SUPREME COURT COPY

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SUPREME COURT
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IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CUITLAHUAC TAHUA RIVERA, Defendant and Appellant.	Colusa County Superior Court Case No. CR 46819 Hon. S. William Abel, Judge Automatic Appeal From A Judgment and Sentence of Death

Appellant Cuitlahuac Tahua Rivera's Reply Brief

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DEATH PENALTY

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Appellant Cuitlahuac Tahua Rivera's Reply Brief

Introduction

Appellant Cuitlahuac Tahua Rivera respectfully submits this reply to respondent's brief. Appellant replies to contentions by respondent necessitating an answer to present the issues fully to this court. Appellant does not reply to arguments that are adequately addressed in the opening brief. The absence of a reply to any particular argument,

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

/ / /

Guilt Phase and Special Circumstance Issues

1. The evidence is insufficient to sustain the finding that appellant committed the murder in count 1 with premeditation and deliberation, requiring reduction of the offense to second degree murder.

Appellant explained in his opening brief that the evidence is insufficient to elevate an intentional killing of Stephan Gray from second degree murder to deliberate and premeditated first degree murder. (Appellant's Opening Brief ("AOB") 45-55.)

The encounter with Gray arose from a traffic stop initiated by Gray, and thus there was no evidence of a pre-planned killing. (RT 6:1240-1252;[1] see Respondent's Brief ("RB") 7-8.) The prosecution failed to adduce substantial evidence of a gang motive for the shooting, resulting in the jury finding *not* true the gang special circumstance. (CT 47:13591.) Appellant fired two shots while running away from Gray, revealing a hasty, unconsidered act insufficient to elevate even an intentional killing to first degree deliberate and premeditated murder. (AOB 48-55; see *People v. Bender* (1945) 27 Cal.2d 164, 181 ["the

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[1] References to rules are to the California Rules of Court, "RT" designates the Reporter's Transcript, and "CT" designates the Clerk's Transcript. Volume and page references are in the format "volume:page."

mere intent to kill is not the equivalent of a deliberate and premeditated intent to kill"]; *People v. Manriquez* (2005) 37 Cal.4th 547, 590.)

Respondent acknowledges that first degree deliberate and premeditated murder "requires more than a showing of intent to kill." (RB 27.)

Respondent argues that beyond showing a specific intent to kill Gray, there was "at least some evidence of all three" factors described in *People v. Anderson* (1968) 70 Cal.2d 15–i.e., planning, motive, and manner of killing. (RB 29.) Respondent is mistaken.

With respect to planning activity, respondent argues that after Gray began following Peterson's vehicle "appellant made two phone calls for people to come get him." (RB 29.) But absent speculation, there is nothing in these two calls suggesting appellant intended to even shoot Gray, let alone kill him. The fact that appellant was running away from Gray–and only fired *after* Gray gave chase–demonstrates an unplanned, impulsive shooting.

As further evidence of planning, respondent points to appellant's possession of a loaded .45-caliber handgun and a prior statement that appellant was "going to do something" to Gray. (RB 30.) But

appellant's possession of a gun and his prior statement do not support a reasonable inference of an intent to kill Gray because the encounter with Gray was entirely unplanned. Appellant's action in running away from Gray, and only firing upon him *after* Gray gave chase, further belies any inference of an intent to kill from appellant's possession of the gun and the prior statement.

Respondent cites *People v. Morris* (1988) 46 Cal.3d 1 for the holding that "defendant's possession of a weapon in advance of the shooting and his rapid escape support [an] inference of planning activity[.]" (RB 30, *People v. Morris, supra*, 46 Cal.3d at p. 23, disapproved on another ground in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.) In *Morris*, the defendant "brought a .38-caliber revolver to a public bathhouse during the early morning hours, parked his car near by, and shot the victim twice from close range inside an enclosed restroom with no witnesses present." (*People v. Morris, supra*, 46 Cal.3d at p. 22.) *Morris* is inapposite because there the defendant initiated the contact with the victim, and thus the defendant's possession of the firearm and subsequent use of the firearm supported a reasonable inference of a pre-planned intent to kill. (*Id*. at. pp. 22-23.) Contrary to

respondent's suggestion, this court in *Morris* did not suggest that a similar inference of an intent to kill could arise from a defendant's possession of a firearm in connection with an entirely unintended encounter with the victim.

Respondent argues that appellant's failure to dispose of the gun before using it shows pre-planning activity–i.e., appellant "did not attempt to give the handgun to Peterson, hide it in the vehicle, or otherwise dispose of it." (RB 30.) But appellant's subsequent action in running away from Gray and only firing after Gray gave chase shows that appellant merely intended to maintain possession of the gun.

Respondent asserts that "Peterson's behavior was also evidence that appellant planned to kill Officer Gray." (RB 30.) Respondent states that the jury could reasonably have inferred that "Peterson's attempt to get out of the car and confront Officer Gray was a conscious effort to stall him and prevent a situation in which appellant would try to kill him." (RB 30.) But such an inference is entirely speculative. (See *People v. Harvey* (1984) 163 Cal.App.3d 90, 105, fn. 7 ["Substantial evidence means more than simply one of several plausible explanations for an ambiguous event"].) There is no evidence to support a finding

that Peterson was somehow running interference for appellant. Peterson was the driver of the vehicle, and thus might be expected to engage Gray as she did by exiting the vehicle to talk to him.

Respondent argues that the jury "could have inferred that appellant ran from Officer Gray so as to put enough distance between them so that appellant could grab his gun and shoot Officer Gray before the officer had time to react." (RB 30-31.) But this is mere speculation and conjecture, upon which a conviction cannot be sustained. It amounts to an argument that such a scenario is plausible, but plausibility is not the test. (*Louis & Diederich, Inc. v. Cambridge European Imports, Inc.* (1987) 189 Cal.App.3d 1574, 1584-1585 ["An inference must be the product of logic and reason" and "must rest on the evidence, on probability rather than on speculative possibility or conjecture"].)

Implicitly acknowledging the speculative nature of the argument made in the preceding paragraph, respondent next writes: "*Even if appellant had not intended to kill Officer Gray before he started running*, during his run of approximately 100 feet with Gray on his tail (46 CT 13084), appellant had sufficient time to reflect on his decision and weigh the considerations for and against turning around and

shooting Officer Gray." (RB 31, italics added.) But this argument suggests no more than the possible formation of a specific intent to kill, which is insufficient to sustain a conviction for first degree murder. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

Respondent points to the prosecution's gang evidence, stating that the "gang culture appellant belonged to" made him "mentally prepared to commit violence and kill a police officer if the opportunity presented itself." (RB 31.) Here again, respondent's argument ignores the salient fact that appellant only fired at Gray while appellant was running away from Gray and after Gray began a foot pursuit. (RT 5:1065-1067, 6:1256-1258.) In other words, contrary to respondent's suggestion, this is not a case where the defendant was out looking to kill a police officer, and upon finding a police officer executed a planned killing.

Moreover, a purported gang motive for the killing is entirely speculative. There was no evidence that any gang was trying to kill Gray. Appellant was not in the presence of any gang members when the killing occurred. Nor was appellant in gang territory. No gang epithets were uttered, nor gang signs used. Further, the jury found *not* true the gang special circumstance, which required a finding that the murder was

carried out to further the activities of a criminal street gang. (AOB 107-121.)

Respondent argues that evidence of motive shows an intent to kill with premeditation and deliberation. (RB 32.) Respondent points to appellant's knowledge of Gray and to appellant's statements to Peterson during the traffic stop showing anger toward Gray. (RB 32.) Respondent argues that from this evidence the "jury reasonably could have inferred that appellant murdered Officer Gray because of his hatred and to fulfill his previous threat." (RB 32.) But any such inference is belied by the fact that appellant ran from Gray, and did not fire until after Gray gave chase. (RT 5:1065-1067, 6:1256-1258.) Eyewitness Yolanda Rosa Cabanas testified on cross-examination, in part:

> Q: And you said that this person turned around to their right, correct, before they started firing?
>
> A: Yes.
>
> Q: Did they continue to -- you said they continued to take some steps; is that correct?
>
> A: Yes. Yes.
>
> Q: You say -- was the person stepping towards the officer or was he stepping away from the officer?

A: *He was running away from the officer.*

Q: So kind of backpedaling type?

A: Not exactly. *He was running with his body twisted towards the officer.*

Q: *So he didn't turn all the way around then*?

A: *No*. [RT 6:1179, italics added.]

This case stands in stark contrast to cases suggested by respondent's argument–i.e., where prior contact and animosity demonstrates a deliberate, premeditated killing in view of the defendant's planned encounter with the victim. (See *People v. Rogers* (2013) 57 Cal.4th 296, 330 [defendant initiated contact with murder victim, revealing a deliberate and premeditated intent to kill].)

Respondent points to appellant's possession of a firearm, and his parole status and gang affiliation, arguing that a "jury reasonably could find that appellant decided to kill Officer Gray to avoid being caught with the gun and to escape certain incarceration." But this argument again ignores the salient fact that appellant ran from Gray, and did not fire until after Gray gave chase, thereby demonstrating an intent to avoid Gray. (RT 5:1065-1067, 6:1256-1258.) Moreover, even if "appellant

decided to kill Officer Gray" that specific intent to kill is insufficient to elevate an express malice second degree murder to a deliberate and premeditated first degree murder. (See *People v. Bender, supra*, 27 Cal.2d at p. 181 ["the mere intent to kill is not the equivalent of a deliberate and premeditated intent to kill"].)

Turning to the third *Anderson* factor–i.e., the manner of killing, from which it might be inferred the defendant had a preconceived design to kill–respondent acknowledges that the shots were fired in "rapid fashion" as appellant was running away from Gray (RB 33), which suggests a hasty shooting. (See *People v. Wolff* (1964) 61 Cal.2d 795, 821 ["legislative classification of murder into two degrees would be meaningless if 'deliberation' and 'premeditation' were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill"]; see *People v. Ratliff* (1986) 41 Cal.3d 675, 695 [even a shooting at close range does not necessarily demonstrate an intent to kill]; *Braxton v. United States* (1991) 500 U.S. 344, 349 [shooting "at a marshal" establishes "a substantial step toward [attempted murder], and perhaps the necessary intent"].)

Respondent's argument that the manner of killing supports an inference of a preconceived design to kill is premised on the following statement: "[A] jury reasonably could have concluded that appellant ran from Officer Gray so that he had sufficient time to turn, shoot, and kill before the officer was able to react. (RB 33.) The premise is faulty because it ignores that appellant fired the shots while running away, turning and firing over his shoulder in an imprecise manner. (RT 5:1065-1067, 6:1256-1258.)

Moreover, appellant did not shoot until the very last moment as Gray was upon him. (RT 6:1179-1180.) If appellant had a preconceived design to kill Gray by initially running away to put some distance between the two, one would reasonably have expected appellant to have stopped, turned and faced Gray, and then discharged the firearm while maintaining a firm stance from which shots could be accurately aimed to kill. The fact that shots were fired in "rapid fashion" while appellant was still running away from Gray, and only as Gray reached appellant, suggests a desperate, unconsidered action, which is insufficient to elevate even an intentional killing to a deliberate and premeditated killing.

In *People v. Thomas* (1945) 25 Cal.2d 880, this court construed the meaning of "willful, deliberate, and premeditated" in light of the phrase's placement among the specifically enumerated instances of a killing perpetrated, among other ways, during arson, rape, robbery, burglary, or mayhem. (*Id.* at p. 899.) Applying rules of statutory construction, the court stated:

> . . . By conjoining the words "willful, deliberate, and premeditated," in its definition and limitation of the character of killings falling within murder of the first degree the Legislature apparently emphasized its intention to require as an element of such crime *substantially more reflection than may be involved in the mere formation of a specific intent to kill.*

(*Id.* at p. 900, italics added.)

Appellant has demonstrated that respondent's arguments purporting to show a preconceived design to kill–i.e., one beyond the formation of a specific intent to kill–rely on speculative inferences. Substantial evidence is evidence that "maintains its credibility and inspires confidence that the ultimate fact it addresses has been justly determined." (*People v. Conner* (1983) 34 Cal.3d 141, 149; *People v. Marshall* (1997) 15 Cal.4th 1, 34.) Substantial evidence includes circumstantial evidence and related *reasonable* inferences. (*People v.*

Holt (1997) 15 Cal.4th 619, 669.) In other words, evidence must support reasonable inferences and "the prosecution may not fill an evidentiary gap with speculation." (*People v. Felix* (2001) 92 Cal.App.4th 905, 912; *People v. Reyes* (1974) 12 Cal.3d 486, 500; *People v. Morris, supra*, 46 Cal.3d at p. 21 [a reasonable factual inference may not be based on "'suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work.'"].)

Respondent draws a comparison to *People v. Hernandez* (1988) 47 Cal.3d 315–a case where "the verdict indicates that a felony-murder theory was relied on" (*id.* at p. 349)–arguing that the instant case presents "more evidence of premeditation and deliberation than existed in *Hernandez*." (RB 33.) Respondent is mistaken. In *Hernandez*, a case involving the forcible rape, sodomy, and murder of two young women by asphyxiation due to suffocation or strangulation, the van defendant used "provided no chance for escape once someone was inside[,]" and "[b]oth victims were killed in connection with sexual assaults when they screamed and fought violently." (*Id.* at p. 350.) The Court concluded:

> Finally, the manner of killing does not necessarily establish a sudden explosion of violence rather than a calculated killing. (See *People v. Alcala* (1984) 36 Cal.3d 604, 626 [205 Cal.Rptr. 775, 685 P.2d 1126].) Again the injuries to the body carried significant sexual overtones. This was not a case of random stabbings or bludgeoning but of specifically sexual violence repeated in almost every detail with both victims.

(*People v. Hernandez, supra*, 47 Cal.3d at p. 350.)

In contrast to *Hernandez*–which involved significant bodily injury, specific and repeated sexual violence, and death by suffocation or strangulation–appellant's act of shooting as he was running away from Gray and while Gray was in pursuit reveals a sudden explosion of violence rather than a calculated killing.

Reduction of appellant's conviction in count 1 to second degree murder is warranted under traditional, non-capital case standards. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 318 [non-capital case: a conviction unsupported by substantial evidence denies a defendant due process of law]; U.S. Const., 5th, 6th & 14th Amends.)

Reduction to second degree murder is further warranted in this case because the evidence fails to satisfy the requirement of *heightened verdict reliability* at the guilt phase of a capital trial. (See *Beck v.*

Alabama (1980) 447 U.S. 625, 627-646; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 76, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; U.S. Const., 8th Amend.).)

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2. **The trial court prejudicially erred by giving a flawed version of CALJIC No. 8.71 regarding consideration of second degree murder, requiring reduction of the offense to second degree murder.**

A. Introduction.

Appellant explained in his opening brief that the trial court gave a flawed version of CALJIC No. 8.71 [Doubt Whether First or Second Degree Murder], which suggested that a juror was to give appellant the benefit of the doubt as to the degree of the offense only if *all jurors unanimously* had a reasonable doubt as to the degree, thereby making first degree murder the de facto default finding. (AOB 56-66; see *People v. Moore* (2011) 51 Cal.4th 386, 409-411.)

Respondent acknowledges that the trial court instructed with CALJIC No. 8.71, as follow:

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you *unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.* [RB 35, italics added; CT 48:13820.]

Respondent also acknowledges that this court has stated that the instruction carries "'some potential for confusing the jurors about the

role of their individual judgments in deciding between first and second degree murder' . . . ." (RB 38-39, citing *People v. Moore, supra*, 51 Cal.4th at p 411.)

B. The jury reasonably understood that they were to follow the flawed version of CALJIC No. 8.71 regarding consideration of second degree murder.

