SUPREME COURT NO. S129501

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

JULIAN ALEJANDRO MENDEZ,

Defendant and Appellant.

Superior Court
No. RIF090811

APPEAL FROM THE SUPERIOR COURT OF RIVERSIDE COUNTY

Honorable Edward D. Webster, Judge

APPELLANT'S REPLY BRIEF

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By appointment of the Supreme Court
on automatic appeal

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INTRODUCTION

In this reply, appellant will address specific contentions made by respondent, but will 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, disapproved on another point in *Price v. Superior*

Court (2001) 25 Cal.4th 1046, 1069, fn. 13), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

REPLY TO STATEMENT OF THE FACTS

While respondent's factual recitation is generally unobjectionable, several repeated editorializations merit comment. Remarking on Mendez's statements to Nicole Bakotich, respondents states the following: "Mendez seemed more surprised that Rodriguez would inform the police that Mendez was the shooter, than outraged that he was being accused of a murder he purportedly did not commit"; and, "Mendez seemed more angry and disappointed that a fellow gang member, Rodriguez, would inform law enforcement officers on Mendez, than saddened by the deaths of two young people or outraged that he, Mendez, was being 'falsely' accused of shooting the two. It appears that Mendez did not expect the same sort of silence from Redmond, also a childhood friend but not a gang member, and that Mendez was eager to blame Redmond for the shootings." (RB p. 16.)

Appellant admitted he was a member of Northside Colton, a criminal street gang, and the prosecution amply documented the violent reality of criminal street gang life in Colton and surrounding area. Part of this reality is that police contacts and arrests were commonplace for NSC members. (See arguments II and III in appellant's opening brief, and this reply brief, *post*.) It is thus unremarkable that a long-time NSC member--or probably any hardcore member of any similar urban criminal street

gang--would not be "saddened" by the deaths of two young people, or that he would not be "outraged" at being accused of a crime, including murder. On the other hand, given the emphasis on loyalty and never betraying a fellow gang member to authorities in the culture of criminal street gangs (see, e.g., 14 RT 1875), it is hardly surprising appellant would express disappointment at his apparent betrayal by Rodriguez.

Respondent additionally states, "Mendez also mentioned that Robert would be upset at Mendez: 'I know he's [Robert's] going to be mad at me.' If, as Mendez claimed, Mendez had done nothing, there would be no reason for Robert to be mad at him." (RB p. 17.) Respondent's conclusion is unwarranted. It is unknown who Robert is, but appellant was responding to Bakotich's saying she was "dreading talking to Robert," who "kept saying . . . he wanted to get ahold of Eddie. Well, there's no getting ahold of him now, because he's already been gotten ahold of." (7 CT 2082.) It is unclear what this means: Eddie may or may not be Eddie Limon, and "gotten ahold of" may or may not mean Limon had been arrested. Bakotich then says, "I'm almost glad Robert[']s where he is in because[,] you know what I mean"; appellant replies, "Yeah, He is going to be upset. I know he's going to be mad at me"; and Bakotich responds, "Yeah. He was. He knows better than this." (7 CT 2082.) It is again entirely unclear

where Robert is or what it is Robert will be mad about, and respondent fails to explain how these cryptic comments add up to some kind of admission on appellant's part.

ARGUMENT IN REPLY

I

THERE IS INSUFFICIENT EVIDENCE APPELLANT MURDERED MICHAEL FARIA

To begin with, it is unclear why respondent, citing *People v. Battle* (2011) 198 Cal.App.4th 50, makes this drive-by assertion: "A claim of insufficient evidence is forfeited when the defendant's opening brief includes only facts favorable to him instead of all relevant facts." (RB 31.) Respondent's failure to pursue this implied accusation can be explained by its lack of support; indeed, appellant employed only *prosecution* evidence in the argument. This is a far cry from *Battle*, where the court indicated appellant "primarily cites his own statements and the testimony of his psychology expert to support his contention that the evidence was insufficient to sustain the jury's finding that he intended to kill [the victim]." (*Id.* at p. 62.)

Since this is an argument involving evidentiary sufficiency, the facts are of obvious importance, and respondent has made several factual errors that merit comment.

"Mendez and Rodriguez were the ones who initially confronted Faria and chased him down to beat him." (RB 32.) Not so. Prosecution witness Redmond testified that during the initial confrontation, "I couldn't tell who

was the victim's group and who was in the car, because I didn't know everybody that was in the car with Rascal." (8 RT 1059.) When asked what appellant did after that, Redmond replied, "As soon as everyone started running I assumed they went around the corner because I didn't see them."[1] (8 RT 1060.) The point is there was a large group--not just Mendez and Rodriguez--chasing the Faria group: appellant and Rodriguez were "in the group that was chasing them too. It was a big--there was a lot of people." (8 RT 1061; 10 RT 1260-1261.)

According to respondent, "No one else with a gun was close enough to Faria to be able to shoot him. . . . Luna did not get to Faria before the shooting." (RB 32.) The record does not, however, support these assertions. There were six to eight gang members assaulting Faria, any one of which was clearly close enough to be able to shoot him. (11 RT 1511.) The record is silent as to whether the armed Luna got to Faria before Faria got shot, and Redmond could not tell whether the gun appellant had was the same one Eddie Limon had handed to Luna. (8 RT 1069-1070.) In any event, the testimony appellant possessed a gun after Faria was shot is hardly dispositive. Members of criminal street gangs frequently carry firearms (*People v. Roldan* (2012) 205 Cal.App.4th 969, 975 ["[G]uns are often

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[1]Defense counsel's speculation objection was sustained at this point.

passed around freely in gangs . . . ."]), and NSC was no exception (see, e.g., 11 RT 1607-1631 [police officer's testimony re firearm possession by Redmond, Art Luna, and Joe Rodriguez during vehicle stop around two weeks after Faria and Salazar murders].)

Respondent also states, "Consistent with Mendez being the shooter, Lopez insisted on moving Mendez away from the murder location immediately after the shooting." (RB 33.) This assertion is also unsustainable because Lopez was nowhere near the shooting when it occurred, and thus could not have seen who did it. After Lil' Eddie retrieved a handgun from the Luna residence and handed it to Rascal, Lil' Eddie, Rascal, and Lopez headed toward the fleeing Faria group, but Lopez went "maybe two car lengths" before turning back and saying, "Let's go get Midget." (8 RT 1062-1063, 1065-1067.) At that point Redmond and Lopez got in the SUV and drove until they saw appellant and Rodriguez. (8 RT 1069.) Lopez was thus not in a position to see anything that Redmond did not see, and at this point, Redmond thought Faria had been beat up, and denied that he knew there had been a shooting even when the group, including Jessica Salazar, ended up at the Four Seasons. (10 RT 1269, 1321.)

Respondent's assertion that "Mendez condemned himself in his

statements to Nicole Bakotich" is also misplaced. (RB 34.) Appellant's statements are addressed in some detail in the opening brief. (AOB 52-55.) He knew he was charged with Faria's murder when he spoke to Bakotich. Nowhere does appellant admit shooting Faria or even being present when he was shot, and in fact tells Bakotich "we all know Sam did 'em."[2] (7 CT 2063.) In addition, when he states "it happened right there in front . . . of Artie's house" (7 CT 2068), he is obviously referring to the initial confrontation between the Faria group and Northside Colton members, the backdrop for his reference to self-defense "because they fucken started it . . . ." (7 CT 2067.) Faria was not shot in front of the Luna residence, but at some distance from it. Appellant's statements to Bakotich admitted nothing regarding his participation in Faria's shooting.

Respondent states, "The jury was not compelled to credit the evidence from which it could have inferred that Rodriguez was the one who shot [Faria]." (RB 37.) True enough, but while it appears likely Rodriguez was the shooter, this was not an either/or situation where the shooter had to be either Rodriguez or Mendez. As indicated above, there were between six

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[2]See also 7 CT 2072 ["Sam did it."], 2082 ["Go with the truth. That Sam did it; you know what I mean . . . ."]. It is worth remembering here that despite Redmond's claim he had nothing whatsoever to do with Faria's murder, he pled guilty to it.

and eight gang members assaulting Faria, meaning six to eight gang members who could have shot him. Again, however, Rodriguez is the likely candidate. Lizarraga told the police he was 75% sure it was Rodriguez who shot Faria as he lay on the ground. (11 RT 1543-1544.) Rodriguez is 5'11" (11 RT 1611), whereas appellant (a.k.a. "Midget") is only 5'5" (8 CT 2322), indicating Lizarraga saw a tall person shoot Faria. In addition, Lil' Eddie, the one who retrieved the gun from the Luna residence and ran up the street with it, was Rodriguez's brother. (8 RT 1054.)

Respondent further avers that "even if the jury determined that Mendez was guilty of Faria's death as an aider and abettor, the conviction for first degree murder, with the special circumstance of multiple murders, would not be reversed." (RB 37.) But this case was tried strictly on the theory that appellant was Faria's shooter. (23 RT 2826, 2830, 2833, 2843, 2845 ["He executed that kid. That kid was no threat to him. He knew if he put three bullets in him, one in his head, that kid was going to be dead."], 2848, 2851, 2891, 2893, 2895, 2899, 2902.) While aiding and abetting instructions were given to appellant's jury, they were given as part of the battery of instructions regarding the accomplice/witness Sam Redmond, where an accomplice was defined as "a person who was subject to

prosecution for the identical offense charged in Counts 1 and 2 against the defendant on trial by reason of aiding and abetting." (23 RT 2811-2813.) Also, if appellant was not the shooter, the Penal Code section 12022.53 enhancement would be invalid. Most important, however, for the reasons argued in the opening brief (AOB 57-60), if appellant did not shoot Faria, his death sentence is invalid.

Finally, although the comments of the prosecutor and trial court are not technically relevant to the evidentiary sufficiency question, it is worth recalling that during trial neither apparently agreed with respondent's contention that there "was strong and compelling evidence that Mendez shot Faria." (RB 36.) The prosecutor expressed doubt whether appellant would be found guilty of the Faria killing (24 RT 2958), and the trial court found it necessary to remark during the Penal Code section 190.4, subdivision (e) motion to modify the death verdict that "even if [appellant] did not pull the trigger on Mr. Faria, he certainly is responsible legally for that death because he . . . is a North Side Colton gang member" (28 RT 3370).

"Evidence is sufficient to support a conviction only if it is substantial, that is, if it 'reasonably inspires confidence' . . . and is 'credible and of solid value.' (*People v. Raley* (1992) 2 Cal.4th 870, 891.) The

evidence does not reasonably inspire confidence that appellant shot Michael Faria. The only eyewitness identified someone else, Joe Rodriguez, as the shooter. Appellant did not admit he was even present at Faria's shooting at a time he believed he had outsmarted his jailers and was engaged in an unmonitored conversation with a friend. And while it is this court's obligation to draw "all reasonable inferences in favor of respondent," such inferences "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence." (*Id.* at pp. 889, 891.) As "a mere speculation as to probabilities" is the best respondent can muster, the judgment on count one must be reversed.

II

THE TRIAL COURT'S DECISION TO ADMIT IRRELEVANT AND PREJUDICIAL EVIDENCE OF THREE GANG-RELATED HOMICIDES AND A PURPORTED DRIVE-BY SHOOTING WAS AN ABUSE OF DISCRETION AND VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Appellant's argument is twofold: the objected-to evidence was irrelevant under any of the enumerated categories of Evidence Code section 1101, its purported basis for admission; and all of the evidence should have been excluded as more prejudicial than probative under section 352. Appellant acknowledges his argument structure was somewhat confusing, in that the trial court's proffered theories of relevance--i.e., intent or motive (AOB 87), common design or plan (AOB 93), and "things 'very hard to write'" (AOB 95)--were placed as subheadings under the general assertion that all of the evidence was irrelevant under Evidence Code section 1101. (AOB 83-95.) They should not have been, and a clearer statement of appellant's position is that the evidence of the Rojas murder and purported drive-by shooting should have been excluded under sections 1101 and 352, and the evidence of the Jesse Garcia and Cindy Rodriguez murders should have been excluded under section 352.

A. The Evidence Code section 1101 Claim Is Not Forfeited

Respondent appears not to contest the adequacy of defense counsel's

Evidence Code section 352 objections. (See, e.g., 12 RT 1697-1698, 13 RT 1725.) Respondent does, however, assert any objection on appeal pursuant to Evidence Code section 1101 is forfeited "unless [appellant's] single objection to propensity evidence is deemed to be an objection under Evidence Code section 1101." (RB 42.) A "single objection," however, is all the law requires. Appellant's "single objection to propensity" encompassed the evidence at issue in this argument; the court's response to the objection was couched in the unmistakable language of section 1101; and the trial court's comments to the jury further reflect the court admitted the evidence under section 1101, subdivision (b). As there is no requirement that the words "Evidence Code section 1101" be ritualistically invoked under such circumstances, the objection was more than adequate and the claim is not forfeited. Appellant noted the paucity of references to section 1101 in the record (AOB 72) in order to underscore that the gang evidence was not subject to the scrutiny it merited (*People v. Balcom* (1994) 7 Cal.4th 414, 426 [other-crimes evidence should be admitted "only with caution"], and not, as respondent would have it, as a "roundabout" concession there was an insufficient objection. (RB 42-43.)

This court has noted, "[T]he requirement of a specific objection serves important purposes. But, to further these purposes, the requirement

must be interpreted reasonably, not formalistically. 'Evidence Code section 353 does not exalt form over substance.' [Citation.] The statute does not require any particular form of objection. Rather, 'the objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility.'" (*People v. Partida* (2005) 37 Cal.4th 428, 434-435.)

