former co-defendant" and his "inconsistent statements in his police interview and his uncooperative testimony at trial . . . ." (RB 83.) Respondent's factual assertions are made without citation to the record, and thus the argument is waived. (See *Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 743 [failure to cite to the record waives claim].) Nor is there any evidence in the record that the jury was aware of Delaloza's status as a former codefendant. (See AOB 7-52 [statement of facts]; RB 2-17 [statement of facts].)

Nor was Delaloza inconsistent in his police interviews. In connection with the Ralphs parking lot incident (counts 1 and 2), after an initial denial, Delaloza admitted being involved in the incident, and then made statements incriminating appellant. (RT 13:1749-1749.) Delaloza admitted taking property, and even told Detective Hanson that some of the stolen items might still be found at his home. (RT 13:1750-1753.)

With respect to the audiotape of Delaloza's interrogation (relating to the murder of Murillo and Molina in counts 4 and 5, respectively), Delaloza placed himself and appellant at the scene of the murders. Delaloza admitted driving the get-away vehicle, but shifted blame to appellant by stating that he heard gunshots and saw appellant running. (RT 12:1443-1444; CT 12:3280-3281; CT Supp. IV:109-142.) There was nothing inherently suspect about Delaloza's statements

to the police such that the jury would be –without proper instruction–compelled to treat his statements with distrust and suspicion.

Finally, respondent argues that the instructional error was harmless because "Delaloza's testimony was sufficiently corroborated by independent evidence." (RB 84.) In connection with the Ralphs parking lot incident (counts 1 and 2), respondent argues that "Delaloza's description of the events were (sic) corroborated by Cordero and Kreisher, who separately identified appellant as the perpetrator of the robberies." (RB 84.) But neither the testimony of Cordero nor the testimony of Kreisher provides sufficient corroboration of Delaloza's statements identifying appellant. Kreisher's identification of appellant was suspect because when first shown a photographic array by Detective Hanson he identified someone else, not appellant. (RT 9:1090-1091.) Cordero's identification of appellant was suspect because he described appellant as being "about 175 to 180 pounds" (RT 9:988-989), whereas appellant weighed 250 pounds. (RT 19:2819.) Cordero's testimony was impeached with evidence that he suffered prior felony convictions for forgery and attempted strong-arm robbery (RT 9:996-998), and he lied at the preliminary hearing in this case. (RT 9:1005-1008, 1020-1022.) Accordingly, the evidence cited by respondent lacks sufficient corroboration because it does *not* connect appellant with an element of the crime in such a way as to suggest that Delaloza was telling the truth. (See

People v. Williams (1997) 16 Cal.4th 635, 680-681 [corroborating evidence must tend to connect the defendant with an element of the crime in such a way as to satisfy the jury that the accomplice is telling the truth].)

With respect to the audiotape of Delaloza's interrogation (relating to the murder of Murillo and Molina in counts 4 and 5, respectively), respondent argues that Delaloza's statements placed appellant at the scene of the shooting and corroborated the description given by Luke and Arias of a man dressed like appellant running away from the Goodhue residence." (RB 84.) But as respondent concedes, Arias's prior testimony and statements to the police were admitted in violation of appellant's federal constitutional right to confrontation, and thus Arias's statements about someone running away from the Goodhue residence cannot be used as corroborating evidence. (*Ante*, § IX; RB 66-67.)

Nor does Luke Bissonnette's testimony provided sufficient corroboration. Luke's testimony was unreliable because he consumed drugs that would have impaired his ability to accurately observe the events. (RT 10:1232-1233, 1237-1238.) He acknowledged that he never saw the gunman's face, but only looked out of the window after the shots were fired and saw someone in the distance, from behind, and for only two seconds. (RT 10:1059-1066.) He admitted that it was too dark to tell what the person was wearing, and thus he could not identify the person, although he *assumed* it was appellant because he had seen appellant

an hour earlier on Hornell Street. (RT 10:1059-1066.) Dr. Kathy Pezdak, Ph.D., testified that Luke could not have accurately identified someone under the circumstances described by him (i.e., in the dark, at a distance, and from behind), but explained the phenomenon where an erroneous identification occurs when the witness has an expectation of seeing a particular person. (RT 19:2850-2852, 2856, 2872.) The evidence lacks sufficient corroboration because it does *not* connect appellant with an element of the crime in such a way as to suggest that Delaloza was telling the truth.

The prosecutor's repeated reliance during closing summation on Delaloza's statements implicating appellant reveals the importance of those statements to the prosecution's case, and strongly suggests that the verdicts were influenced by Delaloza's statements. (RT 22:3403-3404, 22:3420, 22:3432, 22:3434, 24:3695; see *Yates v. Evatt* (1991) 500 U.S. 391, 403-404 [an instructional error may be found to be harmless where it is shown beyond a reasonable doubt that the error was "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record"].)

It is thus reasonably probable that the instructional error affected the verdict. The prosecution also will be unable to prove that that omission of the accomplice instructions as to Delaloza did not contribute to the guilty verdicts.

(Cf. *Sullivan v. Louisiana, supra*, 508 U.S. at p. 279.) Appellant's convictions on counts 1, 2, 4 and 5 must be reversed for instructional error.

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XII.

THE JUDGE'S REMARKS IN THE PRESENCE OF THE JURY–VOUCHING FOR THE TRUTH OF THE PROSECUTION'S EVIDENCE AND INTERPRETING THE EVIDENCE IN A MANNER FAVORABLE TO THE PROSECUTION–REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS.

Appellant explained in his opening brief that after Delaloza invoked the privilege against self incrimination and refused to testify, the court forced an Evidence Code section 402 hearing–in the presence of the jury–on the admissibility of Delaloza's statements to the police. (AOB 261-285.)

At issue here are comments the judge made when informing the jury that Delaloza had refused to testify and when overruling the defense objection to the admission of his statements. (*Post*, § XII.C.)

A. THE FORFEITURE RULE DOES NOT APPLY BECAUSE THE JUDICIAL MISCONDUCT AROSE DURING A FORCED 402 HEARING IN THE PRESENCE OF THE JURY, PLACING DEFENSE COUNSEL IN AN UNTENABLE POSITION AND RELIEVING HIM OF A DUTY TO OBJECT.

Respondent argues that the issue has been forfeited by failure of trial defense counsel to object to the court's comments in the presence of the jury. (RB 85-86.) Respondent is mistaken. The forfeiture rule does not apply because in view of the judge's insistence that the matter be discussed in the presence of the jury (RT 12:1431), it would be unfair to require defense counsel to choose between provoking the judge into making further negative statements (by objecting to "judicial misconduct" in the presence of the jury), and thus poisoning

the jury against his client or, alternatively, giving up his client's ability to argue misconduct on appeal. (See *People v. Sturm* (2006) 37 Cal.4th 1218, 1237.) The failure to object thus should not preclude review because the record reveals that any attempt by counsel to object to the court's procedure and comments "would have been futile and counterproductive to his client." (*Ibid.*, citing *People v. Hill* (1998) 17 Cal.4th 800, 821.)

Respondent argues that the "futility exception typically arises when the court has overruled the defendant's objections in a manner that suggests any further objections would be useless." (RB 85, citing *People v. Hill, supra*, 17 Cal.4th at p. 821.) Although overruling a series of objections might excuse additional objections as futile, an objection is excused where, as here, it would almost certainly be overruled. (See *People v. Hamilton* (1989) 48 Cal.3d 1142, 1184, fn. 27; *People v. Pitts* (1990) 223 Cal.App.3d 606, 692 [rule that objection is necessary to preserve issue on appeal "is not applicable where any objection would almost certainly be overruled"].)

Nor should a rule of forfeiture be applied in this case because the trial court's conduct in forcing a 402 hearing in the presence of the jury, and then openly stating its view of the evidence, in a manner damaging to the defense, is shocking and denied appellant a fundamentally fair trial. (See *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648 [court retains "discretion to excuse

the lack of an objection and elect to exercise that discretion in defendant's favor because of the shocking nature of the error which rendered the trial unfair"].)