Relying in part on *People v. Pescador* (2004) 119 Cal.App.4th 252 and *People v. Gunder* (2007) 151 Cal.App.4th 412, respondent argues that CALJIC No. 8.71, read together with the other instructions, could not have confused jurors about the role of their individual judgments in deciding between first and second degree murder. (RB 37-38.) But *Pescador* and *Gunder* were decided before *Moore*, and thus the appellate courts in those cases did not have the benefit of the decision in *Moore* finding that CALJIC No. 8.71 was potentially confusing.

Moreover, *Pescador* examined CALJIC No. 8.71 "in the context of the overall instructions, particularly CALJIC Nos. 17.11 and 17.40" (RB 37), but as respondent acknowledges appellant's jury was not instructed with CALJIC No. 17.11. (RB 41.) Respondent also acknowledges that in *Gunder* the trial court omitted CALJIC No. 17.11,

but instructed with CALJIC Nos. 8.75 and 17.40. (RB 38.) Appellant's jury was not instructed with CALJIC No. 8.75.

Here, CALJIC No. 17.40 directed the jury, in part, to "not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision." (CT 48:13842; see *People v. Gunder, supra*, 151 Cal.App.4th at p. 425; *People v. Pescador, supra*, 119 Cal.App.4th at p. 257.) CALJIC No. 17.40 also instructed that each juror's individual decision should be made "only after discussing the evidence and instructions with the other jurors[,]" and that a juror should "not hesitate to change an opinion if you are convinced it is wrong." (CT 48:13842.)

But in contrast to CALJIC No. 17.40, CALJIC No. 8.71 is a very specific instruction, telling the jurors that appellant could not be given the benefit of the doubt on second degree murder unless the jury unanimously agreed that there was reasonable doubt whether the offense was first or second degree murder. (CT 48:13820.) CALJIC No. 17.40 is a general instruction, which does not refer to first or second degree murder, and thus does not cure the defect in CALJIC No. 8.71. (See *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, 823 [common sense

principle: the specific controls over the general]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975; *Nickell v. Rosenfield* (1927) 82 Cal.App. 369, 377 ["Every trial judge knows from experience that many general instructions are quite puzzling to the average juror."].)

As this court has held with respect to inconsistent jury instructions:

> More significantly, *where two instructions are inconsistent, the more specific charge controls the general charge. . . . .* In the present case, the correct instruction was a general negligence instruction, while the erroneous charge applied the principle of contributory negligence in the specific context of medical malpractice. Therefore, if the jury regarded the two instructions as inconsistent, it is more likely that they followed the improper instruction.

(*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 878, italics added, footnote and citation omitted.) Established rules of construction support a finding that the jury reasonably understood they were required to follow the plain meaning of CALJIC No. 8.71.

Nor did CALJIC No. 8.74–which provided that the jurors must agree unanimously on the degree of murder, should they find appellant guilty of murder, before returning a verdict–cure the defect in CALJIC Nos. 8.71. (CT 48:13821.) CALJIC No. 8.74 reenforces that the jury

must be unanimous as to the degree of murder, but the unanimity requirement found in CALJIC No. 8.71 imposes a more stringent requirement for second degree murder than that required by law–i.e., that the jury must first unanimously agree that there is a reasonable doubt whether the murder was of the first or of the second degree, before giving the defendant the benefit of the doubt and returning a verdict of second degree murder.

Respondent refers to numerous other instructions, which it asserts correctly informed the jury that to convict of first degree murder the jury had to agree unanimously that the prosecution proved premeditation and deliberation beyond a reasonable doubt. (RB 34-36.) None of the listed instructions, however, either individually or collectively, or directly or impliedly, counteracted the problem with CALJIC No. 8.71 as identified in *Moore*. The instructions on reasonable doubt in general and unanimity do not remedy the more specific, incorrect instruction on reasonable doubt as to degrees of murder in CALJIC No. 8.71. (See *Francis v. Franklin* (1985) 471 U.S. 307, 316-320 [where reasonable juror could have understood specific instruction as creating unconstitutional burden shifting presumption with respect to element,

more general instructions on prosecution's burden of proof and presumption of defendant's innocence did not clarify correct law]; *LeMons v. Regents of University of California, supra*, 21 Cal.3d at p. 878 & fn. 8 [in determining how jurors would understand a series of instructions, "the more specific charge controls over the general charge"].)

When a defendant is charged with a lesser and greater offense, the prosecution bears the burden to prove the greater offense beyond a reasonable doubt. In the absence of unanimity regarding guilt of the greater offense, the jury may convict on the lesser offense only.

> It has been consistently held in this state since 1880 that when the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense.

(*People v. Dewberry* (1959) 51 Cal.2d 548, 555, quoted in *People v. Lee* (2011) 51 Cal.4th 620, 656.)

By requiring all twelve jurors to have a reasonable doubt regarding the greater offense, in contravention of this principle, the

instruction unlawfully and erroneously lowered the prosecution's burden of proof.

Further, in contrast to *Moore*, the special circumstance verdicts in this case do not provide a basis for concluding that the jury unanimously convicted the defendant of first degree murder on a legal theory and instructions that were not affected by CALJIC No. 8.71. In *Moore*, this court held that any instructional error was harmless beyond a reasonable doubt because the jury's true findings on the burglary-murder and robbery-murder special circumstances established that the jury must also have found the defendant guilty of first degree murder on those felony-murder theories. (*People v. Moore, supra*, 54 Cal.4th at p. 412.) Because felony murder during burglary or robbery can only be in the first degree, the jury's unanimous verdict on first degree felony murder would not be affected by the confusing degree-setting instruction. But that is not the case here. The verdicts on the special circumstances of murder of a peace officer engaged in the performance of his duties (Pen. Code, § 190.2, subd. (a)(7)) and murder committed to avoid or prevent lawful arrest or escape from lawful custody (Pen. Code, § 190.2, subd. (a)(5)) indicated that the jury had found appellant guilty of first degree

murder. (See CT 48:13822.) But they rested on the very same theory of premeditation and deliberation as the first degree murder conviction. Premeditation and deliberation was the only theory of first degree murder presented to the jury. The special circumstance findings simply confirm what the jury found in returning the first degree murder verdict. As such, the special circumstance verdicts do not present a basis independent of the first degree premeditated murder conviction for finding that the defect in the CALJIC No. 8.71 was cured or harmless beyond a reasonable doubt.

C. The instructional error was prejudicial, requiring reduction of the offense in count 1 to second degree murder.

Respondent argues that any instructional error was harmless "because the evidence and proof of guilt with respect to deliberation and premeditation was overwhelming, as shown in Argument I." (RB 43.) Respondent is mistaken.

Preliminarily, in Argument I, respondent characterized the evidence as "ample" and "sufficient," but not "overwhelming." (RB 29, 33.)

Respondent's argument–that the evidence supports a finding of premeditation and deliberation–ignores the fact that the instructions impermissibly limited the jury's consideration of second degree murder, and thus the fact that the jury rendered a verdict of first degree murder does *not* preclude the possibility that at least one juror, if properly instructed, would have entertained a reasonable doubt whether the murder was of the first or second degree. (See *United States v. Price* (9th Cir. 2009) 566 F.3d 900, 914.)

Under *Chapman v. California* (1967) 386 U.S. 18, "reversal is unwarranted *not* when the record is devoid of evidence that the error had an adverse effect, but *only* when the state has shown beyond a reasonable doubt that the error *did not* have an adverse effect." (*People v. Jackson* (2014) 58 Cal.4th 724, 778 (conc. & dis. opn. of Liu, J.), italics in original; see *Gamache v. California* (2010) 562 U.S. __ [131 S.Ct. 591, 593] (statement of Sotomayor, J.).)

Evidence of deliberation and premeditation was weak and insubstantial. (*Ante*, Arg. § 1.) The fact that appellant did not initiate the encounter with Gray and then ran away from Gray without first shooting–and then only fired after Gray gave chase and while still

running away–demonstrates a rash, impulsive act inconsistent with premeditation and deliberation.

Moreover, appellant explained in his opening brief that the weight of the prosecution's evidence is not even considered on harmless error review of an instructional error that lowers the prosecution's burden of proof. (See *People v. Aranda* (2012) 55 Cal.4th 342, 368; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281.) Respondent implicitly acknowledges this legal principle, but states in a footnote that *Aranda* "is distinguishable because the jury in this case was adequately instructed on the concept of proof beyond a reasonable doubt, and the standard reasonable doubt instruction was not erroneously omitted." (RB 43, fn. 15.) Although *Aranda* involved the omission of the standard reasonable doubt instruction, the holding is equally applicable here because both *Aranda* and the instant case involve instructional error relating to the burden of proof, as distinguished from instructional error on an element of the offense. (See *People v. Aranda, supra*, 55 Cal.4th at p. 368; see *United States v. Russell* (3d. Cir. 1998) 134 F.3d 171, 181; *United States v. Edmonds* (3d Cir. 1996) 80 F.3d 810, 824.)

Reduction of appellant's conviction in count 1 to second degree murder is warranted for instructional error.

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3. The trial court prejudicially erred by giving an acquittal-first instruction on count 1, requiring reduction of the offense to second degree murder.

Appellant explained in his opening brief that the jury was instructed on count 1 that if it found beyond a reasonable doubt that the crime of murder was committed, then it could find appellant guilty of either first degree murder or of the lesser offense of second degree murder. (RT 11:2311-2233, 2235; CT 48:13814-13817.) The instructions required the jury to find appellant not guilty of first degree murder before it could return a verdict of second degree murder. (RT 11:2232-2233; CT 48:13820.)

Appellant recognized that this court has upheld the giving of an acquittal-first instruction, but urged this court to reconsider the holding in light of the facts of this case. (AOB 68, citing *People v. Fields* (1996) 13 Cal.4th 289, 310-311.)

Respondent argues that this court has routinely reaffirmed the rule. (RB 44, citing, among other cases, *People v. Bacon* (2010) 50 Cal.4th 1082, 1110, *People v. Jurado* (2006) 38 Cal.4th 72, 125, and *People v. Nakahara* (2003) 30 Cal.4th 705, 715.)

None of this court's decisions cite to, or reference, the out-of-state decisions in *Cantrell v. State* (GA 1996) 469 S.E.2d 660, 662 [acquittal-first instruction "gives the prosecution an unfair advantage"] and *People v. Helliger* (NY 1998) 691 NY.S.2d 858, 865 [acquittal-first rule is based on "the desire to avoid lending encouragement to jurors who are irrationally holding out for a lesser charge" while at the same time the rule "lends support to jurors who are irrationally holding out for a greater charge"], which soundly criticize and reject the rule.

Nor has the issues been addressed in the context of the fact that the categorical statement contained in CALJIC No. 8.71 (CT 48:13820)–that the court cannot accept a guilty verdict on a lesser offense unless there is first a unanimous acquittal on the greater–*is simply incorrect.* This is because when jurors report they are deadlocked on the greater offense, the prosecution can, and often does, dismiss the greater to let deliberations continue on the lesser. (See *People v. Fields, supra*, 13 Cal.4th a p. 311.) The jurors are not told of this; instead they are told flatly that an acquittal on the greater must precede a verdict on the lesser. This falsely tells jurors that a deadlocked jury necessarily will result in no conviction at all, resulting

in either a full retrial or the defendant escaping conviction. For the reasons set forth in appellant's opening brief (AOB 68-75), this could strongly influence jurors leaning toward not guilty to switch to guilty.

Respondent further argues that the acquittal-first instruction merely "direct[ed] the jury on how to return its verdicts[,]" not how to deliberate, and thus was proper. (RB 44, citing *People v. Bacon* (2010) 50 Cal.4th 1082, 1110 ["Under the acquittal-first rule, a trial court may direct the order in which jury verdicts are returned by requiring an express acquittal on the charged crime before a verdict may be returned on a lesser included offense."].) Respondent is mistaken. The instructions erroneously direct the jury on how to deliberate, requiring unanimous agreement among all 12 jurors that there was a reasonable doubt whether the murder was of the first or of the second degree before giving appellant the benefit of the doubt and returning a verdict of second degree murder. (CT 48:13820.)

Respondent makes a summary prejudice argument, which is fully rejoined in appellant's opening brief. (RB 46; AOB 68-75.) Appellant's conviction in count 1 for first degree murder must be reduced to second degree murder.

4. The trial court prejudicially erred in failing to instruct that subjective provocation may reduce premeditated first degree murder to second degree murder.

A. Introduction.

Appellant explained in his opening brief that the trial court prejudicially erred in failing to sua sponte instruct in the language of CALCRIM No. 522 that subjective provocation can negate premeditation and deliberation. There was substantial evidence that the shooting–which occurred while appellant was running away from Gray–was in response to appellant's perception that the traffic stop and search were part of a pattern of harassment, provoking the shooting. (AOB 80-88.)

Respondent acknowledges that "[t]he existence of provocation may raise a reasonable doubt as to whether the defendant's killing was deliberate and premeditated." (RB 47, citing *People v. Valentine* (1946) 28 Cal.2d 121, 132.) Respondent also acknowledges that the "jury did *not* receive any instruction expressly discussing the concept of provocation and its potential to reduce first degree murder to second degree murder." (RB 46-47, italics added.)

Sua sponte instruction on subjective provocation was essential to the jury's application of the facts to the law on premeditation and deliberation. (*Post*, § 4.B.) The failure to instruct on subjective provocation was prejudicial because appellant presented substantial evidence of provocation and no other instruction mentioned provocation. (*Post*, § 4.C.)

B. Appellant did not forfeit the right to have the jury correctly and fully instructed on the law responsive to the evidence.

Recognizing that the jury was never instructed that subjective provocation negates premeditation–and that such an instruction is correct in law–respondent argues the issue was forfeited because defense counsel failed to request the instruction. (RB 47, citing *People v. Rogers* (2006) 39 Cal.4th 826, 878-880 [CALJIC No. 8.73], *People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1333-1334 [CALCRIM No. 522], and *People v. Saille* (1991) 54 Cal.3d 1103, 1119-1120.) Respondent is mistaken.

The error in failing to instruct in the language of CALCRIM No. 522 is properly reviewed on appeal without objection because appellant's substantial rights were affected. (*People v. Wickersham*

(1982) 32 Cal.3d 307, 330 ["because important rights of the accused are at stake, it also must be clear [from the record] that counsel acted for tactical reasons and not out of ignorance or mistake"]; *People v. Williams* (2010) 49 Cal.4th 405, 457; *People v. Prieto* (2003) 30 Cal.4th 226, 247 [holding that "instructional error that affects the defendant's substantial rights may be reviewed on appeal despite the absence of an objection"].)

Moreover, in view of the facts of this case, CALCRIM No. 522 is not properly labeled a pinpoint instruction. First, the instruction is a general statement of the law set forth in a standard jury instruction. Second, the instruction was responsive to the evidence in this case because there was weak evidence of premeditation and deliberation and substantial evidence of provocation. Third, the instruction is not a pinpoint instruction on a *defense* theory of the case. Instead, because there was substantial evidence of subjective provocation, the instruction was essential to allow for a reasoned determination by the jury whether the prosecution had proven premeditation and deliberation beyond a reasonable doubt–i.e., an *essential element* of express malice

first degree murder. The instruction thus was necessary in this case for the jury to properly apply the law to the facts of the case.

Sua sponte instruction in the language of CALCRIM No. 522 also was necessary to provide due process to appellant–i.e., to balance other instructions favorable to the prosecution. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-527 ["There should be absolute impartiality as between the People and the defendant in the matter of instructions"].)

In *Wardius v. Oregon* (1973) 412 U.S. 470, for example, the high court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (*Id.* at p. 473, fn. 6; see *Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344.) Noting the due process "does speak to the balance of forces between the accused and his accuser," *Wardius* held that there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon, supra*, 412 U.S. at p. 474.)

Although *Wardius* involved reciprocal discovery rights, the principle applies with equal force to jury instructions. (See *People v.*

Moore, supra, 43 Cal.2d at pp. 526-527; *Bollenbach v. United States* (1979) 326 U.S. 607, 614-615; *Reagan v. United States* (1895) 157 U.S. 301, 310 ["The court should be impartial between the government and the defendant."]; *United States v. Meadows* (5th Cir. 1979) 598 F.2d 984, 989-990.)

