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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DANIEL NUNEZ and WILLIAM TUPUA SATELE, Defendants and Appellants.	Supreme Court No. S091915 Los Angeles Superior Court No. NA039358

AUTOMATIC APPEAL FROM A JUDGMENT OF DEATH
FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
THE HONORABLE TOMSON T. ONG, JUDGE PRESIDING

APPELLANT'S REPLY BRIEF

on behalf of

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Supreme Court of California for
Defendant and Appellant
DANIEL NUNEZ

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **DANIEL NUNEZ** and WILLIAM TUPUA SATELE, Defendants and Appellants.	Supreme Court No. S091915 Los Angeles Superior Court No. NA039358

APPELLANT'S REPLY BRIEF

on behalf of

DANIEL NUNEZ

INTRODUCTION

Appellant was convicted of two counts of "willful, deliberate, premeditated" murder. As to each count, the jury found the multiple murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)) and the personal gun use (Pen. Code, § 12022.53, subd. (d)) and gang purpose (Pen. Code, § 186.22, subd. (b)) enhancements to be true.

In the opening brief and this reply brief, appellant has shown, inter alia:

1. The multiple murder special circumstance finding must be reversed because it is the product of an instruction (CALJIC No. 8.80.1) that allowed the jury to hold appellant liable for the special circumstance if it found him to be a major participant who acted with reckless indifference to human life, a legally incorrect theory under the circumstances of this case. The erroneous instruction allowed the jury to return a true finding as to appellant without first finding beyond a reasonable doubt that he acted with the required intent to kill. It is particularly likely the jury relied on the legally incorrect provision of CALJIC No. 8.80.1 in returning a true finding because the prosecution, by the prosecutor's own admission to the jury, failed to prove the identities of the actual shooter and the aider and abettor and as a result failed to prove appellant possessed the necessary mental state for liability. Because the jury found the multiple murder special circumstance – the legal platform for appellant's judgment of death – to be true based on an instruction that incorrectly stated the mental state requirements for liability, the death penalty must be reversed. (CALJIC No. 8.80.1; *People v. Green* (1980) 27 Cal.3d 1; *People v. Guiton* (1993) 4 Cal.4th 1116.)

2. The convictions of two counts of "willful, deliberate, premeditated" murder must be deemed to be convictions of murder of the second degree by operation of Penal Code section 1157. The "premeditated" language on the verdict form did not provide a "descriptive and definitive label" constituting an "acceptable alternative" to the required numerical designation of degree in this case. Rather, the "premeditated" language is the result of a defectively drawn verdict form in this case in which the prosecution

argued appellant was guilty of murder on three alternative theories of first degree murder and on one theory of second degree murder. (Pen. Code, § 1157; *People v. San Nicolas* (2004) 34 Cal.4th 614, 634-635; *People v. Goodwin* (1988) 202 Cal.pp.3d 940, 946.)

3. The gang purpose enhancement must be reversed because it is the product of an erroneous instruction. The trial court mistakenly instructed the jury on the elements of the substantive offense of participation in a criminal street gang (Pen. Code, § 186.22, subd. (a)) rather than on the sentence enhancement applicable when a felony is committed for a gang purpose (Pen. Code, § 186.22, subd. (b)). (Pen. Code, § 186.22, subds. (a), (b); *Blakely v. Washington* (2004) 542 U.S. 296; *Apprendi v. New Jersey* (2000) 530 U.S. 466.)

4. The gun use enhancement must be reversed because it is the product of an incorrect statement of the law; a correlating legally erroneous argument by the prosecutor; and a correlating defectively drawn verdict form, all of which served to blur the distinction between personal and vicarious liability and confuse the mental state requirements for the actual perpetrator and the aider and abettor. As well, the instruction allowed the jury to return a true finding on the gun use enhancement based on proof of the gang purpose enhancement, which itself was the product of an incorrect instruction as explained in the preceding paragraph. The legally incorrect gun use instruction and the defectively drawn verdict forms allowed the jury to find the enhancement to be true without determining the identities of the shooter and the aider and abettor and without deciding whether the prosecution had met its burden of proving the mental states required for each.

(Pen. Code, § 12022.53, subd. (d), (e)(1); CALJIC Nos. 17.19, 17.19.5; *People v. Garcia* (2002) 28 Cal.4th 1166.)

In this brief, appellant does not reply to arguments by respondent that are adequately addressed in his opening brief. The failure to address any particular argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment, or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995 fn. 3, cert. den. (1993) 510 U.S. 963), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in appellant's opening brief (AOB).

Statutory references are to the Penal Code unless otherwise noted.

ARGUMENT

GUILT PHASE ISSUES

I.

THE COURT'S ERRONEOUS INSTRUCTION AS TO THE PERSONAL FIREARM USE ENHANCEMENT VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS BECAUSE IT AND OTHER ERRORS RELIEVED THE STATE OF THE BURDEN OF PROOF ON THE CRITICAL QUESTION OF MENTAL STATE AND FAILED TO DEFINE ESSENTIAL ELEMENTS OF THE ENHANCEMENT. MOREOVER, THE ENHANCEMENT IS NOT SUFFICIENTLY SUPPORTED BY EVIDENCE THE MURDERS WERE COMMITTED FOR THE BENEFIT OF A CRIMINAL STREET GANG UNDER THE INSTRUCTIONS GIVEN. THE ERRORS DESCRIBED HEREIN PRODUCED FACTUALLY INCONSISTENT AND IRRECONCILABLE FINDINGS, WHICH WERE USED TO CONVICT APPELLANT AND TO OBTAIN A HARSHER SENTENCE IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS. REVERSAL OF THE JUDGMENT IS REQUIRED.

A. SUMMARY OF CONTENTIONS

Appellant contended in the opening brief that the personal firearm use enhancements (Pen. Code, § 12022.53, subd. (d)) attached to counts 1 and 2 were obtained in violation of his Fifth and Fourteenth Amendment Due Process rights and must be stricken.

The enhancements were achieved through defective instructions that allowed the jury to find the enhancements to be true as to both defendants solely on a theory of vicarious liability. The instruction failed to distinguish

the proof necessary to find against the actual shooter on the one hand and the aider and abettor on the other (AOB 60-63, 72-73) and failed to define the term "intentionally and personally discharged a firearm" (AOB 60-63). The instruction thus allowed the jury to hold both defendants liable for the enhancement on a theory of vicarious liability. The Attorney General claims in response that the instruction given appellant's jury was free of error. (RB 184-188.)

The instructions additionally created a presumption that relieved the prosecution of proving that appellant was in fact a principal in the commission of the crime by instructing the jury it was required to find appellant was a principal subject to the enhancement if he had been *charged* as a principal and the gang benefit enhancement (Pen. Code, § 186.22, subd. (b)(1)) had been pled and proved (AOB 64-67). Respondent contends there was no burden-shifting as to the gun-use findings (RB 191-194) and further contends the jury was not required to agree on who was the actual "shooter" and who was the "aider and abettor" (RB 190). In short, the Attorney General's argument perpetuates the prosecutor's contention that both appellant and Satele may be found vicariously liable without first finding the actual shooter liable.

Also, the instructions were subject to an interpretation that allowed the jury to find the enhancement to be true on a legally invalid theory, *viz.*, namely that appellant was liable for the enhancement because he had been charged as a principal (AOB 67-71). These incorrect statements of the law were not corrected by other properly given instructions (AOB 72-73). Respondent argues appellant's reading of the instruction is "strained" and that other instructions corrected the misinstruction. (RB 188.)

Moreover, the instructional errors were re-emphasized in the prosecutor's explanation of the law in his argument (AOB 53-58) and again in the language of the verdict forms, which only provided a place for the jury to find appellant was liable as the actual shooter, although the corresponding instruction and prosecutor's argument directed a finding based on vicarious liability (AOB 74-75). Respondent contends the prosecutor correctly stated the applicable law in argument (RB 188-189). As to defects in the language of the verdict form, in its heading on this topic, respondent contends there was no defect in the verdict form, but then argues in the narrative that follows that the wording of the verdict forms was immaterial because the verdicts indicated the jury's intention to find both appellants liable for the gun use (RB 190). Thus, respondent's heading is inexplicably inconsistent with the substance of the discussion that follows and should not be credited.

Appellant additionally argued the jury's finding regarding the weapon use enhancements was also fatally flawed because it was based in part upon the incorrect gang purpose instruction discussed in Argument IV of the opening brief (AOB 52, 80, 126-138; see also argument IV in this brief). Respondent contends the jury was adequately instructed on the gang purpose charge; that error, if any, was harmless (RB 158-175); and that because such is the case the weapon use enhancement is valid.

Appellant also argued the enhancement findings that both appellant and Satele were actual shooters offended due process by unjustifiably attributing to each defendant an act only one could have committed (AOB 46-51, 81-83). Respondent construes appellant's complaint to be based on the absence of juror unanimity (it is not) and contends that

inasmuch as juror unanimity is not required under state or federal law, appellant's claim must fail. (RB 102-119.)

These errors in the aggregate undermined the reliability of the special findings (AOB 75-76). The effect of the instructional errors reached into the jury's guilt phase determinations because the jury, having concluded as the result of the instructional errors and the prosecutor's argument, that both defendants were the actual shooters, albeit erroneously under a theory of vicarious liability, failed to consider whether the non-shooting defendant possessed the requisite mental state to be held liable as an accomplice (AOB 84-88). The instructional errors also affected the outcome of the penalty phase because the jury was instructed it could consider guilt phase evidence in determining the appropriate penalty (AOB 88-94). Respondent contends any error was harmless. (RB 194-195.)

Respondent also contends that appellants have forfeited constitutional attacks on the instruction (RB 184).

B. RESPONDENT'S TWO-SHOOTER THEORY VIOLATES THE WELL-ESTABLISHED RULE OF APPELLATE PRACTICE KNOWN AS THE DOCTRINE OF "THEORY ON WHICH THE CASE WAS TRIED" AND RAISES DUE PROCESS CONCERNS; RESPONDENT SHOULD BE ESTOPPED FROM ASSERTING IT

At trial, the prosecutor presented (1) substantial evidence that only one shooter shot and killed Edward Robinson and Renesha Fuller; and (2) insufficient evidence to prove the identity of the shooter. As well, (3) the prosecutor informed the jury he need not prove the identity of the actual

shooter. In colloquy with court and counsel and in argument to the jury, the prosecutor freely acknowledged the state of the evidence and the law to be as stated here. (13RT 3048-3049; 14RT 3222-3223; AOB 53-58.)

In the opening brief, appellant described the evidence establishing that only one person shot and killed. (AOB 46-51.) The evidence included (1) forensic firearms evidence that all of the gunshots were fired from a single, very large, and unwieldy "high capacity rapid fire semiautomatic" weapon (9RT 1979, 1986, 1987-1989); (2) percipient witness testimony that the gunshots occurred in a single rapid burst that did not allow for even a quick exchange of the gun between the car's occupants (5RT 983-984, 988-990); (3) coroner's testimony that the placement of Robinson's wounds indicated the shots that struck Robinson were fired in such rapid succession he neither turned nor fell to the ground between shots (9RT 2014, 2016-2019, 2021, 2022, 2024, 2027, 2044-2045).

Appellant described also the extraordinary claims of witness Ernie Vasquez, a custodial informant who received substantial personal benefit from law enforcement in exchange for his information and testimony[1] that both appellant and Satele separately disclosed their individual roles as shooters to him. (AOB 49-51.)

Vasquez' testimony that both appellant and Satele told him each had actually shot at Robinson and Fuller, thus establishing a two-shooter scenario, was so problematic for the experienced prosecutor who tried this double-murder, two-defendant capital case that he refused to rely on it and

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[1] Please see description of financial and legal benefits provided to Ernie Vasquez as the direct result of his efforts in this case set forth at AOB 9-13.

chose instead to admit and argue the contrary – that there was but a single shooter; he had been unable to prove the shooter's identity; and that the law did not require him to do so. Although the prosecutor's evaluation of the evidence is not itself evidence, it is an indicator of an experienced prosecutor's weight of the evidence. Notably, in his response to appellant's motion for new trial based on the absence of evidence appellant was the actual shooter, the prosecutor stated his belief that appellant was not that shooter:

> Defense counsel correctly states that there was no evidence the defendant [Nunez] was the shooter. As this court is well aware, I conceded this fact throughout the trial. (39CT 11190:13-19.)

The single shooter scenario, upon which the prosecutor relied in proving his case, is integral to a number of issues in this appeal, including the gun use instructional issue discussed here.

Despite the District Attorney's obvious renunciation[2] of the two-shooter evidence provided by Ernie Vasquez in its prosecution of this case, the Attorney General, on appeal, now chooses to rely upon it entirely. (See, e.g., RB 190.) As appellant will show below and in the discussion of the other issues that follow in the briefing, the Attorney General ignores the countervailing evidence there was but a single shooter and ignores the prosecution's reliance on the single-shooter theory, and asks that this Court embrace and rely upon the two-shooter scenario rejected by the prosecution in ruling on appellant's claims of error.

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[2] The prosecutor told the jury: "I told you, I don't know how long ago it was now I've been going on, that I did not prove to you *which of the two defendants* personally used a gun." (14RT 3222; emphasis added.)

In doing so, respondent violates a well-established rule of appellate practice known as the doctrine of "theory on which the case was tried" in urging the adoption of a contention that is contrary to the facts and clearly contrary to the theory upon which the case was tried.