B. RESPONDENT IMPLICITLY CONCEDES THAT DEFENSE COUNSEL'S FAILURE TO OBJECT RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL.

Respondent does not address appellant's argument that should this Court find the issue forfeited, then appellant was deprived of the constitutional right to effective assistance of counsel. (See RB 84-92; AOB 267-270; *Strickland v. Washington* (1984) 466 U.S. 668, 684-685.)

Respondent's failure to address the issue constitutes a concession of appellant's position. (See *People v. Bouzas, supra*, 53 Cal.3d at p. 480 [omission of response to appellant's argument implies concession to that argument].)

C. THE JUDGE ENGAGED IN PREJUDICIAL MISCONDUCT BY HOLDING THE 402 HEARING IN THE PRESENCE OF THE JURY, BY VOUCHING FOR THE TRUTH OF THE PROSECUTION'S EVIDENCE, BY INTERPRETING THE EVIDENCE FOR THE JURY IN A MANNER FAVORABLE TO THE PROSECUTION (AND THUS USURPING THE JURY'S ESSENTIAL FACT-FINDING FUNCTION), AND BY CREATING THE IMPRESSION THAT HE WAS ALLYING HIMSELF WITH THE PROSECUTION.

At issue here are the following categories of statements by the judge, as identified in appellant's opening brief (AOB 261-267, 270-284):

(1) commenting to the jury that Delaloza had been brought into the courtroom outside of their presence and refused to testify and/or take part in the proceedings (RT 12:1431 ["I'm sorry for this delay in the proceedings, but what

was involved here was a witness who is in custody was to be brought into the court to testify. And that witness was unwilling to even come into the court, and, once he came into the court, he refused to testify or to be sworn or to have any part in the proceedings. The name of that witness was Mr. Delaloza. He has been referred to as Hondo in these proceedings."]);

(2) forcing an Evidence Code section 402 hearing on the issue of the admissibility of Delaloza's statements to the police in the presence of the jury (RT 12:1431), and subsequently discussing the evidence and overruling defense counsel's objections in the presence of the jury (RT 12:1431-1444);

(3) agreeing with the prosecutor's assessment of Delaloza's statement that Delaloza was the getaway driver in connection with the Molina and Murillo homicides (counts 4 & 5), thereby implicitly suggesting that appellant was the shooter (RT 12:1433 [the court: "I think that's inherent in his statement that he made [to the police]."]; see RT 12:1435 [the court: "He was there. He was the driver of the car."]);

(4) disparaging defense counsel Bernstein's argument regarding the admissibility of Delaloza's statements to the police and vouching for the truth of Delaloza's statements (RT 12:1434-1435 [the court: "Mr. Bernstein, if this witness were called to the stand and had willingly testified, I would not stop him

in his testimony if he testified exactly as he's testified in this statement. [¶] That doesn't make sense [Mr. Bernstein]."]);

(5) vouching for the truth of Delaloza's statements to the police. (RT 12:1435 [the court: "He was there. He was the driver of the car."]);

(6) disparaging defense counsel and vouching for the truth of Delaloza's statements. (RT 12:1436 [the court: "Based on the cursory reading of this [transcript], I disagree with Mr. Bernstein's position that this is an exculpatory statement. There are admissions in this statement that he actually drove to the location; that he drove away from the location and, therefore, was part and parcel of what was going on [in connection with the double homicide], it could be contended."]); and,

(7) informing the jury that Delaloza was previously tried by a jury for the "double murder" charged in this case, was convicted by the jury, was sentenced, and has appealed the judgment (RT 12:1442-1443).

Respondent acknowledges that (1) "a judge should be careful not to throw the weight of his judicial position into a case," (2) "judges should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other[,]" and (3) only "one instance of judicial misconduct may constitute prejudicial error if egregious . . . ." (RB 86.) Respondent further acknowledges that "a trial court cannot become an

advocate for either party under the guise of commenting on the evidence . . . ." (RB 87.)

In connection with the first category of statements identified above, respondent argues that the judge did not commit misconduct by telling the jury that Delaloza had refused to testify because a "judge's factually accurate comment cannot be said to be improper." (RB 89.) Respondent is mistaken. The judge stated:

> I'm sorry for this delay in the proceedings, but what was involved here was a witness who is in custody was to be brought into the court to testify. And *that witness was unwilling to even come into the court, and, once he came into court, he refused to testify or to be sworn or to have any part in the proceedings*. The name of that witness was Mr. Delaloza. He has been referred to as Hondo in these proceedings. [RT 12:1431, italics added.]

At the time of the hearing, Delaloza had been convicted of the double homicide of Molina and Murillo and the judgment of conviction in his case was pending appeal. (RT 12:1442.) Delaloza thus retained a Fifth Amendment privilege not to testify. (See *People v. Fonseca* (1995) 36 Cal.App.4th 631, 633; *People v. Lopez* (1999) 71 Cal.App.4th 1550, 1554.)

The judge's comment that Delaloza was initially "unwilling to even come into the court," and then when he did "he refused to testify or to be sworn or to have any part in the proceedings" (RB 12:1431), was not a proper evidentiary matter in this case because Delaloza was exercising a constitutional right.

(*People v. Fonseca, supra*, 36 Cal.App.4th at p. 633.) The comments revealed the judge's displeasure with Delaloza's actions and suggested to the jury that Delaloza's actions were unlawful. This encouraged speculation by the jury that Delaloza had something to hide or was fearful of testifying against appellant.

In connection with the second category of statements identified above, respondent argues that there was no misconduct in holding the 402 hearing in the presence of jury, and thus the judge's statement to "defense counsel to 'state his position' regarding the finding that Delaloza was unavailable" was not misconduct. (RB 89.) Respondent misreads appellant's argument. Appellant does not argue that the court's statement to counsel ("state your position") was itself misconduct. (See AOB 274.) Nor does appellant argue that every 402 hearing conducted in the present of a jury constitutes misconduct, although appellant is unaware of any case where a 402 hearing on the admissibility of evidence was held in the presence of the jury, and respondent points to none. (See AOB 274; see Evid. Code, § 310, subd. (a) ["All questions of law (including but not limited to questions concerning . . . the admissibility of evidence, and other rules of evidence) are to be decided by the court."]; see also *People v. Banks* (1970) 2 Cal.3d 127, 137, fn. 6.)

Instead, appellant argues that the judge engaged in misconduct "[b]y engaging defense counsel in an Evidence Code section 402[] hearing in the

presence of the jury, *and then ultimately discussing the evidence and overruling defense counsel's objections in the presence of the jury* . . . ." (RT 1431-1444). (See AOB 274, italics added.) In other words, the section 402 hearing actually conducted *in this case* amounted to misconduct.

Respondent groups the third, fourth, fifth, and sixth categories of statements identified above into one general response under the heading, "No misconduct for commenting on evidence because it did not distort the testimony." (RB 90.)

Preliminarily, respondent fails to address appellant's arguments that (1) the judge criticized and disparaged defense counsel in the presence of the jury, (2) the judge vouched for the prosecution's theory and the truth of the Delaloza's statements to the police, and (3) the judge's comments on the evidence favored the prosecution and usurped the jury's fact-finding function. (See RB 90-91; AOB 274-278.) Respondent's failure to address these issues constitutes a concession of appellant's position. (See *People v. Bouzas, supra*, 53 Cal.3d at p. 480 [omission of response to appellant's argument implies concession to that argument].)