Here, the court instructed, in part, that the "*law does not undertake to measure in units of time the length of the period during which the thought must be pondered* before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances." (CT 48:13816, italics added.) "The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision *may be arrived at in a short period of time*, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree." (CT 48:13816, italics added.)

Although the instructions quoted above–that premeditation can be arrived at in a very short period of time–are a correct statement of California law, subjective provocation also can be arrived at in a very

short period of time. After Gray stopped Peterson's vehicle for no apparent lawful reason, appellant expressed frustration that Gray was always harassing him. (RT 6:1236-1253, 6:1272, 7:1294-1295.) Appellant exited the vehicle at Gray's request, but then ran as Gray was preparing to search him. (RT 6:1246-1247.) Gray then yelled at appellant and pursued him on foot, after which appellant turned while still running away and fired in Gray's direction. (RT 5:1065-1067, 6:1256-1258.) The jury could have found that appellant's subjective provocation triggered the shooting as Gray was closing in on him. (AOB 80-88; see *People v. Lewis* (2001) 25 Cal.4th 610, 646 ["The testimony of a single witness, including the defendant, can constitute substantial evidence requiring the court to instruct"]; *People v. Breverman* (1998) 19 Cal.4th 142, 177 ["In deciding whether evidence is 'substantial,' . . . a court determines only its bare legal sufficiency, not its weight"].)

Instruction on subjective provocation thus was essential to the jury's application of the facts to the law on premeditation and deliberation, and to balance the language of the above-quoted

instructions, which instructed that premeditation and deliberation can be arrived at in a very short period of time.

C. The failure to instruct on subjective provocation was prejudicial because appellant presented substantial evidence of provocation and no other instruction mentioned provocation.

Respondent argues any error in failing to instruct on subjective provocation was harmless because the jury was instructed "that acting under a sudden heat of passion or any condition precluding the idea of deliberation would negate first degree murder and reduce the crime to second degree." (RB 47-48, citing CT 48:13816-13817 CALJIC Nos. 8.20, 8.30].) Respondent is mistaken.

CALJIC No. 8.20, defining premeditation and deliberation, does not mention the word "provocation," nor does it state that evidence of subjective provocation can demonstrate that the prosecution failed to sustain its burden of proving beyond a reasonable doubt that appellant acted with premeditation and deliberation when firing upon Gray. (CT 48:13816.) CALJIC No. 8.30, defining second degree murder as involving "insufficient [evidence] to prove deliberation and premeditation[,]" also does not mention the word "provocation," nor

does it state that evidence of subjective provocation can demonstrate that the prosecution failed to sustain its burden of proving beyond a reasonable doubt that appellant acted with premeditation and deliberation when firing upon Gray. (CT 48:13816.)

Jury instructions provide essential guidance to the jury. (See *Carter v. Kentucky* (1981) 450 U.S. 288, 302.) "It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." (*Gregg v. Georgia* (1976) 428 U.S. 153, 193 [opn. of Stewart, Powell, and Stevens, JJ.].)

> Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria.

(*Bollenbach v. United States* (1946) 326 U.S. 607, 612.)

Instruction on subjective provocation was necessary in this case to the jury's application of the law to the facts because there was substantial evidence that the shooting arose from appellant's feeling of subjective provocation from the perceived pattern of harassment by Gray.

Respondent argues that "there was no evidence or argument that would have supported an instruction that appellant was provoked." (RB 48.) Respondent is mistaken.

There was ample evidence from which the jury could have found that appellant's feeling of subjective provocation from the perceived pattern of harassment raised a reasonable doubt whether the prosecution had proven premeditation and deliberation. As Gray initiated the stop, appellant, who was a passenger in the vehicle and had prior contact with Gray, expressed frustration that Gray was always harassing him, telling Peterson, "Why is he always bothering me? Why is he harassing me? Why don't (sic) he just leave me alone?" (RT 6:1242; see RT 6:1236-1237, 6:1272, 7:1294-1295.) Appellant exited the vehicle and ran, only turning to fire in Gray's direction *after* Gray yelled at him that he could not get away and then pursued appellant. (RT 5:1065-1067, 6:1246-1258.)

If the jury had been instructed that it could consider appellant's subjective provocation in evaluating whether appellant acted with premeditation and deliberation, then the evidence may well have persuaded at least one juror that subjective provocation resulted in

appellant having committed only an express malice second degree murder. The judgment of conviction of deliberate and premeditated first degree murder should be reduced to second degree murder for instructional error. (See *Sullivan v. Louisiana, supra*, 508 U.S. at p. 279.)

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5. The jury was instructed on an invalid theory in connection with the special circumstance allegation of murder to prevent arrest or escape from lawful custody, requiring the true finding to be vacated.

Appellant explained in his opening brief in connection with the special circumstance allegation the jury found true that "the defendant committed this murder for the purpose of avoiding or preventing a lawful arrest, or *perfecting or attempting to perfect an escape from lawful custody*" within the meaning of the Penal Code section 190.2, subdivision (a)(5). (AOB 89-92; RT 11:2388; CT 47:13592.) The jury was instructed that a true finding thereon could be returned upon a finding that the murder was committed to perfect or attempt to perfect an escape from lawful custody. (RT 11:2238; CT 48:13823.) But that finding was based on an invalid theory because appellant was not in custody. (AOB 90-92.)

Acknowledging that appellant was *not* in custody, respondent raises two contentions: (1) "the alternate theory of murder for the purpose of perfecting or attempting to perfect an escape from lawful custody *was a factually inadequate theory*" subject only to state harmless error analysis; and (2) "if the alternate theory constituted a

legally inadequate theory, any instructional error was harmless beyond a reasonable doubt." (RB 49-50, italic added.) Respondent is mistaken.

Preliminarily, as a matter of law appellant was not in custody when the shooting occurred because he was not under arrest when he fled from Gray and he had not submitted to Gray's authority. (AOB 91-92.)

Respondent urges this court to find that the second legal theory presented to the jury–escape from lawful custody–was a factually inadequate theory, not implicating a constitutional right.[2] (RB 51-53.) Respondent reasons that the theory was "factually inadequate because there was *insufficient proof* that appellant was in the lawful custody of Officer Gray." (RB 52, italics added.) Respondent's argument should be rejected because Gray ordered appellant, a parolee, out of the vehicle,

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[2] Appellant explained in his opening brief that a conviction based on a legally inadequate theory will be reversed unless "it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory." (AOB 93, citing *People v. Guiton* (1993) 4 Cal.4th 1116, 1130.) A conviction based on a factually inadequate theory will be affirmed "unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." (AOB 93-94, citing *People v. Guiton, supra*, 4 Cal.4th at p. 1130.)

thereby presenting a show of authority which reasonable jurors would have interpreted as limiting and controlling appellant's lawful movement. (See RT 6:1246-1247.)

> The nature of this harmless error analysis depends on whether a jury has been presented with a legally invalid or a factually invalid theory. When one of the theories presented to a jury is legally inadequate, such as a theory that "'fails to come within the statutory definition of the crime'" (*People v. Guiton, supra*, 4 Cal.4th at p. 1128, quoting *Griffin v. United States* (1991) 502 U.S. 46, 59), the jury cannot reasonably be expected to divine its legal inadequacy. *The jury may render a verdict on the basis of the legally invalid theory without realizing that, as a matter of law, its factual findings are insufficient to constitute the charged crime*. In such circumstances, reversal generally is required unless "it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory."

(*People v. Perez* (2005) 35 Cal.4th 1219, 1233, italics added.)

Here, there was nothing to dispel a reasonable conclusion that appellant was in Gray's lawful custody when he ran from Gray. The prosecution presented evidence that appellant was on parole and that Gray had lawfully stopped Peterson's vehicle. (RT 6:1246-1247, 1253.) The prosecution also presented evidence that Gray, wearing a police uniform, lawfully ordered appellant to exit the vehicle. (RT 6:1246-1247.) Appellant exited the vehicle and fled while Gray was engaging

appellant in preparation to search him. (RT 5:1065-1067, 6:1253-1258.) In view of the order to exit the vehicle and the show of authority over appellant, the jury would have reasonably concluded that appellant was not free to leave, and thus was in Gray's lawful custody at the moment he fled.

Moreover, the jury was not instructed on the legal distinction between a detention (not involving custody) and an arrest, nor was the phrase "lawful custody" defined. In view of the fact that appellant fled from an officer commanding his presence, and in view of the fact that the court never instructed in a manner that would permit the jury to make a meaningful distinction between detention and arrest, the jury would have no way of knowing that its factual findings might not constitute the charged crime.

Respondent argues that "[e]ven if this Court determines the jury was instructed on a legally inadequate theory, any error was harmless under the federal standard as well." (RB 53.) Respondent argues the error is harmless as evidenced by the fact that the jury (1) returned a true finding that the murder was of a peace officer engaged in the performance of his duties (Pen. Code, § 190.2, subd. (a)(7)) and (2)

"found appellant guilty of being a felon in possession of a firearm when he ran from Officer Gray." (RB 55.) Respondent concludes: "The jury would have based its true finding on the special circumstance on the valid theory had it been correctly instructed." (RB 56.) Respondent's arguments should be rejected.

If even one juror may have relied on the invalid theory, then the true finding must be reversed. (See *People v. Chun* (2009) 45 Cal.4th 1172, 1203 ["a reviewing court must conclude, beyond a reasonable doubt, that the jury based its verdict on a legally valid theory"]; *Keating v. Hood* (9th Cir. 1999) 191 F.3d 1053, 1063.)

Appellant's jury was instructed on both theories in the disjunctive, meaning that a finding on either one of the two theories was alone sufficient for conviction. The jury was instructed in a manner permitting it to return a verdict on the invalid theory, consistent with the facts of this case, without realizing that the factual determinations were legally insufficient to sustain the invalid theory of conviction. The jury was *not* instructed on unanimity, and thus one or more jurors may have returned a verdict on the basis of the invalid legal theory. There is nothing in the true findings on the remaining special circumstance and

the felon-firearm-possession enhancement that precluded a verdict on the special circumstance at issue here based on the invalid legal theory.

Reversal of the true finding on the special circumstance allegation of murder to prevent arrest or escape from lawful custody is warranted because on this record it cannot be determined, absent speculation, which of the two theories was relied upon by the jury when reaching the verdict. (See *Mills v. Maryland* (1988) 486 U.S. 367, 376; see also *Keating v. Hood, supra*, 191 F.3d at p. 1062.)

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6. Respondent is correct that the peace-officer-killing special finding on count 1 was stricken by the trial court, and thus appellant withdraws the argument.

Respondent agrees that the jury erroneously returned a true finding on the peace-officer-killing enhancement (Pen. Code, § 190, subd. (c)) because the enhancement applies to a conviction for second degree murder, not first degree murder. (RB 57-58; AOB 101-103.)

Respondent notes that the trial court subsequently set aside the true finding. (RB 58.) Appellant agrees. (RT 14:3032.) The instant argument is moot, and thus appellant withdraws the argument.

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7. The true findings on the gang enhancement in counts 1 and 2–murder and unlawful possession of a firearm–must be vacated because the evidence is insufficient to prove that the shooting of Gray was both gang related and committed with the specific intent to promote, further, or assist in any criminal conduct by gang members.

Appellant explained in his opening brief that the evidence is insufficient to sustain the dual findings necessary to sustain the true findings that the shooting of Gray and appellant's unlawful possession of a firearm were gang-related. (AOB 104-121.)

Undisputed evidence shows that this was an encounter initiated by Gray without any planning by appellant. (RT 6:1243, 1246-1253.) Appellant was with his girlfriend and their child, and was not promoting any gang when the vehicle was stopped. (RT 6:1236-1237, 1256-1258.) Appellant ran from Gray after exiting the vehicle. He ran to avoid a parole search, which Gray stated he was going to conduct. (RT 6:1246-1253.) Gray gave chase, and only then did appellant fire while still running away. (RT 5:1065-1067, 6:1246-1258.) These facts demonstrate that appellant's conduct was personal in nature–i.e., trying to get away from Gray–and not designed to benefit any gang, nor one done with the specific intent to benefit a gang. (AOB 107-121.)

Respondent acknowledges that dual findings are necessary to sustain the true finding on the gang enhancement–i.e., the prosecution was required prove that the shooting was committed (1) for the benefit of, at the direction of, or in association with any criminal street gang and (2) with the specific intent to promote, further, or assist in any criminal conduct by gang members. (RB 59, citing *People v. Livingston* (2012) 53 Cal.4th 1145, 1170, and *People v. Albillar* (2010) 51 Cal.4th 47, 59.)

Respondent further acknowledges, as she must, that "the evidence shows that *one possible and probable reason for the murder was appellant's personal animosity toward the officer*." (RB 63, emphasis added.)

Respondent argues that there was sufficient "evidence that appellant murdered Officer Gray for the benefit of the Merced Gangster Crips[,]" pointing to appellant's gang affiliation, possession of a firearm, and the shooting a few days earlier. (RB 60.) But "[n]ot every crime committed by gang members is related to a gang." (*People v. Albillar, supra*, 51 Cal.4th at p. 60.) There was no evidence that when appellant shot Gray he was using his gang affiliation to benefit the Merced Gangster Crips. Nor does the shooting a few days earlier

somehow show that this unintended encounter with Gray, which ended in a shooting, was designed to benefit the Merced Gangster Crips.

Respondent argues appellant knew that Gray "monitor[ed] the activities of the Merced Gangster Crips." (RB 60.) But even so, this does not convert an otherwise non-gang-related shooting into a gang-related shooting. The facts presented here show an unplanned, unintended contact with Gray and an attempt to prevent apprehension–i.e., one that appellant was not initially seeking in any event, let alone one to further some gang-related purpose and done with the specific intent to promote the gang.

Respondent also points to "[a] gang member's postmortem statement" that someone had to kill Gray[,]" suggesting that the after-the-fact statement somehow could be attributed to a desire by appellant to further the gang's drug activities by eliminating Gray. (RB 60-61.) But this is entirely speculative as there is no evidence that appellant shot Gray for the purpose of promoting the gang's drug activities. Nor was there evidence that appellant knew of, or approved, the gang member's postmortem statement, or that appellant had any influence over whether

such a statement might somehow be reliably attributed to appellant's motive in shooting Gray.

Recognizing that "there was no outward expression of gang involvement at the time of the shooting, such as the display of gang signs or the yelling of gang slogans," respondent argues the contact with Gray alone was sufficient to establish the necessary elements of the gang enhancement. (RB 61.) Not so. Appellant's knowledge of Gray and Gray's involvement with the gang unit does not automatically convert a non-gang-related shooting into one done with the specific intent to benefit a gang. (*People v. Albillar, supra*, 51 Cal.4th at p. 60.)

Respondent argues that the gang expert's testimony supports the true finding. (RB 61, citing *People v. Vang* (2011) 52 Cal.4th 1038, 1048.) Sergeant Trindad expressed the opinion that "the murder was committed for the benefit of, in association with, and at the direction of the Merced Gangster Crips because the shooting increased the gang's power, influence, and reputation within the community." (RB 61; see RT 10:1930-1933.) But this was entirely generic, speculative testimony that would apply to any killing committed by any gang member. (AOB 112-113.) Here, appellant was acting alone, the crime occurred outside

of the gang's territory, and the evidence showed that the shooting resulted from appellant's anger at Gray for perceived unjustified harassment–i.e., a purely personal matter entirely unrelated to any gang. Sergeant Trindad's testimony thus is insufficient to support the gang-related prong. (See *People v. Ochoa* (2009) 179 Cal.App.4th 650, 661-663; *People v. Albillar, supra*, 51 Cal.4th at p. 72 (conc. & dis. opn. of Werdegar, J.).)