On August 13, 2004, defense counsel stated, "I think the record should be clear--I attempted to do this yesterday, but I want the record to be clear that I have made a general objection to the board,[3] the evidence being presented at all. And I would like it to be clear that my objection is that it's highly prejudicial, that these are incidences . . . *some of which are criminal incidents or offenses that are otherwise not readily admissible against Mr. Mendez in the guilt phase of the trial.*" (13 RT 1725; italics added.) Counsel shortly thereafter specified his meaning:

> MR. BELTER: Your Honor, my last comment to make the record complete is that . . . *what I ask the Court to consider for Mr. Mendez, and also obtain a ruling, is there is a certain degree of propensity*[4] *evidence that is attendant to the introduction of these*

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[3]The contents of appellant's gang board are detailed at pages 79-80 and 106-107 of appellant's opening brief.

[4]"Propensity" and "disposition" evidence are synonymous: "Section 1101 is concerned with evidence of a person's character (i.e., his propensity

particular contacts, that is, yes, Mr. Mendez is in a gang, he's down with North Side Colton, but *to be permitted to introduce the particular contacts that Mr. Mendez has where there are shootings involved, et cetera, that raises, I think, a prejudicial propensity that Mr. Mendez is involved in shootings, and that prejudicial propensity would not otherwise have been admissible in the guilt phase of this case.*

And to permit it to come in to support the 186.22 allegations I think is a way to circumvent the inadmissibility of it as propensity evidence.

And with that *I'd . . . ask the Court to make a ruling on that particular aspect of this objection*, and then I am prepared to go through each one of the incident dates that Mr. Ruiz proffers in his poster board. (13 RT 1727; italics added.)

The court was thus asked, and, as the following reflects, obviously believed it was being asked, to rule on Evidence Code section 1101 issues:

THE COURT: Well, in some respects when you're talking about gang motivation and why a gang member does some things, *you are talking a little bit about propensity, and when you talk about common plan or scheme in the characteristic way that gang members respond, you're talking about propensity evidence.*

For example, it almost goes without saying that oftentimes gang shootings start--not just this gang, but gangs all over Southern California--with this challenge, "Where are you from?" and it goes from there. *Clearly that's propensity evidence, but it's admissible because it's almost a common process of responding.*

¶¶

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or disposition to engage in a certain type of conduct) that is offered as a basis for an inference that he behaved in conformity with that character on a particular occasion." (Evid. Code, § 1101, Law Revision Commission Comments.)

. . . It is propensity to a degree, but it seems different to me in a gang context.

Again, the record's clear. Your objection's noted. I'm going to allow it in on what--on my experience with gangs as a judge, basically. (13 RT 1728-1729.)

Before the prosecution's gang expert, Detective Jack Underhill, testified, the court read the following cautionary instruction, which tracks the language of section 1101, to the jury regarding gang evidence:

Ladies and gentlemen of the jury, it's my understanding that through this witness Mr. Ruiz will be presenting a considerable amount of what is called "gang evidence," and that evidence may also involve other criminal acts, not just by parties here, but other parties that may have been involved with North Side Colton.

That evidence is not being offered, and should not be considered by you, as character or general disposition evidence in the sense that it's generally not allowed in court to prove previous crimes to say because a person did crimes on day one, they did crimes on day two. It's not being offered for that purpose. Does everybody understand that?

However, there is a gang allegation specifically alleged and it's also alleged in one of the allegations of special circumstance,[5] so that evidence is being admitted for purposes of those allegations.

Also, that evidence may be considered by you as *it may be relevant to motive, intent or common scheme or plan. Now, for those purposes you may consider that, and it may even be identity* later on, I don't know. But what weight and significance you choose to give this evidence will be completely up to you. Does everybody

---

[5]The court was mistaken. There was no gang special circumstance alleged; the offense in this case preceded the March 8, 2000, enactment of Penal Code section 190.2, subdivision (a)(22).

understand that? (14 RT 1766-1767.)

Respondent's forfeiture argument is thus misplaced. Defense counsel clearly objected to the gang evidence on the board as propensity evidence and specifically sought the court's ruling as to that issue, the court understood the nature of the objection and ruled on it, and the court instructed the jury that it should not consider the gang evidence as disposition evidence but for the exceptions noted in section 1101, subdivision (b) of motive, intent, common scheme or plan, and identity.

B. The Contested Evidence Was Irrelevant and Prejudicial

Respondent's citation (RB 41) to *People v. Gionis* (1995) 9 Cal.4th 1196 is instructive. In *Gionis*, this court stated, "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues*." (*Id.* at p. 1214; italics in original.) That is precisely what happened here: The contested gang evidence was irrelevant, and respondent has failed to specify how the evidence helped the jury decide the issues before it .

In his opening brief, appellant noted that a great deal of the gang evidence was formally irrelevant because of the stipulation that Northside Colton was a criminal street gang within the meaning of the S.T.E.P. Act

and that appellant was a member thereof. (AOB 84-85.) Respondent's citation (RB 41) to *People v. Gutierrez* (2009) 45 Cal.4th 789 for the proposition that the gang evidence "was relevant to the charged crimes and allegations" thus misses the fundamental point that in appellant's case it was not. In *Gutierrez*, because there was no stipulation, the People were required to prove the gang enhancement, and the gang expert's testimony "related directly to the elements of the gang enhancement . . . ." (*Id.* at p. 820.)

Respondent also quotes *People v. Hernandez* (2004) 33 Cal.4th 1040, 1048, stating that "the criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense." (RB 41.) But at issue in *Hernandez* was whether the trial court abused its discretion in denying a motion to bifurcate the trial of guilt on the underlying offense and the truth of the gang enhancement. It is in this context that the court made the above quoted statement before concluding that "less need for bifurcation generally exists with the gang enhancement than with a prior conviction allegation." (*Ibid.*)

In arguing that the trial court carefully weighed the contested evidence, respondent asserts, "The court recognized that there were limits on the hearsay an expert could testify about . . . ." (RB 41.) The record

belies this assertion. Even though the trial court stated, "There's got to be some limit as to how much hearsay a gang expert can testify to" (12 RT 1682), the fact is the court placed virtually no limits on the testimonial hearsay which abounded in this trial.[6] Only once did the court impose such a limit, when gang expert Underhill testified about what Officer Fivey said about what Officer Quiroz said about what Sam Redmond said. (14 RT 1846-1847.)

Respondent quotes at some length the trial court in overruling codefendant Lopez's Evidence Code section 352 objection to the gang evidence. (RB p. 42; quoting 12 RT 1680-1681.) But the court's statement involves "situations where people are being arrested and he [Lopez] is being arrested and he comes back and he still associates with them, suggests that his tie is pretty strong with them and . . . no matter what happens, I'm down with my gang and what my gang members do . . . ." (12 RT 1680-1681.) This statement, which pertains to codefendant Lopez, does not even mention the most objectionable material that was addressed in appellant's opening brief: the murders of Jesse "Sinner" Garcia, Cindy Rodriguez, and John Rojas, and the purported drive-by shooting involving appellant and

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[6]The confrontation clause issues in this case are addressed in the next argument.

Paul "Creeper" Negrete.

Respondent argues the evidence was relevant because it provided a "gang motive" for the killings: "Without the gang expert testimony, the jury might have misconstrued the initial fight between Faria and Mendez, and decided that the shooting of Salazar was only to benefit Mendez. The expert's testimony was relevant to prove the elements of the charged allegations, because the stipulation did not include the elements of 'committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further or assist in any criminal conduct by gang members.'" (RB 45.) But respondent's characterization of appellant's position is a straw man.

Appellant did not claim Detective Underhill should not have been allowed to testify as a gang expert. (*People v. Hernandez, supra,* 33 Cal.4th at 1047-1048 ["In order to prove the elements of the criminal street gang enhancement, the prosecution may . . . present expert testimony on criminal street gangs."] Rather, appellant's complaint was directed at discrete items of irrelevant evidence, most notably the superfluous dead bodies. Detective Underhill mentioned *none* of the evidence at dispute here when asked to explain his answer to the question whether "the killing of Michael--in your opinion was that committed for the benefit of, at the direction of, or in

association with any members of North Side Colton?" Likewise, *none* of the evidence was mentioned when the detective answered the same question regarding Jessica Salazar. (14 RT 1855-1858.)

> In short, according to the prosecution's best evidence [i.e., gang expert Underhill], simple gang dynamics explained the murder of Faria, and the desire to eliminate a witness explained the murder of Jessica Salazar. Any rival gang member challenging NSC in the same manner at the same location would have been subject to the same treatment. The Rojas, Garcia, and Rodriguez murders did not provide motive for the offenses, and were thus irrelevant but highly prejudicial. (AOB 92.)

Respondent correctly notes that "[a]ppellant's discussion of the admissibility of gang evidence includes evidence that was never before the jury as well as that which was actually presented to the jury," citing as an example the statement on appellant's gang board that was taped over to the effect that Rojas's blood and tissue were found on a car door panel. (RB 46, fn. 15.) True enough, but the discussion was there for a reason. The court admitted the Rojas incident as "1101(b) evidence . . . that as originally related by [the prosecutor] that [appellant] would know that cars would have evidence, and that's why when he says 'Let's burn [Redmond's] car,' that would be consistent with what he learned in the past." (12 RT 1715.) When, however, it turned out that the forensic reports were inconclusive as to whether the blood and tissue recovered from the car were even blood and tissue to begin with, the sentence on the gang board, "The victim's blood

and tissue were found on the outside of the passenger door and rear quarter panel," was taped over. (14 RT 1757-1760, 1803-1804.) The incident itself, however, remained.

The evidence of the Rojas killing was still placed before the jury, even though its purported basis for admission had disappeared. The Rojas killing was the first item on appellant's gang board (exhibit no. 76):

> May 1, 1994: Mendez present at scene of shotgun killing of rival gang member John Rojas. Killing occurred on sidewalk in front of Art 'Rascal' Luna's (NSC) house at 1890 Michigan. In voluntary statement to police, Mendez admits to being outside, in front of Luna's house, near the garage. He heard 2-3 shotgun blasts and saw the victim on the ground. He then fled in NSC gang member Daniel 'Chato' Luna's yellow VW. [Taped-over sentence.] Daniel Luna was charged with the murder of Rojas. Mendez was not charged in any way with any crime related to the shooting of Rojas.

Detective Underhill further provided this testimony:

> Q: (BY MR. RUIZ) Directing your attention to May 1st, 1994 did officers from your department have contact with the defendant, Mr. Mendez?
>
> A: Yes.
>
> Q: At that time were your officers investigating an alleged homicide that occurred near Art Luna's House?
>
> A: Yes. Mendez was present at the scene of a shotgun killing of a rival gang member John Rojas.
>
> Q: Okay. Now, where did that killing occur?
>
> A: The killing occurred on the sidewalk in front of Art "Rascal" Luna's North Side Colton house at 1890 Michigan.

Q: And did detectives from your department question Mr. Mendez at that time about what he saw and what he heard?

A: Yes. In a voluntary statement to police Mendez admits to being outside in front of the Luna house near the garage. He heard two to three shotgun blasts and saw the victim on the ground. He fled in North Side Colton Daniel "Chato" Luna's yellow Volkswagen.

Q: Okay. Now, that--that is one of the Luna brothers that we've heard so much testimony about; is that correct?

A: Yes.

Q: Now, in that case was Luna charged with the murder of Rojas?

A: Daniel was charged with the murder of Rojas and Mendez was not charged with any crime in any way relating to the shooting of Rojas.

Q: Okay. Was he contacted four days later after that killing?

A: Yes.

Q: And what day was that?

A: On May 5th, 1994 Mendez [was] detained during a traffic stop.

Q: Okay. Does that mean to you that there was a traffic stop and Mendez was in the vehicle?

A: Yes.

Q: Was anyone else in the vehicle with him?

A: Yes. In the car with him were three . . . North Side Colton members Daniel Luna, "Chato," Jessie "Sinner" Garcia, and Jimmy "Slim" Continola.

Q: Okay. Now, Chato, is that the same guy who was charged with the Rojas killing, the killing having occurred four days before?

A: Yes.

Q: Jessie Garcia, who's that?

A: That's Sinner.

Q: The funeral photo Sinner? The guy who died and was in that funeral?

A: Yes.

Q: And then Jimmy Continola, did you identify him as being one of the persons whose picture you saw from the funeral of Jessie Garcia?

A: Yes.[7] (14 RT 1859-1861.)

And the prosecutor further brought up the Rojas killing during argument: "Remember how we heard about Mr. Mendez being at the scene of that shotgun slaying of Rojas back in I think 1994? The guy drops on Art Luna's sidewalk. That's the one where he jumps into the yellow Volkswagen driven by the guy they prosecuted for the case." (23 RT 2898.)

It is thus simply not the case that "[e]vidence of the Rojas murder in front of the Luna's house was minimal," or that "[t]here was no evidence of

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[7]The exchange prompted the trial court to ask the witness whether there was "ever a connection made by law enforcement between the death of Rojas and the death of Sinner? Is that thought to be revenge for the death of Rojas?" (The answer was no, underscoring the irrelevance of the Rojas murder.) (14 RT 1863.)

any bad act by Mendez in connection with that killing, only that he was a witness." (RB 47.) The insinuation is overwhelming that appellant was somehow involved in this incident.[8]

Respondent's assertion that appellant has no Evidence Code section 1101 claim regarding the murders of Garcia, Cindy Rodriguez, and John Rojas because the murders "were committed by other people, as far as the jury knew" (RB 49) is thus correct regarding Garcia and Cindy Rodriguez, but, as explained above, wrong regarding Rojas. The Garcia and Cindy Rodriguez murders should have been excluded for other reasons.

As related in appellant's opening brief (AOB 67-68), the Garcia and Cindy Rodriguez murders were admitted over Evidence Code section 352 objection:

> Generally speaking, over 352 objection, the incident involving Jesse Garcia will be allowed to be testified to in the context of motive evidence, gang commitment, reasons why they would dislike Verdugo and that it's a feud to the point of death. (12 RT 1697.)

