IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. WILLIAM LEE WRIGHT, JR., Defendant and Appellant.	No. S107900 (Los Angeles County Superior Court No. KA048285-01)

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of Los Angeles

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INTRODUCTION

In this reply, appellant addresses specific contentions made by respondent, but does not reply to arguments which are adequately addressed in his opening brief. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert 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 appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief.

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ARGUMENT

I. THE TRIAL COURT'S ERRONEOUS DENIAL OF APPELLANT'S TIMELY REQUEST TO REPRESENT HIMSELF VIOLATED HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

Appellant argues that his unequivocal request to represent himself, made two days before the scheduled hardship qualification of the large venire was erroneously denied by the trial court on the ground that it was untimely, and that the court's error requires reversal of the entire judgment. (AOB 25-67.) Respondent claims that appellant's argument that this Court's holding in *People v. Windham* (1977) 19 Cal.3d 121 (hereafter "*Windham*") is not supported by the federal constitution is misplaced, that the trial court did not abuse its discretion in denying appellant's untimely motion and that in any event, appellant's self-representation request was equivocal and therefore properly denied. (RB 26-49.) Respondent is wrong on all counts.

A trial court *must* grant a defendant's request to proceed without counsel if three conditions are met: (1) the defendant is competent and made the request knowingly and intelligently, having been apprised of the dangers of self-representation; (2) the request is made unequivocally; and (3) the request is timely. (*People v. Jackson* (2009) 45 Cal.4th 662, 689; *People v. Stanley* (2006) 39 Cal.4th 913, 931-932.) Respondent's claim that appellant's request did not meet these conditions is unfounded.

A. This Court's Interpretation of the Timeliness Requirement for the Assertion of the Sixth Amendment Right to Counsel Is Not Supported by State Law and Violates the Federal Constitution

As explained in detail in appellant's opening brief, there is no logical or legal reason why the federal constitutional right to self-representation

should be dependent upon anything more than an unequivocal request and a determination by the trial court that granting the request will not result in an unreasonable delay or affect the orderly administration of justice. (AOB 37-45.) Cases analyzing the timeliness of motions brought pursuant to *Faretta v. California* (1975) 422 U.S. 806 (hereafter "*Faretta*"), to the extent that they have construed "timeliness" in a manner which allows trial courts to deny motions that are allegedly "untimely" but present no threat of delay or disruption, erect an unconstitutional barrier to defendants' *Faretta* rights. Respondent makes a broad argument regarding the constitutionality of the timeliness requirement. (RB 32-39.)

Respondent mischaracterizes appellant's position when it claims that appellant is arguing that this Court's interpretation is unconstitutional "because the *Faretta* decision does not require timeliness." (RB 32-33.) Appellant's opening brief says no such thing, but as a result of respondent's failure to apprehend the argument, it fails to address in a meaningful way the argument appellant *did* make. While appellant noted that *Faretta* did not have occasion to consider the timeliness of the assertion of the right to self-representation, California and other jurisdictions have read a timeliness requirement into the invocation of the right to self-representation. (AOB 39.) The purpose of the timeliness requirement is to prevent a defendant from misusing a *Faretta* motion to unjustifiably delay the trial or obstruct the orderly administration of justice – concerns consistent with *Faretta*. Thus, appellant has no quarrel with respondent's recitation of federal cases upholding the timeliness requirement for *Faretta* motions.[1] (RB 33.)

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[1] This is also true for respondent's extensive argument that the timeliness requirement for the assertion of the right to self-representation is (continued...)

Appellant did not – and does not – contend, as respondent claims, that "nothing in the rationale of *Faretta* suggests that timeliness is required." (RB 33.) Appellant's position, as clearly set forth in the opening brief, is that the timing of the motion in and of itself is not dispositive, but is a factor to be considered in assessing whether granting the motion would likely disrupt the trial or obstruct the orderly administration of justice. (AOB 39, citing *People v. Lynch* (2010) 50 Cal.4th 693, 721 (hereafter "*Lynch*").) Further, as discussed in greater detail below, it is appellant's position that under *Lynch,* the motion was timely and should have been granted. (AOB 47-48.)

Addressing appellant's assertion that this Court's rule significantly interferes with the exercise of a fundamental constitutional right and therefore its validity must be assessed by applying the strict scrutiny standard, respondent offers various rejoinders. (RB 34-36.) Respondent agrees that the right to self-representation is a fundamental right but argues that interference with the right does not warrant strict scrutiny review. (RB 34.) This is so, according to respondent, because the right to self-representation does not "rise to the level" of rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental [and] implicit in the concept of ordered liberty, such that neither liberty or justice would exist if they were sacrificed." (RB 34, quoting *Washington v. Glucksberg* (1997) 521 U.S. 702, 721; RB 35.) In *Glucksberg*, the United

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[1] (...continued)
justified by the State's interest in the prompt and orderly prosecution of criminal cases. (RB 37-39.) Again, appellant does not disagree with this proposition, and indeed the opening brief states, the "concern with unjustifiable delay and obstruction is consistent with *Faretta*." (AOB 41.)

States Supreme Court held that the asserted right to assistance in committing suicide was not a fundamental liberty issue protected by the Due Process Clause of the Fourteenth Amendment. (*Id.* at p. 728.) By contrast, the high court in *Faretta* held that the rights afforded by the Sixth Amendment, including the right to self-representation "are basic to our adversary system of criminal justice, they are part of the 'due process of law' that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the states." (*Faretta, supra*, 422 U.S. at p. 818, fn. omitted.) Similarly, the court in *Medina v. California* (1992) 505 U.S. 437, also cited by respondent (RB 34) rejected the argument that California statutes in competency proceedings regarding the burden of proof and presumption of competency violated defendants' fundamental rights. (*Id.* at pp. 445-446.) Indeed, respondent's extensive argument against strict scrutiny review contains no authority addressing the Sixth Amendment right to self-representation. (RB 34-36.)

Moreover, respondent's argument that "not all limitations on fundamental rights are subject to strict scrutiny review" (RB 34 & fn. 12 and cases cited therein) begs the question. Casting the fundamental constitutional right to self-representation as one subject to the discretion of the trial court is not merely a "limitation" on that right, it is a virtual removal of the right altogether.

Finally, respondent argues that the strict scrutiny standard should not be applied because the timeliness limitation on the exercise of *Faretta* rights is "merely incidental," but fails to explain how the transformation of an unconditional right into one subject to the trial court's discretion does not constitute "a real and appreciable impact." (RB 36-37.) Indeed, respondent goes even further, arguing that the distinction between the

mandatory (and constitutionally-based) right to self-representation and the discretionary right delineated by this Court for untimely motions "is of no consequence." (RB 37.) As noted in appellant's opening brief, however, the rule has significant consequences: the unconditional right to self-representation becomes subject to the trial court's discretion, and because of this transmutation, the erroneous denial of an untimely *Faretta* motion becomes subject to review under the state harmless error standard. (AOB 40, and cases cited therein.) Respondent fails to address this point, instead making the curious argument that it somehow benefits the defendant "because it permits a trial court to exercise discretion to grant an untimely *Faretta* motion." (RB 37.) If respondent's argument is that this Court intended by its decision in *Windham* to confer upon trial courts the authority to grant self-representation motions that would not otherwise be granted under the *Faretta* criteria, it is unsupported by either law or logic.

B. The Trial Court Erroneously Denied Appellant's *Faretta* Motion in Violation of the Sixth and Fourteenth Amendments

1. The Motion Was Not Untimely

The trial court's finding that appellant's motion for self-representation was untimely is not supported by the record. Respondent argues that because the motion was made "on the eve of trial," and was coupled with a request for a continuance, it was untimely. (RB 40, quoting *Lynch, supra*, 50 Cal.4th at p. 722.) The quoted language from *Lynch* – made in the course of discussing *Faretta* motions made either weeks in advance of, or just before the start of the scheduled trial date – was followed by this Court's recognition that timeliness is not a fixed point. "Nevertheless, our refusal to identify a single point in time at which a self-

representation motion filed before trial is untimely indicates that outside these two extreme time periods, pertinent considerations may extend beyond a mere counting of the days between the motion and the scheduled trial date." (*Ibid.*) Respondent cites *Lynch*, but fails to apply its analysis.

An example of this is respondent's position that appellant's request for a continuance rendered the *Faretta* motion untimely. (RB 40.) As noted, the "totality of the circumstances" analysis set forth in *Lynch* reflects the purpose of the timeliness requirement which is to prevent the misuse of a motion for self-representation to unjustifiably delay trial or obstruct the orderly administration of justice. (*Lynch*, *supra*, 50 Cal.4th at p. 724.) Thus, the mere fact that a continuance would have been necessary had the motion been granted did not render the request untimely. Any self-representation motion made close in time to the trial will likely require some delay, but a defendant may have a valid reason for bringing the motion at that time, as did appellant.