Recognizing that "no other gang members were present" when Gray was shot (RB 62), respondent argues that appellant's call to Martin while the stop was in progress and the aid appellant received from gang members to escape satisfies the requirements of the gang enhancement. (RB 62-63.) Respondent is mistaken. With respect to Martin, there was no evidence that the call to Martin was to assist in killing Gray or to escape after a planned killing. (See RT 6:1246-1248.) Instead, the reasonable inference from the evidence is that appellant intended to run away from Gray–as appellant did–and thus was seeking a ride after fleeing on foot. With respect to assistance received from gang members after the killing to avoid arrest, the reasonable inference from the evidence is that gang assistance was to *avoid arrest*, not to kill Gray.

The commission of the charged offense must be shown to be gang-related; the true finding on the gang enhancement cannot be sustained on proof that only some uncharged offense occurring thereafter was committed for the benefit of the gang. The enhancement requires that the prosecution prove the defendant *committed the charged crime* "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." (Pen. Code, § 186.22, subd. (b)(1).)

Respondent argues that the gang-related nature of the shooting in this case is comparable to "the shooting of several security guards in *People v. Livingston, supra*, 53 Cal.4th at pp. 1171-1172." (RB 62.) Respondent is mistaken. In *Livingston*, the defendant, a known gang member sporting gang tattoos, committed the crime "in association with Sanders, the fellow gang member" who accompanied defendant in an earlier gang shooting. (*Id.* at p. 1171.) The fact that the defendant committed the crime with another gang member was significant, as this court cited *People v. Albillar, supra*, 51 Cal.4th at p. 62 for the following holding: "evidence of gang tattoos supports finding that *crime*

committed with fellow gang members was gang related[.]" (*People v. Livingston, supra*, 53 Cal.4th at p. 1171, italic added.) The gang-related nature of the shooting of the security guards also was shown by the fact that defendant's gang "considered the New Wilmington Arms apartment complex–the complex the security guards were guarding–to be their territory." (*Id.* at p. 1172.) This court concluded that evidence that defendant committed the crime with a fellow gang member, and targeted persons guarding an area within the gang's territory, was substantial evidence supporting the gang enhancement. (*Ibid.*) In contrast to *Livingston*, appellant was with his girlfriend and child when the shooting occurred, not with other gang members. (RT 6:1256-1258; see RB 62 ["It is true that *no other gang members were present* when appellant murdered Officer Gray."], italics added.) Nor was the shooting in territory claimed by the Merced Gangster Crips. (See RB 14-16.)

In sum, respondent posits a generalized factual scenario in which every encounter between appellant and Gray necessarily would be gang-related by virtue of the fact that Gray was assigned to the gang unit and appellant was affiliated with a gang. But as this court has explicitly

held, this is plainly not the law, nor is it the standard by which a defendant can be held criminally liable under Penal Code section 186.22, subdivision (b)(1). (See *People v. Albillar, supra*, 51 Cal.4th at p. 60 ["[n]ot every crime committed by gang members is related to a gang"]; *People v. Nunez and Satele* (2013) 57 Cal.4th 1, 40 [vacating the gang enhancement true findings for instructional error and stating, "Both defendants in this case were indisputably members of a criminal street gang . . . , but, as discussed below, the evidence did not clearly show that the murders were gang related."].)

The evidence is insufficient to sustain either prong of the enhancement. The shooting occurred during an unplanned encounter with Gray. (RT 6:1243, 1246-1253, 1256-1258.) Appellant was not in the presence of any gang members. (RT 6:1256-1258; see RB 62.) No gang signs were displayed or gang epithets uttered prior to or during the encounter. (RT 6:1146-1173, 1189-1195, 1246-1258.) When Gray initiated the traffic stop, appellant complained to Peterson about being continually harassed by Gray. (RT 6:1242.) There was no mention of any gang. (RT 6:1242-1250.) The evidence thus is woefully insufficient to sustain the requisite dual findings that the offenses in

counts 1 and 2 were gang related and committed by appellant with the specific intent to promote, further, or assist in any criminal conduct by gang members.

The gang enhancement findings as to counts 1 and 2 must be vacated.

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8. The acknowledged failure to instruct on any and all of the elements of assault requires reversal of the convictions for assault with a semiautomatic firearm, counts 5 and 6.

A. Introduction and acknowledgment of instructional error.

Appellant explained in his opening brief that the trial court failed to instruct on any and all of the elements of assault, in connection with counts 5 and 6, assault with a semiautomatic firearm on McIntire and Bianchi, respectively, requiring per se reversal for structural error. (AOB 122-130.) Alternatively, the instructional error was prejudicial because the factual issue posed by the omitted instruction was *not* necessarily resolved adversely to appellant under other instructions. (AOB 129-130.)

Respondent "agrees that the trial court erred by not instructing the jury on the elements of assault . . . ." (RB 66.) Respondent further "agree[s] that the instructions omitted '*substantially all of the elements of the offense*'" because although instructed "that the assault be committed with a semiautomatic firearm–the jury was *not instructed on what constituted an assault, the gravamen of the offense*." (RB 69, italics added.)

B. Omission of substantially all of the elements of the offense of assault with a semiautomatic firearm requires reversal for structural error.

Respondent argues that the failure to instruct on substantially all of the elements of the offense does not warrant reversal for structural error because "the instructional error may be quantitatively assessed" (RB 70)–i.e., the "record demonstrates that the jury did in fact find every fact necessary to establish the omitted elements of the offense beyond a reasonable doubt." (RB 71.) Respondent is mistaken.

Respondent's argument relies on *People v. Mil* (2012) 53 Cal.4th 400, 409, although respondent candidly states that this court's "'own case law has held that the omission of 'substantially all of the elements' of a charged offense is reversible per se.'" (RB 68, quoting *People v. Mil, supra*, 53 Cal.4th at p. 409; *People v. Cummings* (1993) 4 Cal.4th 1233, 1315.)

In *Mil*, the defendant argued that the trial court's failure to instruct on two elements of the felony-murder special circumstances constituted structural error. (*People v. Mil, supra*, 53 Cal.4th at p. 411.) This court recognized that most constitutional errors can be harmless. As a consequence, unless the error is a defect that affects the very

""""framework within which the trial proceeds"""" (*id.* at p. 410), where an instruction omits multiple elements of the offense or special circumstance allegation "but the elements were uncontested and supported by overwhelming evidence, it would not necessarily follow that the trial was fundamentally unfair or an unreliable vehicle for determining guilt or innocence" (*id.* at p. 411).

Quoting *People v. Cummings, supra*, 4 Cal.4th 1233, this court reaffirmed that omission of "'substantially all of the elements'" of a charged offense is reversible per se. (*People v. Mil, supra*, 54 Cal.4th at p. 413).

> The critical inquiry . . . is not the number of omitted elements but the nature of the issues removed from the jury's consideration. Where the effect of the omission can be "quantitatively assessed" in the context of the entire record (*and does not otherwise qualify as structural error*), the failure to instruct on one or more elements is mere "trial error" and thus amenable to harmless error review.

(*Id.* at pp. 413-414, citation omitted, italic added.) This court held that "the instructions omitted only two elements from the charge" (*id.* at p. 416), distinguishing the case from *Cummings*, where the trial court's instructions failed to define robbery, and thus "[w]e do not find that the omission here was akin to what occurred in *Cummings*." (*Id.* at p. 416.)

In *Cummings*, in connection with the killing of a police officer motivated by a desire to avoid capture for a series of robberies (*People v. Cummings, supra*, 4 Cal.4th at pp. 1257-1258), the trial court omitted instruction on four of the five necessary elements of robbery, only instructing on the intent to permanently deprive the owner of the property. (*Id.* at pp. 1311-1312.) Reversing the convictions for robbery, this court held that under the federal Constitution the instructional error was not amenable to harmless error analysis because the jury lacked instruction on substantially all the elements of robbery. (*Id.* at p. 1315.)

Mils is readily distinguishable from the instant case because what occurred here–i.e., omission of all of the elements of the crime of assault–is akin to what occurred in *Cummings*. Respondent acknowledges, as she must, that "the instructions omitted '*substantially all of the elements of the offense*'" because although instructed "that the assault be committed with a semiautomatic firearm–the jury was *not instructed on what constituted an assault, the gravamen of the offense*." (RB 69, italics added.) Omission of substantially all of the elements of the offense places the instant case squarely within the holding of *Cummings*, requiring per se reversal for structural error.

Respondent argues that the omission of all the elements of the crime of assault can be "quantitatively assessed" in the context of the entire record, and thus is subject to harmless-error review. (RB 70, citing *People v. Marshall* (1996) 13 Cal.4th 799, *People v. Kobrin* (1995) 11 Cal.4th 416, and *People v. Sedeno, supra*, 10 Cal.3d at p. 703. Respondent is mistaken.

Neither *Marshall*, *Kobrin*, nor *Sedeno*, created an exception to the rule in *Cummings*–which rule was recently reaffirmed in *Mil*–that omission of *substantially all of the elements* of an offense requires per se reversal for structural error. *Marshall*, which did not discuss *Cummings*, held that the failure to return a finding on the multiple-murder special-circumstance was harmless because the finding was encompassed within other jury findings. (*People v. Marshall* (1996) 13 Cal.4th at pp. 849-852.) No other jury findings encompassed the crime of assault.

Kobrin, in the context of omission of instruction on an element of perjury, declined to decide the question whether the failure to instruct on an element of an offense is reversible per se or instead is subject to harmless error analysis, and instead concluded that reversal was

required because it cannot be determined beyond a reasonable doubt that the instruction had no effect on the jury's verdict on the perjury offense. (*People v. Kobrin, supra*, 11 Cal.4th at pp. 430 [maj. opn.] and 432 [conc. opn., George, J.].)

Sedeno, decided a decade before *Cummings*, overruled *People v. Modesto* (1963) 59 Cal.2d 722, which held that the erroneous failure to give an instruction on a lesser included offense is necessarily prejudicial, even though it reasonably appears from the verdict and the instructions given that the jury rejected the evidence tending to prove the lesser offense. (*People v. Sedeno, supra*, 10 Cal.3d at p. 720-721.)

Respondent argues that this case comes within a so-called *Sedeno* exception to a harmless error analysis under *Chapman* (RB 70-71), and applying that exception here the "record demonstrates that the jury did in fact find every fact necessary to establish the omitted elements of the offense beyond a reasonable doubt." (RB 71.) Respondent's argument should be rejected, however, because *Sedeno* was decided a decade before *Cummings* and involved the separate issue of instruction on a lesser included offense. (*People v. Sedeno, supra*, 10 Cal.3d at p. 720-721.) Respondent cites no authority applying such an exception in

connection with the omission of instruction on substantially all of the elements of a charged offense. (RB 70-73.)

C. Omission of substantially all of the elements of the offense of assault with a semiautomatic firearm also requires reversal for prejudicial error.

Appellant explained that reversal is required even on harmless-error review because the jury was never called upon to make the determination whether appellant committed an assault as charged in counts 5 and 6, and thus the factual issue posed by the omitted instructions was not necessarily resolved adversely to appellant under other proper instructions. (See AOB 129-130, citing *People v. Sedeno, supra*, 10 Cal.3d at p. 721; *People v. Castaneda* (2011) 51 Cal.4th 1292, 1328.)

Respondent argues that the omission of all the elements of the crime of assault was harmless "because the evidence relevant to the proof of assault was overwhelming." (RB 73.)

Respondent has not met its burden of proving that that the instructional error was harmless beyond a reasonable doubt because, among other reasons set forth in the opening brief, instruction on the essential elements of assault was necessary to the jury's understanding

of the charge. This is so because assault has a technical meaning not commonly understood by laypersons, and no other instructions required the jury to determine whether appellant had committed an assault on McIntire and Bianchi. (AOB 127-130.)

Appellant's convictions for counts 5 and 6 cannot be deemed "surely unattributable to the" instructional error. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) Reversal of appellant's convictions for counts 5 and 6 is required.

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9. The prosecutor committed egregious misconduct during guilt-phase closing argument, requiring reversal of appellant's convictions.

A. Introduction.

Appellant argued in his opening brief that during guilt-phase closing argument the prosecutor committed egregious misconduct by repeatedly referring to matters outside the evidence, vouching for prosecution witnesses, appealing to passion, using the prestige of the prosecutor's office, and misleading jurors into diluting their role and responsibility. (AOB 131-150.)

The following six statements in the prosecutor's closing argument are at issue here:

(1) "That's not research. That's not an investigation. That's taking money and trying to arrive at a conclusion that the money was paid to secure." (RT 11:2281.)

(2) "We would ask you, Ladies and Gentlemen, to bring a verdict into this courtroom that honors its more than 150-year tradition of justice." (RT 11:2285.)

(3) "Members of the Jury, this case has gone faster than we anticipated because frankly, and sadly, the facts just aren't very

complex. Many of the witnesses we could have called would have been repetitive, and Mr. Bacciarini and I are completely satisfied that you understand what happened in both shootings." (RT 11:2284.)

(4) "[O]ne of the most important acts of citizenship that any person can be asked to perform is now being performed by you in your service as jurors; and more so, in a murder trial in which the penalty being sought is death. (RT 11:2258-2259.)

(5) "The fact is, Ladies and Gentlemen, gangsters don't deserve second-degree murder because they already come from a murder mindset. Murder is already part of their culture. It was already part of the defendant's lifestyle, part of who he is." (RT 11:2276.)

(6) "Gang members . . . don't get second-degree murder, they don't deserve second-degree murder. (RT 11:2360.)

B. The issue is preserved for appellate review.

Despite the fact that at a sidebar conference immediately following the prosecutor's closing argument the trial court overruled appellant's objections to statements (1) through (3) (RT 11:2287-2293), respondent argues that the claim of prosecutorial misconduct has been forfeited. (RB 74, citing *People v. Friend* (2009) 47 Cal.4th 1, 29.) The

premise of respondent's argument–i.e., that a defense objection is untimely if made after the close of the prosecution's argument but before submission of the case to the jury–is erroneous. (See *People v. Peoples* (2016) 62 Cal.4th 718, 801 [claim preserved by objection the day after closing argument and before the jury began deliberating]; compare *People v. Adams* (2014) 60 Cal.4th 541, 577 [postverdict motion for a new trial is insufficient to preserve claim].)

In *Peoples*, this court held that claims of prosecutorial misconduct were preserved by virtue of defense counsel's motion for mistrial made the day following prosecutor's closing argument. (*People v. Peoples, supra*, 62 Cal.4th at p. 801.) In declining to apply a forfeiture rule, this court stated:

> The Attorney General argues that defendant has forfeited his challenge to statements (6) through (10) because defense counsel failed to contemporaneously object to these statements or request a curative admonition at trial. Although defendant did not object to these statements during the prosecutor's closing argument, he did move for a mistrial the following day in the proceedings, challenging statements (7) through (10). . . . . Defendant's motion here is distinguishable from both prior cases; although there was no immediate discussion among judge and counsel regarding the propriety of the remarks, defendant challenged those remarks before the jury had

> begun deliberating and well before a verdict had been reached.

(*Id.* at p. 801.)

Nor should this court find forfeiture of statements (4) through (6). The trial court's order overruling the defense objections to the three categories of arguments identified above shows that additional objections would have been overruled, and thus objection would have been futile. (See *People v. Arias* (1996) 13 Cal.4th 92, 159 [the general rule that claims are not preserved for review in the absence of a timely objection does not apply when the failure to object or request an admonition would have been futile].) Moreover, as explained in the opening brief, the prejudice to appellant was so great that it could not have been cured by an admonition even if the court had sustained a defense objection to statements (4) through (6). (AOB 147-150.)

The due process requirement of heightened verdict reliability at the guilt phase of a capital trial also weighs in favor of this court considering all of the claims of prosecutorial misconduct asserted here. (See *Davis v. Alaska* (1974) 415 U.S. 308, 315-319; *Bridges v. State* (Nev. 2000) 6 P.3d 1000, 1011 [Nevada Supreme Court employs

"greater flexibility in considering issues of prosecutorial misconduct that were not preserved for appeal where a defendant's life is at stake."]; *Beck v. Alabama, supra*, 447 U.S. at pp. 627-646; see also *People v. Williams* (1998) 17 Cal.4th 146, 161, fn. 6. [the forfeiture rule bars a party from presenting a claim of error on appeal, but it does not prevent an appellate court from reaching such a question].)