And this:

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[8]Indeed, law enforcement believed appellant was the shooter. As the prosecutor told the trial court, "[I]t is Detective Underhill's opinion that Mr. Mendez was the shooter in that case. He was contacted as a suspect for procedural reasons. They listed him as a witness, but it's Detective Underhill's opinion that Mendez was the shooter. ¶ I wasn't going to ask him that, but to use the characterization that he was questioned simply as a witness like, perhaps, Sergio [Lizarraga] is entirely misleading . . . ." (12 RT 1713.)

> So generally speaking, I will overrule under Evidence Code section 352 any objection to the testimony relating to the death of Mr. Rodriguez's mother, assuming proper foundation. . . . It would seem to me if I'm a member of a very close group of people, I look at them as being my brothers, and [if] my brother's mother was killed, I would have that same anger. (12 RT 1268.)

Also, respondent neglects to address the prejudicial impact of the photograph of Jesse Garcia in his casket, there for the jury to see during the entire trial. This irrelevant and gratuitous reminder of gang death--keep in mind it was juxtaposed with a picture of a living Jesse Garcia in a photo booth--on appellant's gang board epitomizes the gang evidence admitted in this case. (Exhibit no. 76.)

"The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Especially in a gang case such as this, the evidence of three irrelevant murders and a drive-by shooting was precisely that "which tends to evoke an emotional bias against the defendant as an individual and which has very little efect on the issues." For the reasons more fully specified in appellant's opening brief, the evidence concerning the Jesse Garcia and Cindy Rodriguez murders should have been excluded under Evidence Code section 352, the evidence concerning the John Rojas murder and alleged drive-by shooting should have been

excluded under Evidence Code sections 1101 and 352, and appellant was prejudiced under the standards of either *People v. Watson* (1956) 46 Cal.2d 818, 837 or *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].

III

THE UBIQUITOUS GANG HEARSAY EMPLOYED BY THE PROSECUTION'S GANG EXPERT WAS TESTIMONIAL IN NATURE AND WAS INTRODUCED FOR ITS TRUTH

In this third argument, appellant demonstrated that the voluminous gang hearsay introduced at trial violated appellant's Sixth Amendment right to confront the witnesses against him. He additionally demonstated that the evidence was inherently unreliable, the trial court's failure to exclude it was an abuse of discretion, and its introduction rendered the trial fundamentally unfair and resulted in a due process violation.[9]

The government has two primary responses. First, the testimony regarding the evidence in dispute here "was admitted as foundational evidence" to support Detective Underhill's opinion the murders were committed for gang purposes "within the meaning of the gang enhancements that were alleged"; that is, "The out-of-court statements were not admitted for the truth of the matters asserted, or as substantive evidence." (RB 53.) Second, the statements were not testimonial, and thus did not violate the confrontation clause under *Crawford v. Washington*

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[9]Respondent does not address appellant's contentions based on the inherent unreliability of the hearsay evidence. (AOB 130-134.) Appellant believes the issue was adequately briefed in the opening brief and will not further address it.

(2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177].)[10] (RB 53-54.)

Respondent discusses this second point first, so it will be addressed first here. In this reply, appellant will further demonstrate the testimonial nature of the statements in question, and will establish that a majority of the United States Supreme Court now rejects the notion that facts relied upon by experts, so-called "basis evidence," are not admitted for their truth but merely as the basis for the expert's opinion.

A. The Hearsay Statements Were Testimonial

According to respondent, "Not all responses to questions by the police are testimonial within the meaning of the Sixth Amendment. [Citations.] To date, the term 'police interrogation' has only been used to describe 'interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. [Citations.]'" (RB 55.)

The first of these sentences is true, though the second is potentially misleading if it is read to suggest that *only* police interrogations in their

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[10]In his opening brief, appellant argued defense counsel had preserved an adequate objection to the evidence (AOB 104-105), or, in the event the court determined the objection inadequate, appellant received the ineffective assistance of trial counsel (AOB 134-138). As respondent has not contested the adequacy of the objection, the matter requires no further discussion.

formal legal sense (see, e.g., *Rhode Island v. Innis* (1980) 446 U.S. 291, 300-302 [100 S.Ct. 1682, 64 L.Ed.2d 297] [interrogation for purposes of *Miranda*[11] analysis]) qualify as testimonial. In *Michigan v. Bryant* (2011) -- U.S. --- [131 S.Ct. 1143, 179 L.Ed.2d 93], the court stated that in *Crawford,* "We noted that '[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not," and added that *Crawford* correspondingly "limited the Confrontation Clause's reach to testimonial statements." (*Id.* at p. 1153.) To the extent, however, that respondent's statement can be read to suggest that "police interrogation" means something like interrogation for purposes of *Miranda* analysis, it would be erroneous: "We noted in Crawford that '[w]e use the term "interrogation" in its colloquial, rather than any technical legal, sense,' and that '[j]ust as various definitions of "testimonial" exist, one can imagine various definitions of "interrogation," and we need not select among them in this case.'" (*Ibid.*, fn. 2.)

The court in *Bryant* further noted it had expanded upon the meaning of "testimonial" in *Davis v. Washington* (2006) 547 U.S. 813 [126 S.Ct.

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[11] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

2266, 165 L.Ed.2d 224]: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Michigan v. Bryant, supra,* 131 S.Ct. at p. 1154.) Citing *Bryant*, this court too has noted the importance of determining "whether an 'ongoing emergency' exists, or appears to exist, when the statement was made" in determining whether a statement is testimonial for confrontation clause purposes. (*People v. Blacksher* (2011) 52 Cal.4th 769, 814.) No such "emergency exception" appears in the instant case.

In *Bryant,* the court added, "*Davis* did not 'attemp[t] to produce an exhaustive classification of all conceivable statements--or even all conceivable statements in response to police interrogation--as either testimonial or nontestimonial." While the court noted the paradigm "in which the Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial," testimonial hearsay

in violation of the Sixth Amendment was not limited to such: "Whether formal or informal, out-of-court statements can evade the basic objective of the Confrontation Clause, which is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial." (*Id.* at p. 1155.) In the instant case, appellant was unable to cross-examine the countless--and sometimes nameless[12]--officers who filled out the field interrogation cards, let alone the underlying hearsay declarants.

Respondent disputes that field interrogation cards[13] were testimonial for confrontation clause purposes:

> Information collected on field identification cards was not obtained for the purpose of establishing the facts of a past crime. Officers talked to young men for the purpose of collection information and staying abreast of the people and activities in the community. Field identification cards were used to collect criminal intelligence, not to report crimes or to collect information to prosecute the perpetrator of a crime that has occurred. (RB 56.)

Collection of "criminal intelligence" is not, however, an end in itself, but a means to an end. Underhill's testimony reveals one of the primary purposes of these cards was to assist criminal prosecutions of gang

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[12]See AOB 132, fn. 83.

[13]As noted in the opening brief, at trial these cards were variously referred to as "S.M.A.S.H. cards" [San Bernardino County Movement Against Street Hoodlums], "gang cards," "field interrogation cards," "field identification cards," and "F.I. cards." (AOB 105, fn. 69.)

members, and an essential flaw in respondent's position is that active participation in a criminal street gang such as Northside Colton is per se a criminal offense under Penal Code section 186.22:

> A. One of the assignments was completing the S.M.A.S.H. cards, which we would do on a daily basis when we would contact gang members or suspected gang members. We would then speak to them, complete gang cards on them, photograph them if necessary, and just get a brief--just briefly talk with them and try to find out exactly what their involvement and what level of involvement they are with the gang. (14 RT 1771.)

All of which led to potential prosecution:

> Q. Do you serve--sometimes do you serve gang members with notices that law enforcement considers them to be a criminal street gang?
>
> A. Yes.
>
> Q. And was that what this type of contact was?
>
> A. Yes, it was.
>
> Q. Was this part of an operation where you were serving other members of Northside Colton with those same notices, those, quote-unquote, S.T.E.P. notices?
>
> A. Yes. (14 RT 1807.)

Detective Underhill also testified that collection of information concerning criminal offenses is a vital aspect of the gang interrogations:

> Q. What is a S.M.A.S.H. card?
>
> A. S.M.A.S.H. card is a card that's given to the gang officers to complete, to fill out when they make contact with a gang member

or get some documentation on a gang member.

Q. Are these cards collected and maintained in your department?

A. Yes. They're kept in a file in the gang files.

¶¶

Q. In talking with gang members you've shared with us that you've spoken with a lot of gang members over your career. *Will they sometimes talk about the criminal activities of the other members of their gang*?

A. Yes, sometimes.

Q. Depending upon the circumstances *have you found that there are times where a gang from North Side Colton is more willing to talk about some of the things that his gang has been involved in as opposed to others--other times*?

A. Yes. (14 RT 1790, italics added.)

Respondent's claim that "[f]ield identification cards are not the basis for a criminal prosecution" (RB 57) is inaccurate, even ignoring for the moment their use in prosecuting gang membership:

Q. Okay. Now, have you found--well, let me ask this: Getting--you mentioned a term, "gang intelligence," is it very important to you in order to do your job right to know as much as you can about what gangs in your area are doing at the time?

A. Yes.

Q. Is it important to know who's at war with who?

A. Yes.

Q. Because you tend to find bodies on the ground if two gangs are at war, right?

A. Correct.

Q. *And so you being a peace officer you'd like to know as much as you can so that you can catch those people doing those horrible things, right?*

A. *Yes.*

Q. *Have you found that the gathering of gang intelligence is very important in order for to you do your job*?

A. *Yes. It's invaluable, really.* (14 RT 1796, italics added.)

And, contrary to respondent's claim that "[s]tatements to officers that are collected on field investigation records are not testimonial within the meaning of the Confrontation Clause, even though made in response to questions by police officers" (RB 57), the testimonial nature of the field interrogation cards is explicit in the following exchange:

Q. You have been doing gang investigations for a long period of time. Have you noticed anything about gang members in your experience from the areas who claim turf in the city of Colton that as a gang member gets older many of them stop admitting to police officers whether they're members of gangs?

¶ ¶

A. *It's not uncommon for these gang members as they get older, get arrested, get schooled by the older guys, not uncommon for them to start denying their gang membership because they don't want to be tagged with that--with additional charges of being in a gang.* It's not uncommon for them to suddenly start denying they're members of the gang.

Q. Are you--do you have specific knowledge of many instances where veteranos of NSC have schooled out younger members of NSC about talking to police and admitting their monikers and admitting their gang affiliations?

A. Yes, I do.

Q. Okay. This just isn't something that you're talking about hispanic gangs in general? You've seen this from your experience with this specific gang NSC; is that correct?

A. Yes. *I've also spoken to members who have denied to law enforcement that they're gang members and later told me the reason why they did that, the reasons for it.*

Q. *And is one of the reasons to help thwart law enforcement's investigation of gang crimes?*

A. *Yes.* (14 RT 1797-1798, italics added.)

Detective Underhill's testimony establishes that the purpose of the field interrogation cards is to assist law enforcement in the detection and prosecution of gang crimes, including gang membership involving active participation in a criminal street gang, and as such the cards are testimonial within the meaning of the confrontation clause.

B. The Hearsay Statements Were Admitted for Their Truth

In his opening brief, appellant argued the hearsay statements relied on by the gang expert were necessarily admitted for their truth. (AOB pp. 114-127.) Respondent asserts the statements were "not hearsay under California law because those statements are not offered to prove the truth

of the matters asserted." (RB p. 59.) This proposition has now been repudiated by a majority of the United States Supreme Court, however, and the cases respondent relies on--*People v. Gardeley* (1996) 14 Cal.4th 605; *People v. Sisneros* (2009) 174 Cal.App.4th 142; *People v. Ramirez* (2007) 153 Cal.App.4th 1422; *People v. Cooper* (2007) 148 Cal.App.4th 731; *Peopole v. Thomas* (2005) 130 Cal.App.4th 1202--would appear to have been overruled by necessary implication.

Since respondent's brief was filed, the court decided the case of *Williams v. Illinois* (2012) --- U.S. --- [132 S.Ct. 2221, 183 L.Ed.2d 89], in which a majority of the justices agreed that state evidentiary rules holding that facts underlying an expert's opinion are not introduced for their truth--and thus are not testimonial hearsay within the scope of *Crawford*--run afoul of the Sixth Amendment.

Williams is a plurality opinion. In *Williams*, a prosecution expert, Sandra Lambatos, testified that a DNA profile produced by Cellmark, an outside laboratory, matched the defendant's blood profile produced by a state lab. At issue was whether "*Crawford* bar[s] an expert from expressing an opinion based on facts about a case that have been made known to the expert but about which the expert is not competent to testify." (*Williams v. Illinois, supra,* 132 S.Ct. at p. 2227.)

Four justices (Alito, Roberts, Kennedy, and Breyer) held that "this form of expert testimony does not violate the Confrontation Clause because that provision has no application to out-of court statements that are not offered to prove the truth of the matter asserted." (*Id.* at p. 2228 (plur. opinion of Alito, J).) The four stressed that the case before it involved a bench rather than a jury trial.[14] (*Id.* at pp. 2234-2235, 2236-2237.) Noting that whoever participated in preparing the profile could always be subpoenaed by the defense and questioned at trial, they also held as an "independent basis for our decision" that a DNA profile prepared before any suspect was identified was not the kind of extrajudicial statement "that the Confrontation Clause was originally understood to reach." (*Id.* at p. 2228.)