In *Ernst v. Searle* (1933) 218 Cal. 233, this Court considered a real property transaction gone bad in which it was required to resolve whether a particular agent had acted as an agent or as a principal. The buyers claimed at trial that the agent had acted as an agent for the principals, but on review argued the agent had instead acted as a principal. This Court rejected the appellant's attempt to have the Court rely upon a different factual theory, stating:

> Appellant, evidently with the realization that its contention that Searle as agent of the Ernsts had ostensible authority to deliver the deed is not tenable, has attempted to change completely its theory of the case. On this rehearing almost the sole contention made by appellant is that at all times it dealt with Searle as a principal and not as an agent. Based upon this premise, it is urged that the entrustment of the deed by the Ernsts to Searle conferred on Searle such indicia of ownership that a delivery by Searle to the grantee therein named binds the grantors.
>
> [¶] This contention, in our opinion, is contrary to the facts and clearly contrary to the theory upon which the case was tried. The point was not seriously urged by appellant until the filing of its reply brief. Until that time it appears that it was the theory of all concerned that the question involved was whether Searle as agent of the Ernsts had ostensible authority to deliver the deed and collect the purchase price.
>
> [¶] The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be

> unfair to the trial court, but manifestly unjust to the opposing litigant. [Citation.] (*Ernst v. Searle*, *supra*, 218 Cal. at pp. 240-241.)

Appellant respectfully submits that respondent should be estopped from asserting the two-shooter theory on appeal, since such theory stands in direct contrast to the theory under which the case was prosecuted and tried to the jury.

In addition, as *Ernst* recognized, allowing a party to adopt a new and different theory on appeal is manifestly unjust to the opposing litigant. (*Ibid.*) The Attorney General's attempt to introduce a new theory on appeal directly impacts appellant's right to present a defense, an essential part of the right to due process of law. (*People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 599; *Davis v. Alaska* (1974) 415 U.S. 308, 317; *People v. Reeder* (1978) 82 Cal.App.3d 543, 552.) Here, the prosecutor's position was that there was (1) a single shooter; (2) he had not proven the shooter's identity; (3) because of the gang enhancement, the law did not require him to prove the shooter's identity. In light of the prosecution's articulated theory, appellant would not have been put on notice that he had to defend against being found to be the actual shooter and, understandably, would not have defended against a charge not made.

For these reasons, appellant respectfully submits that respondent should be estopped from pursuing the two-shooter theory on appeal.

C. THE PROOF REQUIREMENTS OF PENAL CODE SECTION 12022.53, SUBDS. (D) AND (E)(1)

In the opening brief, appellant discussed the case of *People v. Garcia* (2002) 28 Cal.4th 1166, in which this Court identified the separate proofs needed to impose liability under Penal Code section 12022.53, subdivisions (d) and (e)(1), upon a defendant/shooter and a defendant/aider and abettor. (AOB 51-53.)

Garcia explained that a defendant/shooter who is convicted of a specified felony and who is found to have intentionally and personally discharged a firearm proximately causing great bodily injury or death when committing that felony is subject to section 12022.53, subdivision (d). (*People v. Garcia, supra*, 28 Cal.4th at p. 1173.) Subdivision (d) is thus predicated upon a determination of personal liability.

This Court further explained that in order to find an aider and abettor who is not the shooter liable under subdivision (d), "the prosecution must plead and prove that (1) a principal committed an offense enumerated in section 12022.53, subdivision (a), section 246, or section 12034, subdivision (c) or (d); (2) a principal intentionally and personally discharged a firearm and proximately caused great bodily injury or death to any person other than an accomplice during the commission of the offense; (3) the aider and abettor was a principal in the offense; and (4) the offense was committed 'for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.'" (*People v. Garcia, supra*, 28 Cal.4th at p. 1174.) Subdivision (e)(1) thus holds a principal aider and abettor vicariously liable for the personal and intentional gun use by a principal shooter.

It is clear from this statutory arrangement that liability for the weapon use enhancement under subdivision (e)(1) does not flow to a defendant aider/abettor until a proper finding is made under subdivision (d), as this Court explained in *People v. Garcia*, *supra*, 28 Cal.4th at pp. 1173-1174; AOB 54-55.) Stated another way, an accomplice may not be found vicariously liable for the enhancement until the actual shooter is found personally liable.

Respondent argues that appellant's reliance on *Garcia* is misplaced because "[t]he jury was not required to unanimously agree on which appellant was a "shooter" and which appellant was an "aider" as long as the jury found appellants guilty beyond a reasonable doubt of first degree murder as defined by law and charged." (RB 187-188.)

Alternatively, respondent contends that unanimity is not required because subdivision (e) imposes liability for the gun use on both appellants regardless of who was the actual shooter under the evidence and instructions as a whole. (RB 190.)

Respondent bases its argument on a series of cases holding that juror unanimity is not required in reaching a conviction for first degree murder prosecuted on alternative theories, e.g., premeditated murder and felony murder. These cases do not consider the circumstances present here and respondent presents no authority applying the "unanimity" line of cases to subdivisions (d) and (e)(1) of Penal Code section 12022.53.

Respondent relies on *People v. Riggs* (2008) 44 Cal.4th 248, 313; *People v. Maury* (2003) 30 Cal.4th 342, 423; *People v. Jenkins* (2000) 22 Cal.4th 900, 1025; *People v. Milwee* (1998) 18 Cal.4th 96, 160; *People v. Pride* (1992) 3 Cal.4th 195, 249-250. (See RB 187, 188, 189, 190.) In these

cases, this Court held (at the respective pinpoint cites above) that unanimity as to the theory of culpability was not compelled as a matter of state or federal law. "Each juror need only have found defendant guilty beyond a reasonable doubt of the single offense of first degree murder as defined by statute and charged in the information." (*People v. Milwee*, *supra*, 18 Cal.4th at p. 160.)

However, that cannot be the case here, as appellant has shown above. There is an obvious difference between unanimity regarding various alternative theories constituting the crime of first degree murder and unanimity regarding the individual culpability of each defendant. The cases upon which respondent relies establish that jurors must be unanimous about the crime and degree of crime, but not about the theory of the crime. Herein lies the problem. The cases do not establish that jurors need not be unanimous about the culpability of a particular defendant. The very language of subdivisions (d) and (e)(1) and *Garcia*'s explication of the statute's requirements establish that the statutes authorize a sequential imposition of liability. The statutory language specifically provides that the prosecution is required to first prove beyond a reasonable doubt the personal liability of a principal, i.e., that a particular principal intentionally and personally discharged a firearm, under subdivision (d) before vicarious liability for the aider and abettor under subdivision (e)(1) applies. (*People v. Garcia*, *supra*, 28 Cal.4th at pp. 1173-1174.) The statutory scheme follows a rational design. Vicarious liability is a derivative form of liability in that the accomplice's liability derives from the principal's liability.

Respondent's contention that subdivision (e) imposes liability for gun use on both appellants regardless of who did the actual shooting (RB 190) is not supported by the law. The Attorney General's reading of

subdivisions (d) and (e)(1) would make subdivision (d)'s requirement that the jury find that a particular principal intentionally and personally discharge a firearm meaningless. If all individuals charged as principals were vicariously liable for the weapon use enhancement so long as a gang enhancement was pled and proved, as the prosecutor contended, the finding called for under subdivision (d) of a personal and intentional shooting would be unnecessary. "Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage. [Citation.]" (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22; see also *People v. Flores* (2005) 129 Cal.App.4th 174 (trial court's erroneous omission of accomplice limitation in Pen. Code, § 12022.53(d) instruction in accomplice killing case required reversal of subdivision (d) enhancement).)

Similarly, respondent's assertion that the jury need not decide which of the defendants was the actual killer in proving the enhancement because the jury convicted both of the substantive crime of murder is also not supportable. There is an obvious difference between the substantive offense of murder and the gun use enhancement. The substantive offense, which punishes for the crime, does not require unanimity as to theory of culpability. The enhancement punishes for a particular manner of killing and the statutory language explicitly requires that the jury find the actual shooter beyond a reasonable doubt before the enhancement is applicable to the vicariously liable accomplice.

For these reasons, respondent's reliance on the "unanimity cases" is misplaced.

D. THE PROSECUTION MISAPPREHENDED THE APPLICABLE LAW AND ITS BURDEN OF PROOF REGARDING THE FIREARM USE ENHANCEMENT AND OBTAINED AN INSTRUCTION AND SUCCESSFULLY ARGUED THAT APPELLANT WAS LIABLE FOR THE ENHANCEMENT ON THE BASIS OF THAT MISTAKE ABOUT THE LAW

It was the prosecutor who proposed that the jury be instructed as it was. In making the request, the prosecutor indicated there was but a single shooter and that he was well aware he had failed to prove which of the two defendants, i.e., appellant or Satele, was the actual shooter and which defendant was the aider and abettor. The instruction put forth by the prosecutor and his argument made clear that he sought by his proffered instruction to impose liability for the weapon use enhancement upon both appellant and Satele without proving that the actual shooter intentionally and personally discharged the firearm and without proving the non-shooter was an accomplice with the requisite mental state. (13RT 3048-3049.)

As a result, the prosecutor incorrectly stated the law in argument to the jury and obtained an instruction that misdirected the jury and substantially reduced his burden of proving appellant's liability for the enhancement as either the actual killer or the aider and abettor accomplice. (AOB 53-58.)

Respondent relies upon the same series of "unanimity cases" cited and discussed in the preceding section (RB 189). Respondent reiterates that unanimity as to the identity of the shooter and the identity of the aider and abettor was not required (RB 190), and further reiterates that the prosecutor's understanding of the law as reflected in the modified instruction and argument was, in fact, accurate. (RB 188-189).

Appellant has explained in the previous section why these cases do not apply to the enhancement and respectfully refers the reader to his discussion as to why unanimity is not a relevant argument here and the reasons why the instruction and argument were incorrect.

E. THE INSTRUCTION GIVEN THE JURY OMITTED CRITICAL ELEMENTS OF THE ENHANCEMENT, CREATED A MANDATORY PRESUMPTION, AND WAS SUBJECT TO INTERPRETATION AS PRESENTING ALTERNATE LEGAL THEORIES, ONE OF WHICH WAS LEGALLY INCORRECT

In addition to omitting the requirement that the jury was required to find that a particular principal intentionally and personally discharged the firearm proximately causing death, which appellant has discussed above, appellant contended in the opening brief that the modified instruction given to appellant's jury created an impermissible mandatory presumption. (See AOB 64-67.)

The court instructed the jury in relevant part: "This allegation pursuant to Penal Code section 12022.53(d) applies to any person charged as a principal in the commission of an offense, when a violation of Penal Code sections 12022.53(d) and 186.22(b) are plead [sic] and proved."[3] (37CT 10788; 14RT 3200-3201.)

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[3] The following version of CALJIC No. 17.19, as modified on request of the prosecutor, was given to appellant's jury:

The instruction thus expressly told the jury the law required it to find the personal firearm use enhancements to be true as to any person *charged* as a principal in the commission of the crime when Penal Code section 12022.53 and 186.22, subdivision (b)(1), are pled and proved. As may be seen, the instruction required that the jury find that appellant was in fact a principal in the commission of the crime from the fact appellant had been

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[1.] It is alleged in Counts One and Two that the defendants Daniel Nunez and William Satele intentionally and personally discharged a firearm, and proximately caused death to a person not an accomplice to the crimes, during the commission of the crimes charged, in violation of Penal Code section 12022.53(d).

[2.] If you find the defendants Daniel Nunez or William Satele guilty of one or more of the crimes charged, you must determine whether the defendants Daniel Nunez or William Satele intentionally and personally discharged a firearm, and proximately caused death to a person not an accomplice to the crimes, in the commission of those felonies.

[3.] The word "firearm" includes a Norinco MAK-90.

[4.] Death is a proximate cause of the discharge of a firearm if it is a direct, natural, and probable consequence of the discharge of the firearm, and if, without the discharge of the firearm, death would not have occurred.

[5.] This allegation pursuant to Penal Code section 12022.53(d) applies to any person charged as a principal in the commission of an offense, when a violation of Penal Code sections 12022.53(d) and 186.22(b) are plead [sic] and proved.

[6.] The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.

[7.] Include a special finding on that question in your verdict, using a form that will be supplied for that purpose. (37CT 10788; 14RT 3200-3201; bracketed paragraph numbers added.)

that the likelihood the jury might have followed that faulty analytical path was heightened by the prosecution's argument – "Because of that gang allegation, they are both liable for that personal use of the gun. So I don't want that word 'personal' to throw you off." (14RT 3222; AOB 68-69.)

The Attorney General characterizes this reading of the modified instruction as "strained." (RB 188.) Respondent makes specific reference to CALJIC No. 3.00 and further contends, "Given all instructions considered as a whole, the jury necessarily found both appellants were actual principals, not simply charged as principals." (RB 188.)

The flaw in respondent's argument is that "all instructions considered as a whole," includes the instruction complained of here with its language assigning liability to a person *charged* as a principal in the commission of the offense and allowing liability to be imposed vicariously without finding the actual perpetrator. Respondent's argument cuts both ways. Respondent argues the jury appropriately applied CALJIC No. 3.00 in determining liability for the personal weapon use enhancement. But, given the thrust of the prosecutor's argument, the jury is just as likely to have applied the language of the modified instruction in determining principal status for the substantive offense. From this vantage point, it is not possible to know.

Because nothing in the record establishes that the personal weapon use enhancements were actually based on a valid ground, because the prosecution presented its case to the jury on the legally incorrect theory, and because nothing in other properly given instructions corrected the mistake about the law, a reversal of the enhancements is required. (*People v. Green*

(1980) 27 Cal.3d 1, 63-71; *People v. Guiton* (1993) 4 Cal.4th 1116, 1125-1126, 1128.)

F. THE IMPACT OF THE INSTRUCTIONAL ERRORS WAS EXACERBATED BY THE TRIAL COURT'S INSTRUCTION THAT THE JURY WAS REQUIRED TO USE VERDICT FORMS THAT FAILED TO REFLECT THE LEGALLY AVAILABLE OPTIONS AND BY THE FACT THAT THE LANGUAGE SET FORTH IN THE VERDICTS CONFORMED TO THE LEGALLY INCORRECT THEORY SET FORTH IN THE COURT'S INSTRUCTION

Appellant discussed the deficiencies in the language of the verdict form at pages 74-75 of the opening brief.

Respondent acknowledges the verdict forms were "phrased to indicate each appellant personally discharged a firearm" (RB 190), but contends the defects in the verdicts forms were harmless because the prosecutor argued the jury could find the enhancement true on finding "each appellant was a principal in the commission of the murders." (RB 190.)

What the prosecutor actually told the jury was markedly different than respondent's representation.