C. The prosecutor committed egregious misconduct during guilt-phase closing argument.

Respondent acknowledges that "[a] finding of misconduct does not require a determination that the prosecutor acted in bad faith or with wrongful intent." (RB 77, citing *People v. Kennedy* (2005) 36 Cal.4th 595, 618; see AOB 136.)

(1) Respondent agrees that statement (3) constituted prosecutorial misconduct.

In statement (3), the prosecutor argued: "Members of the Jury, this case has gone faster than we anticipated because frankly, and sadly, the facts just aren't very complex. *Many of the witnesses we could have called would have been repetitive*, and *Mr. Bacciarini and I are completely satisfied that you understand what happened in both shootings*." (AOB 137-138; RT 11:2284, italics added.)

The argument, relying on facts not in evidence, was misconduct because it encouraged the jury to return a verdict based on unspecified witness who had never testified. (AOB 137-138.) The argument, which vouched for the credibility of the prosecution's case, contained a personal guarantee from the prosecutor that these unspecified witness would have fully supported the witnesses who testified. (AOB 139-140.)

Respondent acknowledges that in the first part of statement (3) "the prosecutor improperly stated that he could have called other witnesses who would have testified similarly to the witnesses that he did call." (RB 79; *People v. Linton* (2013) 56 Cal.4th 1146, 1207 [improper to suggest that evidence available to the government but not before the jury corroborates the testimony of a witness]; *People v. Frye* (1998) 18 Cal.4th 894, 975-976, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see *People v. Boyette* (2002) 29 Cal.4th 381, 452.)

Respondent also acknowledges that in the second part of statement (3) that "to the extent that the 'completely satisfied' statement could be understood to reference the existence of the uncalled repetitive

witnesses or something other than the evidence adduced at trial, it was improper as well." (RB 79; *People v. Huggins* (2006) 38 Cal.4th 175, 206-207 [misconduct for a prosecutor to express personal belief or opinion as to the reliability of a witness to bolster the testimony in support of the prosecution's case by reference to facts outside the record].) The phrase "completely satisfied" was joined with the statement about other repetitive witnesses, and thus considered in context the jury reasonably understood the prosecutor as vouching the strength of the case based, in part, on the other repetitive, non-testifying witnesses. (See AOB 139-140.)

Respondent argues that the prosecutorial misconduct in this case constituted harmless error. (RB 80-84.) Respondent is mistaken, as explained in the opening brief and Argument 9.D., *post*. Securing convictions by use of such tactics amounts to egregious misconduct by a prosecutor, particularly in a capital case where due process demands heightened reliability of the verdicts rendered. (See *Beck v. Alabama, supra*, 447 U.S. at pp. 633-646.)

(2) Statements (2) and (4) through (6) appealed to passion and fear, constituting prosecutorial misconduct.

Respondent acknowledges that it "is improper for a prosecutor to make an appeal to the jury's passion and prejudice." (RB 85, citing *People v. Cornwell* (2005) 37 Cal.4th 50, 92-93, disapproved on another ground in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22; *People v. Redd* (2010) 48 Cal.4th 691, 742.)

In statement (2), the prosecutor committed misconduct by explicitly encouraging the jurors to "*bring a verdict into this courtroom that honors its more than 150-year tradition of justice*." (RT 11:2285, italics added.) Respondent argues that the above statement did not constitute misconduct because it was "merely an appeal for the jury to take its duty seriously . . . ." (RB 88, citing *People v. Adanandus* (2007) 157 Cal.App.4th 496, *People v. Wash* (1993) 6 Cal.4th 215, and *People v. Lang* (1989) 49 Cal.3d 991.) Respondent is mistaken. The prosecutor did not urge the jury simply to do justice in this case. Instead, the prosecutor urged the jury to consider the 150-year tradition of justice of either the Merced Police Department or the Colusa

Courthouse–a fact not in evidence in this case–when deliberating the guilt verdicts.

Contrary to the suggestion from respondent's citation to *People v,. Wash, supra*, this court did *not* condone the prosecutor's statement urging the jury to restore "confidence" in the criminal justice system by returning a verdict of death, instead referring to such statements as potentially inflammatory. The court stated:

> . . . We have stated that "[i]solated, brief references to retribution or community vengeance ..., although *potentially inflammatory*, do not constitute misconduct so long as such arguments do not form the principal basis for advocating the imposition of the death penalty." [Citations.] The prosecutor's remarks here were not particularly inflammatory, nor did they constitute the principal basis of his argument in favor of the death penalty. Accordingly, any conceivable error was harmless.

(*People v. Wash, supra*, 6 Cal.4th at p. 262, italics added, citing *People v. Ghent* (1987) 43 Cal.3d 739, 771.)

Moreover, *Wash* and *Lang* involved the issue of prosecutorial misconduct during *penalty phase* closing argument. (*People v. Wash, supra*, 6 Cal.4th at pp. 261-262; *People v. Lang, supra*, 49 Cal.3d at p. 1041.) Nothing in either case suggests that in guilt-phase closing

argument the prosecutor avoids misconduct when encouraging a verdict based on a desire to honor a 150-year tradition of justice.

In *Adanandus*, the prosecutor urged the jury "to restore order," which was a direct comment on the charged offense. (*People v. Adanandus, supra*, 157 Cal.App.4th at p. 513.) There is nothing in the appellate court's decision in *Adanandus* suggesting that statements about the need to return a verdict upholding a 150-year tradition of justice are not inflammatory in the guilt phase of a capital trial. (*Id.* at p. 513; see *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 680 [opinions must be understood in accordance with the facts and issues before the court; they are not authority for propositions not considered or analyzed by the court].)

In statement (4), the prosecutor committed misconduct by encouraging the jury to return a guilty verdict, in part, by reminding them that this was a very important case "*in which the penalty being sought is death*." (RT 11:2259, italics added; see *People v. Thomas* (2011) 51 Cal.4th 449, 486 [it is improper for a prosecutor to reference punishment during the guilt phase of a capital trial].)

Respondent argues that the reference to penalty at the guilt phase of the trial "was not improper" because the prosecutor was not encouraging a verdict based on the death penalty and the jury already knew that the death penalty was being sought. (RB 85-86, citing *People v. Lang, supra*, 49 Cal.3d at p. 1041.) *Lang* in inapposite as it involved the issue of prosecutorial misconduct during *penalty phase* closing argument, where it is entirely appropriate for the prosecutor to encourage a verdict based on the fact that the penalty being sought is death. (*Id.* at pp. 1440-1441.) Nothing in *Lang* suggests that in guilt-phase closing argument the prosecutor avoids misconduct when encouraging a verdict based on the fact that the *penalty being sought is death.* (*Ibid.*; see *People v. Alvarez* (2002) 27 Cal.4th 1161, 1176 ["cases are not authority for propositions not considered"].)

In statement (5), the prosecutor committed misconduct by warning the jury that "*gangsters don't deserve second-degree murder* because they already come from a murder mindset." (RT 11:2276, italics added.) In statement (6), the prosecutor committed misconduct by again warning the jury that "*[g]ang members . . . don't get*

second-degree murder, they don't deserve second-degree murder." (RT 11:2360, italics added.)

Respondent argues that the statements were not an appeal to passion but, instead, were statements about gang members, which were not improper. (RB 86-87.) But statements about what a group of people *deserve* is a statement about reward and/or punishment, which appeals to passion. (See Oxford Dictionaries <http://www.oxforddictionaries.com> (as of January 11, 2016) [deserve: "Do something or have or show qualities worthy of (reward or punishment)"].) The statements thus reasonably are understood as encouraging the jury to punish appellant by denying him a verdict of second-degree murder, regardless whether the prosecution had failed to sustain its burden of proving premeditation and deliberation beyond a reasonable doubt.

(3) Statements (5) and (6) misstated the law on first degree premeditated murder, constituting prosecutorial misconduct.

Respondent acknowledges that it "is misconduct for a prosecutor to misstate the law during closing argument." (RB 88, citing *People v. Whalen* (2013) 56 Cal.4th 1, 77.)

In statements (5) and (6) the prosecutor committed misconduct by arguing for a conviction for first-degree murder based on the assertion that gangsters like appellant do not deserve to be convicted of second-degree murder. (RT 11:2276, 2360.)

Respondent argues that the statements "did not misstate the law or advocate for an objective rather than subjective standard regarding appellant's intent." (RB 88.) But this is precisely what occurred when the prosecutor argued that categorically gangsters are deserving of first-degree murder, not second-degree murder. (See *People v. Boyette, supra*, 29 Cal.4th at p. 435 [prosecutorial misconduct to misstate the applicable law during argument to the jury].) Of course, a defendant's gang affiliation does *not* preclude a conviction for second-degree murder. (See *People v. Chiu* (2014) 59 Cal.4th 155, 166.)

(4) Statement (1) suggested unethical conduct by the defense expert witness, constituting prosecutorial misconduct.

In statement (1) the prosecutor committed misconduct by urging the jury to disregard defense expert witness Professor Lopez's testimony on the basis that the testimony was fabricated: "That's not research. That's not an investigation. *That's taking money and trying to arrive at*

a conclusion that the money was paid to secure." (RT 11:2281, italics added.)

Respondent argues that this court has approved of similar statements by prosecutors in capital cases, citing *People v. Arias* (1996) 13 Cal.4th 92 and *People v. Blacksher* (2011) 52 Cal.4th 769. (RB 90-91.) In both of these cases, however, this court emphasized that harsh attacks on the credibility of opposing witnesses must be supported by the evidence. (*People v. Arias, supra*, 13 Cal.4th at p. 162 [permissible to argue "from the evidence"]; *People v. Blacksher, supra*, 52 Cal.4th at p. 839 ["permissible argument based on the evidence"].)

Here, the prosecutor's statement that Professor Lopez was simply taking money to arrive at a purchased conclusion was not supported by the evidence, but was entirely speculative. A reasonable inference may not be based on speculation (*People v. Morris, supra*, 46 Cal.3d at p. 21), and thus it was misconduct for the prosecutor to encourage a verdict based on speculation. (See *People v. McGreen* (1980) 107 Cal.App.3d 504, 517-518 [defendant prejudiced by prosecutor's suggestion of ethics violation by expert witness], overruled on other grounds in *People v. Wolcott* (1983) 34 Cal.3d 92, 99-100.)

D. Egregious misconduct warrants reversal of appellant's convictions.

Respondent acknowledges that prosecutorial "misconduct that violates the federal Constitution requires reversal unless it is harmless beyond a reasonable doubt." (RB 80, citing *People v. Cook* (2006) 39 Cal.4th 566, 608; *Chapman v. California, supra*, 386 U.S. at p. 24.)

Respondent does *not* assert that the misconduct here is only subject to the less stringent state harmless error analysis (RB 80), and thus respondent implicitly concedes that the *Chapman* standard applies. (See e.g., *People v. Bouzas* (1991) 53 Cal.3d 467, 480 [omission of response to appellant's argument implies concession to that argument]; see also *People v. Werner* (2012) 207 Cal.App.4th 1195, 1212 [citing *Bouzas* and noting Attorney General's apparent concession].)

Respondent argues that statement (3)–"Many of the witnesses we could have called would have been repetitive, and Mr. Bacciarini and I are completely satisfied that you understand what happened in both shootings"–was harmless prosecutorial misconduct. (RB 80.) Respondent is mistaken.

Respondent points to CALJIC Nos. 1.00, 1.02, and 1.03, which in combination instructed the jury to determine the facts for the evidence presented and to following the instructions over statements by counsel. (RB 80.) Respondent also points to CALJIC No. 2.11, which instructed the jury that neither side is required to call all persons with knowledge of the events as witnesses. (RB 80.) But respondent points to no more than what can be said about any case involving prosecutorial misconduct where the jury has been instructed with these general points of law.

Respondent also asserts that the evidence was "overwhelming" and thus any error was harmless. (RB 81, 84.) This, however, is not the standard under *Chapman*. It is respondent's duty to prove, beyond a reasonable doubt, that the error did not contribute to the verdict. The test is not outcome determinative. In any event, in connection with count 1, these statements are belied by the closeness of the case on the issue of premeditation and deliberation (*ante*, Arg. 1), a finding on which was necessary to elevate this case to a capital case, and upon which the death judgment could not have otherwise been imposed. The evidence on the gang enhancement also was weak and insubstantial.

(*Ante*, Arg. 7.) Moreover, in connection with counts 3 through 7, relating to the shooting of McIntire and Bianchi, the inconsistent and impeached testimony of both McIntire and Bianchi rendered the evidence pointing to appellant as the gunman weak and unreliable. (AOB pp. 34-35.)

Respondent argues that statements (2) and (4) through (6)–which appellant has shown appealed to passion and fear, thus constituting prosecutorial misconduct–were harmless, citing CALJIC No. 1.00 and *People v. Medina* (1995) 11 Cal.4th 694, 759-760 [brief and isolated comments harmless].) Respondent's argument ignores the fact that the offending comments were neither brief nor isolated, but instead were made repeatedly and spread throughout the prosecutor's closing argument. (See RT 11:2258-2259, 2276, 2281, 2284, 2285, 2360.)

Similarly, respondent argues that any error in suggesting unethical conduct by defense expert witness Professor Lopez (i.e., statement (1)) was rendered harmless by CALJIC No. 1.00, the standard admonition that argument is not evidence. (RB 91, citing *People v. Cash* (2002) 28 Cal.4th 733.) But in *Cash* the statement at issue was "brief, truncated by an objection, and not resumed[,]" leaving this court

to conclude any error was cured by the standard admonition that argument is not evidence. (*Id.* at pp. 733-734.) Where the prosecutor engages in repeated misconduct that infects the entire closing argument, as here, the standard admonition cannot render the error harmless. (See e.g, *People v. Bandhauer* (1967) 66 Cal.2d 524, 530; *People v. Kirkes* (1952) 39 Cal.2d 719, 726.)

In view of the egregious prosecutorial misconduct, as shown by any one or a combination of the prosecutor's statements (1) through (6), reversal of appellant's convictions is required for a denial of due process, a fundamentally fair jury trial, and the right to effective assistance of counsel. (See *Beck v. Alabama, supra*, 447 U.S. at pp. 633-646; *Kyles v. Whitley, supra*, 514 U.S. at p. 422; *Burger v. Kemp, supra*, 483 U.S. at p. 785.)

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10. Respondent agrees that this court should review the sealed transcripts of the trial court's *Pitchess* hearings for a determination whether the trial court improperly withheld relevant documents from the personnel file of Officer Stephan Gray.

In his opening brief appellant requested that this court review the sealed record of the trial court's *Pitchess*[3] review to determine whether the trial court abused its discretion by failing to order full disclosure of all relevant information. (AOB 151-160; see *People v. Mooc* (2001) 26 Cal.4th 1216, 1232.)

Respondent "agrees that this court should review the record of the in camera hearing under the appropriate standard." (RB 93, citing *People v. Hughes* (2002) 27 Cal.4th 287, 330.)

The Court thus should conduct an independent review of the materials identified in appellant's opening brief to determine whether the trial court abused its discretion.

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[3] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

11. The trial court prejudicially erred in admitting irrelevant, highly prejudicial evidence of appellant's uncharged conduct involving Mohammed, Gonzalez and Bradley several years prior to the instant offenses, requiring reversal of appellant's convictions.

Appellant explained in his opening brief that admission of extensive evidence of appellant's use of a firearm in two separate incidents years prior to the charged offenses was an abuse of discretion, resulting in a denial of due process, because the evidence lacked substantial probative value. (AOB 161-177; *People v. Thompson* (1980) 27 Cal.3d 303, 318 [admission of uncharged conduct could be upheld only if it has "substantial probative value. If there is any doubt, the evidence should be excluded."].)