Justice Thomas concurred in the result only, finding the expert's testimony did not violate the Sixth Amendment "solely because Cellmark's statements lacked the requisite 'formality and solemnity' to be considered

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[14]Justice Kagan commented on this bench-trial emphasis in her dissent: "I welcome the plurality's concession that the Clause might forbid presenting Lambatos's statement to a jury [citation]; it indicates that the plurality realizes that her testimony went beyond an 'assumption.' But the presence of a judge does not transform the constitutional question. In applying the Confrontation Clause, we have never before considered relevant the decisionmaker's identity." (*Williams v. Illinois, supra,* 132 S.Ct. at p. 2271 (dis. opn of Kagan, J.).)

'testimonial' for purposes of the Confrontation Clause." Justice Thomas otherwise shared "the dissent's view of the plurality's flawed analysis." (*Williams v. Illinois, supra*, 132 S.Ct. at p. 2255 (conc. opn. of Thomas, J.)) Four justices (Kagan, Scalia, Ginsburg, and Sotomayor), dissenting, noted "the prosecution introduced the results of Cellmark's testing through an expert witness who had no idea how they were generated," and characterized the approach as a "confrontation-free [method] of presenting forensic evidence we have formerly banned " (*Id.* at p. 2265 (dis. opn. of Kagan, J.).)

According to Justice Thomas, "[S]tatements introduced to explain the basis of an expert's opinion are not introduced for a plausible nonhearsay purpose. There is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth." (*Williams v. Illinois, supra,* 132 S.Ct. at p. 2257 (conc. opn. of Thomas, J.).) "[T]he point is that the purportedly 'limited reason' for such testimony--to aid the factfinder in evaluating the expert's opinion--necessarily entails an evaluation of whether the basis testimony is true." (*Ibid.*, fn. 1.) While "other evidence corroborating the basis testimony may render any Confrontation Clause violation harmless, . . . it does not change the

purpose of such testimony and thereby place it outside of the reach of the Confrontation Clause." (*Id.* at p. 2258.)

The four dissenters agreed with Justice Thomas's position on basis evidence, so that a majority of the Supreme Court have held that basis evidence is employed for its truth:

> The plurality's primary argument to the contrary tries to exploit a limit to the Confrontation Clause recognized in *Crawford.* "The Clause," we cautioned there, "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."[15] [Citations.] The Illinois Supreme Court relied on that statement in concluding that Lambatos's testimony was permissible. On that court's view, "Lambatos disclosed the underlying facts from Cellmark's report" not for their truth, but "for the limited purpose of explaining the basis for her [expert] opinion," so that the factfinder could assess that opinion's value. [Citation.] The plurality wraps itself in that holding, similarly asserting that Lambatos's recitation of Cellmark's findings, when viewed through the prism of state evidence law, was not introduced to establish "the truth of any . . . matter concerning [the] Cellmark" report. [Citation.] *But five Justices agree, in two opinions reciting the same reasons, that this argument has no merit: Lambatos's statements about Cellmark's report went to its truth, and the State could not rely on her status as an expert to circumvent the Confrontation Clause's requirements.* [Citation.] (*Williams v. Illinois, supra,* 132 S.Ct. at p. 2268 (dis. opn. of Kagan, J.), italics added.)

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[15]As noted in appellant's opening brief (AOB 119-120), this statement in *Crawford* is a quotation from *Tennessee v. Street* (1985) 471 U.S. 409, 414 [105 S.Ct. 2078, 85 L.Ed.2d 425], and the issue in *Street* was light years removed from the question of expert basis testimony. Both Justice Thomas's concurrence (*Williams v. Illinois, supra,* 132 S.Ct. at 2256-2257) and the dissent (*id.* at pp. 2268-2269) comment on the differences. Respondent cites this quotation from *Crawford* and notes it originated in *Street* without further noting the differences. (RB 60-61.)

Justice Kagan continued:

> [W]hen a witness, expert or otherwise, repeats an out-of-court statement as the basis for a conclusion, . . . the statement's utility is then dependent on its truth. If the statement is true, then the conclusion based on it is probably true; if not, not. So to determine the validity of the witness's conclusion, the factfinder must assess the truth of the out-of-court statement on which it relies. That is why the principal modern treatise on evidence variously calls the idea that such "basis evidence" comes in not for its truth, but only to help the factfinder evaluate an expert's opinion "very weak," "factually implausible," "nonsense," and "sheer fiction." (D. Kaye, D. Bernstein, & J. Mnookin, The New Wigmore: Expert Evidence § 4.10.1, pp. 196–197 (2d ed.2011); id., § 4.11.6, at 24 (Supp.2012).) . . . . Unlike in *Street*, admission of the out-of-court statement in this context has no purpose separate from its truth; the factfinder can do nothing with it except assess its truth and so the credibility of the conclusion it serves to buttress. (*Id.* at pp. 2268-2269.)

Contrary to respondent's implicit assumption and reliance on California Evidence Code sections 801 and 802 (RB 59), the constitutional issue does not defer to state evidentiary rules:

> At bottom, the plurality's not-for-the-truth rationale is a simple abdication to state-law labels. Although the utility of the Cellmark statement that Lambatos repeated logically depended on its truth, the plurality thinks this case decided by an Illinois rule holding that the facts underlying an expert's opinion are not admitted for that purpose. [Citations.] But we do not typically allow state law to define federal constitutional requirements. And needless to say (or perhaps not), the Confrontation Clause is a constitutional rule like any other. As Justice Thomas observes, even before *Crawford*, we did not allow the Clause's scope to be "dictated by state or federal evidentiary rules." [Citation.] Indeed, in *Street*, we independently reviewed whether an out-of-court statement was introduced for its truth--the very question at issue in this case. [Citation.] And in *Crawford*, we still more firmly disconnected the Confrontation Clause inquiry from state evidence law, by overruling an approach

> that looked in part to whether an out-of-court statement fell within a "firmly rooted hearsay exception." [Citation.] That decision made clear that the Confrontation Clause's protections are not coterminous with rules of evidence. So the plurality's state-law-first approach would be an about-face. (*Id.* at p. 2272.)

After cataloguing the abuses the state-law approach would permit, Justice Kagan concluded with this observation: "No wonder five Justices reject it." (*Ibid.*)

A majority of the United States Supreme Court clearly rejects respondent's position. Like all basis evidence, the basis evidence in this case was admitted for its truth.

C. Prejudice

Finally, in a brief paragraph, respondent asserts that even if the testimonial hearsay was admitted for its truth, any error was harmless beyond a reasonable doubt. (RB 62-63.) Appellant believes the prejudice resulting from the evidence was adequately addressed in his opening brief (AOB 138-141) and thus will not belabor the point here.

IV

THE SIXTH AMENDMENT VIOLATION OCCURRING WHEN STATEMENTS MADE TO POLICE BY A NON-TESTIFYING CODEFENDANT ARE ADMITTED AGAINST A DEFENDANT DOES NOT DISAPPEAR MERELY BECAUSE A DEFENDANT REPEATS THOSE STATEMENTS TO A THIRD PARTY

Because codefendant Joe Rodriguez made statements to the police implicating appellant, the trial court ordered separate juries pursuant to *Aranda-Bruton*.[16] During appellant's recorded jailhouse conversation with Nicole Bakotich, however, appellant repeated several of Rodriguez's incriminatory statements. In his opening brief, appellant argued that the trial court erred in refusing to redact these statements from the tape and transcript of the jailhouse conversation. (AOB 142-167.)

Respondent appears to make three basic contentions in response. First, "[t]he contested statements were Mendez's own statements." Second, "[t]o the extent he repeated statements of others, he adopted those statements as his own admissions." And third, "the statements that he repeated reflected his state of mind" and were admissible as such. (RB 63.)

While respondent is correct as to the first of these contentions, it is of no consequence to the argument, and in fact merely begs the question.

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[16]*People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620; 20 L.Ed.2d 476].

Appellant will demonstrate the statements were not adoptive admissions, nor did they reflect his state of mind. They were, however, the statements of a codefendant unavailable for cross-examination implicating appellant, and were thus violations of his Sixth Amendment right to confront the witnesses against him. Respondent tellingly fails to address this basic question posed in the opening brief (AOB 157-158): Since appellant's jury heard Rodriguez's statements implicating appellant anyway, just what was the point of separate juries in this case?

To begin with, respondent makes numerous assertions with citations to the record as if they were established by the evidence, though they were not. To take two examples: "He revealed his consciousness of guilt of the murders. (19 RT 2301-2305.)," and "Mendez believed that the truth would come out, that he was the shooter. (19 RT 2300-2305.)" (RB 64.) The record supports neither contention; appellant was appraising his legal situation with Bakotich,[17] and far from admitting the truth of Rodriguez's accusations, he consistently denied them. There was no consciousness of guilt exhibited here, only a consciousness appellant had been accused of two murders and was potentially facing the death penalty.

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[17]E.g., "So, I mean, how is that going to look for a jury? You got 8 guys saying that I was the shooter." (7 CT 2077.)

According to respondent,

> What is important is that Mendez believed that the police had several eyewitnesses who saw Mendez shoot Faria and Salazar. Mendez was worried that he would get the death penalty for the double murders due to the existence of these eyewitnesses and their apparent willingness to testify against him. Mendez would not have been worried about the death penalty if he knew the police were lying. His reaction shows he adopted and implicitly admitted the officer's premise, that eight people saw Mendez shoot Faria. (RB 66.)

This assertion is flawed: What is important is that the police let him know that Rodriguez and others *said* he was involved, something that functions irrespective of actual guilt. Respondent makes the unwarranted assumption that if the police told appellant others--all gang members in this case, by the way--made statements implicating him, appellant must have accepted those statements as true for him to have been concerned about a possible conviction and death sentence. Thus, respondent's statement that appellant "would not have been worried about the death penalty if he knew the police were lying" misses the point, which is that appellant *believed* he was being fingered by fellow gang members.

Appellant's statements to Bakotich left the jury in no doubt that some kind of electronic recording[18] of Rodriguez's statement had been

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[18]There was general confusion below concerning whether Rodriguez had made a videotape as well as an audiotape, confusion no doubt caused in large part by the blurry distinction between video and audio tapes in

played during appellant's interrogation:

> "[T]hen they showed a fucking tape of Gato telling, saying. ¶ He heard shots and that's when he looked over that he seen me standing over the guy, so that's what he said." (7 CT 2062.)
>
> (Bakotich) "And then sit and see him [i.e., Rodriguez] on videotape. That's dirty." (7 CT 2064.)
>
> "They got like 10 tapes on Sam, 8 on Gato, like 3 on Little Eddie, and some other 3 on Jess, 3 on--." (7 CT 2067.)
>
> "Then he said I got another one [a tape] of Joe Rodriguez. That's Gato. He's all, it's right here. He reenacted the other crime [i.e., the Faria killing]." (7 CT 2077-2078.)
>
> "They showed me videotapes. First they showed me tapes, then they showed me pictures about who was talking.[19] ¶ Joe says, I'm repeating what is on tape. Okay? Joe said he heard shots. Okay? Cop says, well, when you heard shots, he's all, what did you do after that? He's--I looked up. Okay. When you looked up, what did you see? Who did you see standing over the body? He's all, I seen Midget. Then I told you what I seen on videotape.[20] So that's

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appellant's (and Bakotich's) conversation. During deliberations, the jury sent the court a note reading, "If there is a taped interview with Joe Rodriguez we would like to view this." (8 CT 2228.) The question was obviously directed to the possible existence of a videotape rather than audiotape. In any event, Rodriguez did not make a videotaped reenactment. (23 RT 2909.)

[19]This statement demonstrates appellant's blurry distinction between videotape and audiotape. If police in fact showed him videotapes, it would not be necessary to show him "pictures about who was talking."

[20]This "videotape" is Redmond's videotaped version of the Salazar murder, which appellant references several times during the conversation with Bakotich. (7 CT 2062, 2064, 2077-2078.) The videotaped reenactment, which took place on March 24, 2000, was played for the jury. (17 RT 2098; 7 CT 2053-2055.)

it." (7 CT 2080-2081.)

In addition, although appellant's interrogation was not before the jury, Detective Del Valle *did in fact* refer to and play tapes of others at several points during appellant's interrogation. (See augment ordered June 29, 2011, of appellant's police interrogation at Bates numbers 3826-3827, 3828, 3831-3832, 3848-3852, 3854, 3856, 3858-3859, 3861, 3862-3863, 3878.)

Respondent's statement that "the jury was told that there was no evidence that Rodriguez made a statement to the police" (RB 68) is inaccurate. At the record citations respondent provides for this assertion, the trial court told the jurors that no *videotape* existed of Rodriguez: "One is a videotape reenactment allegedly by Gato, Mr. Rodriguez. . . . There's been no evidence that any of that actually happened." (29 RT 2910) And again, in response to the jury note stating, "If there is a taped interview with Mr. Rodriguez we would like to *view* this," the court responded, "There is no taped interview with Joe Rodriguez in evidence." (24 RT 2952; 8 CT 2228, italics added.) The court was responding to the jury's request for a videotape, if it existed. (The court's statement was furthermore technically accurate concerning both video and audiotapes, in that there was no taped interview formally admitted *in evidence*.) These

statements do not support the contention that "the jury was told that there was no evidence that Rodriguez made a statement to the police." Appellant's statements to Bakotich detailed above provide ample evidence that Rodriguez made a statement to the police implicating appellant.

A. It Does Not Matter that Rodriguez's Statements Were Relayed by Appellant for Sixth Amendment Purposes

Respondent appears to be suggesting a per se rule that statements by a nontestifying codefendant otherwise within the purview of *Aranda-Bruton* are excluded from confrontation clause challenge merely because they are transmitted to the jury by the defendant: "There is no *Bruton* error for admission of Mendez's own statements. Mendez's characterization or belief of the substance of Rodriguez's alleged statement was admitted, but the jury was told that there was no evidence that Rodriguez made a statement to the police."[21] (RB 68.)