In *Windham*, this Court ruled that "when the lateness of the request and even the necessity of a continuance can be reasonably justified the request should be granted." (*Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5.) Thus, under *Windham*'s "reasonable time prior to the commencement of trial" rule, a criminal defendant's constitutional pretrial *Faretta* motion is timely and not subject to the trial court's discretion, even if it is late, when the record contains "some showing of reasonable cause for the lateness of the request." (*Ibid.*; cf., *People v. Ruiz* (1983) 142 Cal.App.3d 780, 791 [finding pretrial *Faretta* motion untimely where "[a]ppellant's motion was unaccompanied by any showing of reasonable cause for its lateness"].)

Respondent's claim that appellant's request for a continuance suggests his "purpose was to delay the proceedings," is completely

unfounded.[2] (RB 45.) Appellant explained to the court why he made the motion so close to the time set for trial: his concerns about his attorney's representation based on his observations of cross-examination of witnesses and the failure to obtain information about a third-party culpability defense were confirmed by counsel's announcement at their meeting the week before that he intended to defend the case solely by cross-examining the prosecution witnesses. (1 RT 226.) This is in contrast to *People v. Burton* (1989) 48 Cal.3d 843, 854, cited by respondent (RB 46), in which the defendant's motion was made on the morning of trial and he could offer no reason for the delay in making his request. Appellant had caused no pretrial delays nor exhibited any other behavior consistent with a purpose to unjustifiably delay the proceedings.

In *People v. Moore* (1988) 47 Cal.3d 63, cited by respondent (RB 40), this Court upheld the trial court's denial of defendant's *Faretta* motion as untimely under *Windham*. *Moore* is distinguishable from the present case on several grounds. On the Friday before the Monday when the case

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[2] Respondent cites *Fritz v. Spalding* (9th Cir. 1982) 682 F.2d 782, 784-785, for the proposition "if a defendant accompanies his motion to proceed with a request for a continuance '[this] would be strong evidence of a purpose to delay.'" (RB 45.) In fact, the case stands for no such thing. The portion quoted reads: "A showing that a continuance would be required and that the resulting delay would prejudice the prosecution may be evidence of a defendant's dilatory intent. *In this case, for example, where Fritz's pre-trial conduct had already caused substantial delay, a showing that his motion included a request for a continuance would be strong evidence of a purpose to delay.* The inquiry, however, does not stop there. The court must also examine the events preceding the motion, to determine whether they are consistent with a good faith assertion of the *Faretta* right and whether the defendant could reasonably be expected to have made the motion at an earlier time." (*Id.* at pp. 784-785, italics added.)

was set for trial, the defendant moved to represent himself and requested a continuance to prepare his defense. (*People v. Moore*, *supra*, 47 Cal.3d at p. 78.) The prosecutor objected to a continuance because he had out-of-state witnesses for whom a continuance would occasion extreme hardship. The court found that a continuance would disrupt the orderly administration of justice based on the significant efforts that had been made in the criminal and civil calendars to ensure the availability of the courtroom for defendant's trial. Finally, the court noted that trial counsel had announced ready for trial. Thus, contrary to respondent's synopsis of the court's holding that the "motion . . . was untimely because the defendant also requested a continuance to prepare for trial," the court's decision was based on additional factors – ones not present in appellant's case – that rendered the delay unjustifiable.

Similarly, in *People v. Ruiz*, *supra*, 142 Cal.App.3d 780, also cited by respondent (RB 40), the prosecution objected to the continuance sought by the defendant in conjunction with his motion to represent himself made three days before the trial was scheduled to begin. (*People v. Ruiz*, *supra*, 142 Cal.App.3d at pp. 785-786.) The court's denial of the motion was upheld on appeal based on the significant witness problems the prosecution faced if the case were delayed, as well as the defendant's failure to explain the lateness of his request. (*Id.* at pp. 791-792.) Again, these are facts distinguishable from those in the present case.

Respondent contends that granting appellant's request for a continuance in order to prepare to represent himself at trial would have disrupted a trial that was committed to start in two days, but the record is not clear that this is so. (RB 41-42.) While respondent's recitation of the proceedings suggests that the court and parties were moving toward a trial

date, it fails to acknowledge the issues that remained unresolved at the time appellant made the motion for self-representation. As noted in the opening brief, the court had scheduled the proceeding at which appellant made his request to make sure that the court was available. (1 RT 217-218.) Neither side announced ready to proceed to trial, and there remained outstanding issues of late discovery and trial readiness. (1 RT 96-98.)

The record does not support respondent's assertion that granting appellant's motion would have "adversely impacted the victims and witnesses in the case." (RB 42.) Julius Martin, a prosecution witness, was ultimately deemed unavailable as a witness at the guilt phase due to ongoing health issues. (6 RT 1122.) Nothing in the record supports respondent's speculation that a continuance affected Martin's availability. (RB 43.) Nor does respondent cite to the record for support of its statement that because witnesses were brought to trial from state prison, "a delay would have caused an inconvenience to the prison and judicial systems, and it would have impacted the state's monetary cost of transporting and housing these witnesses." (RB 43.) No record citation is available because nothing of the kind was ever said.[3]

Respondent fails to address the points raised in the opening brief regarding the lack of disruption a continuance would have caused. (See

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[3] Respondent notes in the factual background of this argument that on the day appellant made his motion, the trial court ordered seven state prison inmates to be transferred to Los Angeles County in order to testify at appellant's trial. (RB 27, citing 2 CT 474-487.) Significantly, however, this fact is not cited in support of the assertion that a delay in the trial would cause disruption and added expense, presumably because it is apparent that had the court granted appellant's motion, the order could have been rescinded or revised to reflect a new trial date.

AOB 56-57.) The court to which appellant's case was assigned was a long cause courtroom, meaning that if the case had been continued, it could have remained on the court's docket and not have had to be reassigned. And, although jurors had been summoned, no questionnaires had been distributed nor had the venire been sworn, so the jurors could have been reassigned to another court room. Finally, the case had been in superior court for far less time than the average capital case in Los Angeles Superior Court.[4] Indeed, the strongest evidence that granting appellant's motion would *not* have been disruptive to the prosecutor's case is that he never objected to the possibility of a continuance, whether that possibility was raised by trial counsel (1 RT 98) or appellant (1 RT 224-227). As noted in the opening brief, when the court discussed the possibility of a continuance of the case before April 29, neither side objected. (1 RT 217.)

Respondent argues that appellant's motion was properly denied because his case was complex "and he failed to demonstrate that he was even minimally capable of handling his own defense." (RB 43.) However, the "complexity of the case" as a factor to be considered by a court in ruling on a *Faretta* motion does not, as respondent suggests, have to do with the defendant's ability to defend himself, but rather with the consideration of whether granting the motion will disrupt the orderly procedure of the court faced with a complex case. (See, e.g., *Lynch*, *supra*, 50 Cal.4th at p. 726 [court refers to "inherently complex" preparation for trial involving multiple counts, at least 65 guilt phase witnesses and "voluminous

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[4] Erickson, *Capital Punishment at What Price: An Analysis of the Cost Issue in a Strategy to Abolish the Death Penalty* (1993) p. 24, <http://www.deathpenalty.org/downloads/Erickson1993COSTSTUDY.pdf> (as of April 16, 2015).

discovery"].) As this Court has repeatedly held, a trial court may not measure a defendant's right to waive his right to counsel by evaluating his "technical legal knowledge." (*People v. Doolin* (2009) 45 Cal.4th 390, 454, quoting *People v. Dunkle* (2005) 36 Cal.4th 861, 908; *Godinez v. Moran* (2009) 509 U.S. 389, 399-400; see also *Peters v. Gunn* (9th Cir. 1994) 33 F.3d 1190, 1192 ["Lack of legal qualifications alone cannot be a basis for refusing a defendant's pro se request"].)

Respondent's reference to appellant's competency as a basis for denying the motion (RB 43-44) is also misplaced. The court made no reference to concerns about the knowing and intelligent nature of appellant's pro per request. Further, the high court's decision in *Indiana v. Edwards* (2008) 554 U.S. 164, which held that states may, but need not, deny self-representation to defendants, who although competent to stand trial, lack the mental health or capacity to represent themselves at trial – persons the court referred to as "gray-area defendants" (*id.* at p. 174), does not apply to this case. "While *Edwards* makes clear states may set a higher or different competence standard for self-representation than for trial with counsel, California had not done so at the time of defendant's trial. In the absence of a separate California test of mental competence for self-representation, the trial court had no higher or different standard to apply to the question. In that circumstance, the court did not err in relying on federal and state case law equating competence for self-representation with competence to stand trial." (*People v. Taylor* (2009) 47 Cal.4th 850, 866.)