Respondent acknowledges that the prosecution admitted *extensive* evidence of appellant's uncharged conduct, including the following:

(1) Mohammed's testimony about an incident in 2000 or 2001 when he and his friend Gonzalez were in a vehicle and appellant purportedly displayed a gun and pointed it at both of them;

(2) Bradley's testimony about an incident in September 2000 when he and two other people were outside his residence when

appellant purportedly fired six bullets from a revolver in their direction, but did not strike anyone; and,

(3) Peterson's testimony about an unspecified shooting incident involving appellant and Bradley in September 2000. (RB 95; AOB 165-167.)

Respondent argues the evidence was relevant under Evidence Code section 1101, subdivision (b), to prove motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident, and was not unduly prejudicial under Evidence Code section 352. (RB 96-102.) Specifically, respondent argues that the uncharged conduct "was relevant to prove appellant's state of mind at the time he committed the charged offenses." (RB 97, citing *People v. Rogers, supra*, 57 Cal.4th at p. 330.) Respondent is mistaken.

In *Rogers*, the trial court properly admitted evidence of two prior murders on the issue of defendant's intent and common design or plan to commit the charged premeditated murder, citing to numerous common and distinctive features between the charged murder and the out-of-state murders so as to warrant admissibility on the issues of intent and common design or plan. (*Id.* at p. 327.) There were at least ten

elements of similarity including, among other things, (1) all victims were women of a particular age group, (2) all victims were selected by defendant a local bar, (3) all woman were unknown to defendant, and unaccompanied by a man, (4) in each instance defendant socialized with the victim and subsequently got the victim to give him a ride to or to accompany him to his residence or lodging, and (5) the manner of the killing was similar–i.e., all occurring inside a room or small enclosed area. (*Ibid.*)

Respondent's citation to *Rogers* in connection with the assertion that the uncharged conduct was relevant to whether appellant premeditated the shooting of Gray is entirely misplaced. (RB 97.) With respect to evidence of appellant's state of mind when shooting Gray, there is *no* similarity between the uncharged conduct. Appellant displayed a gun to Mohammed and Gonzalez, but there was no shooting. (RT 7:1427-1428.) Appellant fired several bullets from a revolver at Bradley, but the shooting was instigated and encouraged by a statement made by accomplice Roberts. (RT 9:1628-1633, 1637.) Neither case involved a shooting where appellant was fleeing from a police officer (or from anyone else), and thus the evidence was *not*

sufficiently similar to support an inference that appellant harbored the same intent in each instance.

> . . . In order to be admissible to prove intent [i.e., state of mind], the uncharged conduct must be sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance.'"

(*People v. Foster* (2010) 50 Cal.4th 1301, 1328, citing *People v. Ewoldt* (1994) 7 Cal.4th 380, 402.)

Aside from the conclusory statement that the uncharged conduct "was relevant to prove appellant's state of mind" (RB 97, citing *Rogers*), respondent does *not* even assert–nor can she–that the prior conduct was similar to the shooting of Gray. (See RB 96-98; see *People v. Bouzas, supra*, 53 Cal.3d at p. 480 [omission of response to appellant's argument implies concession to that argument].)

Respondent does *not* assert that the prior conduct involving Bradley was similar to any of the other offenses charged in this case. (See RB 96-98; see *People v. Bouzas, supra*, 53 Cal.3d at p. 480 [omission of response to appellant's argument implies concession to that argument].)

Respondent argues that the "prior conduct against Mohammed and Gonzalez was very similar to appellant's encounter with McIntire and Bianchi, in that both conflicts began by passing motorists exchanging dirty looks at each other." (RB 97.) Not so. The incident involving Mohammed and Gonzalez was preceded by a verbal dispute between appellant and Gonzalez (RT 7:1426-1427), unlike the incident involving McIntire and Bianchi. (RT 9:1678-1681, 1692, 1695, 1712, 1750-1751.) The incident involving Mohammed and Gonzalez did not involve a shooting, whereas the charged offenses involved shootings. The uncharged conduct involving Mohammed and Gonzalez thus was not sufficiently similar to the charged offenses in this case to support an inference that appellant harbored the same intent in each instance. (See *People v. Ewoldt, supra*, 7 Cal.4th at p. 402.)

Respondent also argues that "[e]vidence of *appellant's prior gang-related offenses* were relevant to prove appellant's gang-related motive and intent in committing the charged crimes, which included establishing that appellant was aware of a pattern of criminal activity committed by gang members to support the gang allegations." (RB 97, italics added, citing *People v. McKinnon* (2011) 52 Cal.4th 610.)

Respondent's suggestion that the prior uncharged conduct was all gang-related is misplaced. There was no evidence that the incident involving Mohammed and Gonzalez was gang-related. (RT 7:1417-1436.) Although there was evidence that the incident involving Bradley was gang-related because the shooting involved rival gang members, the victims in this case were *not* rival gang members, and thus the gang-related nature of the prior conduct was not relevant. (See *People v. Champion* (1995) 9 Cal.4th 879, 922.)

Nor does citation to *McKinnon* support respondent's argument that the evidence was admissible to show a gang motive. (RB 97.) In *McKinnon*, defendant killed the victim, a member of a rival gang, in retaliation for the prior killing of Scotty Ware by a member of the victim's gang. (*People v. McKinnon, supra*, 52 Cal.4th at pp. 655-656.) The trial court properly admitted evidence of defendant's gang affiliation as relevant to the meaning of defendant's statement to the murder victim, "This is for Scotty." (*Id.* at p. 655.) In contrast to *McKinnon*, there was no evidence in this case that the shootings involved rival gangs. Nor was gang evidence relevant to show the meaning of any statements made by appellant.

Respondent also argues that "[c]ontrary to appellant's assertions, the evidence was indeed used to prove predicate acts of the Merced Gangster Crips and to support Sergeant Trinidad's expert opinions that the crimes were gang-related." (RB 97.) Respondent misstates appellant's argument.

Appellant argued that "[a]lthough the prosecutor purported to seek admission of the evidence to prove 'predicate acts' (RT 5:899), the prosecutor proved the requisite predicate offenses involving the MGC gang with other evidence . . . , and instead impermissibly used the uncharged criminal activity to prove that appellant premeditated the murder of Gray." (AOB 170-171.) The prosecution proved the predicate acts not with evidence of the uncharged conduct but, instead, with (1) appellant's conviction for the offenses of possession for sale of rock cocaine and unlawful possession of a firearm, (2) Jermaine Ewing's conviction for the offense of possession for sale of cocaine, and (3) Teotis LaMark Robertson's conviction for the offense of robbery. (RT 9:1836-1847; People's Exhs. 51 & 54; AOB 30.) Indeed, respondent's statement of facts relating to gang evidence does not mention the uncharged conduct as being part of the gang evidence relied

upon by the prosecution in proving the gang enhancements. (RB 14-16.)

Nor was the *uncharged* conduct even relevant and admissible to prove predicate acts of the Merced Gangster Crips. Predicate acts are proven with prior criminal convictions for specified offenses, not uncharged conduct, which is the only conduct at issue here. (See Pen. Code, § 186.22, subd. (e); *People v. Gardeley* (1996) 14 Cal.4th 605, 624; *People v. Tran* (2011) 51 Cal.4th 1040, 1046.) Respondent's citation to "gang expert testimony" at pages 1836 and 1837 of the reporter's transcript is to prior convictions, not uncharged conduct. (RB 97, citing RT 9:1836-1837.)

As explained above, the uncharged conduct was inadmissible because it was not relevant to show intent, motive, knowledge, or relevant gang-related activity. Respondent's argument that the trial court did not abuse its discretion in admitting the evidence under Evidence Code section 352 is fully rejoined in appellant's opening brief, and with the reply set forth above. (RB 98-105; AOB 167-173.)

Respondent argues that admission of the uncharged conduct, if error, was harmless. (RB 105-107.) Respondent is mistaken. The

admission of evidence of appellant's uncharged misconduct involving use of a firearm years before the charged offenses undermined his defense of factual innocence in connection with counts 3 through 7, and it undermined his defense to first degree murder in count 1 (i.e., lack of premeditation and deliberation; see *Michelson v. United States* (1948) 335 U.S. 469, 475-476 [character evidence "is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge"].)

Moreover, the prosecutor emphasized the evidence of uncharged misconduct during closing summation, telling the jury:

> *How long do you think it took this individual to decide to kill*? How long do you think it took for him to decide to fire three shots at Aaron McIntire and Kimberly Bianchi four days before? *How long do you think it took for him to fire six shots at Marlon Bradley three-and-a-half years before that*? The Defense will undoubtedly try to focus your *premeditation analysis* from the moment the defendant pushed Officer Gray and took off running. [RT 11:21276, italics added.]

The prosecutor again mentioned the Bradley shooting in connection with an argument on premeditation and deliberation (RT 11:2359-2360), stating, "We're not even talking one shot, Ladies and

Gentlemen; were talking two shots. You got to pull that trigger twice. He had to pull it three times with Bianchi and McIntire, *like he had to pull it six times with Marlon Bradley*." (RT 11:2360, italics added.)

The prosecutor's repeated reliance during closing summation on evidence of uncharged misconduct reveals the importance of the evidence to the prosecution's case, strongly suggesting that the verdicts were influenced by evidence of the uncharged misconduct. (See *People v. Guzman* (1988) 45 Cal.3d 915, 963; *People v. Roder* (1983) 33 Cal.3d 491, 505 [error not harmless under *Chapman* because, in part, "the prosecutor relied on the [erroneous] presumption in his closing argument"]; *People v. Martinez* (1986) 188 Cal.App.3d 19, 26 [error not harmless under *Chapman* based, in part, on prosecutor's closing argument]; *People v. Frazier* (2001) 89 Cal.App.4th 30, 39 ["reasonable doubt [under *Chapman*] is reinforced here by the prosecutor's use of the propensity instruction in closing argument"]; *Depetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1063 [prosecutor's reliance on error in closing argument is indicative of prejudice].)

In sum, the prosecution's use of the uncharged conduct was severely prejudicial to appellant because it encouraged the jury to view

the charged offenses as part of a pattern of misconduct involving appellant's use of a gun. In connection with the capital offense in count 1, the evidence was entirely irrelevant to the issue whether–assuming appellant formed the specific intent to kill Gray–appellant further acted upon careful deliberation and premeditation.

Reversal of appellant's convictions is warranted.

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12. The cumulative effect of the guilt phase errors requires reversal of appellant's convictions for a denial of the constitutional rights to due process and a fair and reliable jury trial.

Appellant identified numerous errors in his opening brief which occurred during the guilt phase trial. (AOB 45-177)

Respondent summarily addresses appellant's cumulative prejudice argument, first asserting that the evidence was overwhelming and then asserting "to the extent that there were any errors in this case, they were not substantial." (RB 107-108.)

Respondent concedes instructional error in connection with the special circumstance allegation of murder to prevent arrest or escape from lawful custody (Pen. Code, § 190.2, subd. (a)(5)), acknowledging that the theory of murder for the purpose of perfecting or attempting to perfect an escape from lawful custody was an inadequate theory. (RB 49-50.)

Respondent concedes instructional error in connection with the offenses of assault with a semiautomatic firearm, acknowledging that "the instructions omitted 'substantially all of the elements of the offense'" because although instructed "that the assault be committed

with a semiautomatic firearm–the jury was not instructed on what constituted an assault, the gravamen of the offense." (RB 69.)

Respondent concedes that the prosecutor committed misconduct during guilt-phase closing argument, acknowledging that in the first part of statement (3) "the prosecutor improperly stated that he could have called other witnesses who would have testified similarly to the witnesses that he did call." (RB 79.)

Respondent also acknowledges that in the second part of statement (3) that "to the extent that the 'completely satisfied' statement could be understood to reference the existence of the uncalled repetitive witnesses or something other than the evidence adduced at trial, it was improper as well." (RB 79.)

Respondent acknowledges that "the cumulative effect of multiple errors may constitute reversible error." (RB 107, citing *People v. Cunningham* (2001) 25 Cal.4th 926, 1009, *People v. Bunyard* (1988) 45 Cal.3d 1189, 1236, and *People v. Hill* (1998) 17 Cal.4th 800, 844; see *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"].)

This is the case here, where serious errors separately identified in Arguments 1 through 11 cumulatively, or in any combination thereof, violated appellant's due process rights under *Chambers v. Mississippi* (1973) 410 U.S. 284, 298, 302-303.

Against the backdrop of the insufficiency of the evidence to sustain the finding that appellant committed the murder in count 1 with premeditation and deliberation (AOB, Arg. 1) and the insufficiency of the evidence to sustain true findings on the gang enhancements as to counts 1 and 2 (AOB, Arg. 7), these errors include giving a flawed version of CALJIC No. 8.71 regarding consideration of second degree murder (AOB, Arg. 2), prejudicial error in giving an acquittal-first instruction on count 1 (AOB, Arg. 3), prejudicial error in failing to instruct that subjective provocation may reduce premeditated first degree murder to second degree murder (AOB, Arg. 4), instructing the jury on an invalid theory in connection with the special circumstance allegation of murder to prevent arrest or escape from lawful custody (AOB, Arg. 5), egregious prosecutorial misconduct during guilt-phase closing argument (AOB, Arg. 9), failing to compel the disclosure of relevant discovery in connection with the *Pitchess* motion (AOB, Arg.

10), and prejudicial error in admitting irrelevant, highly prejudicial evidence of appellant's uncharged conduct involving Mohammed, Gonzalez and Bradley several years prior to the instant offenses (AOB, Arg. 11).

In connection with the finding that appellant committed the offenses in counts 3 through 7, the errors include failing to instruct the jury on all of the elements of assault for purposes of the offense of assault with a semiautomatic firearm on McIntire and Bianchi (AOB, Arg. 8), permitting egregious prosecutorial misconduct during guilt-phase closing argument (AOB, Arg. 9), failing to compel the disclosure of relevant discovery in connection with the *Pitchess* motion (AOB, Arg. 10), and prejudicially admitting irrelevant, highly prejudicial evidence of appellant's uncharged conduct involving Mohammed, Gonzalez and Bradley several years prior to the instant offenses (AOB, Arg. 11).

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

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

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Penalty Phase and Sentencing Issues

13. The trial court erroneously admitted evidence that appellant sustained juvenile adjudications and was committed a ward of the juvenile court at ages 15 and 16, requiring reversal of the death judgment.

Appellant explained in his opening brief that the trial court prejudicially erred by admitting evidence that appellant sustained juvenile adjudications and was made a ward of the juvenile court when 15 and 16 years of age for making criminal threats, brandishing a deadly weapon, and threatening public school officials. (AOB 184-201.)

Acknowledging that juvenile adjudications are not criminal convictions and thus are inadmissible under factor (c), respondent argues that "juvenile adjudications are admissible under factor (b), if they show 'the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.'" (RB 110-111, citing *People v. Combs* (2004) 34 Cal.4th 821, 859-860.)

Appellant acknowledged *Combs* in his opening brief as "holding that '[a]lthough evidence of violent juvenile adjudications is not

admissible under section 190.3, factor (c), such evidence is admissible under factor (b).'" (AOB 187.)

But as appellant explained in his opening brief, if a juvenile adjudication is neither relevant, nor constitutes a criminal conviction, nor was part of a criminal proceeding (Welf. & Inst. Code, § 203), then the fact of the adjudication alone cannot prove violent felony criminal activity beyond a reasonable doubt. (AOB 187-190.)

Moreover, in view of evolving standards in Eighth Amendment jurisprudence, the jury's consideration of appellant's juvenile adjudications and wardship requires reversal of the death judgment for a violation of the Eighth and Fourteenth Amendments. (See *Roper v. Simmons* (2005) 543 U.S. 551; *Graham v. Florida* (2010) 560 U.S. __ [130 S.Ct. 2011]; *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455]; *Hall v. Florida* (2014) __ U.S. __, 134 S.Ct. 1986.)