There is no such per se rule, nor should there be. That the jury learned of Rodriguez's statements, otherwise excluded under *Aranda-Bruton*, through the Bakotich tape rather than through Rodriguez on the

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[21]It is worth noting that appellant's version of Rodriguez's statement implicating him in the Faria murder is very similar to Detective Del Valle's testimony recounting Rodriguez's statement during proceedings before the Rodriguez/Lopez jury (20 RT 2497-2498) and at the Rodriguez/Lopez retrial (2 RT Lopez/Rodriguez retrial 476-477).

stand, ultimately makes little difference. As we have seen, respondent is mistaken in claiming the jury was told Rodriguez had not made a statement; the evidence on the Bakotich tape demonstrates that the police had played Rodriguez's statement in some form during appellant's interrogation. The jury thus knew that Rodriguez had made a statement incriminating appellant, and knew the substance of that statement because appellant relayed it.

Respondent further ignores the temporal proximity of appellant's interrogation to the taped conversation between appellant and Bakotich. During the tape, appellant said the police had just shown him a "tape of Gato telling, saying" the previous day during a ten-hour interrogation.[22] (7 CT 2062.) Appellant accurately relayed to Bakotich the substance of Rodriguez's incriminating statement because he had just heard it.

B. Rodriguez's Statements Did Not Transmute Into Adoptive Admissions Just Because Appellant Repeated Them

According to respondent, "Mendez adopted the statements as his own by the way he repeated the statements and used them in his own conversation with Bakotich." (RB 68.) Not so: These statements fail as

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[22]As demonstrated in the opening brief, the elapsed time between interrogation and Bakotich statement was somewhere around eight hours. (AOB 187-188.)

adoptive admissions under Evidence Code section 1221. (AOB 150-153.)

The requirements for an adoptive admission are "(a) the defendant heard and understood the statement under circumstances that normally would call for a response; and (b) by words or conduct, the defendant adopted the statement as true." (*People v. Davis* (2005) 36 Cal.4th 510, 535.) Here, neither criterion was met. Nicole Bakotich did not make the statements at issue here--Joe Rodriguez did. And appellant did not hear and understand Rodriguez's statements under circumstances that would normally call for a response, as he was undergoing police interrogation, circumstances that "lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment." (*People v. Riel* (2000) 22 Cal.4th 1153, 1189.) Nor did he adopt the statements as true by words or conduct, or admit them merely because he recited them: "[T]he mere recital or description of another's statement does not necessarily constitute an adoption of it: '[A] statement describing another's declaration is normally not regarded as an admission of the fact asserted by the other. One does not admit everything he recounts or describes merely by reason of the relating of it.'" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1258.)

In fact, appellant explicitly denied committing the killings, thus invoking "the longstanding rule that denials are not admissions and must be

excluded from evidence along with the underlying accusations." (*People v. Jennings* (2003) 112 Cal.App.4th 459, 474-475.) Respondent dismisses this vital point by asserting that appellant's denial "was not credible because in the next breath Mendez told Bakotich of his efforts to convince the other gangsters to say that Redmond was the shooter." (RB 70.) But appellant also told fellow gangster Art Luna, "Go with the truth. That Sam did it . . . ." (7 CT 2082.) Exhorting a fellow gang member to "Go with the truth" does not sound like an "effort to convince" in the manner respondent suggests. At least respondent's statement that "Mendez tacitly admitted that he shot Faria and Salazar and that he needed a defense to those murders to avoid the death penalty" (RB 70) is half correct. He did need a defense.

Furthermore, despite the trial court's statement to the jury that the Bakotich tape was "only to be considered by you in reference to Mr. Mendez' state of mind or to the extent he adopts these things" (23 RT 2910), the jury was never instructed on adoptive admissions.[23] "To warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances

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[23]The CALJIC instruction for adoptive admissions, CALJIC No. 2.71.5, was not given to the jury, though the standard instruction on admissions, 2.71, was given. (23 RT 2807; 8 CT 2124.)

affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide." (*People v. Riel, supra,* 22 Cal.4th at pp. 1189-1190.) Respondent's repeated contention that it was up to the jury to decide whether appellant made an adoptive admission (RB 69, 72, 74-75, 77, 79) is thus misplaced, as the jury was never instructed how to identify or evaluate an adoptive admission.

Respondent's attempt to shoehorn appellant's case into that of *People v. Davis, supra,* 36 Cal.4th 510 is unavailing. *Davis* involved a classic adoptive admissions situation: three murder suspects talking to one another, their conversation taped by the police, with the defendant adopting numerous statements made by others. Respondent's quote (at RB 71) from *Davis* even illustrates the most telling difference between *Davis* and appellant's situation: "From this response, the jury reasonably could have concluded that by not denying that he had shot the victims, defendant had implicitly adopted the substance of [another suspect's] statement that defendant was the shooter." (*Id.* at p. 537.) Appellant, of course, denied to Bakotich that he was the shooter, and the rule that a denial is not an admission bears repeating.

Respondent seeks to avoid this rule by stating "[t]hat rule should be

modified in the circumstances here, when the denial is not credible. Mendez's statement that Redmond was the shooter was not credible." (RB 74-75.) But this would turn the entire concept of an adoptive admission inside out. An adoptive admission is meant to serve as an evidentiary coequivalent to a conventional admission (Evid. Code, § 1220), with both listed as exceptions to the hearsay rule, whereas appellant's denial of guilt was just that. And respondent's recognition of the need to create a new rule is tantamount to a recognition there were no adoptive admissions under existing law.

Finally, a word is in order regarding the credibility of appellant's statement that Redmond was the shooter. Respondent has avoided engaging appellant's contention (AOB 11, 20, 160-161, 208, 218-220) that Redmond's guilty plea to Faria's murder speaks for itself. According to Redmond's account of the Faria incident at trial, Redmond was blameless in this event, and he denied even knowing what had happened to Faria until later in the evening, at the earliest when the group in Redmond's SUV ended up at the Four Seasons apartment complex. If Redmond did not shoot Faria, why did he plead guilty to murdering him and accept a life without parole sentence for doing so? If Redmond's account was credible, why did the prosecutor and trial court accept his guilty plea, in what would

have amounted to a massive miscarriage of justice?

C. Rodriguez's Statements Were Not Admissible as State of Mind Evidence as to Appellant

Respondent next asserts, "In the unlikely event that the jury found as a matter of fact that Mendez did not adopt Rodriguez's statement that Mendez was the shooter,[24] that statement was nonetheless admissible to give context to Mendez's own statements to Bakotich, and to explain his state of mind as he talked about his defense to that adverse fact." The statement "was admissible for the *nonhearsay* purpose of explaining his state of mind as he talked with Bakotich." (RB 77, italics added.) Respondent then, however, quotes Evidence Code section 1250, which defines the *hearsay* exception for statements regarding a declarant's mental or physical state. (RB 77.)

There is, of course, a difference between the two. A statement offered not for its truth but as nonassertive background material explaining a defendant's state of mind and conduct is not hearsay and is governed by Evidence Code section 1200. (*People v. Hill, supra,* 3 Cal.4th at p. 987.) On the other hand, evidence of a declarant's "state of mind, emotion, or physical sensation" is admissible despite being hearsay under certain

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[24]To repeat, the jury was never instructed on adoptive admissions.

circumstances and is governed by Evidence Code section 1250.

Subdivision (b) of section 1250, however, disallows "evidence of a statement of memory or belief to prove the fact remembered or believed." What this means is that "[h]earsay statements really meant to establish past events should not be admitted under the guise of showing the declarant's statement of mind." (1 Jefferson, Cal. Evidence Benchbook (4th ed. 2012 update) § 14.9, p. 245.) Appellant's statements relaying Rodriguez's accusations were clearly "really meant to establish past events"--i.e., the events on the evening of February 4, 2000. "[S]tatements recounting past events are an implicit expression of the declarant's belief or memory that such events occurred, and are inadmissible for their truth under Evidence Code section 1250, subdivision (b)." (*People v. Whitt* (1990) 51 Cal.3d 620, 643, fn. 13.)

According to respondent, citing subdivision (b) of section 1250, "If admitted only to show Mendez's state of mind and not as adopted admissions, however, the hearsay statements could not be used for the truth of the matter asserted." (RB 78.) Respondent then acknowledges that the prosecutor urged the statements were true, and adds "[t]his could be error if Mendez's repetition of Rodriguez's alleged [sic] statement was admitted only for the effect on Mendez's state of mind," but asserts any potential

claim of misconduct was waived. (RB 78-79.)

This entire discussion appears to be beside the point, as section 1250 allows state of mind evidence as an exception to the hearsay rule--meaning for its truth--in circumstances not applicable here. In addition, appellant did not allege prosecutorial misconduct. In any event, respondent acknowledges that for purposes of *Aranda-Bruton* analysis, it does not matter whether the statements at issue are admitted for their truth or for some other non-hearsay purpose. (RB 80; citing *People v. Anderson* (1987) 43 Cal.3d 1104, 1125.)

Finally, respondent seeks to avoid *Crawford* by asserting "the statements were Mendez's own statements and were made to a friend, not to a police officer." (RB 79.) But it was Rodriguez's statements relayed by Mendez that violated *Crawford.* Rodriguez made the statements incriminating Mendez to a police officer, and a police officer played a tape of those statements for Mendez. Rodriguez's statements were clearly testimonial hearsay within the meaning of *Crawford* (see AOB 155-156), and their back-door introduction at trial violated the Sixth Amendment.

The trial court's refusal to redact the statements of non-testifying cofendant Rodriguez implicating appellant from the Bakotich tape requires reversal of the judgment.

V

THE FIFTH AMENDMENT VIOLATION OCCURRING WHEN LAW ENFORCEMENT OBTAINS AN ADMISSION IN FLAGRANT VIOLATION OF *MIRANDA* DOES NOT DISAPPEAR MERELY BECAUSE A DEFENDANT REPEATS THE STATEMENT TO A THIRD PARTY: IT IS THE FRUIT OF THE POISONOUS TREE

As with the previous Sixth Amendment violation that occurred when the trial court refused to excise Joe Rodriguez's statements from the Bakotich tape, respondent's primary assertion here is that appellant's Fifth Amendment claim is negated merely because he relayed to Bakotich the same statement made to the police in violation of *Miranda* and otherwise excluded at trial.

To begin with, respondent neglects to discuss the significance of the prosecutor's withdrawing his request to introduce *any* of appellant's statements made to police. (3 RT 418-419.) This withdrawal reflects the prosecutor's recognition that appellant had requested counsel from the time of the very first interrogation of February 24, 2000, and is significant in evaluating whether the statement the jury heard was voluntary or involuntary for purposes of *Miranda* analysis.

Respondent relies on *Arizona v. Mauro* (1987) 481 U.S. 520 [107 S.Ct. 1931, 95 L.Ed.2d 458] and *People v. Leonard* (2007) 40 Cal.4th 1370 for the proposition that while appellant was in custody, "he was not

being interrogated by a law enforcement officer or agent when he spoke with his friend Bakotich, and therefore no *Miranda* or other constitutional right violation occurred." (RB 86.) The reliance is inapposite. *Mauro* held that no *Miranda* violation occurs when a suspect who has invoked the right to counsel makes incriminating statements to his wife (with a police officer and tape recorder in full view of the suspect during the conversation), the precise issue being whether the actions of the police "were the 'functional equivalent' of police interrogation." (*Arizona v. Mauro, supra*, 481 U.S. at p. 527.) In *Leonard*, the police taped a conversation held in an interrogation room at the sheriff's department between the defendant and his father. This court found that although the defendant was in custody, there was no interrogation per *Miranda,* and quoted *Mauro*: "Officers do not interrogate a suspect simply by hoping that he will incriminate himself." (*People v. Leonard, supra,* 40 Cal.4th at p. 1402.) There was, in other words, no interrogation by the police in either *Mauro* or *Leonard.*

These cases thus stand for the unremarkable proposition that because there was no interrogation, there was no *Miranda* violation to begin with, whereas here, it was undisputed that there were both interrogations and *Miranda* violations. Mr. Mauro's and Mr. Leonard's

Fifth Amendment rights were not violated by the police; appellant's were, and intentionally so. Respondent's claim that "There was no compulsion or coercion here in Mendez's conversation with Bakotich" is thus beside the point. (RB 88.) The compulsion and coercion occurred in the repeated refusals of the police to honor appellant's requests for an attorney.

Respondent further claims the statement relayed by appellant was not the fruit of the poisonous tree because "there is no causal connection between the police interrogations and Mendez's conversation with Bakotich. Nothing in the police interrogations in any way coerced or caused Mendez to repeat his statements to Bakotich." (RB 88.) Respondent ignores that appellant repeated the statement only hours after the lengthy interrogation. In his opening brief, appellant demonstrated that the interrogation transcript indicated that the Bakotich conversation, which took place at 8:00 a.m., occurred perhaps eight hours after the interrogation ended. (AOB 187-188.) In the Bakotich conversation, appellant confirms that he was returned to his cell around 12:30 a.m. (7 CT 2066.) While the police interrogation may not have caused Bakotich to visit and converse with appellant, appellant was still under the stress of a lengthy interrogation, which included accusations of double murder, the prospect of execution, and repeated denials of his requests for an attorney. Also,

appellant made the incriminating statement at issue here towards the end of the interrogation, during the third tape that the prosecutor conceded was inadmissible (3 RT 362-364, 368), so it was especially likely to appear during his conversation with Bakotich just hours later.

Respondent seeks to avoid the "fruit of the poisonous tree" doctrine by asserting that since the purpose of the doctrine is to deter police misconduct (*Nix v. Williams* (1984) 467 U.S. 431, 442-443 [104 S.Ct. 2501, 81 L.Ed.2d 377]), it does not apply here because there was no police misconduct in the recorded jailhouse conversation between appellant and Bakotich. (RB 88-89.) But as we have seen, the police misconduct did not occur in taping the conversation; it occurred earlier when appellant was repeatedly denied his requests for an attorney. Allowing the statement rewarded the misconduct: Appellant's admission that he was close to Jessica Salazar when she was shot, obtained in violation of his right to counsel, ended up before the jury just as it would have had the interrogation itself been introduced into evidence.