The prosecutor told the jury:

> Now, this [proof of the gang enhancement allegation] is also important for another reason. The last allegation. Penal Code section 12022.53 (d). This is the gun allegation.
>
> That gun allegation requires that I prove that a defendant personally and intentionally discharged a firearm that

> proximately caused someone's death. Obviously, it proximately caused someone's death. Renesha and Edward.
>
> You know this was intentional. This wasn't an accident.
>
> Then we have the words "personal use." I told you, I don't know how long ago it was now I've been going on, that I did not prove to you which of the two defendants personally used a gun. So you're going to say, "I'm going to find that allegation not true, because Mr. Millington [the prosecutor] did not prove who personally shot the gun." But if you look in that instruction, I think it's 17.19, there's a paragraph that is important. It's towards the bottom. What it says is that gang members are vicariously liable. They are all liable for that personal use if that gun has been intentionally discharged and proximately caused death and there is a gang allegation that has been pled and proven.
>
> I've told you I pled and proved that, because I proved that Dominic Martinez, Ruben Figueroa – we had Julie Rodriguez. So that gang allegation is proven.[4]
>
> Because of that gang allegation, they are both liable for that personal use of the gun. So I don't want that word "personal" to throw you off. When you go back there and it says, "We, the jury, find the allegation that the defendants personally, intentionally used a firearm . . ." dah, dah, dah, "to be true or not true," please circle the true. The reason being is because the law says that they are both liable if it's a gang allegation proven. (14RT 3222-3223; AOB 57-58.)

The prosecutor expressly told the jury it could find the enhancement to be true on a finding of vicarious liability, that it was okay to

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[4]. Prosecution gang expert Julie Rodriguez testified to the convictions and gang membership of WSW members Martinez and Figueroa

ignore the word "personal." The prosecutor's argument did not correct any deficiencies in the language of the verdict forms.

Respondent also argues that because the evidence was "overwhelming," "the wording of the verdict forms was immaterial since the verdicts unmistakably signaled the jury's intention to find both appellants liable for the gun use." (RB 190.) This is a curious argument, if not a specious argument, to make about the weight of the evidence in this case in which the trial prosecutor repeatedly conceded he had failed to prove the identity of the shooter. Respondent's related contention that the incorrect wording of the verdict forms is immaterial because the jury's findings reveal the jury wanted to hold each defendant liable for the gun use enhancement is also specious and amounts to no more than arguing that the result justifies the means, which is an argument fundamentally offensive to the concept of due process.

The language of the verdict forms mattered. The verdict forms failed to provide the jury with the legally available range of verdict options. The language made no provision for finding any defendant vicariously liable for the enhancement under the proof requirements identified by this Court in *People v. Garcia, supra*, 28 Cal.4th at p. 1174.)

The deficiencies in the language of the verdict forms conformed with the instructional errors described above and in the opening brief and with the misdirection in the prosecutor's argument. As a result, the gun use findings are inherently suspect and must be reversed.

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to prove WSW is a criminal street gang within the meaning of Penal Code section 186.22. (9RT 2100.)

G. APPELLANT DID NOT FORFEIT HIS CONSTITUTIONAL CLAIMS, INCLUDING HIS *APPRENDI-BLAKELY* CLAIM

Respondent contends appellant has forfeited his constitutional claims by a failure to object below. Respondent supports its contention with a reference to *People v. Thornton* (2007) 41 Cal.4th 391, 462-463. (RB 184.)[5]

Thornton does not help respondent. In *Thornton*, this Court considered a *Batson-Wheeler*[6] claim in connection with the selection of an alternate to replace a sitting juror. Although this Court noted the defendant had failed to raise a *Batson-Wheeler* challenge at trial and had therefore forfeited the claim, this Court nonetheless chose to consider and rule upon the merits of the defendant's claim. (*Ibid.*)

Respondent further contends appellant has forfeited his claims pursuant to *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Blakely v. Washington* (2004) 542 U.S. 296. (RB 194.) Respondent reasons that *Apprendi* and *Blakely* do not apply because the gun use enhancement does not increase appellant's penalty beyond the statutory maximum of the death penalty.

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[5] Respondent repeats his claim that appellant has forfeited his constitutional claims with each of the briefed issues and relies on *Thornton, supra*, among other cases on each occasion. Appellant briefly discusses *Thornton* here and, in lieu of repeating his reply to respondent's forfeiture contention, respectfully refers the reader to appellant's discussion of the aggregated cases upon which respondent relies in Argument X, subsection A, and Argument IX, subsection A.

[6] *Batson v. Kentucky* (1986) 476 U.S. 79 (federal constitutional guaranty of equal protection of the laws applied to jury selection). *People v. Wheeler* (1978) 22 Cal.3d 258 (state constitutional right to jury drawn from representative cross-section of the community).

The fact is, however, that appellant's sentence was increased because of the enhancements. The trial court imposed and stayed separate terms of 25 years to life in counts 1 and 2 for the gun use enhancements. (18RT 4606-4607; see judgment of death commitment and death warrant (39CT 11312-11323) and abstract of judgment (39CT 11346-11348).)

The United States Supreme Court has held that because a sentence enhancement requires findings of fact that increase the maximum penalty for a crime, this rule applies specifically to sentence enhancement allegations. (*Blakely v. Washington*, *supra*, 542 U.S. at pp. 301-302; *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 476, 490.) (AOB 77.)

H. THE PERSONAL FIREARM USE ENHANCEMENT IS NOT SUFFICIENTLY SUPPORTED BY EVIDENCE THE CRIMES WERE COMMITTED FOR THE BENEFIT OF A STREET GANG AND MUST BE REVERSED

In Argument IV of the opening and reply briefs, appellant contended the trial court incorrectly instructed the jury with regard to the gang benefit enhancement (Pen. Code, § 186.22, subd. (b)(1)) when it instructed on the substantive offense of active gang participation (Pen. Code, § 186.22, subd. (a)) rather than on the gang benefit sentence enhancement (Pen. Code, § 186.22, subd. (b)(1)) alleged in the pleadings.

Appellant explained that the personal firearm use instruction given his jury and the prosecutor's corresponding misdirection in argument together irrebuttably directed the jury to rely upon the prosecution's proof of

the gang benefit enhancement in making its findings concerning the personal firearm use. Because the jury's finding regarding the gang benefit enhancement is the product of a defective instruction that omitted the elements of the enhancement, that finding must fall. Accordingly, the gang benefit enhancement finding may not support the personal firearm use enhancement, which consequently must also be reversed because it is not supported by substantial evidence. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.)

The Attorney General argues there was no gang benefit instructional error and therefore no corresponding prejudice requiring reversal of the gun use finding. (RB 175.)

In Argument IV of this brief, appellant has explained why respondent's claim regarding the gang benefit instructional error must fail. Because that is the case, the gun use enhancements are not sufficiently supported by evidence the crimes were committed for a gang purpose and the gun use enhancements must fail.

I. THE INSTRUCTIONAL ERRORS WERE NOT HARMLESS BEYOND A REASONABLE DOUBT. THE LEGAL MISDIRECTION CONTAINED WITHIN THE INSTRUCTION LED INEXORABLY TO FINDINGS ATTRIBUTING TO BOTH APPELLANT AND SATELE, RESPECTIVELY, A CULPABLE ACT ONLY ONE OF THEM COULD HAVE COMMITTED. THESE FACTUALLY IRRECONCILABLE FINDINGS WERE IMPERMISSIBLY USED TO CONVICT AND TO OBTAIN THE DEATH PENALTY IN VIOLATION OF DUE PROCESS BECAUSE IN THOSE CIRCUMSTANCES THE STATE HAS NECESSARILY CONVICTED OR SENTENCED A PERSON ON A FALSE FACTUAL BASIS

Respondent presents two pro forma conclusory arguments regarding prejudice. Respondent contends that because the evidence was "overwhelming," appellant was subject to the gun use enhancement regardless of who fired the fatal shots, any error was harmless under the standards of either *People v. Watson* (1956) 42 Cal.2d 818 or *Chapman v. California* (1987) 386 U.S. 18. (RB 194-195.)

Alternatively, respondent reiterates its responses to appellant's contention and argues that, as to the gun use charge, there was no instructional error; defective verdict forms; improper burden-shifting; improper prosecutorial argument; or violation of a unanimity duty, and as a result no prejudice and consequence related to guilt and penalty phase verdicts. (RB 195.)

Appellant respectfully submits that respondent's failure to engage the prejudice discussion set forth in the opening brief is an implied recognition of the merits of appellant's claim. Appellant respectfully refers the reader to his discussion of prejudice at pages 81-94.)

II.

THE PERSONAL WEAPON USE FINDINGS (PEN. CODE, § 12022.53, SUBD. (D)) ATTRIBUTED TO BOTH APPELLANT AND SATELE, RESPECTIVELY, A CULPABLE ACT ONLY ONE OF THEM COULD HAVE COMMITTED. THE USE OF IRRECONCILABLE FACTUAL THEORIES TO CONVICT OR TO OBTAIN HARSHER SENTENCES FOR BOTH DEFENDANTS ON THE BASIS OF AN ACT ONLY ONE DEFENDANT COULD HAVE COMMITTED VIOLATED APPELLANT'S FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS BECAUSE IN THOSE CIRCUMSTANCES THE STATE HAS NECESSARILY CONVICTED OR SENTENCED A PERSON ON A FALSE FACTUAL BASIS

A. INTRODUCTION

For the reasons appellant has set forth in Argument I, the jury's findings that both appellant and Satele *personally* shot and killed Robinson and Fuller attributed to both of them a culpable act only one of them could have committed. The only logical interpretation of the evidence (e.g., forensic firearms analyses establishing use of single firearm; coroner's evidence that clustered nature and location of Robinson's wounds indicated body did not move between shots and thus indicated rapidity of shots; percipient witness accounts of rapid burst of gunshots) proved that only one person fired the rifle.

The findings that both appellant and Satele *personally* fired the single weapon were caused by erroneously worded verdict forms and the corresponding legal misdirection in the prosecutor's argument and in the instruction from the court. As appellant explained in Argument I, the very experienced trial prosecutor personally acknowledged, in colloquy with the

court and with counsel and in argument to the jury, that his assessment of the evidence was that he had failed to prove who had actually shot and killed Robinson and Fuller.

The prosecutor's acknowledgment amounted to a tacit recognition there was evidence of but one shooter. Later, in his response to appellant's motion for new trial based on the absence of evidence appellant was the actual shooter, the prosecutor stated his belief that appellant was *not* that shooter:

> Defense counsel correctly states that there was no evidence the defendant [Nunez] was the shooter. As this court is well aware, I conceded this fact throughout the trial. (39CT 11190:13-19.)

The erroneous personal gun use finding deprived appellant of a fair trial and a reliable jury determination of the essential elements of the crimes and penalty with which he had been charged. This error was further aggravated when the trial court, in denying the motions for a new trial and modification of the sentence, and in imposing the death penalty, relied in part on the fact that the jury determined that both defendants were the shooters. Because this was the case, reversal is required.

As appellant will explain, respondent's contentions regarding this issue are flawed for the following reasons:

First, respondent misconstrues and mischaracterizes the nature of appellant's argument. Respondent frames the issue as an objection that there is a lack of unanimity regarding a legal theory, whereas appellant's contention is that the jury made impermissibly conflicting *factual* findings. (RB 102-108, 142-143.)

Second, respondent takes the jury's findings and argues they are correct without addressing appellant's contention that the jury returned those very findings because the wording of the verdict forms was defective and that the language of the verdict forms together with the corresponding argument of the prosecutor and the instructions of the court amounted to a misdirection in the law. As a result, respondent would ask this Court to conclude that the jury correctly found that both defendants fired the weapon, although this was not the People's position at trial, and is a conclusion that can only be reached by reliance upon a factual scenario so unreliable the experienced trial prosecutor both expressly and impliedly acknowledged his rejection of it.

Third, respondent chooses not to understand the difference between the personal and vicarious liabilities that are the subject of subdivisions (d) and (e)(1), respectively, of section 12022.53, and would have this Court do the same. Respondent also fails to recognize the increased moral and legal consequences that befall individuals who are found to *personally* use a firearm and cause death.

B. RESPONDENT MISCASTS THE NATURE OF THIS ISSUE

Respondent incorrectly characterizes the nature of appellant's contentions by framing this issue as purely an issue regarding unanimity of legal theory. Respondent argues there is no error because a jury is not required to be unanimous as to the *theory* of liability. (RB 106-107, 112-113, citing inter alia, *People v. Millwee* (1998) 18 Cal.4th 96, 160; *People v. Pride* (1992) 3 Cal.4th 195, 249.) *Millwee* and *Pride* hold that when a first degree murder case is prosecuted on alternative theories of premeditated and felony

murder, the jury must unanimously agree the defendant is guilty of first degree murder but need not be unanimous as to the underlying theory of liability.

Appellant did not, however, claim that the jury was not unanimous in the *legal* theory upon which it relied. Rather, appellant claimed that the verdicts rest on two *conflicting factual* theories under the facts proven at trial, namely that each of the defendants was the actual shooter, and that the verdicts therefore assign to each defendant an act the evidence shows only one of them could have done. (See AOB 82-83, 95-102.)

Having misstated the basis of appellant's claim, respondent argues that a jury is not required to determine whether liability is based on whether the defendant is the aider and abettor or the direct perpetrator. (RB 107-108.) What respondent fails to address is the gist of appellant's contention. In appropriate circumstances, a jury may not need to determine whether a particular defendant was the actual killer or the aider and abettor. But, a jury may not find that two different defendants are the actual killers when the factual evidence indicates there was only one actual killer.

This Court has recognized that the prosecution may not convict two individuals of a crime only one could have committed or obtain harsher sentences against two individuals by unjustifiably attributing to each a culpable act only one could have committed. (*In re Sakarias* (2005) 35 Cal.4th 140, 156-157.) *Sakarias* recognized that a defendant's due process rights are violated when a conviction or death sentence is sought and obtained against him and another defendant on the basis of culpable acts for which only one could be responsible. (*Id.*, at pp. 159-160.)