Respondent argues that the judge "did not distort testimony not only because they (sic) were accurate and already part of the evidence, but also because the trial court's comments concerned a rational inference that could be

drawn from the evidence, i.e., Delaloza admitted being the driver of the car." (RB 91, citing *People v. Mayfield* (1997) 14 Cal.4th 668, 755.) Contrary to respondent's suggestion that the judge may help the jury interpret the evidence, in a jury trial, as here, "All questions of fact are to be decided by the jury." (Evid. Code, § 312, subd. (a).) Further, "the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants." (Evid. Code, § 312, subd. (b); see *Bracy v. Gramley* (1997) 520 U.S. 899, 904-905 [due process requires the trial judge to protect the defendant's right to a fair jury trial, and to conducting the proceedings without bias and in a manner not favoring either party]; *Turner v. Louisiana* (1965) 379 U.S. 466, 472-473; *In re Murchison* (1955) 349 U.S. 133, 136.)

Nor does respondent's quote from *People v. Mayfield, supra*, 14 Cal.4th 668 assist her.[6] (RB 91.) In *Mayfield*, in connection with a jury view of the crime scene, this Court held that the trial judge did not improperly participate in the proceedings by requesting of the parties "that police cars be positioned at the service station as they were at the time Sergeant Wolfley was killed" and by directing "where the jurors would be positioned during the proposed demonstration firings of Sergeant Wolfley's gun." (*Id.* at pp. 737, 739.) This

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[6] Respondent cites to page 755, but the quoted statement is found at page 739.

Court "reject[ed] defendant's underlying assumption that a trial judge, except when ruling on objections, must remain passive at the trial while the attorneys are presenting the evidence." (*Id.* at p. 739.) Here, appellant does not assert that the judge must remain passive. Instead, appellant argues that the judge usurped the jury's fact-finding function and improperly signaled to the jury that the judge was allied with the prosecution. The judge did so by (1) disparaging defense counsel, (2) vouching for the prosecution's theory, (3) providing the jury with an interpretation of Delaloza's statements in a manner favorable to the prosecution, and (4) vouching for the truth of Delaloza's statements. (AOB 274-278.)

Respondent also argues, without citation to legal authority, that "the judge's comments cannot be said to be improper as they were part and parcel of the court's decision-making process regarding the admissibility of the statements." (RB 91.) Respondent misses the point. Regardless of whether or not "the judge's comments . . . were part and parcel of the court's decision-making process regarding the admissibility of the statements" (RB 91), the judge's comments were improper because they were made *in the presence of the jury*. (AOB 273-285.)

In connection with the seventh category of statements identified above, respondent argues that appellant invited the error because defense counsel requested that the jury be informed that Delaloza was convicted of the double

murders. (RB 92.) Respondent is incorrect as this did not invite the error. The trial court previously overruled appellant's objection to admission of Delaloza's statements to the police (RT 12:1432-1440), and thus defense counsel's request that the jury be informed that Delaloza was convicted of the double murders was a defensive action to offset or explain the erroneously admitted evidence. (See *People v. Turner* (1990) 50 Cal.3d 668, 704, fn. 18 ["defensive acts" to mitigate effect of adverse ruling do not amount to waiver]; *People v. Scott* (1978) 21 Cal.3d 284, 291; *People v. Sam* (1969) 71 Cal.2d 194, 207-208; *Jameson v. Tully* (1918) 178 Cal. 380, 384.)

Finally, respondent argues harmless error because there were no repeated disparaging comments and the jury was instructed that it, not the court, was the trier of fact. (RB 93.) Respondent is mistaken. The judge's comments during the 402 hearing in the presence of the jury painted a vivid picture of Delaloza as a recalcitrant witness–i.e., one "unwilling to even come into the court," and refusing "to be sworn or to have any part in the proceedings." (RT 12:1431.) But Delaloza's actions, as described above, had no relevance to appellant's guilt or innocence because Delaloza was lawfully exercising his constitutional right not to testify. After portraying Delaloza as a recalcitrant witness, the judge improperly commented on the evidence and created the impression that he (the judge) was allying himself with the prosecution. (AOB 274-278.) The general

jury instructions cited by respondent at page 93 on witness credibility and statements by the judge afforded appellant no protection against the backdrop of the trial judge's misconduct. (See *People v. Sturm, supra*, 37 Cal.4th at pp. 1233, 1237-1238; *Jackson v. Denno* (1974) 378 U.S. 368, 382, fn. 10.)

The prosecution will be unable to prove that the judicial misconduct was harmless beyond a reasonable doubt because Delaloza's statements to the police formed a material part of the prosecution's evidence on the double homicide, which also provided the purported motive for appellant to conspire to kill Castillo. Delaloza identified himself as the driver of the Cadillac, and placed appellant at the scene of the killings (wearing a large black jacket) at the precise time that the gunshots were being fired. (RT 12:1443-1444; CT 12:3280-3281; CT Supp. IV:109-142.) Delaloza shifted the blame to appellant, stating he was unaware there would be a shooting, and when appellant came running back to the Cadillac (at the time of the shooting) Delaloza was upset with appellant about the shooting. (CT Supp. IV:109-126.) This undercut appellant's defense to the charges that pointed to Delaloza as the likely gunman. (See AOB 43-52.)

Reversal of appellant's convictions is warranted. (Cf. *Sullivan v. Louisiana, supra*, 508 U.S. at p. 279; *People v. Sturm, supra*, 37 Cal.4th at pp. 1243-1244.)

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XIII.

THE TRIAL COURT'S INSTRUCTIONS TO THE GUILT-PHASE JURY IN THE LANGUAGE OF CALJIC NO. 17.41.1–THE DISAPPROVED "JUROR SNITCH" INSTRUCTION–REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS.

Appellant argued in his opening brief that by instructing in the language of CALJIC No. 17.41.1 (i.e., the jury snitch or anti-nullification instruction) the trial court violated his federal constitutional rights to jury trial and due process by invading the secrecy of jury deliberations and undermining the jury's free exercise of the power of nullification. (AOB 286-290, but recognizing *People v. Engelman* (2002) 28 Cal.4th 436.)

Respondent argues that the claim has been forfeited because appellant did not object to the instruction. (RB 94.) Respondent is mistaken. The claim is cognizable on direct appeal because the instruction is incorrect and it implicates appellant's substantial rights. (See *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7; Pen. Code, § 1259.)

Penal Code section 1259 states, in relevant part, "Upon an appeal taken by the defendant, the appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in a lower court, if the substantial rights of the defendant were affected thereby." Respondent's assertion that the instructional error claim is forfeited because appellant's substantial rights were not affected misstates the statutory language. (RB 94.) In

other words, it is illogical to argue, as respondent does, that section 1259 means that a defendant must object to an instructional error if, and only if, it did not affect his substantial rights or he has forfeited the claim.

Respondent fails to critically analyze the issue, but simply refers to this Court's decision in *People v. Engelman, supra*, 28 Cal.4th 436. (RB 94-95.) Appellant urges this Court to recognize the constitutional infirmity in CALJIC No. 17.41.1, which is revealed in the application of the time-honored concepts of the secrecy of jury deliberations and the power to nullify. The "secrecy of deliberations is the cornerstone of the modern Anglo-American jury system." (*United States v. Thomas* (2nd Cir. 1997) 116 F.3d 606, 618.) A juror's ability to acquit "in the teeth of both law and facts" (*Horning v. District of Columbia* (1920) 254 U.S. 135, 138) is a well-established power that has been with us since Common Law England. (*Bushell's Case* (C.P. 1670) 124 Eng.Rep. 1006 [releasing jury foreman Bushell, who was arrested for voting to acquit William Penn of unlawful assembly against the weight of the evidence and the requirements of the law]; *Dunn v. United States* (1932) 284 U.S. 390, 393-394 [recognizing power of nullification].)

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XIV.

THE CUMULATIVE EFFECT OF THE GUILT PHASE ERRORS REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS.

Appellant identified numerous errors in his opening brief which occurred during the guilt phase trial. (AOB 152-290.) Respondent summarily addresses appellant's cumulative prejudice argument, asserting that "either no errors occurred or that any alleged error either considered individually or together was harmless." (RB 96.)