The "fruits of the interrogation initiated by police" following a request for counsel cannot be used against a defendant. (*Edwards v. Arizona* (1981) 451 U.S. 477, 485 [101 S.Ct. 1880, 68 L.Ed.2d 378.) The exception is that statements taken in violation of *Miranda* can be used

for impeachment at trial if the statements are otherwise voluntary, whereas involuntary statements cannot be used for any purpose. (*Michigan v. Harvey* (1990) 494 U.S. 344, 351 [110 S.Ct. 1176, 108 L.Ed.2d 293].) Because appellant did not testify, the impeachment exception is inapplicable, and the fruits of the interrogation following the *Miranda* violations cannot be used against him, regardless of whether those fruits are considered voluntary or involuntary.

But the involuntary nature of appellant's statement bolsters all the more his position that the statement could not be used against him for any purpose whatsoever, including derivative use. Asserting appellant's statements were voluntary, respondent makes several claims, each of which is unsupported by the record. "Investigator Del Valle made neither promises nor threats to Mendez." (RB 90.) Not so. The police threatened appellant with the death penalty (see, e.g., Aug. CT 3872), and indeed, he was preoccupied with it during his conversation with Bakotich. (7 CT 2062, 2065, 2068, 2072, 2078.) While "[r]eference to the death penalty does not necessarily render a statement involuntary," it is certainly a factor worthy of consideration. (*People v. Williams* (2010) 49 Cal.4th 405, 443.) Also, as defense counsel relayed in his moving papers, "Detective Del Valle advised Mendez that he has spoken with others and is concerned that

the information might get Mendez killed" (1 CT 52), something respondent acknowledges (RB 91, citing Aug. CT 3817, 3821; see also Aug. CT 3801, 3867.) This is, of course, an implied threat, designed to lure a suspect into cooperating with the police because they are the only ones who can protect him in a custodial setting.

Regarding appellant's supposed sophistication in legal matters (RB 90), appellant thought "self defense" carried 6 years in prison. (7 CT 2068.) But self defense is an absolute defense, not a crime with any penalty. And, respondent continues, "At the beginning of both interviews, he was advised of his rights and waived his rights to an attorney." (RB 90.) So what? *Miranda* states the Fifth Amendment requires police honor an invocation *at any time*:

> Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent. (*Miranda v. Arizona, supra,* 384 U.S. at p. 474.)

The *Miranda* violation here did not result from the failure of the police to advise appellant of his right to any attorney at the beginning of the interrogation. It occurred when they failed to honor that right during the

interrogation.

Finally, respondent claims that appellant's "mentions of an attorney were ambiguous, and the officers obtained consent from Mendez to continue questioning him after seeking clarification of his ambiguous references to an attorney." (RB 91.) This statement is simply untrue, and it is not the position the People took below. The prosecutor acknowledged that appellant had invoked twice during the third tape, and told the trial court it did not even need to read the interrogation transcript past the second tape.[25] (3 RT 362-364.) At least as to the last two of the four invocations, then, any ambiguity has first sprung up on appeal. And, it is important to remember, the admission at issue here occurred well into the third tape, immediately after Detective Del Valle ignored appellant's second request for an attorney. (Aug. CT 3884-3885.) Regarding the first two admissions, the prosecutor's decision to withdraw *any* of the interrogation speaks volumes: "I am not comfortable, especially with it being a death case, with the state of the record now as to his invoking or not invoking [so] I am not going to seek to introduce that." (3 RT 418.)

Also, at none of the four invocations did the police seek "clarification of his ambiguous references to an attorney" (RB 91), no

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[25]These two invocations are at Aug. CT 3869 and 3884.

doubt because there was no ambiguity in those references.

Here is the first invocation, on February 24, 2000:

> MENDEZ: No I--*I'll just have my attorney present sir.* I mean . . . I tried to answer what I could and--I mean I don't know what's going on or whatever . . . . (Aug. CT 3800.)

The officer[26] continues questioning--"And maybe it didn't happen in front of you"--with no mention of an attorney, and in fact shortly thereafter mentions the possibility Mendez was fearful of getting "green lighted" for talking to the police. (Aug. CT 3801; italics added.)

The second invocation occurred on April 8, after appellant said three times that he did not understand what was going on:

> MENDEZ: "*I think I should do this with an attorney.*"
>
> DEL VALLE: Well, hold on, hold on, hold on. Let me ask you something. Do you wanna listen to this right now"
>
> MENDEZ: I don't know.
>
> DEL VALLE: You don't know, do you want to?
>
> MENDEZ: Yes.
>
> DEL VALLE: . . . You sure it's okay?
>
> MENDEZ: Yeah.

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[26]The transcript indicates Detective Del Valle is the interrogator, but the prosecutor stated the transcript was in error, and that Detective Brown conducted the entire interview of February 24. (3 RT 365-367.)

DEL VALLE: Can I continue?

MENDEZ: Yeah. (Aug. CT 3848; italics added.)

By no stretch of the imagination can this be considered "seeking clarification" of his request for an attorney.

The prosecutor recognized appellant invoked by the third tape--the tape that contained the admission at issue here--and told the court it need not read past the transcript of the second tape. In any event, here is the third invocation:

> DEL VALLE: . . . . [H]e [another interrogator] explained to you that a parolee, has the right to defend himself, why didn't you say something?
>
> MENDEZ: *Cause I don't have--*
>
> DEL VALLE: Right?
>
> MENDEZ: *--my attorney here.*
>
> DEL VALLE: That's why? So you--so you didn't say--you said something differently if you have an attorney here?
>
> MENDEZ: [Tap.] Nah-nah [negative]. I don't know what to--what to do. I wasn't there. (Aug. CT 3869; italics added.)

The only "clarification" Del Valle attempted here was to determine whether appellant would have spoken up during the earlier interrogation had he had an attorney present.

The final invocation occurred immediately before the admission

appellant was close to Salazar when she was killed: "All right. Uh if I had my--*if I had an attorney right here right now I would answer your question.*" (Aug. CT 3884; italics added.) Again, no attempt at any "clarification."

Finally, respondent does not really address appellant's prejudice argument that the jury's hearing an admission he was within feet of Jessica Salazar when she was shot was uniquely damaging to his defense. Prejudice was adequately demonstrated in the opening brief. (AOB 188-190.)

VI

APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WAS VIOLATED WHEN THE TRIAL COURT DID NOT ALLOW COUNSEL TO CROSS-EXAMINE SAMUEL REDMOND REGARDING AN ADOPTIVE ADMISSION

In his opening brief, appellant argued he was denied his Sixth Amendment confrontation right when the trial court refused to allow co-counsel to ask Sam Redmond whether he had told the prosecutor a poster board in clear display during Redmond's testimony was wrong because it indicated Redmond had been a Northside Colton member since 1996, with the gang moniker of "Devil." (AOB 191-203.) Respondent asserts appellant lacks standing to make the claim, there was no adoptive admission at issue, and there was no prejudice even if there was. Respondent is mistaken as to each.

Citing no authority, respondent asserts that appellant lacks standing to make the claim because the question was posed by attorney Exum, counsel for codefendant Joe Rodriguez. (RB 96-97.) It is not entirely clear whether respondent is using lack of standing ("Mendez has no standing to raise this claim. Mendez did not ask this question when he had the opportunity to do so.") and forfeiture ("Accordingly, Mendez forfeited the claim by failing to make an argument in support of it at trial.") interchange-

ably, so appellant will address both.

In his opening brief, appellant argued the trial court's curtailment of cross-examination violated both the confrontation clause and his due process right to present a defense (AOB 192), and he has standing to raise the issue on appeal because he is asserting a violation of his own constitutional rights. (*People v. Jenkins* (2000) 22 Cal.4th 900, 965-966 [defendant has standing to raise violation of third party's privilege against self-incrimination if the improperly-admitted statements violate defendant's due process right to fair trial].) The interests of the three codefendants were virtually coextensive when it came to Sam Redmond. For example, following co-counsel Exum's cross-examination of Redmond, the trial court discussed two issues raised as a result of it, the adoptive admission regarding NSC membership and an implication Redmond had been threatened by a codefendant, a threat that had not in fact occurred. (10 RT 1448-1450) As appellant's counsel noted concerning the alleged threat, ". . . Mr. Exum asked those questions, but the detriment would eventually inure to Mr. Mendez." (10 RT 1454.) And attorney Exum could have been speaking for any of the codefendants when, also discussing the alleged threat, he made this statement: "Your Honor, the whole point here is that if the jury believes Mr. Redmond about all of his testimony, then, certainly,

that does not insure on the benefit of my client. ¶ Two things the jury needs to believe here in my opinion, is that, one, it's possible that Mr. Redmond himself is, in fact, the person that committed these crimes, and, two, that he's lying on the stand." (10 RT 1453-1454.)

Thus, although the question was asked by counsel for codefendant Rodriguez, it represented a continuation of questions asked by appellant's counsel concerning the statement on the exhibit that Redmond had been a Northside Colton gang member since 1996, and that he went by the moniker of "Devil." (9 RT 1174, 10 RT 1431.) In a capital case, furthermore, this court has entertained on appeal legal claims by a technically non-objecting defendant when a defendant and codefendant's objections are inextricably interwined: "As stated, defendant did not object to S.A.'s excusal or otherwise join in codefendant Richard's objection to her excusal. We nevertheless reach the merits of the claim because defendant argues that the trial court had a sua sponte duty to reexamine S.A.'s excusal once it found a prima facie case of group bias as to V.J., and defendant effectively preserved the issue of V.J.'s excusal." (*People v. Avila* (2006) 38 Cal.4th 491, 548.)

Nor is the issue forfeited. Although none of the parties employed the precise phrase "adoptive admission," it is clear the parties and court

were talking about, and knew they were talking about, precisely that. As the trial court said after it sustained the prosecutor's objection, "I'm sure that you were going to ask him as to when you saw the information on that diagram why didn't you bring it to the attention of the district attorney." (10 RT 1448.) The trial court obviously understood it was ruling on an adoptive admission question, and the issue is not forfeited merely because no party referred to the concept by its exact name. (*People v. Scott* (1978) 21 Cal.3d 284, 290 [objection sufficient if court understands issue it is asked to decide].)

Turning to the merits of the claim, respondent denies Redmond made an adoptive admission: "Redmond was not in a position that called for him to object to the prosecutor about the exhibit. He was a convicted felon[27] brought into court from jail to answer questions posed by the deputy district attorney. The exhibit had already been prepared, and apparently was behind him." (RB 97.) Respondent adds that Redmond was likely restrained during his testimony. (RB 97, fn. 23.)

How any of this matters respondent fails to specify, especially since Redmond admitted he had seen the board since his first day of testimony.

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[27]Once again, this conviction includes a guilty plea to the murder of Michael Faria, a murder Redmond denied any involvement in during his testimony.

(10 RT 1446.) There are two requirements for another person's hearsay statement to be admissible against a party as an adoptive admission: "The party has knowledge of the content of the other person's statement; and the party has, by words or conduct, adopted the statement or manifested belief in the truth of the statement." (1 Jefferson, Cal. Evidence Benchbook (4th ed. 2010) § 3.24, p. 105; Evid. Code, § 1221.) Redmond acknowledged he had seen the board on the first day of his testimony (10 RT 1446), and, as he was specifically questioned about it, obviously knew of the gang accusation contained on the board (9 RT 1173-1175, 1199-1190; 10 RT 1431). And if Redmond said nothing to the prosecutor about the prosecutor's own exhibit indicating he was a long-term NSC member nicknamed "Devil," his silence indicated a belief in its truth. (*People v. Geier* (2007) 41 Cal.4th 555, 590; *People v. Silva* (1988) 45 Cal.3d 604, 623-624.)

Respondent further asserts that Redmond's denial of NSC membership on direct examination sufficed as an objection to the characterization on the board. (RB 98.) True, Redmond denied NSC membership, around the same time in his testimony he claimed to have talked to a total of "about ten" NSC members during his lifetime. (7 RT 1036-1037.) But the question here is not whether Redmond denied NSC

membership--he obviously, and obviously falsely, did--but whether defense counsel should have been allowed to question him concerning his apparent failure to inform the prosecutor the information on the board was wrong. Thus, respondent's assertion that, "Whether Redmond also noticed the board, had an opportunity to tell the prosecutor it was wrong, or told the prosecutor it was wrong, and if so when, were all irrelevant to the issues at trial" (RB 98), is not only mistaken but misses the point, which is the trial court's curtailment of cross-examination on an issue of paramount importance: Sam Redmond's credibility.

Respondent quotes *People v. Fuiava* (2012) 53 Cal.4th 622, 665-666 for the proposition that, "'[A] state court's application of ordinary rules of evidence--including the rule stated in Evidence Code section 352--generally does not infringe upon' the constitutional right to offer a defense." This, however, was no pedestrian evidentiary ruling, but one that directly curtailed the right to cross-examine by far the most important witness against appellant and his codefendants. Important United States Supreme Court cases such as *Chambers v. Mississippi* (1973) 410 U.S. 284 [93 S.Ct. 1038, 35 L.Ed.2d 297] and *Green v. Georgia* (1970) 442 U.S. 95 [99 S.Ct. 2150, 60 L.Ed.2d 738] "challenged the application of the rules of evidence in a given factual scenario" on constitutional grounds without

striking down the state evidentiary rule itself. (*Cudjo v. Ayers* (9th Cir. 2012) 698 F.3d 752, 767.)