The Attorney General seeks to distinguish *Sakarias* as a case involving prosecutorial misconduct and the separate trials of two defendants.

Neither factor is present here. (RB 142-143.) In the opening brief, appellant expressly stated he was not repeating *Sakarias*' claim of prosecutorial misconduct in connection with the issue presented here. (AOB 82, 95.) And, although the claim of impermissible factual inconsistency arose in *Sakarias* in the context of two trials, that factor is of no real consequence here. If the evidence established that a single actual killer committed the act in question the fundamental unfairness of attributing that act to two defendants is the same whether that attribution occurred in one trial or two trials.

The premise underlying *Sakarias* is that "it violate[s] due process to base criminal punishment on unjustified attribution of the same criminal or culpability-increasing acts to two different persons when only one could have committed them." (*In re Sakarias*, 35 Cal.4th at pp. 159-160.) In addition, *Sakarias* recognized that a prosecutor's use of inconsistent factual theories "surely does not inspire public confidence in our criminal justice system." (*Id.*, at p. 159, quoting *Thompson v. Calderon* (9th Cir. 1997) 120 F.3d 1045, 1072 (dis. opn. of Kozinski, J).)

The failure in public confidence and the violation of due process would be the same if the factually inconsistent results were produced in one trial rather than two. Accordingly, respondent's effort to distinguish *Sakarias* on the ground the factually inconsistent results were produced in two trials lacks merit.

Significantly, respondent never squarely addresses the substance of appellant's claim of error. Respondent never discusses *Sakarias* in the context of its holding. Instead, respondent discusses *Sakarias* on a tangential point (prosecutorial misconduct), on which appellant expressly did not rely. (RB 142-143.)

Appellant respectfully submits that the Attorney General's failure to engage the substance of appellant's claim amounts to an implied concession of the merits of appellant's claim.

C. RESPONDENT FAILS TO DISCUSS THE SHORTCOMINGS IN THE LANGUAGE OF THE VERDICTS, WHICH ECHOED THE LEGAL ERRORS IN THE GUN USE INSTRUCTION AND THE RELATED ARGUMENT OF THE PROSECUTOR

Penal Code section 12022.53, subdivision (d), imposes a sentence enhancement upon a defendant who *personally* uses a gun. Subdivision (e)(1) of that section imposes the enhancement *vicariously* on a principal in the crime if: (1) that person also violated section 186.22, subdivision (b), by committing the crime for a gang purpose, and (2) a principal in the crime used a firearm within the meaning of subdivisions (b), (c), or (d) of section 12022.53.

At trial, the prosecutor expressly told the jury:

> Then we have the words "personal use." I told you, I don't know how long ago it was now I've been going on, that I did not prove to you which of the two defendants personally used a gun. So you're going to say, "I'm going to find that allegation not true, because Mr. Millington [the prosecutor] did not prove who personally shot the gun." But if you look in that instruction, I think it's 17.19, there's a paragraph that is important. It's towards the bottom. What it says is that gang members are vicariously liable. They are all liable for that personal use if that gun has been intentionally discharged and proximately caused death and there is a gang allegation that has been pled and proven. (14RT 3222-3223.)

In so arguing, the prosecutor specifically directed the jury to the paragraph in the weapon use instruction that incorrectly allowed imposition of the gun use enhancement based on vicarious liability alone on "*any person charged as a principal* in the commission of an offense when a violation of Penal Code sections 12022.53(d) and 186.22(b) are plead [sic] and proved." The prosecutor told the jury they could use that instruction and the fact of the gang enhancement to satisfy the proof requirements associated with the word "personal" to find each defendant vicariously liable and return a true finding for the gun use enhancement. (Emphasis added; see Argument I, section E, *supra*; 14RT 3222-3223.)

After he directed the jury to the instruction and told the jury that both appellant and Satele were vicariously liable for the gun allegation because of the gang allegation, the prosecutor specifically told the jury they should not be "thrown off" by the proof requirements for "personal" use because the law allowed both defendants to be held vicariously liable.

> Because of that gang allegation, they are both liable for that personal use of the gun. So I don't want that word "personal" to throw you off. When you go back there and it says, "We, the jury, find the allegation that the defendants personally, intentionally used a firearm . . ." dah, dah, dah, "to be true or not true," please circle the true. The reason being is because the law says that they are both liable if it's a gang allegation proven. (14RT 3222-3223.)

Appellant has argued that the verdict forms were inadequate in that they failed to provide the jury with the legally available range of verdict options. (See AOB 74-75.) The forms provided a place to find that appellant personally and intentionally discharged a firearm within the meaning of

subdivision (d) of section 12022.53, but that was all. (38CT 10929; verdict language recreated at AOB 74.) The language employed in the forms made no provision for finding any defendant liable for the enhancement as an accomplice under the proof identified by this Court in *Garcia*. (*People v. Garcia*, *supra*, 28 Cal.4th at p. 1174.)

The jury returned verdicts finding that appellant personally and intentionally used a gun in connection with both the Robinson and Fuller shootings, the only finding available in the language of the verdict forms. (38CT 10929.) But, given the prosecutor's argument and the corresponding instruction that the fact of the gang enhancement and the defendant's status as a principal charged meant that "personal" weapon use essentially was satisfied by a determination of vicarious liability for weapon use, the gun use enhancements are inherently suspect.

That the weapon use findings are unreliable is given further credence by the prosecutor's response to appellant's charge in his new trial motion regarding the absence of evidence that appellant was the shooter. The prosecutor said:

> Defense counsel correctly states that there was no evidence the defendant [Nunez] was the shooter. As this court is well aware, I conceded this fact throughout the trial. (39CT 11190:13-19.)

If there was no evidence appellant personally and intentionally shot and killed that night, as the prosecutor admits, the jury's gun use enhancement findings can only be explained as having resulted from the legal misdirection it received from the argument of the prosecutor, the flawed instruction, and the defective verdict form language. The jury returned the

gun use finding it did because of the argument it heard, the instruction it was bound to obey, and the verdict form before it.

D. OVERWHELMING EVIDENCE ESTABLISHES THERE WAS BUT A SINGLE SHOOTER

As part of its response to this particular argument and to other arguments raised in the briefing in which the acts and mental state of the shooter are in issue, the Attorney General argues that two shooters fired the single weapon and that appellant and Satele were the two shooters. (See, e.g., RB 114-119.)

In section B of Argument I, to which appellant respectfully refers the reader, appellant discussed the quantum and strength of the evidence supporting a one-shooter theory. The evidence included (1) forensic firearms evidence that all of the gunshots were fired from a single, very large, and unwieldy "high capacity rapid fire semiautomatic" weapon (9RT 1979, 1986, 1987-1989); (2) percipient witness testimony that the gunshots occurred in a single rapid burst that did not allow for even a quick exchange of the firearm between the car's occupants (5RT 983-984, 988-990); (3) coroner's testimony that the placement of Robinson's wounds indicated the shots that struck Robinson were fired in such rapid succession he neither turned nor fell to the ground between shots (9RT 2014, 2016-2019, 2021, 2022, 2024, 2027, 2044-2045).

Respondent counters the strength of this evidence by arguing that the testimonies of Ernie Vasquez and Joshua Contreras established

appellant's involvement in the shooting and the jury's acceptance of that version as reflected in the gun use enhancements. (RB 114-116.) In urging this construct upon this Court, respondent would have this Court rely on enhancement findings which appellant has shown above to be inherently suspect and upon the demonstrably unreliable testimony of the much-rewarded Ernie Vasquez (AOB 9-13) and the recanted statements of Joshua Contreras (AOB 13-17).

The Attorney General further contends that appellant's claim – that forensic firearms and pathology evidence, combined with the testimonies of percipient auditory witnesses, support a single gun, single shooter scenario – is flawed by speculation. (RB 116-117.)

The forensic firearms evidence established a single rapid-fire weapon was used and that the expended casings were clustered. Expert opinion evidence established the clustered casings indicated the firearm was not moved a great deal during the shooting. Respondent characterizes appellant's conclusion that such evidence showed the firearm was not moved any significant distance between shots, as would occur if the firearm were transferred between shooters, as "speculation." (RB 117.)

Respondent accuses appellant of relying upon a "false assumption" in arguing the grouped casings inferentially indicate the weapon was not moved between shooters, from which it might be inferred there was but a single shooter. Respondent explains the assumption was "false" because people present at the scene – Ernie Vasquez, Bertha and Frank Robinson, first responders, and others – could have intentionally or unintentionally moved the casings into a cluster. (RB 117.) Appellant at least relied on expert opinion evidence in contending the grouped casings indicated the firearm was not

moved, as respondent recognizes. (RB 117.) Respondent's assertion that the casings were moved into a grouping by first responders, on the other hand, has no evidentiary support and is no more than mere speculation.

Further, respondent's suggested factual scenario that one shooter was positioned inside the car and a second shooter outside the car at the time of the shooting (RB 118) is also unsupported by evidence adduced at trial. In support of this scenario, the Attorney General points not to evidence but to the comments of counsel. (See RB 118.)

And, notably, respondent chooses not to address the medical examiner's testimony that the clustered wounds on Robinson's body also are evidence of shots fired in such rapid succession he neither turned nor fell during the assault. Nor does respondent deal with the synchronicity to be found in the forensic evidence of grouped casings on the street and grouped wounds on Robinson's body and the correlating expert opinions given by the forensic firearms analyst and the medical examiner described above that the shots were fired in rapid sequence and the firearm was not moved during the firing.

E. THE DEATH PENALTY SHOULD NOT BE IMPOSED WHERE THE STANDARD OF PROOF REGARDING A DEFENDANT'S CULPABILITY IS BASED ON A CLAIM THE FINDING IS NOT FACTUALLY IMPOSSIBLE

As noted above, respondent argues "it was not factually impossible to find that each appellant fired a gun." (RB 114-119.) In the same way that it may be said that "everything related to human affairs is open

to some possible or imaginary doubt,"[7] it may be said of the evidence in this case that it is not impossible to say that both defendants fired the gun.

But, this is an inappropriate standard to be applied in determining whether a defendant should be subject to capital punishment. The U.S. Supreme Court has said of capital punishment that "the penalty of death is qualitatively different from a sentence of imprisonment. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

In *People v. Murtishaw* (1981) 29 Cal.3d 733, a capital case, this Court embraced the principle articulated in *Woodson*'s view that the death penalty is inherently qualitatively different to find reversible error in a trial court's ruling that allowed a psychopharmacologist to testify about the defendant's future dangerousness. *Murtishaw* pointed to the unreliability inherent in such predictions and said the "unique severity of the penalty increases the importance of avoiding unjustified reliance upon predictions of 'dangerousness.'" (*People v. Murtishaw*, *supra*, 29 Cal.3d at pp. 768-771.) The Court stated in summary, "evidence which is barely reliable enough to justify a civil judgment or a limited commitment is not reliable enough to utilize in determining whether a man should be executed." (*Id.*, at p. 771.)

Murtishaw also discussed a unique aspect of appellate review of penalty jury verdicts. "Just as the sentence of death is unique, so is the role of the penalty jury. When a jury decides an issue of guilt, an appellate court can reverse that conviction if it rests on evidence which is entitled to little weight – evidence which is not "of ponderable legal significance . . . reasonable in

[7] CALJIC No. 2.90.

nature, credible, and of solid value." [Citation.] The penalty jury's verdict, however, does not resolve a question of fact, and it is not clear whether an appellate court can reverse that verdict on the ground that it is unsupported by substantial evidence. Thus, the danger arises that a penalty verdict may rest upon evidence entitled to little weight and yet escape appellate scrutiny. (*Id.*, at p. 771, fn. 34.)

Appellant therefore respectfully submits that this Court has recognized that special concerns regarding reliability of the supporting evidence and in the ability of the reviewing court to reach the weight of evidence considered by a penalty jury in reaching its verdict attend capital cases.

Both of these areas of concern are present here in respondent's claim that it is not factually impossible to say the jury's findings that both appellant and Satele were the actual shooters is unsupported by the evidence and in the penalty jury's use of those findings under the imprimatur of the court's instruction that the jury determine the penalty in the light of, inter alia, the guilt phase verdicts. (CALJIC No. 17.15.1; 38CT 11118, 11119.)

Respondent urges this Court to adopt the standard articulated in *People v. Rizo* (2000) 22 Cal.4th 681, 684-685. (RB 103.) But *Rizo* does not support respondent's claim that the two-shooter factual findings in the verdict must stand because it is not factually impossible to say there were two shooters. The issue here is sufficiency and, specifically, given this Court's embrace of the reliability standards required in capital cases in *Murtishaw* and *Woodson*, *supra*, whether it is enough to claim it is not factually impossible to say there were two shooters.

Rizo, on the other hand, was concerned about factual and legal impossibility and the question of whether the defendant could be held liable for the substantive crime or just its attempt. In *Rizo*, the defendants sold documents showing the purchaser to be a U.S. citizen to undercover officers who were in fact U.S. citizens. Despite that factual circumstance, the defendants were somewhat anomalously convicted of the crime of selling counterfeit documents concealing the buyer's true citizenship. (*People v. Rizo*, *supra*, 22 Cal.4th at pp. 685-686.) This Court found that the defendants were properly liable for the substantive crime because the operative statute focused solely upon the acts and intent of the violator and required nothing from the recipient to complete the offense. Thus, the intent and acts of the defendants alone completed the crime. (*Id.*, at pp. 686-688.) *Rizo*'s holding, focused as it is on whether the proven facts meet the legal requirements of the crime, does not inform the discussion here.

In contrast, in *People v. Headlee* (1941) 18 Cal.2d 266, 267-268, this Court defined improbable evidence in this way. "Where [] the evidence relied upon by the prosecution is so improbable as to be incredible, and amounts to no evidence, a question of law is presented which authorizes an appellate court to set aside a conviction. [Citations.] Under such circumstances an appellate court will assume that the verdict was the result of passion and prejudice. [Citation.] To be improbable on its face the evidence must assert that something has occurred that it does not seem possible could have occurred under the circumstances disclosed. The improbability must be apparent; evidence which is unusual or inconsistent is not necessarily improbable. [Citations.]"