Respondent concedes error in connection with the admission of Arias's prior testimony and statements to the police, which error violated appellant's constitutional right of confrontation. (RB 61-70.)

Respondent also concedes error in connection with the admission of Delaloza's prior statements, which error violated appellant's constitutional right of confrontation. (RB 71-77.)

Respondent cannot dispute that the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.)

This is the case here, where serious errors separately identified in Arguments VIII through XIII cumulatively, or in any combination thereof,

violated appellant's due process rights under *Chambers v. Mississippi* (1973) 410 U.S. 284, 298, 302-303. These errors include admission of inadmissible testimony that appellant was acting under the jurisdiction of the Mexican Mafia, that he showed allegiance to the Mexican Mafia, and that he paid taxes to the Mexican Mafia. (AOB, § VIII.) The errors include, as respondent acknowledges, erroneous admission out-of-court statements and prior testimony of nontestifying witness Carlos Arias, and erroneous admission of testimonial out-of-court statements of nontestifying witness Alejandro Delaloza. (AOB, §§ IX and X, respectively).

The erroneous admission of Delaloza's statements was compounded by the failure to instruct the jury to view Delaloza's testimony with care and caution. (AOB § XI.) These errors were further compounded by the trial judge's remarks– in the presence of the jury–that he believed that Delaloza was the getaway driver in connection with the Molina and Murillo homicides (counts 4 & 5), thereby implicitly suggesting that appellant was the shooter, thereby depriving appellant of the due process right to fundamentally fair trial. (AOB, § XII.)

Reversal of appellant's convictions is required because respondent has not proven beyond a reasonable doubt that the guilty verdicts actually rendered in this trial were surely unattributable to the cumulative effect of the multiple errors.

(Cf. *Sullivan v. Louisiana, supra*, 508 U.S. at p. 279; *People v. Sturm, supra*, 37 Cal.4th at pp. 1243-1244.)

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PENALTY PHASE AND SENTENCING

XV.

APPELLANT'S EXCLUSION FROM THE PENALTY PHASE CLOSING ARGUMENTS PURPORTEDLY RELATING TO CODEFENDANT CASTRO–WHICH INCLUDED ARGUMENT BY THE PROSECUTOR AND COUNSEL FOR CODEFENDANT CASTRO IMPLICATING APPELLANT–AND APPELLANT'S EXCLUSION DURING THE TRIAL COURT'S INSTRUCTIONS RELATING THERETO, REQUIRE REVERSAL OF THE DEATH JUDGMENT.

A. INTRODUCTION.

Appellant explained in his opening brief that during a joint penalty trial with codefendant Castro–and in the midst of jury deliberation whether appellant should live or die–the jury heard closing argument from the prosecutor and Castro's defense counsel implicating appellant, and then received further instruction on the law. All of this was done outside of appellant's presence, and without a waiver of appellant's right to be present during trial. (AOB 296-303.)

Appellant further explained that the prosecution will be unable to prove beyond a reasonable doubt that the constitutional error did not contribute to the verdict because the prosecutor and Castro's defense counsel repeatedly made inculpatory statements about appellant, and appellant's absence reasonably showed a lack of interest in the proceedings at a critical stage, suggesting that as between the two defendants appellant should receive the harsher sentence–a

result the jury returned with a verdict of death for appellant and life for Castro. (AOB 303-312.)

B. RESPONDENT'S WAIVER ARGUMENT FAILS BECAUSE THE RECORD DOES NOT SUPPORT A KNOWING AND INTELLIGENT WAVIER OF APPELLANT'S RIGHT TO PERSONAL PRESENCE AT TRIAL.

Preliminarily, respondent uses the terms forfeiture and waiver interchangeably, never once distinguishing between the two. (RB 97-98.) The terms are not the same. "[W]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" (*People v. Simon* (2001) 25 Cal.4th 1082, 1097, fn. 9, citing *United States v. Olano* (1993) 507 U.S. 725, 733; see also *In re Sheena K.* (2007) 40 Cal.4th 875, 880, fn. 1 [describing difference between forfeiture and waiver and noting that the term "'waiver' . . . conveys an express relinquishment of a right or privilege"].)

Respondent implicitly recognizes, as she must, that the judge never addressed appellant personally on the issue of the right to be present. Nor did the judge obtain either an oral or written waiver from appellant of his right to be present. (See RB 97-100.)

Instead, respondent states that "defense counsel explicitly waived appellant's the (sic) right to be present." (RB 98, citing RT 30:4470.) Respondent is mistaken. Outside of appellant's presence, the court informed

defense counsel that the proceedings would be conducted in appellant's absence but that defense counsel could attend. (RT 30:4470.) Defense counsel stated, "Thank you, your honor." (RT 30:4470; AOB 297.) The trial court never asked defense counsel to waive appellant's presence, nor did trial defense counsel explicitly waive appellant's presence.

Defense counsel's acquiescence does not constitute a waiver by appellant of the right to be present during a critical stage of the proceedings. In addition to the requirement of a written waiver (*People v. Johnson* (1993) 6 Cal.4th 1, 18; Pen. Code, § 977, subd. (b)(1)), the constitution requires that the waiver of a capital defendant's right to be present during trial must be knowing and intelligent. (*People v. Robertson, supra*, 48 Cal.3d at pp. 60-61.) A trial court's failure to even inform a defendant of his right to personal presence, as here, necessarily precludes a finding on appeal that the defendant knowingly and intelligently waived that right. (Cf. *Moran v. Burbine* (1986) 475 U.S. 412, 421 [a waiver is knowing and intelligent if it is "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."].)

Respondent argues, without citation to any authority whatsoever, that "[a]ppellant has no fundamental right to be present at a codefendant's closing argument during the penalty phase." (RB 98.) Respondent is mistaken. This

was a joint trial where the prosecutor and Castro's defense counsel repeatedly made inculpatory statements about appellant during closing argument, and then the judge instructed the jury on the law–all outside appellant's presence. In view of the fact that this occurred in a joint penalty trial, and prior to the jury returning a verdict as to appellant, the proceedings are correctly viewed as a part of appellant's penalty trial. (See *People v. Bryant, Smith & Wheeler* (August 25, 2014, S049596) __ Cal.4th __, __ [Slip Opn. p. 39] ["A joint trial is not equivalent to simultaneous separate trials"].)

Nor is respondent's argument supported by her case citations. (RB 98.) *People v. Virgil* (2011) 51 Cal.4th 1210 involved the defendant's absence from a side-bar conference, which was not a critical stage of the proceedings. (*Id.* at pp. 1236-1237.) *People v. Santos* (2007) 147 Cal.App.4th 965 involved defendant's absence after verdict when the jury requested to leave through a private exit, and thus "did not constitute a critical stage of the proceedings." (*Id.* at p. 972.) *In re Horton* (1991) 54 Cal.3d 82 involved defense counsel's stipulation to trial by a temporary judge (as opposed to a regularly elected or appointed superior court judge), which could be made without the consent of the client because it did not involve a fundamental constitutional right of the defendant. (*Id.* at pp. 93-95.) *People v. Mayfield, supra*, 14 Cal.4th 668 involved the defendant's absence at a jury view of the crime scene, a critical stage of the proceedings, but in contrast to

the instant case, the "*defendant,* in open court and on the record, *made a voluntary and intelligent waiver of presence at the jury view.*" (*Id.* at p. 738, italics added.) *People v. Frierson* (1985) 39 Cal.3d 803 involved the issue whether trial counsel had the authority, over defendant's objection, to refuse to present a defense to the special circumstance charge, an issue not involving a defendant's presence at trial. (*Id.* at pp. 812-817.)