Finally, respondent essentially urges this issue is a tempest in a teapot: "Mendez's failure to preserve the claim below is hardly surprising because the answer could not have mattered to Mendez. The question had minimal if any probative value. There is no possibility of harm from the trial court's sustaining of the objection." (RB 97.) And this, "It was, indeed, a minor point with no probative value." (RB 99.)

It was no "minor point." In his opening brief, appellant detailed Redmond's consistent denials of NSC membership, as well as the wealth of evidence indicating that Redmond was an NSC member. (AOB 198-199, 201-202.) Appellant also noted the issue was important enough to the prosecutor that he ended his guilt phase rebuttal argument with an emphatic denial of Redmond's gang membership. (AOB 202.) Redmond's credibility was everything in this trial, and whether he told the prosecutor the gang accusation was false was relevant to the jury's assessment of that credibility. Because the trial court curtailed the jury's ability to make that assessment, the convictions must be reversed.

VII

THE TRIAL COURT'S THREAT TO ADMIT INADMISSIBLE POLYGRAPH EVIDENCE WAS ANYTHING BUT AN INSISTENCE "THAT THE JURY NOT BE MISLED ON THE FACTS REGARDING REDMOND'S PLEA AGREEMENT," AND IN FACT VIRTUALLY GUARANTEED THE JURY WOULD BE SO MISLED

It is not entirely clear what position respondent is taking in this argument. Respondent states, "There was no error, and no possible prejudice, in preventing Mendez from asking Redmond whether it was a coincidence that he had an interview in 2003 about ten days before entering his plea agreement." But respondent then cites *People v. Brown* (2004) 33 Cal.4th 892, 901, which stands for the proposition that, "If a judgment rests on admissible evidence it will not be reversed because the trial court admitted that evidence upon a different theory, a mistaken theory, or one not raised below." (RB 99; see also RB 105.)

Respondent repeatedly insists Redmond's statements were consistent, with the implication they were thus trustworthy. (RB 100, 102-104.) Respondent has, however, failed to acknowledge that Redmond admitted lying to the authorities during two out of his four interviews. (10 RT 1423-1424.) And nowhere has respondent acknowledged this fundamental dilemma presented by the question of Redmond's credibility: Why did he plead guilty to Michael Faria's murder if, as he also

consistently testified, he had nothing to do with it?

According to respondent, "It appears that Mendez was permitted to, and did, ask Redmond the questions that he wanted to ask." (RB 102.) Not so. Attorney Belter established that three years after Redmond's last law enforcement interview, he was interviewed by authorities and entered a plea agreement a week or two later whereby he was spared the death penalty in return for his testimony. (10 RT 1425-1426.) The question attorney Belter was prevented from asking is in italics below:

> Q: Now, you've told us about other coincidences that have occurred in your involvement in this, like going to the secluded spot was a coincidence and some other things like that?
>
> A: Yes.
>
> Q: *Are you telling us that was just a sheer coincidence that you had another interview a week and a half before you signed your plea agreement?*
>
> MR. RUIZ: Objection. Calls for speculation. (10 RT 1426; italics added.)

The court sustained the objection, though not on the basis that the question was speculative. The court correctly understood that the thrust of the question was the issue of coincidence (10 RT 1426, line 21; 10 RT 1427, line 9; 10 RT 1428, lines 11-12 ["The problem, of course, is what [attorney Belter's] done is he's made this coincidence, this coincidence and this

coincidence[28] . . . ."]) The court issued the polygraph threat if counsel persisted with the "coincidence" theme: "It seems to me what's going to happen here, if you're going to suggest that it's a coincidence, that Mr. Ruiz could bring out that it was conditioned upon him passing a polygraph . . . ." (10 RT 1426.) Contrary to respondent's assertion, then, defense counsel was not allowed to "ask Redmond the questions that he wanted to ask."

Disputing appellant's assertion that the false impression Redmond could testify however he pleased and still avoid the death penalty served to bolster his credibility, respondent claims that "if the jury had the impression that Redmond could testify at trial with impunity that he was the killer, the most logical inference is that he would do so. If Redmond could freely confess, partly absolve his cohorts, and free himself from the dangers of being an informant while in prison, he would likely do that." (RB 103-104.) Respondent thus asserts that *Redmond* would have testified he was the shooter if *the jury* believed he could freely testify so, which is a non

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[28]The "coincidences" the court was alluding to included Redmond's testimony he just happened to drive to the remote location where Jessica Salazar was killed (8 RT 1090-1091, 10 RT 1272-1274, 23 RT 2871), just happened to write "Diablo" in his cell while supposedly trying to avoid detection although "Devil" was a documented NSC member (9 RT 1215-1216, 1218-1219, 23 RT 2871-2872), and just happened to have a tattoo of a devil embracing a woman that was not documented by police until after Salazar's murder (9 RT 1195-1198, 23 RT 2874).

sequitur. Also, respondent's claim that Redmond had anything to gain by claiming at trial that he shot Faria and Salazar is unrealistic. As the trial court correctly noted, "[Y]ou're considered a rat, not just if you testify in court, but if you cooperate with the police department. That's the way I've always heard it. So in a gang environment being a rat is somebody who talks to the police in the first place, whether or not you're telling the truth or not telling the truth." (10 RT 1456.)

Finally, respondent appears to insinuate the court's polygraph threat may not have been error to begin with: "Whether mention of the polygraph at the 2003 DOJ interview was permissible rebuttal or not . . . ." (RB 104.) It was not, and there is no ambiguity in the law regarding the point: "The state's exclusion of polygraph evidence is adorned with no exceptions, and its stricture on admission of such evidence has been uniformly enforced by this court and the Court of Appeal." (*People v. McKinnon* (2011) 52 Cal.4th 610, 663.) And, specifically, there is no "state of mind exception" to Evidence Code section 351.1 to bolster witness credibility. (*Id.* at pp. 663-664.)

Respondent has failed to demonstrate that the trial court's curtailment of defense counsel's cross-examination of Redmond and right to present a defense were harmless beyond a reasonable doubt, and the

convictions and judgment must be reversed.

VIII

RESPONDENT APPEARS TO HAVE CONFUSED EXHIBIT 42, THE PHOTOGRAPH AT ISSUE HERE WHICH WAS NOT CROPPED, WITH EXHIBIT 45, A PHOTOGRAPH WHICH WAS CROPPED AND NOT OBJECTED TO ONCE IT WAS EDITED[29]

There were two photographs of victim Faria initially objected to, one that ended up as exhibit 42, and one that ended up as exhibit 45. Once the court cropped the photograph, however, exhibit 45 was no longer objected to, and it is exhibit 42 that is the subject of this argument. Mistakenly referring to exhibit 42, respondent asserts, "The photograph was cropped to hide the injury to the side that was from a medical procedure to save [Faria's] life. (11 RT 1563.) Mendez agreed the cropping was appropriate. (11 RT 1563.)" (RB 107.) The problem with this assertion, however, and consequently the problem underlying respondent's entire response to appellant's argument, is that the photograph respondent is referring to is exhibit 45, a photograph whose admission appellant did not contest once it was cropped, and not exhibit 42, the subject of the argument.

Appellant's defense counsel, stating "I think all counsel are in

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[29]Although only exhibit 42 is the subject of this argument in appellant's opening brief, appellant will request transmittal of both exhibits 42 and 45 to this court in light of respondent's response.

agreement," initially objected to any photos that "don't show cause of death wounds," and counsel for Lopez specified photographs numbered 008 and 032 as particularly objectionable. (11 RT 1557-1558.) *Photograph 008 became exhibit 42, and photograph 032 became exhibit 45.* The court taped a white piece of paper over that section of photograph 032 "which looks like it may be the result of either a person having some kind of surgical procedure trying to keep him alive, or it may be the result of the first step of the autopsy." (11 RT 1559.) The result is exhibit 45, which shows an entrance wound designated as the number 2 injury. (11 RT 1559-1560.) The cropping is furthermore clearly visible in exhibit 45.

The trial court described photograph 008, on the other hand, as "a distance photograph[30] to show what the victim looked like when he arrived at the autopsy, and I think that's necessary for identification purposes." (11 RT 1560.) This ended up as exhibit 42, which "shows gauze and looks like medical materials over the abdomen area . . . ." The court overruled defense objections to the photograph, claiming, "I think it would be helpful to the pathologist as he explained his testimony." (11 RT 1562.)

The discussion then abruptly switched back to exhibit 45, and it is

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[30]It is fair to call this "a distance photograph" only insofar as it was taken from a distance sufficient to show the entire length of Faria's body.

here that respondent mistakenly assumes the parties were still talking about exhibit 42, the cropped photograph:

> THE COURT: And . . . since now I know what I saw was from the earlier medical procedures, I probably would have even let the entire picture of the injury showing injury to the side in, which is arguably more gruesome, and I just thank Mr. Ruiz for agreeing to crop that because I don't think it's necessary.
>
> But, obviously, the risk you run is that *it's going to be obvious that that's a half-size picture so there's something down below*, but that's how life is. It's not perfect. (11 RT 1563, italics added.)

It is exhibit 45 that the various defense counsel agreed had been suitably edited, not exhibit 42, which was not cropped or otherwise edited. (11 RT 1563.)

Appellant believes this issue was adequately addressed in his opening brief, and does not believe further comment is required given the faulty factual premise of respondent's response.

IX

REFERENCES TO A "GUILT/INNOCENCE" DICHOTOMY IN TWO JURY INSTRUCTIONS AND THE COURT'S COMMENTS DURING VOIR DIRE DILUTED THE REASONABLE DOUBT STANDARD AND SHIFTED THE BURDEN OF PROOF TO APPELLANT

This issue was fully briefed in the appellant's opening brief, and appellant reasserts those arguments and incorporates them by reference herein.

X

CUMULATIVE ERROR DURING THE GUILT PHASE DEPRIVED APPELLANT OF HIS RIGHT TO DUE PROCESS OF LAW

This issue was fully briefed in the appellant's opening brief, and appellant reasserts those arguments and incorporates them by reference herein.

XI

APPELLANT HAS DEMONSTRATED PREJUDICE FROM THE TRIAL COURT'S FAILURE TO REINSTRUCT THE PENALTY PHASE JURY

Respondent's concedes error but asserts it harmless. Respondent acknowledges the trial court instructed the jury to disregard all previous jury instructions. (RB 122.) With the exception of CALJIC Nos. 17.30, 17.40, and 17.41, respondent does not contest that the trial court breached its sua sponte duty to reinstruct the jury with numerous other instructions, including CALJIC Nos. 1.02, 1.03, 2.09, 2.13, 2.20, 2.21.1, 2.21.2, 2.22, 2.27, and 2.60. (RB 113-114.) Respondent declines, however, to discuss the numerous instances of prejudicial prosecutorial misstatements during penalty phase argument cited by appellant in his opening brief as the harm attending the error to reinstruct,[31] specifically with CALJIC No. 1.02,

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[31]These misstatements were that 1) the jury could consider virtually anything as a factor in aggravation, 2) appellant had participated in an uncharged drive-by shooting, 3) the fact Jessica Salazar was not a participant in the events leading to her death was itself a factor in aggravation, 4) there was now an additional special circumstance (gang-related murder) making appellant death-eligible on yet another ground, 5) the effects of appellant's smoking methamphetamine the night of the offenses were like the effects of drinking too much coffee, 6) his age could not be considered a mitigating factor because he was not a 16- or 17-year-old facing execution in California, 7) appellant needed to have done something heroic to avoid execution, 8) the defense bore the burden of demonstrating some reason why appellant should not be executed, and 9) once the jury decided appellant had done what he was accused of there was

"Statements made by the attorneys during the trial are not evidence." (See AOB 258-268.) Instead, respondent hangs its hat on this assertion: "[T]his Court has never found the failure to reinstruct on evidentiary principles to be prejudicial to the defendant." (RB 113.)

Appellant submits this is the appropriate case to do so. There is "the oft-stated presumption that the jury does as it is instructed to do," which means it must be presumed the jury took literally the instruction to disregard all guilt phase instructions. (*People v. Carter* (2003) 30 Cal.4th 1166, 1219-1220.) In this case, the concept behind CALJIC No. 1.02 even got special attention when, during guilt phase instructions, the trial court underscored that what attorneys say is not evidence as part of an impromptu instruction concerning the Bakotich tape:

> During the course of argument attorneys will remember things differently than oftentimes I do and certainly opposing counsel. I just want to remind everybody that what the attorneys say to you in closing argument or in opening statement for that matter is not evidence. What is evidence is what's been presented to you in the courtroom. What a lawyer thinks or what a lawyer doesn't think is not evidence. Do you understand that? The arguments are just to guide you and give you a perspective on how that attorney sees the evidence, which is perfectly appropriate because it organizes and may bring to your attention something that might be significant to you. But again, it's not evidence. (23 RT 2911.)

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sufficient reason to execute him regardless of the penalty phase. (AOB 257-267.)

When the jury was told to disregard these instructions at the penalty phase, it must thus be presumed it did so.

The cases relied on by respondent (RB 113) can all be readily distinguished. In *People v. Virgil* (2011) 51 Cal.4th 1210, 1277, unlike here, the defendant did "not argue the jury might have been confused about how to consider penalty phase evidence by the absence of any particular evidentiary instruction." Instead, the defendant made "the more general claim that his penalty judgment must be reversed because the trial court failed to instruct the jury a second time on the presumption of innocence, the definition of reasonable doubt, and the prosecution's burden of proof." (*Ibid.*) This court stated that none of these instructions was appropriate for penalty phase proceedings anyway,[32] so there was no error in failing to reinstruct with them. (*Id.* at pp. 1277-1278.)