Appellant respectfully submits that for the reasons set forth above, respondent's contention that verdicts finding both appellant and Satele were shooters must be accepted because it is not factually impossible to find they were not is built upon evidence that is so improbable as to be incredible and that respondent's articulated standard of review – factual impossibility – is not the appropriate standard to be applied here.

F. RESPONDENT'S TWO-SHOOTER THEORY VIOLATES THE DOCTRINE OF "THEORY ON WHICH THE CASE WAS TRIED" AND RAISES DUE PROCESS CONCERNS; RESPONDENT SHOULD BE BARRED FROM RAISING IT

Appellant incorporates here by reference his contention, set forth in Argument I, section B, *supra*, that respondent should be estopped from asserting the factual theory that there were two actual shooters. As appellant explained above, the Attorney General's reliance on the two-shooter theory stands in direct contradiction to the trial prosecutor's position there was but one-shooter; whose identity had not been proven; and whose identity the law did not burden the prosecution with proving because of the gang enhancement.

G. RESPONDENT'S ANALYSIS BLURS THE DISTINCTION BETWEEN VICARIOUS AND PERSONAL LIABILITY

Respondent adopts the prosecutor's argument and the court's instruction that all defendants are vicariously liable for the gun use

enhancement as the result of the gang enhancement. Appellant has explained above that while section 12022.53, subdivision (e)(1), imposes the gun use enhancement based on vicarious liability, subdivision (d) imposes the enhancement based on personal liability. Moreover, because of the vicarious nature of its liability, subdivision (e)(1) does not become operative until a proper finding is made under the provisions of subdivision (d).

Observance of the different liabilities and the different proof requirements needed for subdivisions (d) and (e)(1) is important for reasons that reach beyond the enhancement itself.

In this case, the trial court relied on the conclusion that each appellant was the actual shooter in imposing the death penalty upon each appellant. (18RT 4596.)

In *Enmund v. Florida* (1982) 458 U.S. 782, the United States Supreme Court discussed the imposition of the death penalty on someone other than the actual killer in a felony murder case. The Court explained that, absent substantial aggravating factors, only a small handful of states allowed the imposition of the death penalty under a theory of vicarious liability in felony murder cases for a defendant who was not the actual killer. (*Id.*, at pp. 789-793.) The Court noted that "[s]ociety's rejection of the death penalty for accomplice liability in felony murders is also indicated by the sentencing decisions that juries have made." The court observed that the vast majority of the people executed since 1954 were people who had personally committed the fatal assault. (*Id.*, at p. 794.)

As a result, the Court held that the Eighth Amendment does not permit "the imposition of the death penalty on [one] who aids and abets a felony in the course of which a murder is committed by others but who does

not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." (*Id.*, at p. 797.)

The *Enmund* Court reiterated the rule that "[i]n determining whether the death penalty may be imposed, the focus must be on 'relevant facets of the character and record of the individual offender.'" (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304, quoted in *Enmund*, *supra*, at p. 798.)

The Court noted that the focus in the decision to impose the death penalty must be on the culpability of the specific defendant and not on the culpability of the actual shooter. The Court explained why this was so: "for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence.'" (*Id.*, at p. 798, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 605.)

H. Appellant's Constitutional Claims Were Not Waived by a Failure to Object or Assert Them

Respondent relies on *People v. Lewis* (2008) 43 Cal.4th 415 ,490 fn. 19; *People v. Wilson* (2008) 43 Cal.4th 1, 13-14 fn.3; *People v. Thornton* (2007) 41 Cal.4th 391, 462-463; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1008 fn. 8, in arguing that appellant has forfeited his constitutional claims because he did not assert them at trial. (RB 105.) Appellant has discussed why respondent's reliance upon these cases is misplaced in Argument X, *infra*, and respectfully refers the reader to that discussion.

In addition, it is also relevant a reviewing court may address an issue in its discretion.

> In [*People v.*]*Scott* [(1994) 9 Cal.4th 331], we held only that *a party* cannot raise a "complaint[] about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons . . . for the first time on appeal." (*Id.*, at p. 356.) We did not even purport to consider whether *an appellate court* may address such an issue if it so chooses. Surely, the fact that a party may forfeit a right to present a claim of error to the appellate court if he did not do enough to "prevent[]" or "correct[]" the claimed error in the trial court (*id.*, at p. 353) does not compel the conclusion that, by operation of his default, the appellate court is deprived of authority in the premises. An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.)

A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights. (*People v. Vera* (1997) 15 Cal.4th 269.) For example, Evidence Code "[s]ection 353 is, of course, subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law." (*People v. Mills* (1978) 81 Cal.App.3d 171, 176; Assembly Judiciary Committee comment.) Thus, an issue is not waived on appeal by a failure to object below if the error is so fundamental that it represents a deprivation of the right to due process of law. (*People v. Menchaca* (1983) 146 Cal.App.3rd 1019.)

Appellant's present claims that he has been convicted and subjected to a harsher penalty on a false factual basis is predicated on his due

process claims and thus fit in this category of fundamental constitutional rights. Appellant's claims were therefore not forfeited by the failure of trial counsel to make the appropriate objections.

In addition, reviewing courts may consider issues involving pure questions of law without the necessity of an objection being made at the trial level. (*People v. Brown* (1996) 42 Cal.App.4th 461, 475; *People v. Blanco* (1992)10 Cal.4th 1167, 1172.)

When the facts relating to a contention are undisputed and there would probably be no contrary showing at a new hearing, an appellate court may properly treat the contention solely as a question of law and pass on it accordingly. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742; *Williams v. Mariposa County Unified Sch. Dist.* (1978) 82 Cal.App.3d 843, 850.) This is particularly true when the new issue is of "considerable public interest" or when it concerns "important issues of public policy" and has been briefed and argued before the reviewing court. (See *Wong v. Di Grazia* (1963) 60 Cal.2d 525, 532 fn. 9; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal.App.3d 1, 4-5; *Pena v. Municipal Court* (1979) 96 Cal.App.3d 77, 80-81.)

This Court and other appellate courts have addressed such constitutional questions in the absence of proper objection below. (See, e.g., *Hale v. Morgan* (1978) 22 Cal.3d 388, 394 "[A]lthough California authorities on the point are not uniform, our courts have several times examined constitutional issues raised for the first time on appeal, especially when the enforcement of a penal statute is involved [citation]. . . ."]; (*People v. Allen* (1974) 41 Cal.App.3d 196, 201 fn. 1 [The merits of a constitutional evidence challenge were reached even though the record showed no objection, because

"the constitutional question can properly be raised for the first time on appeal [citation]."]; *People v. Norwood* (1972) 26 Cal.App.3d 148, 153 ["A matter normally not reviewable upon direct appeal, but which is . . . vulnerable to habeas corpus proceedings based upon constitutional grounds may be considered upon direct appeal."]).

In *People v. Knighten* (1980) 105 Cal.App.3d 128, 132, the appellant argued that the trial judge erred in entering the jury room during deliberation for the purpose of clarifying the jury's request for rereading of testimony. The judge's conversation in the jury room was not reported, and the defendant and counsel were not present. *Knighten* held that the procedure adopted by the trial judge was error, as any private communication between judge and jury is improper. The communication also directly violated Penal Code section 1138 as it was important that the defendant and his attorney participate in decisions regarding readback. As a result of the court's conduct, the defendant was deprived of his fundamental constitutional right to the assistance of counsel at a critical stage of the proceedings. (*Id.*, at p. 132.)

Although trial counsel failed to make the proper objection, *Knighten* held the issue was cognizable on appeal. "The potential significance of the error is arguably sufficient to negate the waiver which would otherwise be implicit in appellant's failure to make any objection in the trial court, either when the judge first disclosed the communication or as part of appellant's subsequent motion for a new trial. (*Cf. People v. House* (1970) 12 Cal.App.3d 756, 765-766, disapproved on other grounds in *People v. Beagle* (1972) 6 Cal.3d 441, 451; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394.)" *People v. Knighten, supra*, 105 Cal.App.3d at p. 132.)

Courts have also regularly held that the failure to object is not waived when it would have been futile to do so. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Williams* (1997) 16 Cal.4th 153, 255; *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1433; *People v. Whitt* (1990) 51 Cal.3d 620, 655.) Here, however, appellant raised the problems associated with the prosecution's failures of proof regarding the identities of the shooter and the aider and abettor in his new trial motion. (39CT 11152-11154.) Appellant specifically stated: "The inconsistent finding that both defendants acted as the shooter is contrary to the evidence and indicates only an attempt on the jury's part to have the defendants found guilty and receive the death penalty." (39CT 11154.) The trial court, however, not only denied the new trial motion, but as appellant noted above, used the finding that appellant had personally and intentionally shot as a basis for imposing the death penalty. The court's ruling demonstrates the futility of any objection by appellant.

Courts have also held that an objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide. In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the trial court understood the issue presented. (*People v. Young* (2005) 34 Cal.4th 1149, 1186; *People v. Scott* (1978) 21 Cal. 3d 284, 290.) In this case, the additional aspects of this issue that appellant has raised under the Fifth and Eighth Amendments do not present a radically different approach to the issue. Therefore, the trial court was adequately appraised of the issue.

Furthermore, waiver is not a favored concept and should be sparingly applied, especially in a criminal case. "Because the question whether defendant has preserved his right to raise this issue on appeal is close

and difficult, we assume he has preserved his right, and proceed to the merits." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1183, fn. 5; see also *People v. Wattier* (1996) 51 Cal.App.4th 948, 953.) And, courts have recognized that the question of whether the general rule of waiver should be followed is "'largely a question of the appellate court's discretion.'" (*People v. Blanco* (1992) 10 Cal.App.4th 1167, 1173, quoting *Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal.App.3d 1, 5.)

For the reasons set forth above, appellant respectfully submits that he has not forfeited his constitutional claims in connection with this issue.

III.

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO HAVE THE JURY DETERMINE EVERY MATERIAL ISSUE PRESENTED BY THE EVIDENCE WHEN IT FAILED TO INSTRUCT SUA SPONTE ON THE LESSER-INCLUDED OFFENSE OF IMPLIED MALICE MURDER OF THE SECOND DEGREE

A. INTRODUCTION

In the opening brief, appellant contended that the trial court erred in failing to sua sponte instruct his jury on the lesser-included offense of second degree murder resulting from the commission of an unlawful act dangerous to life, i.e., implied malice murder of the second degree. (AOB 103-125.) Appellant further contended that because substantial evidence supported such an instruction, and because the court's error prevented the jury from considering a theory that would have resulted in a lesser degree of homicide, the court's error violated appellant's Fifth and Fourteenth Amendment right to due process of law and his Eighth Amendment right to a reliable determination of guilt and penalty.

B. APPELLANT'S CONSTITUTIONAL CLAIMS WERE NOT WAIVED BY A FAILURE TO OBJECT OR ASSERT THEM

Respondent contends appellant has forfeited his constitutional claims. (RB 147, 149-150.) This contention lacks merit.

Where, as here, a defendant's constitutional claim is based on the same facts underlying the federal claim and requires a legal analysis similar to that required by the federal claim it will not be forfeited. (*People v. Lewis* (2008) 43 Cal.4th 415, 490.) Here, appellant's state and federal claims are based on the same facts – the trial court's failure to give instructions called for by the evidence – and requires a similar legal analysis. Accordingly, the federal claim is not forfeited.

Respondent relies on *People v. Lewis* (2008) 43 Cal.4th 415, 490 fn. 19; *People v. Wilson* (2008) 43 Cal.4th 1, 13-14 fn.3; *People v. Thornton* (2007) 41 Cal.4th 391, 462-463; and *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1008 fn.8.) Appellant has discussed why respondent's reliance on these cases is misplaced in Argument X, which he incorporates here by reference, and to which discussion he respectfully refers the reader.

In addition, these cases do not support respondent's contention because the cases present circumstances in which this Court has considered and ruled upon a defendant's federal claims when the facts are undisputed and the legal analysis similar but the appellate claim has the additional legal consequence of violating the Constitution. (*People v. Boyer* (2006) 38 Cal.4th 412, 441 fn. 17.)

Recently, in *People v. Wilson* (2008) 43 Cal.4th 1, this Court discussed a defendant's failure to raise at the trial level some or all of the constitutional arguments made on appeal by reiterating language it originally used in footnote 17 of *People v. Boyer, supra*:

> As to this and nearly every claim on appeal, defendant asserts the alleged error violated his constitutional rights. At trial, he failed to raise some or all of the constitutional arguments he now advances. "In each instance, unless otherwise

> indicated, it appears that either (1) the appellate claim is of a kind (e.g., failure to instruct sua sponte; erroneous instruction affecting defendant's substantial rights) that required no trial court action by the defendant to preserve it, or (2) the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional legal consequence of violating the Constitution. To that extent, defendant's new constitutional arguments are not forfeited on appeal. [Citations.]
>
> In the latter instance, of course, rejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional "gloss" as well. No separate constitutional discussion is required in such cases, and we therefore provide none. (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.) (*People v. Wilson*, *supra*, 43 Cal. 4th at p. 13 fn.3.)

The constitutional violations appellant raises in the context of this issue neither rely upon different facts nor do they invoke different legal standards from those presented below. They merely assert added constitutional consequences and for that reason appellant's constitutional claims are not forfeited.

This Court explained in *People v. Partida* (2005) 37 Cal.4th 428, that the requirement that an issue be preserved for review by a specific objection is based on Evidence Code section 353. That section provides that a judgment shall not be reversed unless there is a timely objection stating the specific ground of the objection. The purpose of this rule is to allow the proponent of the evidence a chance to address any flaws in the evidence and to allow the trial court the opportunity to consider excluding the evidence or

limiting its admission to avoid possible prejudice. (*Id.*, at pp. 433-434.) Additionally, as explained, a "contrary rule would deprive the People of the opportunity to cure the defect at trial and would 'permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal.'" (*Id.*, at p. 434; citations omitted.)