Nor did appellant waive the statutory right to presence. (AOB 300.) Respondent fails to address the statutory right to presence, which is not waived except in writing. (See RB 98; Pen. Code § 977, subd. (b)(1).) Respondent's failure to address the issue constitutes a concession of appellant's position. (See *People v. Bouzas, supra*, 53 Cal.3d at p. 480 [omission of response to appellant's argument implies concession to that argument].)

Moreover, the proceedings at issue here fall squarely within the language of section 977, subdivision (b)(1), which states, in pertinent part, that "the accused shall be present . . . during those portions of the trial when evidence is taken before the trier of fact . . ." and the "accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present . . . ." Appellant did not execute a written waiver of his presence. Accordingly, there

was no valid waiver of his right to be present during the trial. (*People v. Johnson* (1993) 6 Cal.4th 1, 18.)

C. REVERSAL OF THE DEATH VERDICT IS REQUIRED BECAUSE APPELLANT WAS PREJUDICIALLY DENIED THE RIGHT TO BE PRESENT AT CRITICAL STAGES OF HIS JOINT TRIAL WITH CODEFENDANT CASTRO.

Respondent argues that appellant did not have a right to be present during the closing argument of codefendant Castro because the proceedings did not bear a reasonable, substantial relation to his opportunity to defend against the charges. (RB 99-100.) Respondent is mistaken.

This was a *joint trial* where the prosecutor and Castro's defense counsel repeatedly made inculpatory statements about appellant during closing argument, and then the judge instructed the jury on the law–all in the midst of jury deliberations as to appellant. Closing argument, instruction of the jury, and jury deliberations are critical stages of the criminal proceedings. (See *Herring v. New York* (1975) 422 U.S. 853, 857-858 [closing argument is a critical stage of the proceedings]; *People v. Wright* (1990) 52 Cal.3d 367, 402; *People v. Dagnino* (1978) 80 Cal.App.3d 981, 985-988 [jury instruction is a critical stage of the proceedings]; *People v. Rubalcava* (1988) 200 Cal.App.3d 295, 299 [jury deliberation is a critical stage of criminal proceedings].)

Respondent argues that assuming appellant was absent from a critical stage of the proceedings, "*he has not shown* that his absence was prejudicial."

(RB 100, italics added.) But respondent's formulation of the issue–shifting the burden to appellant to show the absence of prejudice–is plainly not the law, as a constitutional violation during a capital penalty trial is reversible unless *the prosecution* can prove the error was harmless beyond a reasonable doubt. (*People v. Robertson, supra*, 48 Cal.3d at p. 62; see *Chapman v. California, supra*, 386 U.S. at pp. 20-21.)

Indeed, even "[s]tate law error occurring during the penalty phase will be considered prejudicial when there is *a reasonable possibility* such an error affected a verdict. [Citations.] Our state *reasonable possibility* standard is the same, in substance and effect, as the *harmless beyond a reasonable doubt* standard of *Chapman v. California* (1967) 386 U.S. 18, 24. [Citations.]" (*People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11, italics in original.)

Nor is respondent's argument supported by her case citations because each case involved defendant's absence at a *non-critical* stage of the proceedings. (RB 100; *People v. Perry* (2006) 38 Cal.4th 302, 311-312 [bench conference]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1357 [in-chambers conference]; *People v. Santos* (2007) 147 Cal.App.4th 965, 972 ["the jury's request to leave through a private exit and the trial court's approval did not constitute a critical stage of the proceedings"].) Where a defendant is absent during critical stages of the proceedings, as here, respondent bears the burden of proving the error

harmless beyond a reasonable doubt. (*People v. Robertson, supra*, 48 Cal.3d at p. 62; see *Chapman v. California, supra*, 386 U.S. at pp. 20-21.)

Respondent has not sustained its burden of proving that the error did not contribute to the death verdict. Respondent does not dispute that the prosecutor's closing argument implicated appellant as the person who purportedly ordered the witness killing of Castillo, which the prosecutor characterized as among the most "horrific styles of murders that you see . . . ." (RT 30:4473.) Respondent also does not dispute that the prosecutor argued that Castillo was killed because of the "double homicide"–i.e., the killings of Molina and Murillo for which only appellant, and not Castro, was convicted. (RT 30:4473.)

Respondent does not dispute that the prosecutor argued that death was the appropriate penalty, referring explicitly to the killing of Murillo, Molina, and Castillo. (RT 30:4474.) But only appellant was convicted of all three homicides; Castro was not even charged with the murders of Murillo and Molina. Respondent also does not dispute that the prosecutor then explicitly urged the jury to return a death verdict as to appellant. (RT 30:4474-4476, 4480-4481.)

Respondent does not dispute that Castro's trial defense counsel also argued in a manner that implicated appellant and encouraged the jury to further consider the aggravating nature of appellant's actions, especially when compared to Castro's conduct. (RT 30:4484-4485, 4493.)

Respondent also does not dispute that the trial court's instructions applied not only to Castro, but also applied to appellant. (See RB 100; RT 30:4498-4500, 4509.)

Yet appellant was not even present for the jury to view him and *assess his demeanor* while these aggravating arguments were made, or while the court was instructing the jury. This impaired the jury's assessment of his moral culpability by removing his humanity from view. (See AOB 310-311.) A defendant's demeanor is often one of the most important considerations for the jury in deciding whether a capital defendant deserves to live or die. (See *Riggins v. Nevada* (1992) 504 U.S. 127, 143-144 (conc. opn. of Kennedy, J.); *People v. Leonard* (2007) 40 Cal.4th 1370, 1420, citing *People v. Lanphear* (1984) 36 Cal.3d 163, 167 [sympathy for defendant may be based on jury's in-court observations].)

The prosecution thus will be unable to sustain its burden of proving that the error in excluding appellant from these critical proceedings was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at pp. 20-21.) Reversal of the death judgment is required.

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XVI.

THE PENALTY INSTRUCTIONS AND THE TRIAL PROCESS–WHEREBY CLOSING ARGUMENTS OF COUNSEL AND JURY INSTRUCTIONS PURPORTEDLY RELATING TO CASTRO WERE GIVEN IN APPELLANT'S ABSENCE AND IN THE MIDST OF PENALTY PHASE DELIBERATIONS–DENIED APPELLANT THE CONSTITUTIONAL RIGHT TO AN INDIVIDUALIZED SENTENCING DETERMINATION, REQUIRING REVERSAL OF THE DEATH JUDGMENT.

Appellant explained in his opening brief that the trial court erroneously instructed the jury, in part, "So what you decide against one person should not be carried over into the decision of the other person, *unless you feel it is appropriate.*" (RT 29:4426, italics added.) This instruction deprived appellant of the constitutional right to an individualized sentencing determination. (AOB 313-325; see *People v. Lewis, supra*, 43 Cal.4th at p. 461; *Lockett v. Ohio* (1978) 438 U.S. 586, 605-606 (plur. opn. by Burger, C.J.).)

Appellant also explained that the trial process, whereby the jury was interrupted in the midst of deliberations on appellant's sentence to hear further argument urging them to return a verdict of death against appellant and either death or life as to codefendant Castro, deprived him of the constitutional right to an individualized sentencing determination. (AOB 313-325.)

Recognizing that "a judge must appropriately instruct the jury to assess independently the appropriateness of the death penalty for the defendant" (RB 102, citing *People v. Ervin* (2000) 22 Cal.4th 48, 95), respondent states that "the

trial court initially and briefly *misspoke* when it told the jury, 'so what you decide against one person should not be carried over into the decision of the other person, unless you feel it is appropriate' . . . ." (RB 102, italics added.) But there is no indication in the record that the judge misspoke, and respondent cites none. Morever, and critically here, there is no indication in the record that the jurors understood whether or not the judge misspoke. The words actually spoken to the jury must be carefully scrutinized, "for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." (*Sandstrom v. Montana* (1979) 442 U.S. 510, 514.)