2. Appellant's Request Was Unequivocal

Respondent argues that the trial court's denial of appellant's motion for self-representation was proper in any event because the record demonstrates that it was not unequivocal. (RB 46-49.) Respondent is

wrong both about what the record reflects and about its legal significance.

A defendant must unequivocally assert the right of self-representation. (*People v. Marshall* (1997) 15 Cal.4th 1, 21; see *Faretta, supra*, 422 U.S. at pp. 835-836.) The requirement serves two purposes: it guards against the possibilities that "the right of self-representation may be a vehicle for manipulation and abuse" and that "the right to effective assistance of counsel . . . that secures the protection of many other constitutional rights" is not inadvertently or unintentionally waived. (*People v. Marshall, supra*, 15 Cal.4th at p. 23.) "Because the court should draw every reasonable inference against waiver of the right to counsel, the defendant's conduct or words reflecting ambivalence about self-representation may support the court's decision to deny the defendant's motion." (*Ibid.*; accord, *People v. Roldan* (2005) 35 Cal.4th 646, 683.)

In the present case, counsel informed the court that appellant had told him that he wanted to represent himself a week before, and confirmed his intention the morning of the hearing. (1 RT 218.) When questioned by the court, appellant was clear about his desire to proceed pro per. (1 RT 224-226.) He completed the petition provided by the court and answered further questions from the court, again reaffirming his desire to represent himself. (1 RT 228-229.)

Appellant's request is unlike those in which courts have found no assertion or an equivocal assertion of the right to self-representation. First, appellant's request contained no ambivalence or inconsistency about representing himself. (Cf., *Stenson v. Lambert* (9th Cir. 2007) 504 F.3d 873, 883, 884 [equivocal assertion where defendant stated he did not really want to represent himself, but felt he was being forced to do so because although he did not want to proceed without counsel, he did not want to

proceed with the counsel he had]; *People v. Boyce* (2014) 59 Cal.4th 672, 704 [no *Faretta* assertion where defendant raised possibility of representing himself, but in response to questioning by the court explicitly stated three times that he did not wish to represent himself].)

Second, appellant did not seek self-representation as a means to a different, unrelated purpose. (Cf., *People v. Marshall, supra*, 15 Cal.4th at p. 26 [equivocal assertion where *Faretta* request, inter alia, was a means to avoid court order to supply blood and tissue samples, rather than a sincere desire to represent himself].)

Third, appellant's request was not an impulsive or tangential comment. (Cf., *Jackson v. Ylst* (9th Cir. 1990) 921 F.2d 882, 888-889 [impulsive response to denial of substitute counsel was not unequivocal]; *People v. Barnett* (1998) 17 Cal.4th 1044, 1087 [single reference to "making motion to proceed pro se," which was not reasserted when court asked defendant if he had motion about substituting counsel or representing himself, was impulsive response to the court's initial refusal to immediately consider his *Marsden* motion and not an unequivocal demand for self-representation].)

Finally, appellant's request was not simply a hypothetical question or tentative musing about the possibility of self-representation. (Cf., *People v. Marlow* (2004) 34 Cal.4th 131, 147 [defendant's statement – "'Is it possible that I just go pro per in my own defense and have someone appointed as co-counsel?'" – made in an attempt to get counsel of his own choice was a request for information, not a *Faretta* motion]; *People v. Hines* (1997) 15 Cal.4th 997, 1028 [defendant's assertion – if the *Marsden* motion was denied, "I would like to proceed in pro per if possible" – was not an unequivocal request where the next day defendant indicated only that the

self-representation "thought is deep in my mind" and did not correct the trial court's statement that no *Faretta* motion was before it].)

Respondent cites *People v. Danks* (2004) 32 Cal.4th 269, for the proposition that a motion made after an unsuccessful *Marsden* motion may be seen as equivocal. (RB 47.) Respondent fails to acknowledge, however, that it was the trial court's decision to conduct a *Marsden* hearing after appellant first expressed his desire to proceed pro per. When the court asked appellant why he wanted to represent himself and appellant cited the conflict with counsel, the court on its own motion cleared the courtroom and conducted a sua sponte *Marsden* inquiry. (1 RT 218.)

Respondent suggests that appellant's desire to represent himself was not genuine, but rather was the product of his frustration with trial counsel's attitude toward his girlfriend, whom counsel referred to as an "officious intermeddler." (RB 48.) Appellant's dissatisfaction with his attorney for failing to obtain information germane to defense witnesses was the reason why he moved to represent himself, not a reflection of any ambivalence on his part. Respondent's attempt to recast appellant's well-founded dissatisfaction with his counsel's performance as nothing more than a fit of pique should be rejected. Appellant made clear to the court that he preferred to represent himself in order to put forth a third-party culpability defense rather than continue with counsel's inadequate representation. There was nothing equivocal about his stance.

C. The Erroneous Denial of the Right of Self-Representation Requires Reversal

As explained in appellant's opening brief, the trial court's error warrants automatic reversal. (AOB 62-67.) As anticipated, respondent argues that even if the trial court erred in denying appellant's motion, any

error was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836. (RB 46, citing *People v. Rogers* (1995) 37 Cal.App.4th 1053, 1058 and *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050-1053.) Indeed, respondent's one paragraph argument does not address either appellant's point that these cases do not support application of harmless error analysis to the denial of the Sixth Amendment right to self-representation, nor that, even if this Court chooses to apply a harmless error test, reversal is warranted.

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II. THE TRIAL COURT'S REFUSAL TO RELIEVE COUNSEL BASED ON THE SHOWING OF INADEQUATE REPRESENTATION REQUIRES REVERSAL

Appellant argues that the trial court's refusal to relieve counsel based on the showing of counsel's ineffectiveness and the court's failure to adequately inquire into the basis for appellant's conflict with counsel was an abuse of discretion requiring reversal of the verdicts and penalty. (AOB 68-84.) Respondent defends the trial court's actions as adequate and justified by the record, but fails to satisfactorily address the points raised by appellant in the opening brief. (RB 50-53.)

A. The Trial Court Abused its Discretion in Denying Appellant's Motion for Substitution of Counsel Because the Record Established That Counsel's Performance Was Deficient

During the *Marsden* motion, appellant expressed concern about the failure of his attorney to put on a defense in his case and complained that counsel had failed to make contact with a witness – appellant's girlfriend – who had information on third party culpability witnesses. (1 RT 221.) Trial counsel did not dispute appellant's statement that his girlfriend had information about a possible witness who had the names of the people responsible for one of the crimes. (1 RT 220 ["He did indicate that she had some information"].) And counsel admitted that, while he had spoken to her "numerous times," he at some point refused to "discuss[] anything with her anymore," because she was, in his opinion "an officious intermeddler." (1 RT 221.) Counsel and appellant disagreed about whether the investigator had responded to messages left by appellant's girlfriend, with appellant insisting that she called several times with no response, and counsel claiming that she made calls, but did not supply any information to the

investigator. (1 RT 220.)

As appellant argues in the opening brief, counsel's failure to initiate an investigation when made aware of evidence in support of a possible third-party culpability defense, including his refusal to make efforts to contact the witness, alerted the court to the inadequacy of trial counsel's representation and required further inquiry by the court.

Respondent's position, which echoes the trial court's statement – "Why not just have her come into court and she can give the addresses to . . . the defense attorney?" – seems to be that, because appellant's girlfriend did not make more of an effort to get the information about a potential defense witness to trial counsel, counsel had no obligation to find out from her what information the witness might be able to provide. And, because counsel declared his intention to put on a defense based entirely on cross-examining the prosecution witnesses, he was under no further obligation to try to speak to appellant's girlfriend.

This position is contrary to well-established law of this Court, however. As noted in the opening brief, but not addressed by respondent, this Court has reasoned, "[c]ounsel's first duty is to investigate the facts of his client's case and to research the law applicable to those facts" even when confronted with an uncooperative or obstreperous client. (*People v. Ledesma* (1987) 43 Cal.3d 171, 222.) Counsel's "first duty to investigate" is not obviated or diminished because witnesses other than the defendant are difficult, evasive or reluctant. (*In re Hall* (1981) 30 Cal.3d 408, 424-430 [counsel's belief that witnesses would be uncooperative does not excuse failure to investigate].)