In *People v. Ervine* (2009) 47 Cal.4th 745, 803 (italics added), prior to opening statements at the penalty phase, "the court instructed the jury

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[32]The court had previously stated it was harmless error not to reinstruct on reasonable doubt at the penalty phase "because the jury was instructed that defendant's prior criminal acts had to be proven beyond a reasonable doubt before they could be considered in aggravation," an issue separate from whether the jury need "find beyond a reasonable doubt that the prosecution proved each aggravating factor, that the circumstances in aggravation outweigh those in mitigation, or that death is the appropriate penalty." (*People v. Virgil, supra,* 51 Cal.4th at pp. 1277-1278.)

with the basic principles governing their sentencing function and directed them to 'disregard any jury instruction given to you in the guilt determination of this trial *which conflicts with these princip[les]*." The trial court later read CALJIC No. 8.84.1, which included the instruction to "[d]isregard all other instructions given to you in other phases of this trial." (*Ibid.*) This court concluded, "Considering the penalty phase instructions as a whole [citation], combined with the fact the jury was supplied with a written set of the guilt phase instructions, we do not see a reasonable likelihood the jury failed to understand that it was to apply those earlier written instructions to the extent they were not inconsistent with the new instructions the court was providing. [Citations.]." (*Id.* at p. 804.) The court added that even if the jury "misunderstood its duty to apply the appropriate guilt phase instructions," there was no prejudice because the defendant had failed to "explain how the absence of these instructions could have affected the jury's evaluation of the evidence adversely to him." (*Ibid.*) The obvious distinction is that in *Ervine,* the jury was essentially told at the penalty phase that those guilt phase instructions which did not conflict with the new instructions were still in effect. Further unlike the present case, the defendant failed to present specifics as to how he was prejudiced.

In *People v. Wilson* (2008) 43 Cal.4th 1, 28-30, the defendant at least made somewhat particularized claims regarding how the absence of certain instructions might have affected the jury's evaluation of a defense psychologist's testimony during the penalty phase. First, this court rejected the defendant's contention that the lack of instructions on evaluating expert testimony meant the jury did not give due weight to the expert's testimony, while at the same time the jury "impermissibly considered the defendant's drug use and other criminal history as aggravating evidence." Any defect was essentially cured by other instructions which, this court added, the jury was presumed to follow. (*Id.* at pp. 28-29.)

The defendant in *Wilson* also claimed that the failure to give CALJIC No. 1.02 meant that the jury improperly considered a prosecution question to a defense expert as to whether the expert could "guarantee that the defendant will not act out with violence should he get his hands, again, on prison-type shanks." After the prosecutor withdrew the question, the trial court stated in a sidebar that there was no evidence for the jury to ignore, and that jurors had been previously instructed that attorney questions were not evidence; all of this occurred before the court instructed the jury to disregard previous guilt phase instructions. This court found the defendant was not prejudiced because of other "special penalty phase

instructions directing the jury to disregard other aggravating facts or circumstances and any evidence tending to show defendant committed other crimes . . . ." (*People v. Wilson, supra,* 43 Cal.4th p. 29.)

Finally, the defendant in *Wilson* claimed error from the court's failure to re-instruct that a guilt-phase witness's testimony should be viewed with caution, because a penalty phase expert agreed with the prosecutor that a seven or eight hour planning period for a robbery was not impulsive. (*People v. Wilson, supra,* 43 Cal.4th at pp. 29-30.) This court rejected the contention because the guilt-phase witness did not testify during the penalty phase, and because the expert's testimony was based not on that witness's guilt-phase testimony, but on police reports the expert had reviewed. (*Id.* at p. 30.)

In *People v. Lewis* (2008) 43 Cal.4th 415, 535, this court rejected the defendant's claim as speculative that the lack of certain instructions meant the jurors "were 'free to make a standardless assessment' of the evidence in determining defendant's penalty." The court specifically noted that "[n]othing in the closing arguments of the parties suggested that the jurors were free to make a standardless assessment of the evidence." (*Ibid.*) In the present case, because the jury was told to disregard the instruction that statements by attorneys were not evidence, the jury was entirely "free

to make a standardless assessment of the evidence" by accepting as true the prosecutor's numerous misstatements of fact and law during penalty phase argument.

People v. Moon (2005) 37 Cal.4th 1, 35, presented a situation where the prosecution presented no penalty-phase witnesses and the defense presented six witnesses who did not testify "at length" and who were not "virogrously cross-examined by the prosecutor." This court found that while the trial court's failure to reinstruct was indeed error (*id.* at p. 38), it was harmless under the circumstances:

> Defendant called no expert witness to present his social history; instead, his mother and brother provided a brief glimpse into the nature of his childhood. No forensic experts or mental health professionals took the stand for either side. Defendant's witnesses were not impeached with prior inconsistent statements, and all spoke from personal knowledge of defendant. There were no accomplices to the crime, neither side presented any circumstantial evidence, and no evidence was admitted for a limited purpose. In short, the penalty phase evidence was entirely straightforward, and the trial court's failure to reinstruct the jury with any applicable guilt phase instructions was harmless under any standard. (*Id.* at pp. 38-39.)

The defendant's contention the jurors were "free to make a standardless assessment of the evidence presented at both phases of the trial when determining [his] sentence" was rejected as "pure speculation," in that "defendant identifies no specific harm that could plausibly have resulted from a missing guilt phase instruction." (*Id.* at p. 39.) Here, on the other

hand, appellant identified nine such specific instances of harm. (AOB 257-267.)

And finally, in *People v. Carter, supra,* 30 Cal.4th at p. 1220, the defendant "fail[ed] to demonstrate that the omission of the evidentiary instructions . . . resulted in prejudice." As with the other cases discussed above (with the possible exception of *Wilson*), it would appear the defendant made generic rather than specific assertions of prejudice, such as that the lack of CALJIC No. 2.80, which tells the jury it is not bound by expert testimony but can give it whatever weight the jury believes it deserves, meant the jury would have "totally disregarded" a defense expert's penalty-phase testimony. (*Id.* at p. 1221.) *Carter* did specifically mention CALJIC No. 1.02, but found that its absence cut both ways in that particular case: "For example, although in the absence of CALJIC No. 1.02 the jury assertedly might, as defendant contends, have considered in aggravation information about defendant's juvenile record that was not admitted in evidence but was merely employed in cross-examining defense witness Roberts, by the same token the jury also might have considered conditions of confinement mentioned in defense counsel's closing argument urging a verdict of life without parole." (*Id.* at pp. 1220-1221.) Here, on the other hand, respondent fails to point to anything in defense

counsel's penalty phase argument (27 RT 3319-3337) that amounted to a misstatement of fact or law.

Respondent strives to demonstrate that the jury did not do what the law presumes it did do, which is to disregard all previous instructions:

> [J]urors knew that evidence was the facts presented by witnesses. And the jury was told, again, that it is the court that states the law to be followed. By direct implication, the jury was not to follow any legal precepts stated by attorneys that conflicted with the law stated by the judge. Further, in the concluding paragraphs, the court pointed out the dichotomy between evidence and the arguments of counsel. The court told the jury: "After having heard all the evidence, and after having heard and considered the arguments of counsel . . . . ." Evidence and argument are different and there is no basis upon which to conclude the jury did not understand that difference in reaching its penalty phase verdict. (RB 115.)

There was no such "direct implication" of the court's instruction. The jury was indeed instructed at the penalty phase, "You must accept and follow the law that I shall state to you," but respondent omits the very next line: "Disregard all other instructions given to you in other phases of this trial." (27 RT 3281.) One of these instructions to be disregarded was that statements of attorneys are not evidence. Also, respondent ignores the truly direct implication of the court's statement, "After having heard all the evidence, and after having heard and considered the arguments of counsel . . . ," which is that the instruction essentially lumped together evidence and the arguments of counsel as things for the jury to consider during penalty

deliberations.

According to respondent, "Mendez does not explain how the prosecutor properly drawing reasonable inferences from the evidence presented at trial or stating his views as to what the evidence shows would result in the jury failing to distinguish between evidence and argument in reaching a penalty verdict." (RB 116.) Once again, appellant detailed in his opening brief the prosecutor's numerous misstatements during argument, and detailed why they were misstatements rather than reasonable inferences from the evidence. Rather than respond to these individual contentions, respondent has elected to make blanket statements such as this one.

Finally, respondent states, "Without any indication that the jurors acted otherwise, Mendez cannot show prejudice from the failure to re-instruct on evidentiary principles in the penalty phase." (RB 116-117.) Respondent's position appears to be that *this error can never be prejudicial*, but respondent's postion simply cannot be the state of the law: "We again strongly urge trial courts to ensure penalty phase juries are properly instructed on evidentiary matters. 'The cost in time of providing such instructions is minimal, and the potential for prejudice in their absence surely justifies doing so.'" (*People v. Moon, supra,* 37 Cal.4th at p. 37, fn.

7.) Either jurors are presumed to follow the court's instructions, or they are not, and they cannot be presumed to follow the court's instructions only when the presumption works to a defendant's detriment.

The judgment of death must be reversed.

XII

THE VICTIM IMPACT AND PERSONAL CHARACTERISTIC EVIDENCE ALLOWED BY THE TRIAL COURT RESULTED IN AN UNRELIABLE SENTENCE OF DEATH

This issue was fully briefed in the appellant's opening brief, and appellant reasserts those arguments and incorporates them by reference herein.

XIII

CUMULATIVE ERROR DURING THE PENALTY PHASE DEPRIVED APPELLANT OF HIS RIGHT TO DUE PROCESS OF LAW

This issue was fully briefed in the appellant's opening brief, and appellant reasserts those arguments and incorporates them by reference herein.

XIV

THERE WAS NO "UNAUTHORIZED ORAL PRONOUNCEMENT OF JUDGMENT" TO CORRECT REGARDING THE ENHANCEMENTS; THERE WAS SIMPLY NO ORAL PRONOUNCEMENT OF JUDGMENT TO BEGIN WITH

In his opening brief, appellant relied on two cases decided by this court, *People v. Mesa* (1975) 14 Cal.3d 466 and *In re Candelario* (1970) 3 Cal.3d 702, for the proposition that a trial court's failure to orally impose judgment on enhancements found true by jury or by admission meant the enhancements must be stricken. Citing *People v. Turner* (1998) 67 Cal.App.4th 1258, 1268, respondent's primary response is that *Mesa* and *Candelario* are no longer valid, at least as to the Penal Code section 12022.53, subdivision (d), and section 12022.53, subdivision (e), enhancements: "*Mesa* and *Candelario* have been abrogated in situations in which statutes do not authorize the striking of enhancements." (RB 129.) It is, however, axiomatic that a Court of Appeal cannot abrogate the decisions of this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.) *Mesa* and *Candelario* thus continued to be good law following *Turner*.

Regarding the three year upper terms[33] for the gang enhancements

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[33]In his opening brief, appellant inadvertently referred to these as three year midterms. (AOB 306.)

(Pen. Code § 186.22, subd. (b)(1)), respondent acknowledges that California's sentencing scheme in place at the time has since been found unconstitutional. (*Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].) Citing *People v. Sandoval* (2007) 41 Cal.4th 825, 837, however, respondent asserts that "this Court found that in some cases it would be proper to impose the upper term based on circumstances established by the jury's findings." (RB 127.) Not quite. *Sandoval* was a case where--completely unlike the present case--the trial court stated numerous reasons to aggravate the defendant's sentence, but this court found that "[n]one of the aggravating circumstances cited by the trial court come within the exceptions set forth in *Blakely*.[34]" (*Ibid.*) As *Sandoval* characterized those exceptions,

> The United States Supreme Court has recognized two exceptions to a defendant's Sixth Amendment right to a jury trial on an aggravating fact that renders him or her eligible for a sentence above the statutory maximum. First, a fact admitted by the defendant may be used to increase his or her sentence beyond the maximum authorized by the jury's verdict. [Citation.] Second, the right to jury trial and the requirement of proof beyond a reasonable doubt do not apply to the aggravating fact of a prior conviction. [Citations.] (*Id.* at pp. 836-837.)

Here, on the other hand, the trial court stated no aggravating factors at all,

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[34]*Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403].

and respondent is left to invent them from whole cloth. (RB 127-128.)

Because judgment was never imposed on any of the enhancements, the enhancements must be stricken.

XV

CALIFORNIA'S DEATH PENALTY SCHEME VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

These issues were fully briefed in the appellant's opening brief, and appellant reasserts those arguments and incorporates them by reference herein.

CONCLUSION

For the reasons specified above, and those more fully set forth in appellant's opening brief, count 1 must be reversed, and its attendant enhancements stricken, and the multiple murder special circumstance also reversed, because of insufficient evidence; the convictions of both counts 1 and 2 must be reversed because of legal error; a new penalty phase trial must be ordered because of legal error; and the enhancements must be stricken because the trial court neglected to impose oral judgment.

Dated: 01/09/13

Respectfully submitted,

Randall Bookout

Randall Bookout
Attorney for Defendant and Appellant,
JULIAN ALEJANDRO MENDEZ

CERTIFICATION OF WORD COUNT

I, Randall B. Bookout, hereby certify that, according to the computer program used to prepare this document, Appellant's Reply Brief contains 20,677 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 9th day of January, 2013, at Coronado, California.

Randall Bookout

Randall Bookout
Attorney at Law

DECLARATION OF SERVICE

Case Name: *People v. Julian Alejandro Mendez* Cal. Supreme Ct. No. S129501
Superior Court No. RIF090811

I declare: I am employed in the County of San Diego, California. I am over 18 years of age and not a party to the within entitled cause; my business address is Post Office Box 181050, Coronado, California, 92178.

On January 9, 2013, I served the attached

APPELLANT'S REPLY BRIEF

of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Coronado, California on January 9, 2013.

I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed at Coronado, California, on January 9, 2013.

RANDALL BOOKOUT
(Typed Name)

Randall Bookout
(Signature)