Respondent argues that the error was cured when the court instructed the jury, "'In this case you must decide separately the question of the penalty as to each of the defendant.'" (RB 102-103.) Respondent is mistaken. The additional instruction did not cure the error because there is no apparent inconsistency between the two instructions–i.e., the jury could simultaneously decide separately the question of the penalty as to each defendant and arrive at each separate verdict by, in part, comparing the relative culpability the defendants. It is reasonably likely that one or more jurors decided that appellant should die without an accurate understanding of what evidence may properly inform the penalty decision. (See *Carter v. Kentucky* (1981) 450 U.S. 288, 302 ["Jurors are

not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law."].)

Respondent argues that an instruction to consider separately the question of the penalty as to each defendant "is adequate to ensure individualized sentencing in joint penalty trials." (RB 103, citing *People v. Taylor* (2001) 26 Cal.4th 1155, 1173-1174.) *Taylor* is inapposite because it did not address the instructional error presented here, or any instructional error whatsoever. (*Id.* at p. 1174.) "[C]ases are not authority for propositions not considered." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.)

Respondent further argues that "it was clear that the jury carefully considered the evidence as to each defendant and determined each penalty separately, given that appellant and Castro received separate punishments — death for appellant and life without the possibility of parole for Castro." (RB 103.) Respondent is mistaken. Instead of revealing that the jury made an individualized assessment of moral culpability, as required,[7] the disparate verdicts show that it is reasonably likely that the jurors arrived at each verdict by,

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[7] Cf. *Lockett v. Ohio, supra*, 438 U.S. at pp. 605-606; *People v. Cox* (1991) 53 Cal.3d 618, 682-683 ["The very purpose of the penalty phase is to determine the appropriate sentence for the defendant's crime, i.e., an individualized assessment of the offender's moral culpability for his particular offense in light of statutorily and constitutionally relevant considerations."], citing *Woodson v. North Carolina* (1976) 428 U.S. 280, 303-305.

in part, comparing the relative culpability of appellant and Castro, just as the jury was instructed they could do. (RT 29:4426.)

Respondent does not dispute appellant's claim "that the trial court implicitly encouraged the jury to compare the relative culpability of each defendant by allowing the prosecutor to argue Castro's portion of the closing arguments while the jury was deliberating as to appellant." (RB 103.) Instead, respondent argues that "there is nothing in the record indicating the jurors failed to assess independently the appropriateness of the death penalty for appellant, or engaged in improper comparative evaluations of the defendants due to any interruption. In the absence of a showing that the jurors in this joint trial were unable or unwilling to assess independently the respective culpability of each codefendant, there was no error." (RB 103.) Respondent is mistaken. The record shows that the jury was instructed in a manner permitting a comparative analysis of culpability, and then by interrupting the penalty phase deliberations and permitting the prosecutor to argue for a verdict of death against both Castro and appellant, the judge implicitly encouraged the very comparative analysis of culpability its instructions permitted.

Where there is a reasonable likelihood that the jurors applied an instruction in way that violates the federal constitution, as here, the error is one of

federal constitutional dimension. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 71-72.)

The errors described above deprived appellant of the constitutional right to an individualized sentencing determination, requiring reversal of the death judgment because the prosecution is unable to prove beyond a reasonable doubt that the error did not contribute to the verdict. (See *People v. Robertson, supra*, 48 Cal.3d at p. 62; see *Chapman v. California, supra*, 386 U.S. at pp. 20-21.)

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XVII.

THE TESTIMONY OF PROSECUTION WITNESSES JAVIER CASTILLO AND LINDA CASTILLO THAT APPELLANT SHOULD BE SENTENCED TO DEATH REQUIRES REVERSAL OF THE DEATH JUDGMENT.

A. INTRODUCTION.

Appellant explained in his opening brief that the prosecutor was permitted to elicit testimony from Javier Castillo and Linda Castillo (Jaime Castillo's father and stepmother, respectively) that appellant should be sentenced to death. (AOB 326-338; RT 26:3905-3907, 27:3984, 3990.)

Javier Castillo testified that he had no objection to the death penalty being sought against appellant, and since appellant "gave the order to kill my son . . . . he should [not] be given that same opportunity [for life imprisonment] to do the same thing again. . . . ." (RT 27:3984.)

Linda Castillo testified that she was "for the death penalty. I want these people to be killed in [sic] lethal injection. . . . . If you guys get the penalty, it's good. But it's a shame that the system takes so long to be able to kill these people. They might be in for life, anyway." (RT 27:3990.)

B. THE FORFEITURE RULE SHOULD NOT APPLY HERE BECAUSE THE TRIAL COURT OVERRULED DEFENSE COUNSEL'S OBJECTION TO THIS LINE OF QUESTIONING.

Respondent argues the issue has been forfeited because "[a]lthough counsel objected to the initial line of questioning by the prosecutor (see 26RT

3905-3907), defense counsel failed to renew his objection when the prosecutor" questioned Javier and Linda Castillo. (RB 107-108.) Respondent is mistaken. When overruling defense counsel's objection to John Molina's testimony about what he felt was an "appropriate penalty for this jury to impose upon Richard Penunuri" (RT 26:3904), the court and counsel discussed the issue in an Evidence Code 402 hearing, after which the court ruled that the prosecutor was permitted to ask penalty-phase witnesses "what their opinion is [about the penalty the jury should impose], so [the] objection [is] overruled." (RT 26:3905-3907; see *People v. Zemavasky* (1942) 20 Cal.2d 56, 62; *Douglas v. Alabama* (1965) 380 U.S. 415, 422; *People v. Diaz* (1951) 105 Cal.App.2d 690, 696 ["Where a court has made a ruling, counsel must not only submit thereto but it is his duty to accept it, and he is not required to pursue the issue."].)

C. RESPONDENT DOES NOT ADDRESS THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

Respondent does not address appellant's argument that should this Court find the issue forfeited, then appellant was deprived of the constitutional right to effective assistance of counsel. (AOB 330-332; see RB 107-109; *Strickland v. Washington* (1984) 466 U.S. 668, 684-685.)

Respondent's failure to address the issue constitutes a concession of appellant's position. (See *People v. Bouzas, supra*, 53 Cal.3d at p. 480 [omission of response to appellant's argument implies concession to that argument].)

D. THE TESTIMONY OF JAVIER CASTILLO AND LINDA CASTILLO THAT APPELLANT SHOULD BE SENTENCED TO DEATH REQUIRES REVERSAL OF THE DEATH JUDGMENT.

Respondent recognizes that "the views of a victim's family as to the appropriate punishment are beyond the scope of constitutionally permissible victim impact testimony." (RB 107; *Payne v. Tennessee* (1991) 501 U.S. 808, 830, fn. 2 and *Booth v. Maryland* (1987) 482 U.S. 496, 508-509; *People v. Cowan* (2010) 50 Cal.4th 401, 484.)

Nonetheless, respondent argues that "question posed by the prosecutor to three[8] family members was within the scope of constitutionally permissible victim impact testimony" because "the prosecutor merely sought any information from the witnesses that they might deem relevant for the jury to know 'in evaluating the proper punishment' for appellant." (RB 108, footnote added.) Respondent is mistaken. Javier Castillo expressed the opinion that appellant should be executed, stating that he had no objection to the penalty being sought by the prosecutor because appellant "gave the order to kill my son" and thus "should [not] be given that same opportunity [for life imprisonment] to do the same thing again. . . . ." (RT 27:3984.) Linda Castillo explicitly testified that

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[8] Respondent also cites to the testimony of witness Mike Murillo (RB 106), but appellant does not raise an issue with respect to his testimony, and thus the two witnesses at issue here are Javier and Linda Castillo. (AOB 326-338.)

she wanted appellant killed, and even expressed frustration at the system for taking "so long to . . . kill these people." (RT 27:3990.) The prosecutor thus elicited "the views of a victim's family as to the appropriate punishment[, which] are beyond the scope of constitutionally permissible victim impact testimony." (RB 107, citing, among other cases, *Payne v. Tennessee, supra*, 501 U.S. at p. 830, fn. 2 and *Booth v. Maryland, supra*, 482 U.S. at pp. 508-509.)