The record does not support respondent's assertion that "the court thoroughly questioned counsel and ascertained that counsel had adequately

communicated with appellant, had no conflict with appellant, and was ready to represent appellant at trial." (RB 51.) On the contrary, the court made no attempt to ascertain what efforts, if any, counsel had made to obtain the information from the witness, or why counsel had rejected a potential defense of third party culpability without investigation. If nothing more is required than providing a forum at which a defendant can air his grievances against trial counsel, with no regard for whether counsel is performing adequately, then the right to a *Marsden* hearing is a hollow one.

Respondent claims "[o]nce the court had inquired of and listened to appellant, 'nothing more was required of the court as far as listening to appellant's dissatisfaction.'" (RB 51, citing *People v. Penrod* (1980) 112 Cal.App.3d 738, 745.) The defendant in *Penrod* cited two motions his attorney had refused to make, and complained that counsel's case load was too high for him to devote sufficient time to defendant's case. The court questioned the representative from the Public Defender's office who appeared for counsel about the defendant's complaints. The attorney explained that the motions had been considered and rejected for strategic reasons, and that counsel was busy, but not so overloaded that he could not adequately represent the defendant. (*Id.* at pp. 743-745.) In contrast to the trial court's actions in the present case, the court in *Penrod* did more than simply question the defendant and allow him to state his complaints about his attorney's actions. The court satisfied itself, by hearing detailed responses from the Public Defender's representative, that the defendant's complaints were without merit.

Respondent's attempt to recast counsel's failure to investigate evidence to support a defense of third party culpability as nothing more than a disagreement over "trial tactics," and therefore within trial counsel's

purview rather than appellant's, should be rejected. (RB 51-52.) In contrast to the uninvestigated defense about which appellant complained, in *People v. Smith* (2005) 135 Cal.App.4th 914 (overruled on other grounds in *People v. Garcia* (2008) 168 Cal.App.4th 261) the complaint by the defendant was trial counsel's refusal to confirm that he would interview the prosecution's main witness before trial. In upholding the denial of the *Marsden* motion, the court characterized the defendant's complaints as "tactical disagreements, which do not by themselves constitute an 'irreconcilable conflict.'" (*Id.* at p. 926, quoting *People v. Cole* (2004) 33 Cal.4th 1158, 1190; see also, *People v. Jackson* (2009) 45 Cal.4th 662, 686-688 [Trial counsel had a defense, intended to call 12 witnesses, including an expert and defendant to testify]; *People v. Cole* (2004) 33 Cal.4th 884, 946 [defendant's disagreements with trial counsel were not about fundamental strategy decisions].) Here, the trial court knew that trial counsel was refusing to investigate what appellant averred was a viable defense, in contrast to cases in which the court was able to conclude that no viable defense existed, despite the defendants' protestations to the contrary. (*People v. Carter* (2005) 36 Cal.4th 1144, 1199-1200; *People v. Dickey* (2005) 35 Cal.4th 884, 922 [Counsel appointed for new trial motion unable to present evidence to support defense of third party culpability that defendant wanted presented at trial].)

As appellant anticipated, respondent attempts to cast the issue as a credibility determination to be made by the trial court. Respondent cites *People v. Taylor* (2010) 48 Cal.4th 574, for its position that "the court was entitled to believe counsel and to disbelieve appellant with respect to any disputed issue." (RB 51.) As appellant argues in the opening brief, however, there was no dispute, because counsel did not contradict

appellant's statement that neither he nor his investigator had returned appellant's girlfriend's calls. (See AOB 77.)

Ultimately, the issue was not simply a question of who the court believed about whether the witness's calls were returned or not. The question before the court was counsel's duty to his client and the court's obligation once it had been made aware that counsel had not properly investigated a defense, to protect appellant's right to the effective assistance of counsel at trial.

B. The Trial Court's Error in Denying the Motion to Substitute Counsel and in Failing to Make an Adequate Inquiry Requires Reversal

Respondent makes no attempt to discharge its burden to establish beyond a reasonable doubt that the trial court's error in denying the motion for substitution of counsel did not contribute to the verdicts. (*People v. Marsden* (1970) 2 Cal.3d 118, 126; *People v. Chavez* (1980) 26 Cal.3d 334, 348-349; *Chapman v. California* (1967) 386 U.S. 18, 24.) Instead, respondent offers a cursory response to appellant's argument that the trial court's error in denying the *Marsden* motion and failing to make an adequate inquiry requires reversal, claiming that appellant has failed to show that, absent the alleged error he would have obtained more favorable verdicts, citing *People v. Henning* (2009) 178 Cal.App.4th 388, 405. (RB 53.) The prejudice standard articulated by respondent is that of *People v. Watson* (1956) 46 Cal.2d 818; the court in *Henning* correctly applied the *Chapman* standard to the trial court's failure to substitute counsel, concluding that the error was harmless beyond a reasonable doubt. This Court should treat respondent's failure to address harmless error under the appropriate legal test as a concession that it cannot satisfy that test. (See

People v. Bouzas (1991) 53 Cal.3d 467, 480 [People impliedly conceded point made by appellant by failing to dispute it in briefing or at oral argument].)

People v. Washington (1994) 27 Cal.App.4th 940, also cited by respondent (RB 53), involved the failure of the trial court to hear a *Marsden* motion that was not made until after the defendant had been convicted. (*Id.* at p. 943.) On appeal, the court found that defendant suffered no harm from the lack of a *Marsden* hearing because the grounds upon which he sought to attack his attorney's competence were still available to him after the trial. (*Id.* at p. 944.) Here, the question is whether respondent can show beyond a reasonable doubt that had appellant been provided constitutionally adequate representation through the investigation and presentation of third-party culpability evidence, the verdicts would not have been different. Given respondent's failure to even attempt to do so, the answer must be that it cannot and reversal is required.

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III. PROSECUTORIAL MISCONDUCT DENIED APPELLANT A FAIR TRIAL

Appellant argues that the prosecutor committed misconduct by intentionally eliciting improper and highly prejudicial testimony from two different witnesses at the guilt phase of trial. (AOB 85-98.) Respondent first incorrectly treats the argument as one of vindictive prosecution and argues at length that the issue is waived. (RB 54-62.) The instances of misconduct are then addressed. Respondent argues the claim was forfeited by counsel's failure to request a curative instruction, that there was no misconduct, or if there was, the error was harmless. (RB 62-73.)

A. Guilt Phase Misconduct

Contrary to respondent's speculation, appellant's claim is not that the prosecutor engaged in vindictive prosecution against appellant. (RB 54.) Appellant's position is that in order to overcome the evidentiary weaknesses of the guilt phase case against appellant, the prosecutor resorted to improper tactics, namely the presentation of prejudicial and inadmissible evidence, some elicited in direct contravention of the trial court's orders. Because appellant made no such claim, no response is necessary to respondent's argument that the claim is forfeited, or that it lacks merit. (RB 57-62.)

1. Questioning and Elicitation of Evidence from Toni Wright That She Observed Appellant Point a Gun at Someone, a Subject That Had Been Ruled Inadmissible, Was Prejudicial Misconduct

Respondent argues that appellant has forfeited his claims of prosecutorial misconduct because he failed to request curative admonitions at the time of his objections. (RB 66.) Because of the nature of the misconduct, however, an admonition would not have cured the harm.

"While judicial admonition may have lessened the impact of such argument, we cannot conceive of an admonition that would have unrung this particular bell." (*People v. Johnson* (1981) 121 Cal.App.3d 94, 103-104.)

The trial court ruled that Ms. Wright could testify that she "knows that the defendant had a black handgun," but the prosecutor could not introduce evidence that appellant shot Toni Wright because it was inadmissible under Evidence Code section 1101(b) and because the "prejudice *far* outweighs the probative value or any relevance." (5 RT 971, italics added.) Respondent contends that the prosecutor's questioning of Toni Wright about whether she saw appellant point a handgun at "somebody," "*did not necessarily* violate the trial court's ruling (barring evidence that appellant shot Ms. Wright)." (RB 68, italics added.) Of course it did, and to suggest otherwise is completely disingenuous. As is respondent's argument that "[a]lthough Ms. Wright's testimony *might have implied* that appellant used a gun to threaten someone, it did not suggest that any actual violence occurred against her or anyone else." (RB 68, italics added.) Pointing a gun at somebody is not an implied threat; it is an assault. (*People v. Raviart* (2001) 93 Cal.App.4th 258, 263, and cases cited therein [assault with a deadly weapon can be committed by pointing a gun at another person].) This response in no way addresses appellant's claim that the prosecutor's intentional elicitation of testimony deemed inadmissible by the court constitutes misconduct. (*United States v. Shapiro* (9th Cir. 1989) 879 F.2d 468, 471-472; *People v. Crew* (2003) 31 Cal.4th 822, 839 ["eliciting or attempting to elicit inadmissible evidence" in defiance of a court order is misconduct].)