However, the rationale on which Evidence Code section 353 is based is not applicable to issues involving a trial court's sua sponte duty.

A trial court has a sua sponte duty to give correct instructions on the basic principles of the law applicable to the case, including instructions on lesser included offenses, independent of any request or objection of the defendant. (*People v. Williams* (2009) 170 Cal.App.4th 587, 638; *People v. Anderson* (2006) 141 Cal.App.4th 430, 442.) Because this duty does not depend on any action by the defendant, it therefore follows that a defendant's failure to make a specific objection does not result in a waiver of an instructional issue on appeal.

Furthermore, requiring a specific objection to preserve an instructional issue for appeal would result in a de facto abrogation of Penal Code section 1259, which provides that challenges to jury instructions affecting substantial rights are not waived even if no objection is made at trial.

For these reasons, appellant has not waived his Fifth, Sixth, Eighth, or Fourteenth Amendment claims regarding this issue.

C. APPELLANT'S INSTRUCTIONAL CLAIM IS NOT BARRED BY THE DOCTRINE OF INVITED ERROR

Respondent claims appellant's claim is barred by the doctrine of invited error. (RB 150-151.)

This Court explained the substance and application of the doctrine of invited error in *People v. Wickersham* (1982) 32 Cal.3d 307, as follows:

> The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal. However, because the trial court is charged with instructing the jury correctly, it must be clear from the record that defense counsel made an express objection to the relevant instructions. In addition, because important rights of the accused are at stake, it also must be clear that counsel acted for tactical reasons and not out of ignorance or mistake. (*Id.*, at p. 330.)

In his opening brief, appellant reproduced colloquy between court and counsel that illustrated (1) some confusion among the trial court and the parties concerning the nature of express and implied malice murder of the second degree and (2) the presence of substantial evidence, in the view of the court and the prosecutor, warranting a sua sponte instruction on implied malice murder. (AOB 111 [13RT 3071:11-28]; 112 [13RT 3073:15-28 – 3074:1-5]; 13RT 3094:18-23].)

Respondent relies on the first of these reproduced colloquies and ignores the rest of the relevant discussion to construct an argument that the doctrine of invited error applies to bar appellant's claim. (RB 146-147, 150-

151.) Respondent contends that defense counsel "arguably" invited the trial court to omit the instruction for implied malice murder of the second degree (CALJIC No. 8.31) because of a tactical preference for unpremeditated express malice murder of the second degree (CALJIC No. 8.30). (RB 150-151.) Respondent does not identify what the defense might possibly have gained by such a purported tactical choice.

A reasonable reading of the discussion among court and counsel on the subject of an instruction for implied malice murder does not support respondent's constructed conclusion that the defense encouraged the court to omit an instruction on implied malice murder of the second degree. (RB 151.)

This Court found the doctrine of invited error barred a defendant's subsequent instructional complaint under circumstances far different from those present in respondent's strained construct. In *People v. Gallego* (1990) 52 Cal.3d 115, the defendant requested that CALJIC No. 8.84.1 be modified to allow the jury to consider in sentencing "[w]hether or not execution as contrasted with life without possibility of parole will deter future acts of murder." The trial court gave the requested instruction. The defendant was convicted and, on appeal, complained about the instruction. This Court explained that the claim was barred by the invited error doctrine because the defendant, through counsel, made a tactical decision to present expert evidence on deterrence and to request the instruction. (*Id.*, at p. 202.)

Respondent is unable to identify an equivalent clarity of purpose in his constructed view of defense counsel's "tactic" in supposedly inviting the court to omit an instruction for implied malice murder of the second degree.

> Although the sua sponte duty to instruct on lesser included offenses exists even when the defendant objects to the instruction [], the doctrine of invited error precludes the defendant from complaining on appeal of the court's failure to give the instruction if it clearly appears on the record that the defendant objected for tactical reasons and not out of ignorance or mistake. (5 Witkin, Cal. Crim. Law 3d (2000), Crim Trial, § 612, p. 873.)

Appellant never asked the court to instruct on express malice second degree murder and not on implied malice second degree murder. There is nothing in appellant's conduct of his defense that reveals a tactical decision to forego reliance on a theory of implied malice second degree murder.

For the foregoing reasons, appellant respectfully submits the doctrine of invited error does not apply to bar his claim that the trial court failed in its sua sponte obligation to instruct on implied malice murder of the second degree.

D. SUBSTANTIAL EVIDENCE WARRANTED THE GIVING OF AN INSTRUCTION ON IMPLIED MALICE MURDER

In the opening brief, appellant described the substantial evidence warranting a sua sponte instruction on implied malice murder. (See, e.g., AOB 104-106, 108-110, 113-114, 116.)

Respondent claims the evidence did not require the giving of the instruction. (RB 151-154.) Once again, the Attorney General relies heavily on the suspect testimony of Ernie Vasquez in arguing that substantial evidence supported a killing in express, but not implied, malice. In respondent's view,

the jury had a choice between accepting appellant's alibi defense or convicting him of premeditated express malice murder based on his purported statements to Vasquez and other prosecution evidence regarding the use of armor-piercing bullets and a gang purpose for the shooting. (RB 151-153.)

The gist of respondent's argument is that the giving of an instruction on a lesser-included offense is dependent on the relative strengths of the evidence put forth by the defense and the prosecution. But this is not the legal standard, as appellant's discussion on The Duty to Instruct on Lesser-Included Offenses at Section C of Argument III of the opening brief shows. (AOB 106-107.)

This Court has explained that "a defendant has a constitutional right to have the jury determine every material issue presented by the evidence and [], whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present, the failure to instruct on a lesser included offense, even in the absence of a request, constitutes a denial of that right." (*People v. Benavides* (2004) 35 Cal.4th 69, 101.) Under this standard, the trial court's sua sponte instructional obligation is linked to the weaknesses in the prosecution's case and not, as respondent indicates, upon an evaluation of the relative strengths of the prosecution and defense case.

In this case, in discussions with counsel about voluntary manslaughter instructions, the trial court laid out the very evidence that would have supported the giving of an implied malice murder instruction.

The Court: Here's the deal.

> Let's say, for instance, that the jury does not believe your theory that the reason for the murder is, or for the killing I should say, is because of their passion. The culprit [sic] alleged passion against African Americans. They don't believe

> that portion. Then they're [sic] unlawful killing with a drive-by shooting, okay, then arguably could be just a random act, kind of like driving by with wreckless [sic] disregard and even something lesser in order to kill two human beings. Assuming that is the case.
>
> And if there is sufficient information – if we don't believe the hate crime theory, okay, then there is a possibility that does not mean – if the jury does not believe the hate crime theory, and does not believe that there was commission of malice aforethought, and they were driving by spraying at random, with a less than depraved heart, kind of like a wreckless [sic] disregard for safety of humans, then I would say that perhaps that would be without malice aforethought. (13RT 3073:15-28 – 3074:1-5.)

Later in the discussion regarding instructions, the prosecutor revisited the question of whether voluntary manslaughter instructions were warranted in this case and there affirmed the existence of implied malice in the evidence in his case. The prosecutor said:

> If the court was saying these guys got out of the car or if they shot a Norinco Mac-90 within 15 feet of these two individuals with armor piercing bullets, with four rounds that [sic], i[t] was obviously an intentional act dangerous to human life, with conscious disregard for human life. (13RT 3094:18-23.)

Appellant reproduced both of these segments of colloquy in the opening brief and observed that the crime described by the court and the prosecutor was second degree murder committed with implied malice, *viz.*, the doing of an intentional act the natural consequences of which are dangerous to

human life performed with knowledge of the danger to, and with conscious disregard for, human life.

In arguing the absence of evidence warranting the instruction, respondent does not say why an implied malice murder instruction is not warranted by the scenario described by the court and the prosecutor. (RB 151-154.)

Here, the trial court observed that if the jury rejected the prosecution's theory that the murder was motivated for racial reasons, which in fact the jury did,[8] the resulting offense would arguably be a random shooting akin to a "driving by with []reckless disregard and even something lesser," which the court incorrectly described as an act committed "without malice aforethought." (13RT 3073-3074.) The crime described by the court was, of course, second degree murder committed with implied malice, *viz.*, the doing of an intentional act the natural consequences of which are dangerous to human life performed with knowledge of the danger to, and with conscious disregard for, human life.

When there is substantial evidence to support a finding a killing was unpremeditated and without express malice, the trial court must instruct on the lesser-included offense of second degree murder. (*People v. Benavides*, *supra*, 35 Cal.4th at p. 102.) Under the factual scenario described by the trial court and the prosecutor, the trial court was obligated to instruct appellant's jury on the crime of implied malice murder of the second degree.

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[8]. Appellant's jury found the hate crime special circumstance and the related hate crime enhancement to be *not* true. (38CT 10927, 10928.)

E. PREJUDICE

Respondent contends error, if any, was harmless. (RB 154-157.) Respondent argues that the jury's conviction of "deliberate" first degree murder and its rejection of unpremeditated murder of the second degree render the omission of the implied malice murder instruction harmless error. (RB 155.)

The jury returned verdicts convicting appellant of two counts of "willful, deliberate, premeditated murder." (38CT 10925, 10926.) In the opening brief, appellant explained that although it may first appear that these verdicts necessarily mean the jury found appellant acted with express malice, i.e., with an intent to kill, closer review shows the verdicts were necessarily produced by limitations in the verdict forms provided to the jury. (AOB 120-125.)

In addition to willful, deliberate, and premeditated murder of the first degree, the trial court instructed the jury on first degree murder perpetrated by use of armor-piercing ammunition, which does not require an intent to kill, and on first degree murder committed by discharging a firearm from a motor vehicle with the specific intent to inflict death. And yet the first degree murder verdict forms in the record show the jury was only provided with guilty/not guilty verdict forms for willful, deliberate, and premeditated murder. (38CT 10925, 10926, 10927, 10939, 10945-10957.) Under this circumstance, the premeditated murder language in the verdict form cannot be dispositive of the issue of whether appellant acted with express malice, i.e., with the intent to kill. It also follows that the verdict of premeditated murder doesn't render the omission of instructions on the implied malice form of second degree murder harmless error. (*Cf. People v. Coddington* (2000) 23

Cal.4th 529, 591-594; overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046.)

Respondent does not address this argument. Nor does respondent address appellant's related arguments that a jury finding of intent to kill may not be gleaned from the multiple murder special circumstance finding because that particular finding does not require an intent to kill and because the incorrect version of CALJIC No. 8.80.1 given to appellant's jury allowed the jury to find the special circumstance without finding intent to kill. (AOB 121-123.)

Instead, respondent simply states, without explaining how or why, that "the jury could easily find appellants guilty of express malice first degree murder" based on either CALJIC Nos. 8.20, 8.25.1, or 8.22. (RB 155.) A review of the instructions shows that CALJIC No. 8.22 (murder by armor-piercing ammunition) did not require the jury to find an intent to kill, i.e., express malice. (37CT 10768.) And, so, respondent's representation is not accurate.

Appellant also explained in the opening brief that a properly given instruction on murder committed with implied malice, in conjunction with the aiding and abetting instructions[9] given the jury, would have focused the jury's analysis on the question of appellant's mental state, i.e., whether he, with the evidence showing that if he was there he likely functioned as the lookout within the car, had the requisite intent to kill with premeditation and deliberation. (AOB 117-119.)

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[9]. The jury was instructed with CALJIC Nos. 3.00 and 3.01. (37CT 10755; 14RT 3178.)

"All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed." (Pen. Code, § 31; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1122-1123.) Accordingly, a person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts. The aider and abettor's guilt for the intended crime is not entirely vicarious, but "is based on a combination of the direct perpetrator's acts and the aider and abettor's *own* acts and *own* mental state." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.)

Thus, although in this case the prosecution did not distinguish between the acts committed by each principal, it was required to prove each defendant had either the requisite mens rea of the actual killer or of the aider and abettor. Here, the prosecution lacked evidence as to the identity of the shooter and the roles of the defendants. Consequently, it lacked direct evidence regarding the mens rea of the shooter and of the aider and abettor. It could be equally inferred from the prosecution's evidence, for example, that the shooter shot with express malice, i.e., with the intent to kill, as it may be inferred the shooter shot with implied malice, e.g., with the intent to inflict great bodily injury.

In fact, amongst the panoply of instructions relating to statutory and express malice murder, the court also instructed on a special finding pertaining to second degree murder committed by an intentional shooting from a motor vehicle with the intent to inflict great bodily injury. An intentional shooting from a motor vehicle at persons outside the vehicle with the intent to inflict great bodily injury is manifestly the doing of an intentional act the natural consequences of which are dangerous to human life performed with

knowledge of the danger to, and with conscious disregard for, human life. A killing achieved through such means is, of course, implied malice murder of the second degree. In this circumstance, the trial court's failure to instruct on the lesser included offense of second degree murder with implied malice was not harmless beyond a reasonable doubt.

Respondent counters that appellant's contention the evidence showed there was one shooter is speculation and not substantial evidence of implied malice as to the non-shooter. (RB 151.) Appellant has argued in the course of the preceding arguments that substantial evidence supports a factual finding there was but one shooter and so will not repeat his recital of the evidence here. For purposes of this discussion as to whether an implied malice murder instruction was required to be made, an election between appellant's one-shooter and respondent's two-shooter theory need not be made. It is only necessary to find there was substantial evidence to support a one-shooter finding to argue that the implied malice murder instruction should have been given. And, to argue further, that the failure to give the instruction was prejudicial because it removed from the jury's consideration the question whether the aider and abettor acted with the requisite mental state. (AOB 113-114.)

For these reasons, appellant respectfully submits the failure to instruct on implied malice murder was prejudicial because it may not be found beyond a reasonable doubt that the instructional omission and its effect on the jury's consideration of the aider and abettor's mental state did not contribute to the verdict when the effect of the omission is considered with appellant's other contentions regarding the effects of incorrect instructions and verdict forms on the blurring of the mental state requirements for the shooter and the

non-shooter. (*Chapman v. California* (1967) 386 U.S. 18, 26.) Moreover, the error was prejudicial even under the more restrictive test of *People v. Watson* (1956) 46 Cal.2d 818, 836, because it is reasonably probably that a result more favorable to appellant would have occurred had the jury been properly instructed and alerted to the implied malice in the context of differing mens rea requirements for the shooter and non-shooter in light of evidence that if he was present he was the lookout seated in the rear seat.