Respondent seeks support for her position in *People v. Benavides* (2005) 35 Cal.4th 69. (RB 108.) But *Benavides* involved the entirely separate issue concerning testimony about how the victim's death "affected extended family members . . . ." (*Id.* at p. 107.) In *Benavides*, this Court did not address the factual issue presented here–i.e., testimony from family members that the defendant should be killed by the state rather being sentenced to life in prison. (*Id.* at pp. 106-107; see *People v. Alvarez, supra*, 27 Cal.4th at p. 1176 ["cases are not authority for propositions not considered"].)

Respondent also argues that any error was harmless because "the allegedly improper testimony constituted only a small portion of the victim impact testimony." (RB 109.) Respondent is mistaken. Javier and Linda Castillo testified that appellant should be put to death for killing their son. (RT 27:3982-3984, 3986, 3990.) The length of the testimony, in proportion to other testimony, does not somehow lessen its impact. For example, Linda Castillo testified that

people like appellant need "to be killed" by "lethal injection." (RT 27:3990) Her testimony reinforced Javier Castillo's testimony that a death sentence was "especially [appropriate] as to appellant" because appellant "gave the order to kill my son." (RT 27:3984.) This was powerful testimony designed to influence the jury's verdict, and thus the prosecution cannot now carry its burden of proving beyond a reasonable doubt that the error did not contribute to the verdict. (See *Chapman v. California, supra*, 386 U.S. at pp. 20-21; *People v. Cowan, supra*, 50 Cal.4th at p. 491.)

Reversal of the death verdict is warranted.

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XVIII.

ADMISSION OF EVIDENCE IN AGGRAVATION OF A PURPORTED ASSAULT WITH A FIREARM ON JASON UZEL REQUIRES REVERSAL OF THE DEATH JUDGMENT BECAUSE THE EVIDENCE IS WOEFULLY INSUFFICIENT TO SUSTAIN A FINDING THAT APPELLANT PERPETRATED THE ASSAULT.

Appellant explained in his opening brief that the prosecution introduced evidence in aggravation that in May 1997 someone committed an assault with a firearm on R.J. Uzel by shooting him in the leg and chest as he was seated in a vehicle, a violation of Penal Code section 245, subdivision (a)(2). (AOB 339-357.)

Appellant explained that the evidence is insufficient to sustain a finding that appellant perpetrated the assault because (1) Uzel never identified his assailant, (2) witness Debra Recio did not see who fired the shots, although she testified that a few days after the shooting there was speculation "on the street" that Dozer from Cole Street was involved somehow, (3) witness Abraham Van Rood saw a "young man" firing the shots, but was unable to identify the shooter, and (4) the gunman left the scene in a vehicle registered to an address used by codefendant Bermudez. (AOB 339-357.)

Respondent recognizes that Uzel did not identify appellant as the gunman, nor did Uzel see where the shots were fired from. (RB 110 ["Although Uzel testified he did not see where the bullets had come from, he did admit knowing

appellant from high school."].) When interviewed by two police officers at the hospital, Uzel did not have any information about the identity of the person who shot him. (RT 27:4039, 4042.)

With respect to witness Recio, respondent states that Recio "had previously testified that, 'all I remember him it (sic) was Dozer, and he was trying — they were trying to figure out how they could get back at Cole Street for shooting at them, vice versa.'" (RB 110, citing RT 27:4054.) Respondent omits the salient fact that Recio testified that Uzel never told her that he had been shot by appellant, although there was speculation "on the street" that appellant was somehow responsible for the shooting. (RT 27:4050-4051, 4054-4055.) Recio testified, in part, that "when he [Uzel] got out of the hospital, it was out on the street that Dozer, whoever Dozer was, from Cole Street had did it. R.J. [Uzel] did not come straight out, it was Dozer . . . ." (RT 27:4055.) Recio testified on cross-examination, in part:

Q: So basically what he -- what you testified to that's been read back in court?

A: Mm-hmm.

Q: Is in effect gossip from the street?

A: Yeah. Like I said, what they -- they meaning one gang to another.

Q: And you've not heard anything from R.J. [Uzel] where he's telling you who shot him?

A: No.

Q: From his own personal knowledge.

A: No. [RT 27:4055.]

Contrary to respondent's suggestion that "Uzel and Recio gave conflicting testimony," an issue for the jury to resolve, the record does not support a solid, credible inference that appellant was the shooter. Uzel testified that he was never able to identify his assailant. (RT 27:4032-4045.) Uzel's testimony was consistent with what he told the police at the hospital shortly after the shooting. (RT 27:4039, 4042.) Recio also was unable to identify the shooter. (RT 27:4047-4056.) She testified that while she was driving Uzel to the hospital, and then while at the hospital, Uzel never stated that appellant was involved in the shooting. (RT 27:4050-4051.) She testified that the word "on the street" was that Dozer was involved. (RT 27:4051.) But Recio's testimony about the word "on the street"–implicating Dozer in some unspecified way–is speculative, and thus cannot support a finding that appellant was the gunman. (See *People v. Daniels* (1991) 52 Cal.3d 815, 861-862.)

Respondent argues that any error in admitting the evidence was harmless because "[t]he assault on Uzel was relatively trivial in comparison to the circumstances of the crimes in which appellant was convicted . . . ." (RB 111.) Respondent is mistaken. The assault with a firearm on Uzel was the only prior

criminal conduct introduced in aggravation in support of the death verdict. Respondent ignores the fact that the prosecutor used this evidence to show the callousness of appellant's behavior, arguing to the jury during closing summation, "Dozer even two months before the Whittier murders actually tried to kill, injure, and even, well, kill and injure Jason Uzel at that McDonald's parking lot on May 20th, 1997. That kind of tells you what kind of person Dozer was. Or still is, for that matter." (RT 30:4443.) Indeed, contrary to respondent's attempt to minimize the aggravating nature of the assault with a firearm on Uzel, the prosecutor explicitly told the jury during closing summation, "And again, *this is a significant factor in aggravation*, which can not be overcome by anything in mitigation that we've already heard." (RT 30:4444, italics added.)

Having argued to the jury that the assault with a firearm on Uzel was a "significant factor in aggravation" (RT 30:4444), respondent cannot now carry its burden of proving the opposite–i.e., that the evidence did not contribute to the death verdict. (See *People v. Roder, supra*, 33 Cal.3d at p. 505 [error not harmless under *Chapman* because, in part, "the prosecutor relied on the [erroneous] presumption in his closing argument"]; *People v. Martinez* (1986) 188 Cal.App.3d 19, 26 [error not harmless under *Chapman* based, in part, on prosecutor's closing argument]; *People v. Frazier* (2001) 89 Cal.App.4th 30, 39 ["reasonable doubt [under *Chapman*] is reinforced here by the prosecutor's use of

the propensity instruction in closing argument"]; *People v. Younger* (2000) 84 Cal.App.4th 1360, 1384 ["Our conclusion that there is such reasonable doubt is reinforced by the prosecutor's use of the instruction in her closing arguments."]; *Depetris v. Kuykendall, supra*, 239 F.3d at p. 1063 [prosecutor's reliance on error in closing argument is indicative of prejudice].)

Reversal of the death judgment is required.

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XIX.

IN VIEW OF THE ADMISSION OF PRIOR VIOLENT CRIMES EVIDENCE IN AGGRAVATION, THE TRIAL COURT'S INSTRUCTION THAT THE PROSECUTION HAD NO BURDEN OF PROOF AT THE PENALTY PHASE REQUIRES REVERSAL OF THE DEATH JUDGMENT.