Finally, respondent insists the evidence "was not *particularly* inflammatory in light of the overwhelming evidence that appellant used a

gun and a knife to commit the charged offenses." (RB 68, italics added.) The question raised by appellant's argument, however, is whether the jury would have believed that it was appellant who committed the charged offenses were it not for the prosecutor's misconduct.

Respondent argues that any misconduct was harmless because it was not reasonably probable that the jury would have reached a more favorable result absent the alleged misconduct, citing *People v. Watson, supra*, 46 Cal.2d at p. 836. (RB 70.) Respondent fails to address appellant's claim in the opening brief that the prosecutor's actions rendered the trial fundamentally unfair, and that review of the error is required under *Chapman v. California, supra*, 386 U.S. at p. 24. This Court should treat respondent's failure to address harmless error under the appropriate legal test as a concession that it cannot satisfy that test. (See *People v. Bouzas, supra*, 53 Cal.3d at p. 480.)

2. Questioning and Elicitation of Speculative Evidence That Appellant May Have Been in Prison for a Long, Long Time Was Improper and Prejudicial

Appellant argues in the opening brief that the questioning on redirect of Detective Bly, the prosecutor's gang expert, improperly suggested that appellant had been in prison for a long time. (AOB 92-96.) Respondent claims the argument has no merit because trial counsel opened the door to the questions by his cross-examination, and that the prosecutor's question did not suggest that appellant had been incarcerated. Additionally, respondent claims that if the jury did infer from the question that appellant had been in prison, such evidence was admissible under Evidence Code section 1101, subdivisions (a) and (b). Finally, respondent contends that any error was harmless. (RB 70-73.)

Respondent's argument that trial counsel opened the door to the prosecutor's question when he asked Detective Bly if he had ever come in contact with appellant as a member of the Duroc Crips gang is belied by the record. (RB 70.) As noted in the opening brief, appellant was entitled to reinforce the points raised on direct, and trial counsel's cross-examination elicited nothing beyond what the prosecutor had raised on direct regarding Detective Bly's personal knowledge of appellant.

According to respondent, "[t]his line of questioning suggested that, if appellant was a member of the Duroc Crips gang, the detective would have come in contact with him during his frequent contacts with gang members during the time period in question." (RB 70.) While this is certainly true, respondent's conclusion that follows is not: "Therefore, it was permissible for the prosecutor to rebut this inference on redirect examination by offering another plausible explanation for the detective's lack of personal contact with appellant." (*Ibid.*) Even if the prosecutor was entitled to offer another explanation, he was not permitted to put before the jury a reason that was not only wholly speculative, but highly prejudicial as well. Respondent's reliance *People v. Dykes* (2009) 46 Cal.4th 731, is misplaced. In *Dykes*, the defendant offered an explanation for why he owned a gun during his direct examination, and the prosecutor pursued the subject on cross. This Court found that the prosecutor was entitled to explore the credibility of defendant's stated reason for purchasing the firearm. (*Id.* at p. 766.) Here, it was the prosecutor who broached the subject on direct, and then, even though the defense did nothing more than question the witness on cross-examination about this testimony, introduced additional inadmissible evidence on redirect.

Respondent further asserts that because the question posed by the

prosecutor did not focus on appellant's prior incarceration or suggest that the prosecutor or detective had any personal knowledge of a prior incarceration, the jury could reasonably infer that Detective Bly did not know appellant as a gang member because he had been away from the community "for some unknown reason." (RB 70-71.) Respondent's argument illustrates precisely why the prosecutor's question was so gratuitous and improper. If the prosecutor's purpose was only to offer the jury a plausible explanation for why Bly did not know appellant as a gang member, there was no reason to include incarceration "for a long, long time," as one possibility, other than to suggest to the jury that that was the reason.

Having claimed that the jury would not infer that appellant was in prison because the question "was posed as a hypothetical and was ambiguous in nature" (RB 71), respondent then changes course and asserts that the question was relevant and admissible under Evidence Code section 1101, subdivision (b) "to prove the absence of a mistake by Detective Bly . . . as it explained why the gang expert had not seen appellant among other gang members." (*Ibid.*) This was not the position taken by the prosecutor at trial and respondent is precluded from advancing a theory of admissibility that was not proffered at trial. (See *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640.) Additionally, beyond the perfunctory assertion by respondent, the argument is not supported by authority or argument on appeal and should be summarily rejected.

Finally, respondent claims that any error or misconduct was harmless. (RB 72.) However, respondent analyzes the error as the "erroneous introduction of evidence of a defendant's criminality," rather than prosecutorial misconduct. (*Ibid.*) In all but one of the cases cited, the

issue was the trial court's denial of defendant's mistrial motion after the inadvertent admission of evidence. In that case, *People v. Valdez* (2004) 32 Cal.4th 73, 124-125, this Court found that the prosecutor did not intentionally elicit, and could not have foreseen that his witness would offer evidence referring to the defendant being in prison.

The prosecutor's conduct in this case was so egregious that it infected the trial with such unfairness that it denied appellant federal due process. At the very least, the deliberate elicitation of inadmissible evidence was a deceptive or reprehensible method employed in an attempt to prejudice appellant in the eyes of the jury, amounting to a state law violation requiring reversal.

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IV. THE PROSECUTOR IMPROPERLY VOUCHED FOR THE CREDIBILITY OF THE SOLE EYEWITNESS AGAINST APPELLANT ON THE MURDER CHARGE WHEN HE ELICITED TESTIMONY FROM MARIO RALPH THAT HE HAD INTRODUCED RALPH TO HIS DAUGHTER

Appellant argues in the opening brief that the prosecutor improperly vouched for the credibility of his witness, Mario Ralph, by eliciting evidence that he had introduced Ralph to his daughter during an out-of-court conversation, and that the trial court's denial of his motion for mistrial was an abuse of discretion. (AOB 99-112.) Respondent counters that the claim is forfeited by counsel's failure to request a curative instruction, or that the trial court acted within its discretion in denying the mistrial motion. (RB 73-83.)

A. The Claim Is Preserved for Appellate Review by Counsel's Objection and Motion for Mistrial

At a sidebar conference counsel objected to the prosecutor's question "And on one occasion did I introduce you to my daughter?" and moved for a mistrial. The trial court overruled the objection and denied the mistrial motion. (5 RT 825-826.) In doing so, the court noted that the question "in and of itself . . . would be improper, but it's an overlap area," and so the prosecutor was entitled to rehabilitate his witness. (5 RT 827.)

Respondent acknowledges that trial counsel objected to the prosecutor's actions in eliciting testimony from his witness on the ground that it constituted improper vouching, and that counsel moved for a mistrial. (RB 79.) Because counsel did not request an admonition, however, respondent argues that the claim is forfeited. (*Ibid.*)

This argument is addressed in the opening brief. Appellant argues that, while granting a mistrial would have been the only effective remedy

for the prosecutor's misconduct, if an admonition would have cured the harm, a request from counsel would have been futile because the trial court found no misconduct occurred. (AOB 108-109.)

None of the authorities cited by respondent applies to this situation. (RB 80.) In *People v. Carrera* (1989) 49 Cal.3d 291, 321, the court rejected defendant's argument that the trial court had a sua sponte duty to intervene when the prosecutor committed misconduct, despite defense counsel's failure to object. Similarly, in *People v. Montiel* (1993) 5 Cal.4th 877, 914, this Court held the trial court had no duty to intervene to prevent or cure prosecutorial misconduct when trial counsel's objection was sustained, but no admonition was requested. In the present case, of course, the objection was overruled.

Respondent's quote from *People v. Bonin* (1988) 46 Cal.3d 659, 689, states the general rule, but the facts of the case do not support respondent's position. In *Bonin*, trial counsel repeatedly objected to the prosecutor's questioning of a witness, but was overruled. On appeal, this Court found that while counsel failed to "strictly comply" with rule for preserving a claim of prosecutorial misconduct, she did "achieve substantial compliance" and therefore the Court reached the merits of the claim. Finally, in both *People v. Collins* (2010) 49 Cal.4th 175, 198, and *People v. Bennett* (2009) 45 Cal.4th 577, 611, trial counsel either failed or declined to submit a curative instruction to the jury after the admission of objectionable evidence, despite the trial court's invitation to do so. Clearly, this was not what happened in the present case. The error was preserved and this Court should reach the merits.

B. The Defense Did Not Open the Door to Evidence That the Prosecutor Introduced Ralph to His Daughter

Respondent contends the prosecutor's question of Ralph did not constitute improper vouching, but was an appropriate response to defense questioning about contacts between the prosecutor and the witness. (RB 81-82.) Without elaboration, respondent claims trial counsel "clearly opened the door by eliciting testimony regarding the subject matter of the discussions that took place between Ralph and the prosecutor over the course of the preliminary hearing and trial." (RB 81.)