IV.

THE COURT VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS WHEN IT OMITTED ESSENTIAL ELEMENTS FROM THE GANG ENHANCEMENT INSTRUCTION. ALTERNATIVELY, APPELLANT WAS DENIED DUE PROCESS OF LAW BECAUSE HE DID NOT RECEIVE NOTICE OF THE CHARGES AGAINST HIM. THE ENHANCEMENT MUST THEREFORE BE REVERSED

A. INTRODUCTION

The jury found that appellant had committed the murders for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)) in sentence enhancements attached to counts 1 and 2.

In the opening brief, appellant contended these enhancements must be reversed because the trial court mistakenly instructed the jury on the substantive offense of participation in a criminal street gang rather than on the charged sentence enhancement punishing conduct in intentionally committing crimes for a gang purpose.

Appellant contended the instructional error violated his right to due process under the Fifth and Fourteenth Amendments and to notice and jury trial guarantees under the Sixth Amendment. (AOB 127-134.)

Respondent acknowledges that the trial court instructed on the substantive offense rather than on the enhancement, but maintains the incorrect instruction "adequately" instructed the jury (RB 168-172). Alternatively, respondent contends evidence of a gang purpose was so overwhelming any instructional error was harmless (RB 172-174).

Respondent also argues appellant's federal constitutional claims are barred by his failure to assert them below (RB 163) and further contends appellant suffered no further prejudice as a result of the court's misinstruction (RB 175).

B. THE JURY WAS NOT "ADEQUATELY" INSTRUCTED

Instead of instructing the jury on the gang enhancement (Pen. Code, § 186.22, subd. (b)(1)), the trial court mistakenly instructed on the substantive offense of participation in a criminal street gang (CALJIC No. 6.50, modified).[10]

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[10] The court instructed as follows:

[Defendant is accused in Counts 1 and 2 of having violated section 186.22, subdivision (b), of the Penal Code, a crime.]

Every person who actively participates in any criminal street gang with knowledge that the members are engaging in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, is guilty of a violation of Penal Code section 186.22, subdivision (b), a crime.

"Pattern of criminal gang activity" means the [commission of,] [or] [attempted commission of,] [or] [solicitation of] [sustained juvenile petition for,] [or] [conviction of] two or more of the following crimes, namely, murder and assault with a deadly weapon, provided at least one of those crimes occurred after September 26, 1988 and the last of those crimes occurred within three years after a prior offense, and the crimes are committed on separate occasions, or by two or more persons.

"Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, (1) having as one of its primary activities the commission of one or more of the following criminal acts, murder and assault with a deadly weapon, (2) having a common name or common identifying sign or symbol, and (3) whose

As appellant explained in the opening brief, this instruction allowed the jury to find the enhancement to be true without finding the essential elements of the enhancement – *viz.*, that (1) the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang; and (2) the crime was committed with the specific intent to promote, further, or assist in any criminal conduct by gang members. Instead, the jury was able to find the enhancement allegation to be true merely if it found appellant actively participated in a street gang and aided and abetted the commission of a murder or assault with a deadly weapon. (AOB 131.)

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members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

Active participation means that the person (1) must have a current relationship with the criminal street gang that is more than in name only, passive, inactive or purely technical, and (2) must devote all or a substantial amount of his time or efforts to the criminal street gang.

Felonious criminal conduct includes murder and assault with a deadly weapon.

In order to prove this crime, each of the following elements must be proved:

1 A person actively participated in a criminal street gang;

2 The members of that gang engaged in or have engaged in a pattern of criminal gang activity;

3 That person knew that the gang members engaged in or have engaged in a pattern of criminal gang activity; and

4 That person either directly and actively committed or aided and abetted [another] [other] member[s] of that gang in committing the crime[s] of murder and assault with a deadly weapon (CALJIC No. 6.50; 37CT 10761-10762; 14RT 3181-3183; AOB 128.)

Respondent agrees the trial court gave the wrong instruction (RB 158-162), but contends the given instruction was "adequate" (RB 168-172). In doing so, respondent ignores the well-settled recognition on the part of California courts that the elements of the substantive offense and the sentence enhancement are distinct. The substantive offense, for example, requires active and current participation in a criminal street gang, while the sentence enhancement does not. (See, e.g., *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1402; *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1332; *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207.) The sentence enhancement requires that the jury find beyond a reasonable doubt that the crime was committed for a gang purpose with the specific intent to promote criminal conduct by gang members. (Pen. Code, § 186.22, subd. (b)(1).) The instruction for the substantive offense given to appellant's jury required no equivalent finding.

Respondent nevertheless argues that specific *definitions* within the given instruction combined with other instructions given to the jury provided adequate instruction on the sentence enhancement. (RB 168-172.) In so contending, respondent does not stop to explain why the reasonable juror would choose to abandon the instruction's clear directive regarding the *elements* it must find in order to return a finding[11] and apply instead the

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[11] The jury was instructed that it had to find each of the following elements in order to return a verdict:

1. A person actively participated in a criminal street gang;

2. The members of that gang engaged in or have engaged in a pattern of criminal gang activity;

complex and strained construction respondent urges this Court to accept as an adequate instruction.

Thus, for example, respondent asks this Court to deem the specific intent element of the enhancement met in this fashion. Respondent takes the word "willfully" from paragraph two of the instruction, acknowledges it "usually defines a general criminal intent," but nevertheless contends that a reasonable juror who reads "willfully" in combination with the definition of "active participation"[12] in paragraph five of the instruction will realize that "'willfully' meant an intent to do a further act or achieve a future consequence beyond the charged murder, i.e., specific intent." (RB 168.)

Alternatively, respondent asserts the reasonable juror would conclude that in order to return a true finding he or she had to find the defendant committed the crime with the specific intent to promote criminal conduct by gang members (1) by taking the aiding and abetting requirement of the given instruction; (2) by considering the instructions as a whole and each in light of all the others under CALJIC No. 1.01; and (3) by extracting from

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3. That person knew that the gang members engaged in or have engaged in a pattern of criminal gang activity; and

4. That person either directly and actively committed or aided and abetted [another] [other] member[s] of that gang in committing the crime[s] of murder and assault with a deadly weapon (CALJIC No. 6.50; 37CT 10762; 14RT 3183.)

[12] The jury was instructed: "Active participation means that the person (1) must have a current relationship with the criminal street gang that is more than in name only, passive, inactive, or purely technical and (2) must devote all or part of his time or efforts to the criminal street gang." (37CT 10761-10762; 14RT 3182.)

the language of CALJIC No. 3.01 that the mental state required for liability as an aider and abettor is specific intent. (See RB 168-169.)

Viewed pragmatically, it does not seem very likely that a reasonable juror would parse the given instruction in the manner suggested by respondent because the instruction quite clearly said something else. Paragraph two of the instruction, for example, said, in relevant part, "Every person who actively participates in any criminal street gang with the [requisite] knowledge . . . and who *willfully* promotes . . . any felonious criminal conduct by members of that gang, is guilty of . . . a crime." It is entirely implausible to conclude that a reasonable juror would parse that sentence in a manner that would lead, as respondent suggests, to the paragraph defining "active participation" so as to read the two paragraphs together to conclude that "willfully" really meant "specific intent."

Respondent's next contention that the jury was adequately instructed on benefit, direction, or association is equally strained. Respondent asks this Court to find the jury knew that in order to return a true finding it had to first find that appellant committed the charged crimes for the benefit of, at the direction of, or in association with the gang through a synthesized reading of CALJIC Nos. 1.01, 2.90, 6.50, and 3.01, and because the prosecutor told the jury he had the burden of proving appellants committed the murders to benefit or promote the gang. (RB 170-171.)

According to respondent's thinking, a reasonable jury would know from the definition of "active participation" in CALJIC No. 6.50 (must have current relationship with gang and must devote substantial time to gang), from the reasonable doubt instruction (CALJIC No. 2.90), and from the instruction to consider the instructions as a whole and each in light of all the

others (CALJIC No. 1.01) that it had to find beyond a reasonable doubt that appellant committed the murder in association with a gang.

But, nothing in the instruction given to appellant's jury informed the jury of the missing elements and the necessity of finding the missing elements. For example, nothing in the instruction given the jury informed the jury it could not return a true finding for the enhancement unless it first found appellant committed the crime for a gang purpose, as opposed to appellant's own purpose. Nothing in the instruction told the jury it could not return a true finding unless it first found appellant committed the charged crimes with the specific intent to promote, further or assist in criminal conduct by gang members. There is no apparent reason why a jury would apply other jury instructions concerning the specific intent to do other acts to the proof requirements for this sentence enhancement. And, the Attorney General offers no reasons why a jury would do so. CALJIC No. 3.01, for example, informed the jury that in order to find a defendant liable as an aider and abettor, it had to first find the defendant had the required intent to commit the crime. But the intent to commit a crime is not the equivalent of committing a crime for a gang purpose with the intent of promoting criminal conduct by gang members. In short, respondent's list of alternative instructions did not adequately inform the jury that it was required to find the omitted elements of the gang purpose sentence enhancement instruction.

In addition, in urging this construction, respondent fails to deal with why the reasonable juror would refuse to comply with that aspect of CALJIC No. 6.50 that states: "In order to prove this crime, each of the following elements must be proved:" followed by four itemized elements

pertaining to the substantive crime that fail to prove up the required findings for the enhancement.

Moreover, respondent also asks this Court to rely on aspects of the prosecutor's argument to the jury to find the jury adequately instructed on the required specific intent and gang benefit, direction, and association findings of the enhancement (RB 169, 171). In doing, so, respondent offers no reason why the jury would disobey the court's directive, "You must accept and follow the law as I state it to you, regardless of whether you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions." (CALJIC No. 1.00; 37CT 10709; 14RT 3154.)

Furthermore, it is well established that arguments of counsel cannot replace or supersede instructions from the trial court. (*Carter v. Kentucky* (1981) 450 U.S. 288, 304; see *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 586 (Arabian, J., concurring and dissenting: "Counsel's argument was merely that – argument – unless and until a ratifying instruction from the trial court dignified it with the force of law"); *People v. Mathews* (1994) 25 Cal.App.4th 89, 99 – "[I]nstruction by the trial court would weigh more than a thousand words from the most eloquent defense counsel.")

Therefore, the prosecutor's arguments are not an adequate substitution for correct jury instructions when it comes to determining what elements the jury thought it had to find in order to find the enhancement true.

It is entirely unreasonable to expect that a reasonable juror would take part in shopping through the instructions, as respondent has, in order to find a substitute for a very clear and direct instruction.

In sum, for the reasons stated herein, the jury was neither correctly nor adequately instructed on the gang enhancement.

C. *CHAPMAN'S* HARMLESS-ERROR STANDARD IS THE GOVERNING STANDARD OF REVIEW

Appellant contended in the opening brief that the governing standard of review for the challenged instructional error is the harmless-error standard announced in *Chapman v. California* (1967) 386 U.S. 18. (AOB 132-133.) *Chapman* analysis asks whether the prosecution has "prove[d] beyond a reasonable doubt that the error . . . did not contribute to" the jury's verdict. (*Id.*, at p. 24.)

Respondent contends the harmless-error standard announced in *People v. Watson* (1956) 46 Cal.2d 818, 836, is the appropriate standard here. *Watson* asks whether without the error it is "reasonably probable" the trier of fact would have reached a result more favorable to the defendant. (*Id.*, at p. 836.)

Respondent relies on *People v. Sengpadychith* (2001) 26 Cal.4th 316. (RB 158-159, 172-174.) In *Sengpadychith*, this Court concluded that instructional error pertaining to a gang enhancement provision attached to an indeterminate term does not result in federal constitutional error within the

meaning of *Apprendi v. New Jersey* (2000) 530 U.S. 466.[13] Rather, *Sengpadychith* found the instructional error to be a matter of state law error subject to the *Watson* test. (*People v. Sengpadychith*, *supra*, 26 Cal.4th at pp. 320-321.)

Respondent thus contends that because appellant was sentenced to an indeterminate term, the *Watson* standard is the governing standard of review. (RB 158-159.)

But, appellant did not predicate his claim that *Chapman* was the appropriate governing standard for this instructional error on *Apprendi* grounds. Instead, appellant referenced *Mitchell v. Esparza* (2003) 540 U.S. 12, 16, and the cases cited therein pertaining to the trial court's failure to instruct a jury on all of the statutory elements of an offense. (See AOB 132-133.) The U.S. Supreme Court has concluded in a series of cases that various forms of instructional error are trial errors subject to *Chapman* harmless-error review. (See, e.g., *Neder v. United States* (1999) 527 U.S. 1 (omission of an element of an offense); *California v. Roy* (1996) 519 U.S. 2 (erroneous aider and abettor instruction); *Pope v. Illinois* (1987) 481 U.S. 497 (misstatement of an element of an offense); *Rose v. Clark* (1986) 478 U.S. 570 (erroneous burden-shifting as to an element of an offense).

Recently, on December 2, 2008, the U.S. Supreme Court held that harmless-error review was the governing standard in a federal habeas case in which the defendant was convicted by a jury that had been instructed on

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[13] In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the U.S. Supreme Court held as a matter of federal constitutional law: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.*, at p. 490.)

alternative theories of guilt, one of which was invalid.[14] (*Hedgpeth v. Pulido* (2008) ___ U.S. ___; 129 S.Ct. 530; 172 L.Ed.2d 388 (*Pulido*).)