Appellant explained in his opening brief that the court's instruction to the jury, "The People do not have a burden of proof at this stage of the proceeding[,]" (RT 30:4430), and the failure to define proof beyond a reasonable doubt in connection with the prior criminal conduct of assault with a firearm on Uzel (RT 30:4462-4469; CT 13:3526-3540), prejudicially removed the burden of the prosecution to prove that appellant committed the assault. (AOB 358-367; *People v. Cowan, supra*, 50 Cal.4th at p. 494 [when prior violent crimes evidence is admitted in aggravation, the trial court errs by failing to define "reasonable doubt" during penalty phase instructions]; *People v. Lewis, supra*, 43 Cal.4th at p. 535.)

Respondent agrees that the "trial court's omission in defining reasonable doubt was error." (RB 113.)

Respondent argues that the error was harmless because "the jurors had been given the appropriate instructions during the guilt phase." (RB 113, citing *People v. Cowan, supra*, 50 Cal.4th 401.) But *Cowan* is inapposite because there

the trial court did not instruct the jury, as here, that "People do not have a burden of proof at this stage of the proceeding." (*Id.* at pp. 493-495; see RT 30:4430.)

In view of the specific instruction that the prosecution did not have a burden of proof at the penalty phase, and the court's failure to define reasonable doubt, it is reasonably likely that the jury did not apply the beyond-a-reasonable-doubt standard to any evidence produced during the penalty phase, including evidence of the assault with a firearm on Uzel.

Respondent will be unable to prove that the instructional error was harmless beyond a reasonable doubt because (1) the assault with a firearm on Uzel the only prior criminal conduct admitted by the prosecution, (2) evidence that appellant perpetrated the assault was not proven beyond a reasonable doubt (*ante*, § XVIII), (3) the prosecutor argued the assault during closing summation in urging the jury to return a death verdict (RT 30:4443-4444), and (4) as the prosecutor told the jury, appellant's assault with a firearm on Uzel was a "significant factor in aggravation." (RT 30:4444.) (See *Yates v. Evatt, supra*, 500 U.S. at pp. 403-404 [an instructional error may be found to be harmless where it is shown beyond a reasonable doubt that the error was "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record"].)

/ / /

XX.

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

Appellant explained in his opening brief that many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. (AOB 368-411.)

In *People v. Schmeck* (2005) 37 Cal.4th 240, a capital appellant presented a number of often-raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id.* at p. 303.) This Court acknowledged that in dealing with these attacks in prior cases, it had given conflicting signals on the detail needed in order for an appellant to preserve these attacks for subsequent review. (*Id.* at p. 303, fn. 22.) In order to avoid detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (*Id.* at p. 304.)

Accordingly, pursuant to *Schmeck* and in accordance with this Court's own practice in decisions filed since then, appellant has, in Argument XX of the

opening brief, identified the systemic and previously rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requests the Court to reconsider its decisions rejecting them. These arguments are squarely framed and sufficiently addressed in the opening brief, and therefore appellant makes no reply to respondent's argument at pages 115-119.

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XXI.

THE ERRORS IN BOTH THE GUILT AND PENALTY PHASES OF TRIAL, INDIVIDUALLY AND CUMULATIVELY, OR IN ANY COMBINATION THEREOF, REQUIRE REVERSAL OF THE DEATH JUDGMENT.

Appellant explained in his opening brief that numerous errors occurred at every stage of his trial from jury selection through the guilt and penalty phases. (AOB 412-416.) The multiple errors mandate an analysis of prejudice that takes into account the cumulative and synergistic impact of the errors. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

Respondent summarily states that "the record contains few, if any, errors made by the trial court or prosecution, none of which were prejudicial." (RB 120.)

This Court must consider the cumulative prejudicial impact of the various constitutionally-based errors because cumulative prejudicial impact can itself be a violation of federal due process. (*Taylor v. Kentucky, supra*, 436 U.S. at p. 487, fn. 15.) A trial is an integrated whole. This is particularly true of the penalty phase of a capital case, where the jury is charged with making a moral, normative judgment, and the jurors are free to assign whatever moral or sympathetic value they deem appropriate to each item of mitigating and aggravating evidence. The jurors are told to consider the "totality" of the mitigating circumstances with the

"totality" of the aggravating circumstances. (See CT 13:3539-3540; CALJIC No. 8.88.)

As appellant explained in his opening brief, the death sentence is unconstitutionally excessive and unreliable where, as here, appellant suffered from chronic methamphetamine use, which contributed to the conduct at issue in this case because chronic methamphetamine can induce violence, paranoia, alienation, hallucinations, and delusions. (AOB, Statement of Facts, § E.1, pp. 57-61.)

There is a substantial record of serious errors that individually and cumulatively, or in any combination, violated appellant's due process rights under *Chambers v. Mississippi, supra*, 410 U.S. 284 and require reversal of the death judgment. The numerous and substantial errors in the jury selection and guilt phases of the trial, as set forth in Arguments I through XIII, inclusive, including the cumulative effect of the errors in the guilt phase of trial (Argument XIV), deprived appellant of a fair and reliable penalty determination. (AOB 65-295.) The penalty phase jury instructions and the trial process, where appellant was excluded from the courtroom during argument and instructions relating to Castro (but implicating appellant), deprived appellant of the right to be present at trial and denied him an individualized sentencing determination. (*Ante*, §§ XV & XVI; AOB 296-325.) The testimony of prosecution penalty phase witnesses

Javier Castillo and Linda Castillo that appellant should be sentenced to death denied appellant the right to a reliable penalty determination. (*Ante*, § XVII; AOB 326-338.) Finally, the admission of legally insufficient evidence in aggravation of a purported assault with a firearm on Uzel, and the instructional error relating thereto in relieving the prosecution of its burden of proof, undermined the reliability of the penalty determination. (*Ante*, § XVIII & XIX; AOB 339-367.)

In view of the substantial individual and cumulative errors, and appellant's case in mitigation for a life sentence–which included evidence that appellant's conduct was induced by chronic drug addiction and that he is of good character and is a caring person with redeeming qualities (AOB 57-64)–it simply cannot be said that the combined effect of the errors detailed above had "no effect" on at least one of the jurors who determined that appellant should die by execution. (Cf. *Caldwell v. Mississippi, supra*, 472 U.S. at p. 341.) Appellant's death sentence must be reversed due to the cumulative effect of the numerous errors in this case.

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CONCLUSION

For the reasons set forth above, and those set forth in appellant's opening brief, appellant Richard Penunuri respectfully requests reversal of his convictions and the judgment of death.

Respectfully submitted,

Dated: 11-10-2014 By: _____

Stephen M. Lathrop
Attorney for Defendant and Appellant
RICHARD PENUNURI

CERTIFICATE OF COMPLIANCE

I hereby certify under penalty of perjury under the laws of the State of California that there are 28,108 words in this brief.

Respectfully submitted,

Dated: 11-10-2014 By: _____

Stephen M. Lathrop
Attorney for Defendant and Appellant
RICHARD PENUNURI

Proof of Service

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 904 Silver Spur Road #430, Rolling Hills Estates, CA 90274. On November 10, 2014, I served the following document(s) described as **Appellant's Reply Brief** on the interested party(ies) in this action by placing _ the original or X a true copy thereof enclosed, in (a) sealed envelope(s), addressed as follows:

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Los Angeles Superior Court Pomona Courthouse South 400 Civic Center Plaza Pomona, California 91766	Office of the District Attorney 400 Civic Center Plaza, #201 Pomona, California 91766
Richard Penunuri, #T-06637 CSP-SQ 1-AC-60 San Quentin, CA 94974	BLANK

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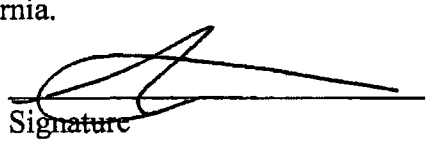

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