As set forth at length in the opening brief, however, this is not the case. It was the prosecutor who first broached the subject of discussions with Ralph. (4 RT 781 [Question on direct: "You and I have talked about this case on several occasions; is that correct?"].) On cross-examination, counsel appropriately followed up on this line of inquiry, attempting to discern what exactly "about the case" was discussed. (5 RT 805-806.) Ralph's responses confirmed that the discussions were case-related or general conversation during which the prosecutor inquired about his well-being. (*Ibid.*) Thus, contrary to respondent's assertion it was not proper for the prosecutor on redirect to go beyond the areas appropriately raised by the defense, i.e., the case-related content of the conversations. (RB 81-82.)

The cases cited by respondent not only do not support its position, they support appellant's. In *People v. Friend* (2009) 47 Cal.4th 1, this Court rejected defendant's claim that the prosecutor committed misconduct by eliciting testimony from the defendant that he had been in jail, after the trial court's ruling with regard to another witness that such evidence was not admissible. (*Id.* at p. 35.) The defendant had testified on direct that he

had been convicted of two felonies, therefore opening the door to questions about jail time. Similarly, in *People v. Dykes*, *supra*, 46 Cal.4th at p. 766, it was the defendant who raised the issue of why he possessed a gun during his direct testimony, and the court ruled the prosecutor was entitled to pursue the issue on cross-examination. In the present case, because the prosecutor first broached the subject of the content of the conversations between him and Ralph, defense counsel was entitled to pursue this area of inquiry on cross-examination, without authorizing the prosecutor to come back on redirect and elicit unrelated testimony from his witness.

C. The Prosecutor's Actions Resulted in the Unfair Bolstering of the Character of the Sole Eyewitness on the Murder Charge and Were Prejudicial to Appellant

Respondent's argument that the prosecutor's actions do not constitute vouching is not supported. (RB 80-81.) As respondent acknowledges, a prosecutor may not bolster the veracity of a witness's testimony by referring to evidence outside of the record, nor may a prosecutor place the prestige of his office behind a witness by offering the impression that he has taken steps to make sure the witness is telling the truth. (*People v. Frye* (1998) 18 Cal.4th 894, 971, disapproved of on another ground in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.) Yet this is precisely what happened in appellant's case.

Respondent claims that the prosecutor's introducing Ralph to his daughter did not constitute vouching, but was merely "a gesture of manners during the course of . . . innocuous or trivial discussions." (RB 82.) Telling the jury that he had done so was proper, respondent argues, because the prosecutor wanted to "introduce testimony that he did not direct Ralph to testify in a particular way." (*Ibid.*) While it may be true that the prosecutor

was being polite to Ralph (or to his daughter) by making the introduction, such actions were not properly before the jury. And if the prosecutor wanted the jury to know that he had not directed his witness to testify in a certain way, he could have asked Ralph that question. Instead, by letting the jurors know that Ralph was a person of sufficiently high trustworthiness and character that he would introduce him to his own daughter, the prosecutor went well beyond any legitimate purpose.

As set forth in the opening brief, Ralph was a crucial prosecution witness; because of that, any vouching for or bolstering of this witness's testimony unfairly tipped the scale toward the prosecution. (AOB 110-111.) The prosecutor impermissibly quelled the jurors' likely distrust of Ralph by eliciting evidence that he had introduced Ralph to his own daughter. In so doing, he unfairly vouched for and bolstered Ralph's testimony, on which the entire murder case relied.

The misconduct therefore prejudiced appellant under either the federal or state standards for prejudice. Had the jury not heard the prosecutor's improper vouching for Ralph's character and credibility, a reasonable probability exists that at least one juror would have rejected Ralph's testimony, and refused to convict appellant of Counts 5, 6, and 7. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) For the same reasons, the error was not harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Reversal is therefore required.

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V. THE ERRONEOUS ADMISSION OF TESTIMONY ABOUT NEGATIVE FINGERPRINT EVIDENCE BOLSTERED THE PROSECUTION'S CASE AND DENIED APPELLANT A FAIR TRIAL

Appellant argues that the trial court erred in permitting the prosecutor to introduce irrelevant testimony about the absence of fingerprint evidence. (AOB 113-120.) Respondent counters that the trial did not abuse its discretion in admitting evidence to explain how appellant could have possessed or loaded a firearm without leaving fingerprints. (RB 83-90.)

As set forth in the opening brief, no testimony was received at any point during appellant's trial of any attempts to recover latent prints from any evidence introduced or referenced in appellant's trial. The purpose of the testimony of the prosecutor's expert witness, Peter Kergil, was, according to the prosecutor, to foreclose any speculation by the jurors about why no fingerprints were recovered from the gun found in appellant's possession or on the shell casings and other items from the crime scene. Because the evidentiary foundation for such evidence was missing, Kergil's testimony was irrelevant and its admission was prejudicial.

A. The Proffered Negative Fingerprint Evidence Was Irrelevant

Respondent argues that the expert's testimony was admissible because "the absence of evidence is relevant to the issue of guilt." (RB 86.) While that may be true in some instances, it does not apply to the present case because the prosecution failed to lay the proper evidentiary foundation for the expert's testimony, which was that an unsuccessful attempt had been made to recover fingerprints from the objects. In the cases cited by respondent, a proper foundation *was* laid and therefore each is distinguishable.

In *United States v. Poindexter* (6th Cir. 1991) 942 F.2d 354, the court reversed the conviction of a defendant whose counsel was precluded by the trial judge from commenting in closing argument on the absence of evidence that his client's fingerprints had been found on an object that had been dusted for prints. (*Id.* at pp. 350-360.) Distinguishing another case from the circuit in which argument about the lack of fingerprint evidence was properly foreclosed, the court in *Poindexter* described the missing foundational evidence: "there was no fingerprint testimony '*or other proof establishing whether such evidence could or could not have been obtained.*'" (*Id.* at p. 359, quoting *United States v. Quinn* (6th Cir. 1990) 901 F.2d 522, 532, emphasis added by quoting opinion.)

Similarly, in *United States v. Latimer* (10th Cir. 1975) 511 F.2d 498, also cited by respondent (RB 86-87), the court observed that trial counsel properly argued that the jurors could infer from the failure of the government to produce a surveillance tape of a bank robbery that the tape did not identify his client. (*United States v. Latimer, supra*, 511 F.2d at pp. 502-503.) In *Latimer*, two bank employees testified that during the robbery they had activated the bank's camera system, thus providing the evidence missing from the present case, i.e., proof that the evidence could or could not have been obtained. And, in *United States v. Hoffman* (D.C. Cir. 1992) 964 F.2d 21, the court held that defense counsel was properly precluded from arguing various inferences from the fact the Government did not introduce any fingerprint evidence because counsel had failed to lay any evidentiary foundation for the argument, i.e., establishing that such evidence was or could have been tested for fingerprints. (*Id.* at p. 25.)

United States v. Obiukwu (6th Cir. 1994) 17 F.3d 816, also cited by respondent, presented a different issue – whether defense counsel was

improperly prevented from questioning a prosecution witness more fully about methods of fingerprint analysis. As respondent notes, trial counsel was able to argue that no fingerprint evidence had been presented. However, a police agent testified to the reasons why there was no fingerprint evidence – on one bag of heroin, he handled the bag extensively, and as to the other, no identifiable prints were recovered. (*Id.* at pp. 820-821.)

Finally, respondent's reliance on *People v. Ochoa* (2011) 191 Cal.App.4th 664, is misplaced, for in that case, the gun had been tested for the defendant's DNA and fingerprints, but none were recovered. Thus, as in all of the cases cited by respondent, an evidentiary foundation had been laid for arguing an inference from the "absence of evidence."

In this case, the prosecutor offered a reason for failing to find fingerprints when no attempt had been made to do so. Even the prosecutor's hypothetical to Kergil contained the foundational facts missing from appellant's case. Kergil agreed with the prosecutor if he dusted the podium at which the prosecutor was standing and lifted one of the prosecutor's fingerprints, he could say for sure that the prosecutor had touched the podium. Kergil was then asked, "But simply because *you printed this podium* and didn't lift my print, that doesn't mean I never touched it, does it?" and he responded, "No, it does not." (7 RT 1266, italics added.)