Respondent acknowledges *Roper*, *Graham*, and *Mille*r, but states that this "Court has repeatedly rejected similar claims based on *Roper* alone. (RB 115, citing *People v. Bramit* (2009) 46 Cal.4th 1221, 1239.) But appellant does *not* rely on *Roper* alone. Instead, appellant relies on *evolving standards* in Eighth Amendment jurisprudence.

In *People v. Bramit, supra*, 46 Cal.4th 1221, this court distinguished the high court's decision in *Roper* on the ground that admission of juvenile conduct is a challenge "to the admissibility of evidence, not the imposition of punishment[,]" and thus does not impact "Eighth Amendment analysis [which] hinges upon whether there is a national consensus in this country against a particular punishment." (*People v. Bramit, supra*, 46 Cal.4th at p. 1239.)

But in *Hall v. Florida* (2014) __ U.S. __, 134 S.Ct. 1986, the high court made clear this limitation on Eighth Amendment analysis is no longer true. The court employed the identical Eighth Amendment analysis employed in *Roper* (and *Graham* and *Miller*)–looking for a national consensus. In *Hall*, the court was not assessing whether there was a "national consensus against a particular punishment," but instead it was assessing whether an evidentiary rule enacted by the Florida legislature violated the Eighth Amendment. (*Hall v. Florida, supra*, 134 S.Ct. at pp. 1994-1995.)

In *Hall*, the defendant was sentenced to death in Florida prior to the Supreme Court's ruling in *Atkins v. Virginia* (2002) 536 U.S. 304, holding that the Eighth Amendment precluded execution of the mentally

retarded. In response to *Atkins*, the Florida legislature enacted a rule of evidence which provided that unless a defendant introduced an IQ test with a score lower than 70, he could not "present[] any additional evidence of his intellectual disability." (*Hall v. Florida, supra*, 134 S.Ct. at p. 1992.) In deciding whether this rule of evidence violated the Eighth Amendment, the high court applied the identical approach it employed in *Roper*–i.e., looking to see if the rule was consistent with a national consensus. (*Hall v. Florida, supra*, 134 S.Ct. at pp. 1996-1998.) The court held that the Florida *evidentiary rule* was not consistent with the national consensus, and thus violated the Eighth Amendment. (*Id.* at p. 1998.)

In light of *Hall*, this Court's suggestion in *Bramit* that traditional Eighth Amendment analysis was limited to assessing the propriety of a "particular punishment" is no longer true.

Respondent acknowledges that appellant's juvenile adjudications were used by the prosecutor as evidence of appellant's character, suggesting that appellant deserved death because he continued engaging in criminal conduct undeterred by the prior adjudications. (See RB 116.) But *Roper*, *Graham* and *Miller* all recognize that the concept of

deterrence simply does not work the same way with children as it does with adults, and that the character of a child is qualitatively different from the character of an adult. (*Roper v. Simmons, supra*, 543 U.S. at p. 571; *Graham v. Florida, supra*, 130 S.Ct. at p. 2028; *Miller v. Alabama, supra*, 132 S.Ct. at p. 2465.)

Respondent acknowledges that evidence erroneously admitted in aggravation requires reversal if there is "a *reasonable possibility* such error affected a verdict[,]" which is the same standard "in substance and effect, as the [*Chapman*] *harmless beyond a reasonable doubt* standard . . . ." (RB 115-116, italics in original, citations omitted.)

Respondent argues that any error in admission of appellant's juvenile adjudications and wardship was harmless beyond a reasonable doubt, asserting this evidence was insignificant in comparison to other evidence admitted during the penalty phase. (RB 115-119.) Respondent is mistaken.

This case involves a single homicide, distinguishing it from other cases involving multiple murders. (See, e.g., *In re Carpenter* (1995) 9 Cal.4th 634; *People v. Bittaker* (1989) 48 Cal.3d 1046; *People v. Bonin* (1989) 47 Cal.3d 808.)

The factor (c) evidence, consisting of appellant's criminal record, was insubstantial as appellant had only suffered two prior criminal convictions–unlawful possession of a firearm and possession for sale of cocaine base. (CT 46:13302-13314.) The juvenile conduct underlying the adjudications for making criminal threats, brandishing a deadly weapon, and threatening school employees was significantly more violent that appellant's adult criminal record.

Although there was other factor (b) evidence, including the Bradley shooting and the Gonzalez and Mohammed brandishing (RT 12:2566-2575, 13:2857), the prosecution used the juvenile adjudications to show a pattern of criminal conduct continuing into adulthood, which encouraged the jury to return a death verdict on the basis of lack of rehabilitation. (RT 13:2888-2889, 2931.)

Respondent does not dispute that the prosecution urged the jury to use appellant's juvenile adjudications to return a death verdict. (See RB 115-119; RT 13:2888-2889, 2931.) Respondent also does not dispute–nor can she–that the prosecutor's reliance in closing argument on erroneously admitted evidence is a strong indicator of prejudice. (See e.g., *People v. Guzman* (1988) 45 Cal.3d 915, 963; *People v.*

Roder, supra, 33 Cal.3d at p. 505; *People v. Martinez* (1986) 188 Cal.App.3d 19, 26; *Depetris v. Kuykendall, supra*, 239 F.3d at p. 1063 [prosecutor's reliance on error in closing argument is indicative of prejudice].)

Respondent dismisses appellant's case in mitigation. (RB 118-119.) Appellant presented a substantial case in mitigation for a life sentence, consisting of evidence that his conduct was influenced by the violence and abuse he suffered in childhood and by serious mental health issues. (AOB 41-44.) Appellant presented persuasive evidence showing his favorable prospects for rehabilitation in prison, including extensive evidence of his good character. (AOB 43-44.)

Moreover, appellant was only 21 years of age when Gray was shot. (RT 13:2879.) Youth is a relevant factor in mitigation. (Pen. Code, § 190.3, subd. (i); see e.g., *Abdul-Kabir v. Quarterman* (2007) 127 S.Ct. 1654, 1672-1673; see *People v. Osband* (1996) 13 Cal.4th 622, 708-709 [age may be considered a factor in mitigation or aggravation]; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 397 [youth at the time of crime mitigating].)

Respondent concludes that a finding of prejudicial error in admitting the juvenile adjudications "'would require capricious speculation . . . .'" (RB 119, citing *People v. Belmontes* (1988) 45 Cal.3d 744, 809.) Respondent is mistaken. During penalty phase opening statement, the prosecutor explicitly relied on the juvenile adjudications as part of its case for a death verdict. The prosecutor told the jury:

> We will show that where the defendant is concerned age is just a number and one that we believe the evidence will show should not be given any consideration whatsoever in affixing the punishment, but *his criminal career didn't start as an adult.* You're going to hear that the *defendant was engaged in serious criminal activity as a juvenile.* [RT 12:2557, italics added.]

In view of the considerable weight that the prosecution assigned to appellant's juvenile adjudications, respondent is now unable to prove beyond a reasonable doubt that jury's consideration of this same evidence did not contribute to the death verdict. Reversal of the death judgment is required.

/ / /

14. The trial court prejudicially erred by admitting appellant's postcrime statement that he was unfairly being held in isolation in the Merced County jail because "some pig got killed," requiring reversal of the death judgment.

Appellant explained in his opening brief that the prosecution presented evidence that *two years after the shooting*, and while being held in isolation at the Merced County jail, appellant flooded his jail cell and stated, "Everybody else gets a chance [to be in general population] and that just because some pig got killed he was there." (RT 12:2568.) The statement was erroneously admitted because it was irrelevant to any statutory sentencing factor and the probative value, if any, was substantially outweighed by the prejudicial nature of the evidence, thereby violating due process and the Eighth Amendment. (AOB 202-217.)

Respondent acknowledges that "[p]ostcrime evidence of remorselessness . . . does not fit within any statutory sentencing factor and is *inadmissible as aggravating evidence*." (RB 122, italics added.)

Nonetheless, respondent argues that the statement was admissible under factor (a) as evidence of appellant's attitude towards Gray, citing

People v. Ramos (1997) 15 Cal.4th 1133 and *People v. Payton* (1992) 3 Cal.4th 1050. (RB 122-123.) Respondent is mistaken.

In *Ramos*, the trial court admitted testimony of David Lam that while in a holding cell at the county courthouse the defendant admitted shooting the victims and said that he "enjoyed hearing them beg for their lives." (*Id.* at p. 1163.) This court held that under factor (a)–matters bearing on the circumstances of the crime–the jury may consider "lack of remorse *when presented in the context of the 'defendant's callous behavior after the killings*[.]'" (*Id.* at p. 1164, italics added, citing *People v. Crittenden* (1994) 9 Cal.4th 83, 147.) The court concluded that this is precisely what occurred here because "Lam testified that defendant 'was saying to the other guy . . . how much of a trip it was, how the people were begging for their lives before they shot them'" and thus as the prosecutor properly argued "this evidence reflected directly on defendant's state of mind contemporaneous with the murder." (*People v. Ramos, supra*, 15 Cal.4th at p. 1164.)

The instant case stands in stark contrast to *Ramos*. Appellant's statement reflected frustration with being held in isolation–*not* callous behavior after the killing–as shown by the fact that the statement was

prefaced with the words, "*Everybody else* get a chance [to be in general population] . . . ." (RT 12:2568, italics added.) In *Ramos*, the defendant's statement about enjoying the victims begging for their lives was prefaced with a statement admitting to shooting the victims, thus showing that the statement reflected "the 'defendant's callous behavior after the killings[.]'" (*People v. Ramos, supra*, 15 Cal.4th at p. 1164; *People v. Crittenden, supra*, 9 Cal.4th at p. 147.)

In *Payton*, the defendant challenged admission of statements he made about "stabbing and raping women, and about all women being potential victims" on the grounds that the statements constituted "use of uncorroborated informant testimony[,]" amounted to "impermissible evidence of future dangerousness[,]" and were inadmissible under Evidence Code section 352. (*People v. Payton, supra*, 3 Cal.4th at pp. 1063-1064.) *Payton* is inapposite because the Court did not consider whether the defendant's statements were admissible under factor (a) as relevant to a circumstance of the offense. (*Ibid.*; see *People v. Alvarez, supra*, 27 Cal.4th at p. 1176 ["cases are not authority for propositions not considered"].)

Respondent next argues that appellant forfeited the alternative claim that the trial court abused its discretion under Evidence Code section 352 by admitting the statement because defense counsel "either impliedly withdrew his Evidence Code section 352 objection or failed to request an express ruling on the objection[.]" (RB 123.) Respondent is mistaken.

When the prosecutor stated an intent to elicit testimony about appellant's statement, trial defense counsel stated, in part: "That is certainly more prejudicial than probative." (RT 11:2457.) Defense counsel requested an Evidence Code 402 hearing, which the court agreed to conduct prior to admission of the proffered testimony. (RT 11:2457-2458.) A few weeks earlier, trial defense counsel also had filed a motion to exclude the statement, wherein he argued that the statement was inadmissible as irrelevant, but "extremely powerful[,]" and thus "would violate defendant's constitutional rights to due process of law, a fair jury trial and a reliable penalty determination (California Constitution, Article I, sections 7,15,17, 24; United States Constitution, Amendments 5, 6, 8 and 14)." (CT 44:12710.)

Respondent does *not* contend that the above-noted objections were insufficient to state an Evidence Code section 352 objection. (See RB 123-124.) Instead, respondent asserts that "[a]ppellant implicitly withdrew his Evidence Code section 352 objection" when defense counsel declined an opportunity to examine Sergeant Carbonaro during an in limine hearing. (RB 124.) But there was no implicit withdrawal of the objection as counsel simply stated that he had spoken with Carbonaro, thereby making it unnecessary to examine her at an Evidence Code section 402 hearing. (RT 12:2536.) In fact, defense counsel explicitly renewed the objection to the statement as irrelevant and inadmissible testimony about lack of remorse, citing his written motion to exclude the statement. (RT 12:2536 ["We filed a motion with this Court on March 26, 2007, motion number nine which the Court put over. The law is well-settled, and I believe our Points and Authorities have clearly pointed that out."]; see CT 44:12712-12717 [defense motion to exclude statement].)

Respondent's citation to *People v. Valdez* (2004) 32 Cal.4th 73 does *not* support her argument that defense counsel implicitly withdrew objection to admission of the statement as unduly prejudicial. (RB 124.)

In *Valdez*, in the context of a claim on appeal of error in admitting several photographs, defense counsel only objected to one photograph, which showed a hand gesture potentially relating to gang affiliation. (*People v. Valdez, supra*, 32 Cal.4th at p. 132.) "However, defense counsel was concerned not with the admission of the photograph per se, but only with its admission in conjunction with a prosecution argument to the jury regarding gang signs." (*Ibid.*) When the prosecutor stated that there would be no such argument, defense counsel dropped the matter, and thus "did not object to the admission of the photograph." (*Ibid.*) In contrast to *Valdez*, where counsel was not concerned about the photograph, but only the prosecutor's argument about the photograph, appellant's trial defense counsel was specifically concerned about admission of appellant's statement, asserting numerous objections thereto, including relevance, "more prejudicial than probative" (RT 11:2457), and due process. (RT 11:2457, 12:2536; CT 44:12712-12717.)

Nor did trial defense counsel fail "to request an express ruling on the objection[.]" (RB 123.) After renewing the objection, as set forth in the preceding paragraph, the trial court ruled that the statement was

admissible as a circumstance of the crime under factor (a), citing *People v. Payton, supra*, 3 Cal.4th 1050. (RT 12:2538.) The trial court thus understood defense counsel's objections and explicitly overruled them.

Respondent argues, in summary fashion, that if the Evidence Code section 352 argument was preserved, then the "trial court implicitly found the evidence more probative than prejudicial when it determined that it could be admitted under factor (a)." (RB 125.) But as appellant explained in the opening brief, any probative value was substantially outweighed by the extremely prejudicial nature of the evidence because the "pig" statement was both offensive and inflammatory. (AOB 207-209.)

Finally, respondent argues that if the statement was inadmissible, then the error in admitting the statement was harmless beyond a reasonable doubt. (RB 125-130.) Respondent is mistaken.

Preliminarily, respondent argues that the *Sullivan v. Louisiana, supra* 508 U.S. 275 formulation of the *Chapman* standard is incorrect–i.e., "to prove any error was harmless, respondent must prove that *the verdict actually rendered was surely unattributable to the*

error[.]" (RB 125, italics added.) This court has explicitly embraced the *Sullivan* formulation of the *Chapman* standard, stating:

> The beyond-a-reasonable-doubt standard of *Chapman* "requir[es] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman, supra*, 386 U.S. at p. 24.) "To say that an error did not contribute to the ensuing verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt* (1991) 500 U.S. 391, 403 [114 L.Ed.2d 432, 111 S.Ct. 1884].) Thus, the focus is what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is "whether *the ... verdict actually rendered in this trial was surely unattributable to the error*." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [124 L.Ed.2d 182, 113 S.Ct. 2078].)

(*People v. Neal* (2003) 31 Cal.4th 63, 86, italics added; see *People v. Aranda* (2012) 55 Cal.4th 342, 365.)

Respondent argues that the "pig" statement was "essentially cumulative" of statements made by appellant showing dislike for Gray. (RB 126.) The "pig" statement was not cumulative because it was significantly more offensive and inflammatory. Appellant made no similar statement. The statement also was made two years after the other statements, which would tend to influence the jury to believe that

appellant lacked remorse and was still a danger to society because he lacked respect for authority.

Respondent's argument about the purported "overwhelming aggravating evidence" does not cure the harm because the aggravating evidence was not overwhelming and appellant presented a strong case in mitigation for a life sentence. (AOB 5-6, 41-44.)