While it is true, as respondent contends, that expert testimony like that offered by Kergil is admissible in order to rebut the inference that the absence of fingerprints suggests that the item was not touched, most of the cases cited contain evidence that some effort was made to recover fingerprints from the object – evidence missing from appellant's case. (See,

e.g., *United States v. Coffee* (6th Cir. 2006) 434 F.3d 887, 897 [no identifiable prints recovered from weapons]; *United States v. Castillo* (7th Cir. 2005) 406 F.3d 806, 810 [defendant's prints not recovered from shotgun or shells]; *United States v. Williams* (D.C. Cir. 2004) 358 F.3d 956 [forensic investigators found no DNA or fingerprints on gun]; *United States v. Burdeau* (9th Cir. 1999) 168 F.3d 352, 357 [fingerprint tests conducted on gun and countertop]; *United States v. Hornbeck* (9th Cir. 2003) 63 Fed.Appx. 340 [investigators did not recover defendant's fingerprints from gun or inside bank]; *United States v. Christophe* (9th Cir. 1987) 833 F.2d 1296, 1300 [no fingerprints found at bank]; *United States v. Glover* (7th Cir. 2007) 479 F.3d 511, 514-515 [objects tested for fingerprints].)

In one of the cases cited, it cannot be determined whether such evidence was in the record. (*United States v. Carpenter* (1st Cir. 2005) 403 F.3d 9, 10, fn. 1.) In another case, *People v. Stanley* (2006) 39 Cal.4th 913, 953, the issue of the admissibility of expert testimony on the subject of the difficulty of recovering fingerprints was not before the court, and thus, the cases are not authority for respondent's position in this case. "It is axiomatic that cases are not authority for propositions not considered. [Citations.]" (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.)

The admissibility of expert testimony on the absence of evidence was addressed in *United States v. Feldman* (9th Cir. 1986) 788 F.2d 544, in which the government was permitted to elicit the testimony of a "bank robbery expert," that in his experience surveillance cameras in robbed banks failed half the time and fingerprints were recovered less than five percent of the time. (*Id.* at p. 554.) On appeal, the court noted that it was not uncommon to admit expert opinions of FBI agents, nor was it unusual or improper for the prosecution to anticipate the defense arguments. While the

court acknowledged the concerns raised in *United States v. Hall* (5th Cir. 1981) 653 F.2d 1002, discussed *infra*, it found any error in admitting the testimony harmless. (*United States v. Feldman, supra*, 788 F.2d at p. 554.)

Respondent fails to address *United States v. Hall, supra*, 653 F.2d 1002, the case cited by the court in *Feldman*, which found the admission of irrelevant expert testimony prejudicial error. In *Hall*, a DEA agent who had no connection to the case was permitted to testify as an expert about various procedures used by the DEA in its investigation, and reasons why certain investigative techniques could not always be used. The testimony was offered to counter the defense theory that the government had been unable to obtain corroborating evidence because the defendant was not guilty. The trial court overruled defendant's objections that the evidence was irrelevant, or if relevant, prejudicial. On appeal, the Court reversed the conviction, finding that the "sole purpose" of the witness's testimony "was to inform the jury that it need not view the absence of corroborating physical evidence as a weakness in the government's case. Such 'evidence' has no place in a criminal trial." (*Id.* at p. 1007.)

B. The Introduction of the Irrelevant Evidence Denied Appellant a Fair Trial and Requires Reversal

Respondent erroneously claims that appellant's claim of prejudicial error is not preserved for review. (RB 90, citing *People v. Partida* (2005) 37 Cal.4th 428, 433-434.) However, the claim on appeal is reviewable because it "'merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal.'" (*Id.* at p. 436, quoting *People v. Yeoman* (2003) 31 Cal.4th 93,

117.)

Respondent argues that any error in admission of the evidence was harmless because it was not reasonably probable that the jury would have reached a more favorable result absent the testimony, citing *People v. Watson, supra*, 46 Cal.2d at p. 836. (RB 92.) Respondent fails to address appellant's claim in the opening brief that the irrelevant testimony rendered the trial fundamentally unfair, and that review of the error is required under *Chapman v. California, supra*, 386 U.S. at p. 24. (AOB 118-199.) This Court should treat respondent's failure to address harmless error under the appropriate legal test as a concession that it cannot satisfy that test. (See *People v. Bouzas, supra*, 53 Cal.3d at p. 480.)

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VI. THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY REGARDING CIRCUMSTANTIAL EVIDENCE VIOLATED STATE LAW, AS WELL AS APPELLANT'S RIGHTS TO DUE PROCESS, TRIAL BY JURY, AND A RELIABLE DETERMINATION OF HIS GUILT OF A CAPITAL OFFENSE, AS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Appellant argues in the opening brief that the trial court erred in instructing the jury with CALJIC No. 2.02 rather than CALJIC No. 2.01 because the prosecution case as to several of the charged counts relied substantially on circumstantial evidence. (AOB 121-133.) Respondent argues that the trial court was correct in its instructions because the prosecution relied primarily on direct evidence, but in the event the court erred, any error was harmless. (RB 95-99.) A review of the record evidence belies respondent's position.

A court must give CALJIC No. 2.01 sua sponte in cases where the prosecution has "substantially relie[d]" on circumstantial evidence for proof of guilt. (*People v. Rogers* (2006) 39 Cal.4th 826, 885.) "Conversely, the instruction need not be given when circumstantial evidence is merely incidental to and corroborative of direct evidence, due to the 'danger of misleading and confusing the jury where the inculpatory evidence consists wholly or largely of direct evidence of the crime.'" (*People v. McKinnon* (2011) 52 Cal.4th 610, 676.) The court should give the instruction, however, unless "the problem of inferring guilt from a pattern of incriminating circumstances is not present." (*People v. Rogers*, *supra*, 39 Cal.4th at p. 885.)

A. The Instruction Was Necessary for the Jury to Decide Counts 1, 3, 5 and 6 Because the Evidence on Those Counts Was Entirely or Predominantly Circumstantial

In the opening brief, appellant went through the evidence offered in support of various counts and explained how the prosecution case was substantially based on circumstantial evidence. (AOB 125-131.) Respondent fails to address appellant's points beyond the assertion that "appellant's guilt was not premised on circumstantial evidence, but on the eyewitness accounts of Martin, Priest, and Ralph." (RB 96.) A review of the evidence shows this is not the case.

As to Count 1, neither Martin nor Priest gave direct testimony as to who shot Martin; both witnesses admitted that they did not see who shot him. (6 RT 1145, 1148 [Martin did not see who shot him, but assumed the shot was fired from outside front door of apartment]; 5 RT 900 [Priest testified, "I didn't see the shooting. I did not see the shooting"].) It is not accurate to state, as respondent does, that "Martin identified appellant as the individual who . . . shot Martin in the head." (RB 96.)

Instead, the prosecution theory that appellant was the shooter relied on quintessential circumstantial evidence: the shooter must have been appellant because he was in the apartment to rob, he had assaulted Priest, he had told Martin to lay down before the shots were fired, and the silhouette of a person was seen leaving the apartment thereafter. The jurors, thus, had to rely on a pattern of incriminating circumstances, not direct evidence, to identify the actual shooter.

As to Count 3, the only direct evidence that appellant stabbed Priest was the starkly contradictory testimony of drug dealers Martin and Priest. (See AOB 128-129.) Thus, the prosecution was forced to rely upon the

circumstantial ballistics evidence to connect appellant to the Chestnut Avenue apartment and to the crimes against Martin and Priest. Again, the prosecutor acknowledged how important that evidence was to his case, and he used that evidence to compensate for the significant credibility problems raised by Martin's and Priest's testimony. (6 RT 1223-1224.) As such, the circumstantial evidence in this case was not merely "incidental to and corroborative of the direct evidence." (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 676.)

A guilty verdict on the murder of Curtis (Count 6) and the shooting of Alexander (and the attached enhancements) (Count 5) also required the jury to infer guilt from a pattern of circumstances. Contrary to respondent's assertion, Ralph's identification of appellant as the shooter was based entirely on circumstantial evidence, i.e., because appellant was the person in the room where Curtis and Alexander were shot, he must have been the person who shot them. Because Ralph did not actually see who shot Alexander and Curtis, and concluded that appellant was the shooter based on circumstantial evidence he perceived, his identification of appellant as the shooter was itself circumstantial, not direct evidence. As for Alexander, he testified that he had never seen appellant before, and appellant was *not* the person who shot him. (6 RT 1049.) Thus, all of the testimony on Counts 5 and 6 presented circumstantial evidence from which the jury had to infer guilt from a pattern of incriminating circumstances. Instruction on CALJIC No. 2.01 was therefore required.

B. The Failure to Instruct on the Sufficiency of Circumstantial Evidence Prejudiced Appellant

Relying on this Court's decision in *People v. Rogers*, *supra*, 39 Cal.4th 826, respondent claims any error in failing to instruct the jury with

CALJIC No. 2.01 was harmless. (RB 98.) In *Rogers*, the trial court's failure to instruct with CALJIC No. 2.01 was harmless in light of the strong circumstantial evidence connecting defendant to both murders with which he was charged. While no direct evidence connected him to the one murder, the circumstantial evidence – his ownership and possession of the gun used in both murders, his confession to the other murder and the similarities between the two killings – was strong. As this Court found, the circumstantial evidence was not susceptible of a reasonable interpretation pointing to the defendant's innocence. (*Id.* at p. 885.)