Respondent cannot carry its burden of proving that the verdict actually rendered in this case was surely unattributable to the error in admitting the "pig" statement. This is so because as respondent acknowledges the prosecution twice mentioned the "pig" statement in closing argument in order to secure a death verdict. (RB 129.) The prosecutor's reliance in closing argument on erroneously admitted evidence is a strong indicator of prejudice. (See e.g., *People v. Guzman, supra*, 45 Cal.3d at p. 963; *People v. Roder, supra*, 33 Cal.3d at p. 505; *People v. Martinez, supra*, 188 Cal.App.3d at p. 26; *Depetris v. Kuykendall, supra*, 239 F.3d at p. 1063 [prosecutor's reliance on error in closing argument is indicative of prejudice].)

Respondent also acknowledges that there were "many jury requests" during deliberations for readback and review of evidence,

"including for readback of testimony from both prosecution and defense witnesses, to view the videotaped law enforcement interview of appellant and photographs of Officer Gray's body after the murder, [and] questions about the instructions[.]" (RB 129, citations to record omitted.) A request for readback of trial testimony is an indication that the case was close. (See *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 490; *People v. Williams* (1971) 22 Cal.App.3d 34, 38-40; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295.)

During deliberations, the jury requested readback of Sergeant Carbonaro's testimony about the "pig" statement (RT 14:3008-3009), further demonstrating that respondent cannot carry its burden of proving that the verdict actually rendered in this case was surely unattributable to the error in admitting the "pig" statement.

Reversal of the death verdict is warranted. (See *Sullivan v. Louisiana, supra* 508 U.S. at p. 279.)

/ / /

15. The trial court prejudicially erred by permitting the prosecution to introduce inadmissible testimony in aggravation that while in pretrial confinement appellant caused a disturbance by flooding his cell, which required a cell extraction.

Appellant explained in his opening brief that the trial court prejudicially erred by permitting the prosecution to introduce inadmissible testimony in aggravation that while in pretrial confinement appellant caused a disturbance by flooding his cell. The incident did not prove violent criminal conduct, and thus was not an aggravating circumstance under factor (b). (AOB 218-224.)

Acknowledging that the flooding incident and cell extraction were not admissible under factor (b), respondent argues that the circumstances of the flooding and forcible cell extraction were admissible under factor (a), as relating to the "pig" statement, discussed in Argument 14, *ante*. (RB 130-131.) Respondent argues that the "jury would not have been able to properly evaluate appellant's statement without placing it in the proper context." (RB 131.) Respondent is mistaken.

The circumstances of cell flooding and forcible cell extraction were not necessary to give context to the "pig" statement. No context

was necessary, beyond the fact of the statement and that it was made two years after the shooting while appellant was in pre-trial confinement at the county jail.

Respondent also states that the "trial court never addressed the admissibility of the flooding incident apart from the admissibility of the 'pig' statement that occurred during the incident, and it was never asked to do so by the defense." (RB 130.) Respondent is mistaken. Appellant objected to admission of this evidence on the grounds that it was irrelevant and unduly prejudicial, stating that there "is *no crime*." (RT 11:2457-2458, italics added.) Counsel further explained that appellant did not hit anyone during the incident, but merely "laid on the floor and was peacefully taken out. He was forcibly but peacefully taken out." (RT 12:2487.) This was a sufficient objection to admission of the evidence as it identified the factual basis therefore and apprised the court of the issue presented. (See *People v. Williams* (1988) 44 Cal.3d 883, 907; *People v. Bob* (1946) 29 Cal.2d 321, 325; *People v. Scott* (1978) 21 Cal.3d 284, 290 ["An objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide."].)

Respondent argues that any error was harmless because the "evidence of the flooding incident apart from the 'pig' statement would not have been used by the jury as aggravating evidence on its own[.]" (RB 131.) The argument should be rejected because the court permitted the jury to consider the evidence in aggravation by admitting it without a limiting instruction. (See RT 13:2846 ["In determining which penalty is to be imposed, you shall consider all of the evidence which has been received during any part of the trial of this case."].)

Respondent also argues that any error was harmless in view of the "evidence in aggravation [and] for the reasons set forth in the preceding argument." (RB 131.) As appellant explained in the preceding argument, and in his opening brief, the error in admitting Sergeant Carbonaro's testimony cannot be proven harmless beyond a reasonable doubt because it was powerfully incriminating, it was relied upon by the prosecutor during closing summation in arguing for a death verdict, and during deliberations the jury requested readback of the testimony. (AOB 222-224.)

Reversal of the death verdict is warranted. (See *Sullivan v. Louisiana, supra* 508 U.S. at p. 279 [the issue is "whether the ... verdict actually rendered in this trial was surely unattributable to the error."].)

/ / /

16. The death judgment must be reversed because the jury's use of an invalid sentencing factor–the special circumstance allegation of murder to prevent arrest or escape from lawful custody–rendered the sentence unconstitutional.

Appellant explained in his opening brief that reversal of the true finding on the special circumstance allegation of murder to prevent arrest or escape from lawful custody requires reversal of the death judgment. (AOB 225-229; *ante*, Arg. 5.)

Although the invalid special circumstance still leaves one eligibility factor (i.e., murder of a peace officer engaged in the performance of his duties), reversal of the death judgment is required because the jury should not have given any aggravating weight to the facts and circumstances that the murder was to prevent arrest or escape from lawful custody. Appellant was not in custody at the time of the killing, and thus he could not, as a matter of law, have acted to prevent arrest or escape from lawful custody. (*Ante*, Arg. 5.) The jury's consideration of the erroneous fact that appellant was in lawful custody at the time of the killing–which was used to aggravate the killing and enhance the prosecution's case for a death verdict–unconstitutionally

skewed the jury's penalty determination, depriving appellant of due process and a reliable penalty determination. (AOB 225-229.)

Respondent argues that an "invalidated sentencing factor will not render the sentence unconstitutional if one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." (RB 132, citing *Brown v. Sanders* (2006) 546 U.S. 212, 220; see AOB 225.)

Respondent asserts that even absent the special circumstance of murder to prevent arrest or escape from lawful custody the jury would have considered the "same facts and circumstances" in aggravation as a circumstance of the crime under factor (a), and in connection with the prosecution's theory of murder and the Penal Code section 190.2, subdivision (a)(7). (RB 132-133.) Respondent argues that the "jury did not make an express finding that appellant was in lawful custody at the time of the killing. Nor did the prosecutor ask it to consider any such fact." (RB 133, fn. 35.) Respondent's argument should be rejected.

The jury was instructed, in part:

> To find that the special circumstance referred to in these instructions as murder to prevent arrest or to perfect an escape is true, the following facts must be proved:

> 1. The murder was committed for the purpose of avoiding or preventing a lawful arrest; or
>
> 2. *The murder was committed to perfect, or attempt to perfect, an escape from lawful custody.* [CT 48:13823; RT 11:2238, italics added.]

The jury's verdict explicitly stated that it had found true that the murder was committed to perfect an *escape from lawful custody*[.]" (CT 47:13582, italics added.)

The jury thus considered the erroneous fact that appellant was in lawful custody when rendering the death verdict. (RT 13:2846 [instruction that the jury "shall consider . . . the existence of any special circumstances found to be true"].) This fact would not have been considered absent instruction and verdict forms on the invalid special circumstance allegation of murder to prevent arrest or escape from lawful custody. Use of this fact to enhance the prosecution's case for a death verdict rendered the death verdict unconstitutional. (See *Brown v. Sanders, supra*, 546 U.S. at pp. 220-221.)

Reversal of the death judgment is warranted.

17. The trial court's refusal to instruct on lingering doubt violated appellant's constitutional rights, requiring reversal of the death judgment.

Appellant explained in his opening brief that the trial court prejudicially erred by refusing the defense request to instruct the jury on "lingering or residual doubt as to whether the defendant premeditated and deliberated the murder of Officer Gray." (AOB 230-236; CT 48:13649.)

Respondent does not dispute that the jury may consider lingering doubt when considering the penalty in a capital case. (See RB 135-136.)

Respondent argues that there is no "constitutional right to a lingering doubt instruction at the penalty phase of a capital case, even if such an instruction is requested by the defendant." (RB 135.)

Appellant recognized in his opening brief that "this Court has held that a lingering doubt instruction is not required by either the state or federal constitutions . . . ." (AOB 232.) Appellant further explained that such an instruction was warranted in this case as a component of due process and Eighth Amendment jurisprudence. (AOB 232-235.) Respondent does not address this issue, beyond stating that CALJIC No.

8.85 sufficiently addresses the issue and this court has routinely rejected the claim. (RB 135-136.)

Appellant explained in his opening brief that although defense counsel argued lingering doubt, appellant was prejudiced by the lack of a specific instruction thereon because argument of counsel does not substitute for a correctly instructed jury, and in fact may be more harmful than helpful. (AOB 235-236; *People v. Morales* (2001) 25 Cal.4th 34, 47; *United States v. Duncan* (6th Cir. 1988) 850 F.2d 1104, 1118 [argument of counsel "unsupported by an instruction to which the defendant is entitled, may be more harmful than helpful."].) Respondent does not address prejudice. (RB 136.)

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18. California's death-penalty statute, as interpreted by this court and applied at appellant's trial, violates the United States Constitution and international law.

Appellant explained in his opening brief that many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution and international law. (AOB 237-252.)

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

claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (*Id.* at p. 304.)

Accordingly, pursuant to *Schmeck* and in accordance with this court's own practice in decisions filed since then, appellant has, in Argument 18 of the opening brief, identified the systemic and previously rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requests the Court to reconsider its decisions rejecting them. These arguments are squarely framed and sufficiently addressed in the opening brief, and therefore appellant makes no reply to respondent's argument at pages 136-144.

/ / /

19. The errors in this case in both the guilt and penalty phases of trial, individually and cumulatively, or in any combination thereof, require reversal of the death judgment for a violation of the state and federal Constitutions.

Appellant explained in his opening brief that numerous errors occurred at every stage of his trial from guilt phase through penalty phase. (AOB 253-258.) The multiple errors mandate an analysis of prejudice that takes into account the cumulative and synergistic impact of the errors. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

Respondent summarily states that "there was no cumulative prejudice arising from any errors at the guilt phase. Similarly, either there were no errors during the penalty phase or any errors were harmless, such that there was no cumulative prejudice from any errors at the penalty phase." (RB 144.)

This court must consider the cumulative prejudicial impact of the various constitutionally-based errors because cumulative prejudicial impact can itself be a violation of federal due process. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn. 15.) A trial is an integrated whole. The court's duty to review for cumulative error is heightened in a capital case, where the jury is charged with making a moral, normative

judgment, and the jurors are free to assign whatever moral or sympathetic value they deem appropriate to each item of mitigating and aggravating evidence. The jurors are told to consider the "totality" of the mitigating circumstances with the "totality" of the aggravating circumstances. (RT 13:2947; CT 48:13853 [CALJIC No. 8.88].)

As appellant explained in his opening brief, the death sentence is unconstitutionally excessive and unreliable where, as here, appellant suffered from serious mental health issues and was adversely influenced by the violence and abuse he suffered in childhood. (AOB 41-43, 256.)

There is a substantial record of serious errors that individually and cumulatively, or in any combination, violated appellant's due process rights under *Chambers v. Mississippi, supra*, 410 U.S. 284 and require reversal of the death judgment. The numerous and substantial errors in the guilt phase of the trial, as set forth in Arguments 1 through 11, inclusive, including the cumulative effect of the errors in the guilt phase of trial (Argument 12), deprived appellant of a fair and reliable penalty determination. (AOB 45-183.) In the penalty phase, the jury was permitted to hear and consider inadmissible evidence in aggravation, including (1) appellant's juvenile adjudications and

commitment at ages 15 and 16 (*ante*, § 13), (2) appellant's postcrime "pig" statement made two years after the shooting (*ante*, § 14), and (3) Sergeant Carbonaro's testimony about the disturbance caused by appellant when he flooded his jail cell with water from the toilet and had to be physically extracted from the cell (*ante*, § 15). The jury was permitted to consider inadmissible aggravating evidence consisting of the invalid sentencing factor–the special circumstance allegation of murder to prevent arrest or escape from lawful custody–which rendered the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process. (*Ante*, § 16.) The jury also was prevented from fully considering relevant evidence in mitigation because the trial court refused to instruct the jury on lingering doubt in connection with the finding that the murder of Gray was deliberate and premeditated. (*Ante*, § 17.)

In view of the substantial individual and cumulative errors, and appellant's case in mitigation for a life sentence–which included evidence that appellant's conduct was induced by serious mental health issues and childhood abuse and violence, but that appellant was fundamentally of good character and is a caring person with redeeming

qualities (AOB 41-44)–it simply cannot be said that the combined effect of the errors detailed above had "no effect" on at least one of the jurors who determined that appellant should die by execution. (See *Caldwell v. Mississippi, supra*, 472 U.S. at p. 341.) Appellant's death sentence must be reversed due to the cumulative effect of the numerous errors in this case.

/ / /

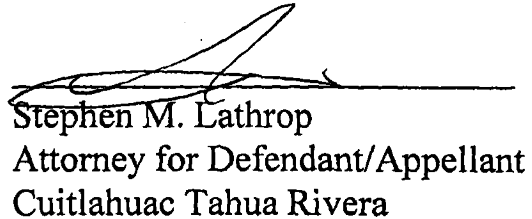
Conclusion

For the reasons set forth above, and those set forth in the opening brief, appellant Cuitlahuac Tahua Rivera respectfully requests reversal of his convictions and the death judgment.

Respectfully submitted,

Dated: 4-25-16

By:



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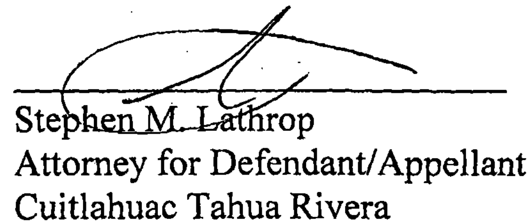
Certificate of Compliance

I hereby certify under penalty of perjury that there are 23,130 words in this brief.

Respectfully submitted,

Dated: 4-25-16

By:



Stephen M. Lathrop
Attorney for Defendant/Appellant
Cuitlahuac Tahua Rivera

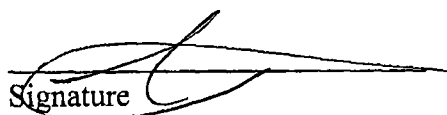
Proof of Service

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 904 Silver Spur Road #430, Rolling Hills Estates, CA 90274. On April 25, 2016, I served the following document(s) described as **Appellant Cuitlahuac Tahua Rivera's Reply Brief** on the interested party(ies) in this action by placing _ the original or X a true copy thereof enclosed, in (a) sealed envelope(s), addressed as follows:

Hon. S. William Abel Colusa County Superior Court Dept. 1 532 Oak Street Colusa, CA 95932	Larry D. Morse II District Attorney Merced County 2222 M Street Merced, CA 95340	Darren Indermill Deputy Attorney General Attorney General's Office PO Box 944255 Sacramento, CA 94244-2550
Charles Press Staff Attorney California Appellate Project 101 Second Street, Suite 600 San Francisco, CA 94105-3647	Dominic J. Falasco 525 J Street, Suite A Los Banos, CA 93635 [Trial Defense Counsel]	C. Logan McKechnie 2121 K Street Merced, California 95340 [Trial Defense Counsel]
Cuitlahuac Tahua Rivera, #T-35975 CSP-SQ; 5-EY-44 San Quentin, CA 94974	BLANK	BLANK

I am readily familiar with the firm's practice for collection and processing of correspondence and other materials for mailing with the United States Postal Service. On this date, I sealed the envelope(s) containing the above materials and placed the envelope(s) for collection and mailing on this date at the address above following our office's ordinary business practices. The envelope(s) will be deposited with the United States Postal Service on this date, in the ordinary course of business. I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this Proof of Service was executed on April 25, 2016, at Rolling Hills Estates, California.

Stephen M. Lathrop
Printed Name



Signature