The present case is distinguishable: all of the evidence against appellant, including the ballistics and firearms evidence was susceptible to an interpretation that pointed to appellant's innocence. In the absence of the correct jury instruction, however, the jurors had no way of properly evaluating the evidence.

Appellant contends the error violated his federal constitutional rights, and respondent cannot prove it was harmless beyond reasonable doubt under *Chapman v. California*, *supra*, 386 U.S. at p. 24. In *Rogers*, this Court expressed doubt that "the common law right to a circumstantial evidence instruction rises to the level of a liberty interest protected by the due process clause," but found any error harmless beyond a reasonable doubt. As noted, the circumstantial evidence in *Rogers* was far more compelling than in the present case. Given the lack of direct evidence of appellant's guilt as to these counts, even under the state law standard, there is a reasonable probability exists that the outcome at trial would have been different (*People v. Watson*, *supra*, 46 Cal.2d at p. 836).

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VII. THE INSTRUCTION TO THE JURY THAT THE DEGREE OF WITNESS CERTAINTY IN HIS IDENTIFICATION POSITIVELY CORRELATES TO THE RELIABILITY OF THE IDENTIFICATION RESULTED IN AN UNRELIABLE VERDICT AND REQUIRES REVERSAL OF THE GUILT PHASE CONVICTION

Appellant argues in the opening brief that instructing the jurors with CALJIC No. 2.92 "Factors to Consider in Proving Identity by Eyewitness Testimony," violated appellant's right to due process and a fair trial by erroneously informing the jurors that the degree of certainty claimed by an eyewitness *at trial* was a relevant factor to consider in assessing the accuracy of that eyewitness identification testimony. (AOB 134-148.)

Respondent claims appellant's argument is forfeited because no objection was lodged at trial, and even if it was preserved, it has no merit. (RB 100-106.) Respondent is wrong on both counts.

Appellant's argument is that the instruction erroneously directed the jury to consider an irrelevant and unreliable factor – "the extent to which the witness is either certain or uncertain of the identification" – when assessing the accuracy of witness identification evidence. As such, an objection is not necessary to preserve a claim of erroneous instruction under Penal Code section 1259. (*People v. Baca* (1996) 48 Cal.App.4th 1703, 1706; *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249 ["Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim-at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was."].)

Respondent contests appellant's request to this Court to reconsider its decision in *People v. Johnson* (1992) 3 Cal.4th 1183, in which it rejected

the argument that the witness certainty factor should have been deleted from CALJIC No. 2.92. (RB 103-105.) In support, respondent cites two unpublished federal court decisions. (RB 104.) Respondent does not, however, address any of the authority cited by appellant in the opening brief, except to assert that the amicus brief filed in *Perry v. New Hampshire* (2012) __ U.S. __, __ [132 S.Ct. 716], is not definitive on the question of the correlation between eyewitness confidence and the accuracy of identifications. (RB 102.) Appellant, therefore, stands on the argument presented in the opening brief and urges this Court to reconsider its prior case law on CALJIC No. 2.92 and witness certainty.

Respondent contends any error in the instruction was harmless because of the strength of the eyewitness identification testimony. Further, respondent argues, because the defense did not depend on the argument that the witnesses mis-identified appellant – the defense alleged that the witnesses lied about appellant's identity as the perpetrator – the certainty of their identifications was not an issue. (RB 105-106.) On the contrary, it is precisely because the jurors could rely on the irrelevant factor of the certainty of the identifications to bolster the reliability of the prosecution witnesses, that the error was prejudicial.

The instructional error unfairly bolstered the government's case and undermined appellant's defense of false identification. Thus, there is no basis for the government to satisfy its heavy burden of proving beyond a reasonable doubt that the trial court's instructional error did not contribute to the jury's verdicts. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

The error was prejudicial even if judged against the state standard. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836 [reasonable probability that error or misconduct contributed to the outcome].) The use of witness

confidence as a factor to be used by jurors in assessing the accuracy of eyewitness testimony should be disapproved and appellant's convictions should be reversed.

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VIII. THE TRIAL COURT PREJUDICIALLY ERRED, AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS, IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY-MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE-MURDER IN VIOLATION OF PENAL CODE SECTION 187

Appellant asserts that because the information in his case charged him with only second degree murder in violation of Penal Code section 187, the trial court lacked jurisdiction to try him for first degree murder. (AOB 149-155.)

Respondent argues, as appellant acknowledges, that this Court has rejected similar claims. (RB 107-110.) Because respondent simply relies on this Court's prior decisions and adds nothing new to the discussion, the issues are fully joined and no reply is necessary. For the reasons stated in appellant's opening brief, this Court should reconsider its previous opinions and hold that the instructions given in this case were erroneous.

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IX. A SERIES OF GUILT PHASE INSTRUCTIONS UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT IN VIOLATION OF DUE PROCESS

Appellant argues that the trial court's instructions with CALJIC Nos. 2.02 [circumstantial evidence regarding mental state] 2.21.1 [discrepancy in testimony], 2.21.2 [witness willfully false], 2.22 [weighing conflicting testimony] and 2.27 [sufficiency of one witness] violated his constitutional rights. (AOB 156-166.)

Respondent argues, as appellant acknowledges, that this Court has rejected similar claims. (RB 110-113.) Because respondent simply relies on this Court's prior decisions and adds nothing new to the discussion, the issues are fully joined and no reply is necessary. For the reasons stated in appellant's opening brief, this Court should reconsider its previous opinions and hold that the instructions given in this case were erroneous.

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

Appellant has argued that the California death penalty statute is unconstitutional in several respects, both on its face and as applied in this case. Appellant acknowledges this Court's decisions rejecting these claims but asked that they be reconsidered. (AOB 167-182.) Respondent cites decisions of this Court that have rejected these claims. (RB 113-125.) The issue is joined and no further briefing is necessary unless this Court requests further briefing to reconsider these claims. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304 [standard claims challenging death penalty considered fairly presented to the Court].)

Respondent's assertion that appellant has forfeited certain claims because trial counsel failed to request clarifying instruction from the court is without merit. (RB 121-122; Pen. Code, § 1259 ["the appellate court may . . . review any instruction given, refused or modified even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"].)

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XI. REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Appellant believes that his trial was infected with numerous errors that deprived him of the type of fair and impartial trial demanded by both state and federal law. However, cognizant of the fact that this Court may find any individual error harmless in and of itself, it is appellant's belief that all of the errors must be considered as they relate to each other and the overall goal of according him a fair trial. When that view is taken, he believes that the cumulative effect of these errors warrants reversal of his convictions and death judgment. (AOB 183-184.)

Even though as to the majority of the arguments propounded by appellant, respondent has argued that any error is harmless, respondent does not address appellant's cumulative error argument beyond the assertion that because there were no errors, there can be no cumulative error. (RB 125.) As such, it does not merit a response, and appellant merely reiterates what he has set forth in his opening brief.

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CONCLUSION

For the reasons stated herein and in appellant's opening brief, the judgment must be reversed in its entirety.

DATED: April 23, 2015

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

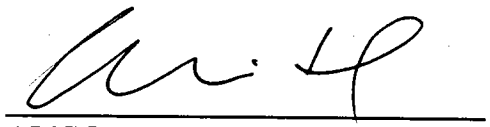
ALISON BERNSTEIN
Senior Deputy State Public Defender

Attorneys for Appellant
WILLIAM LEE WRIGHT, JR.

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(2))

I, ALISON BERNSTEIN, am the Senior Deputy State Public Defender assigned to represent appellant, WILLIAM LEE WRIGHT, JR., in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 12,825 words in length excluding the tables and certificates.

DATED: April 23, 2015



ALISON BERNSTEIN

DECLARATION OF SERVICE

Re: *People v. William Lee Wright, Jr.*

Cal. Supreme Ct. No. S107900
(L.A. Co. Sup. Ct. No. KA048285-01)

I, Marcus Thomas, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, Suite 1000, Oakland, California 94607. On this day, I served a copy of the following document(s):

APPELLANT'S REPLY BRIEF

by enclosing it in envelopes and

/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;

/ X / **placing** the envelopes for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed on **April 24, 2015**, as follows:

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San Francisco, CA 94105

I declare under penalty of perjury that the foregoing is true and correct. Signed on **April 24, 2015**, at Oakland, California.

DECLARANT