Appellant has explained above and in the opening brief that his jury was instructed with a legally flawed instruction on the gang benefit enhancement. The court instructed the jury it had to find the elements of the substantive offense of gang participation instead of the elements of the gang benefit enhancement. The legal flaw was that the instruction was legally invalid for the enhancement. In *Pulido,* the court instructed the jury it could find the defendant guilty of felony murder if he formed the intent to aid and abet the underlying felony after the murder, a legally invalid theory. A legally flawed instruction is akin to instructing the jury on a legally invalid theory, such as occurred in *Pulido.* Just as harmless-error review was appropriate in *Pulido, Neder, Roy, Pope,* and *Rose, supra,* harmless-error review is appropriate in appellant's case. Nothing in those cases suggests that a different harmless-error analysis should govern here. (See *Pulido, supra,* 129 S.Ct at p. 532.)

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[14] *Pulido* observed that *Neder* had made clear "that harmless-error analysis applies to instructional errors so long as the error at issue does not categorically ' " 'vitiat[e] *all* the jury's findings.'"'" (*Hedgpeth v. Pulido, supra,* 129 S.Ct. at p. 532 [quoting *Neder v. United States, supra,* 527 U.S. at p. 11; in turn, quoting *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281 (erroneous reasonable doubt instructions constitute structural error)].) Here, notably, the gang benefit instructional error vitiates the jury's finding on the charged personal firearm use (Pen. Code, § 12022.53, subds. (d), (e)(1)). (AOB 133-134.)

D. THE INSTRUCTIONAL ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT

Appellant repeats the familiar language that *Chapman* analysis asks whether the prosecution has "prove[d] beyond a reasonable doubt that the error . . . did not contribute to" the jury's verdict. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Respondent contends overwhelming evidence of a gang purpose rendered any instructional error harmless under either the standard of *Watson* or of *Chapman*. (RB 172.)

In the opening brief, appellant made the following points with regard to the effect of the instructional error. (1) Appellant neither conceded nor admitted the omitted elements of the sentence enhancement, so the instructional error may not be found harmless on that basis. (*Carella v. California*, *supra*, 491 U.S. at p. 271 (conc. opn. of Scalia, J.).) (2) The jury was not called upon to find the omitted elements as predicate facts in theresolution of appellant's guilt of the substantive offenses. (*Ibid.*) (3) The jury refused to find the hate crime special circumstance allegations to be true and thus rejected the prosecution's theory that appellant killed for reasons related to his gang membership. The prosecution's theory was that appellant was a WSW gang member motivated by the culture of his particular gang to shoot and kill Robinson and Fuller because they were African-Americans. (4) Implicit in the jury's rejection of the hate crime special circumstance allegations and by extension the prosecution's theory is the jury's rejection of the contention that Robinson and Fuller were murdered for gang-related reasons, the gravamen of the sentence enhancement in issue here. (5) That suggests in turn that a properly instructed jury would not have found the sentence enhancement to be true. (6) Finally, no other properly given

instruction required that the jury resolve the factual questions in issue in the omitted instruction. Thus, it may not be said that the jury's verdict on other points resolved the factual issues necessary to a finding of the sentence enhancement. (*California v. Roy* (1997) 519 U.S. 2.)

In its brief, respondent fails to reply to a single one of these points and thereby essentially concedes their merit.

Instead, respondent simply recites evidence pertaining to gang customs and culture and the defendants' gang membership and to Ernie Vasquez' improbably testimony that both appellant and Satele individually divulged their guilt to him during his single jailhouse contact with each of them. (RB 172-174.)

Under the circumstances present here, the instructional error was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Moreover, the jury's rejection of the prosecution's motive theory – that appellant and Satele shot and killed two African-Americans because of their race for gang purposes, as appellant has discussed above and in the opening brief – demonstrates that but for the instructional error it is "reasonably probable" the trier of fact would have reached a result more favorable to the defendant. (*People v. Watson*, *supra*, 46 Cal.2d 818, 836.)

For these reasons, appellant respectfully submits, reversal of the gang benefit enhancement is warranted.

E. THE CONSEQUENCES OF THE INSTRUCTIONAL ERROR REACHED BEYOND THE GANG BENEFIT ENHANCEMENT

1. Appellant Did Not Forfeit His Fifth, Sixth, Eighth, and Fourteenth Amendment Claims

Appellant contended the instructional error complained of here violated his Fifth and Fourteenth Amendment right to due process of law and Sixth Amendment notice and jury trial guarantees that any fact, other than a prior conviction, that increases the maximum penalty for a crime must be charged in a pleading, submitted to a jury, and proven beyond a reasonable doubt. (*Blakely v. Washington* (2004) 542 U.S. 296; *Apprendi v. New Jersey* (2000) 530 U.S. 466; *In re Winship* (1970) 397 U.S. 358, 364.) Because a sentence enhancement requires findings of fact that increase the maximum penalty for a crime, the United States Supreme Court has held that this rule applies specifically to sentence enhancement allegations. (*Blakely v. Washington*, *supra*, 542 U.S. at pp. 301-302; *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 476, 490.) (AOB 127-129, 135-138.)

Respondent argues these contentions lack merit. (RB 163-165.)

2. The Pleadings Failed to Notify Appellant He Would Have to Defend against the Substantive Offense of Participation in a Criminal Street Gang

Appellant contended in the opening brief that he was deprived of his rights under the Fifth, Sixth, and Fourteenth Amendments because he was found under the instructions given to have committed the substantive offense of participation in a criminal street gang. Because the pleadings failed to give him notice he would have to defend against the substantive offense, appellant

argued the instructional error constituted structural error warranting reversal of the enhancement. (AOB 135-138; *Jackson v. Virginia* (1979) 443 U.S. 307, 314; *Gautt v. Lewis* (9th Cir. 2007) 489 F.3d 993.)

Respondent does not engage appellant's contention that as a result of the gang participation instructions given his jury he was found liable for an offense of which he was never given notice. Instead, respondent merely points out that the pleadings alleged section 186.22, subdivision (b)(1), enhancements and the jury returned true findings to the same-numbered enhancements. (RB 163.)

Respondent never addresses the gist of appellant's contention that the instructions given his jury required that he defend against the substantive offense of gang participation. Because the pleadings failed to notify him of that charge, he was deprived of his rights under the Fifth, Sixth, and Fourteenth Amendments and reversal of the enhancement is warranted, as explained at pages 135-138 of the opening brief.

3. Appellant Did Not Forfeit His Constitutional Claims by Inaction in the Trial Court

Respondent contends that because appellant failed to assert his constitutional claims below he has waived them. (RB 163.)

However, the misinstruction in issue here is of the kind that requires no trial court action on the part of the defendant to preserve it. A failure to instruct sua sponte on the elements of a charge or an erroneous instruction affecting a defendant's substantial rights require no trial court action by the defendant to preserve it. In addition, no trial court action is

required by the defendant for preservation purposes when the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional legal consequence of violating the Constitution. (*People v. Boyer* (2006) 38 Cal.4th 412, 441 fn. 17; *People v. Wilson* (2008) 43 Cal.4th 1, 13-14 fn. 3; Penal Code, § 1259.)

Appellant pointed out in the opening brief that the Due Process Clause requires that a court must instruct the jury that the state bears the burden of proving each element of the crime beyond a reasonable doubt and that the court must state each of those elements to the jury. (*In re Winship* (1970) 397 U.S. 358, 363; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; *Carella v. California* (1989) 491 U.S. 263, 265) Omission of an element from an instruction is federal due process error and compels reversal unless the beneficiary of the error can show the error to have been harmless beyond a reasonable doubt. (*Ibid.*)

Similarly, to find the facts necessary for a sentence enhancement to be true beyond a reasonable doubt, the jury must be properly instructed on the elements of the enhancement. Thus, this Court has held that the trial court must instruct on general principles of law relevant to and governing the case, even without a request from the parties. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) This rule applies not only to the elements of a substantive offense, but also to the elements of an enhancement. (*People v. Winslow* (1995) 40 Cal.App.4th 680, 688.)

Furthermore, due process requires that the prosecution prove every element of the offense charged against a defendant. (*United States v.*

Gaudin (1995) 515 U.S. 506, 509-510.) In proving those charges, due process further prohibits instructions which omit an element of the crime. (*Evenchyk v. Stewart* (9th Cir. 2003) 340 F.3d 933-939.)

Respondent presents only a general claim of forfeiture and, although the very authority upon which respondent relies explicitly states no trial court action on defendant's part is required to preserve the claim because of the trial court's instructional obligations and the misinstruction's effect on appellant's substantial rights, respondent fails to respond to appellant's assertion his constitutional claims are cognizable on appeal as explained in the preceding paragraphs. (See RB 163 and, e.g., *People v. Wilson*, *supra*, 43 Cal.4th at pp. 13-14 fn.3, cited therein.)

Appellant did not forfeit his constitutional claims.

4. This Particular Instructional Error Directly Affected the Jury's Finding on the Charged Personal Firearm Use (Pen. Code, § 12022.53, subds. (d), (e)(1))

The information included sentence enhancements alleging that the murders were committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)) and that a principal discharged a firearm in committing the murder (Pen. Code, § 12022.53, subd. (d)). Penal Code section 12022.53, subdivision (d), adds a consecutive 25-years-to-life term if a person convicted of statutorily specified felonies intentionally and personally discharged a firearm and caused great bodily injury or death. Section 12022.53, subdivision (e)(1), imposes vicarious liability under this section on aiders and abettors who commit crimes when both this section and subdivision

(b) of section 186.22 are pled and proved. (*People v. Garcia* (2002) 28 Cal.4th 1166, 1171.)

In Argument I of the opening brief, appellant more fully explained that the trial court gave the jury the wrong instruction regarding the personal firearm use enhancement. As relevant here, that incorrect instruction included language that directed the jury to the gang enhancement instruction, to wit: "This allegation pursuant to Penal Code section 12022.53(d) applies to any person charged as a principal in the commission of an offense, when a violation of Penal Code sections 12022.53(d) and 186.22(b) are ple[]d and proved." (37CT 10788; 14RT 3200-3201; AOB 51-53, 80.)

The prosecutor made specific reference to the foregoing sentence within the personal firearm use enhancement instruction and told the jury that inasmuch as he had both pled and proven the truth of the gang enhancement allegation he was relieved under that aspect of the instruction of the burden of proving personal firearm use by a particular defendant. (14RT 3223.) As appellant explained in the opening brief, pertaining to the incorrect personal firearm use instruction, the prosecutor's statement and the instruction were both manifestly incorrect statements of the law. And, the misdirection inherent in both the prosecutor's argument and the court's instruction permitted the jury to return true findings on the personal firearm use enhancements in reliance upon the determination of the gang enhancement, which, as appellant has explained above, the jury made in reliance upon an incorrect instruction pertaining to the gang enhancement. (AOB 40-69.)

Respondent merely contends this claim fails because there was no instructional error and, if there was error, the error was harmless under *Watson*. (RB 175.)

As appellant has explained above, (1) respondent's argument the jury was adequately instructed is not supportable; and (2) the instructional error contributed to the verdict beyond a reasonable doubt under the governing standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

F. CONCLUSION

For the reasons set forth herein, appellant respectfully submits the Penal Code section 186.22, subdivision (b)(1), enhancement attached to counts 1 and 2 must be reversed. As well, because its proof was dependent on the section 186.22 gang benefit finding, the personal weapon use enhancements attached to counts 1 and 2 (Pen. Code, § 12022.53, subds. (d), (e)(1)) must also be reversed.

V.

THE TRIAL COURT INCORRECTLY INSTRUCTED THE JURY ON THE MENTAL STATE REQUIRED FOR ACCOMPLICE LIABILITY WHEN A SPECIAL CIRCUMSTANCE IS CHARGED. THE ERROR PERMITTED THE JURY TO FIND THE MULTIPLE MURDER SPECIAL CIRCUMSTANCE TO BE TRUE UNDER A THEORY THAT WAS NOT LEGALLY APPLICABLE TO THIS CASE IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND HIS SIXTH AMENDMENT RIGHT TO A JURY TRIAL

A. INTRODUCTION

In his opening brief, appellant explained that the jury found the multiple murder special circumstance to be true against him under an instruction that incorrectly stated the law regarding accomplice intent by allowing the jury to find the enhancement to be true for aiders and abettors without first finding the required intent to kill. (AOB 139-156.)

The error arose because the trial court failed to properly redact from the pattern instruction language applicable to post June 6, 1990, felony-based special circumstances, a theory of liability not pursued during appellant's trial. As a result, the incorrect instruction allowed the jury to find appellant liable for the special circumstance under an incorrect theory of law.

This error violated appellant's Fifth and Fourteenth Amendment rights to due process of law and his Sixth Amendment right to a jury trial. The error was not harmless beyond a reasonable doubt in this case in which the jury could have reasonably concluded, as in fact the prosecutor did, that

substantial evidence established there was but one actual killer; that appellant was *not* that actual killer; that appellant was in fact the aider and abettor.

In such a circumstance, under properly given instructions, the jury would have had to determine whether appellant aided and abetted with the intent to kill before finding the special circumstance true as to him. Instead, under the instruction it received, the jury was told that if it was unable to decide whether appellant was the actual killer or an aider and abettor (a likely happenstance given the prosecution's position on the state of the evidence), it could return a true finding if it found beyond a reasonable doubt that appellant aided and abetted with the intent to kill *or* if appellant was a major participant who aided and abetted the crime with reckless indifference to human life.

The instructional error concerned an element of the special circumstance and allowed the jury to find the special circumstance to be true on two theories, one of which was legally incorrect. The reliability of the verdict is undermined because it is impossible to determine from the verdict which theory the jury relied upon. Reversal of the special circumstance findings is required. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1121-1122, 1126-1129, applying *People v. Green* (1980) 27 Cal.3d 1, 62-74 [overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 239].)

B. RESPONDENT CONCEDES ERROR IN THE INSTRUCTION

Although the Attorney General fails to expressly acknowledge the trial court incorrectly instructed the jury regarding accomplice intent in the

context of special circumstances, respondent impliedly concedes the error by contending that any error in failing to redact CALJIC No. 8.80.1 was harmless. (RB 181-183.)

C. APPELLANT'S CLAIM IS NOT PROCEDURALLY BARRED

Respondent contends appellant's claim is procedurally barred by his failure to request that CALJIC No. 8.80.1 be appropriately redacted. (RB 177.)

This contention must fail because the law places no duty upon appellant to request such a redaction. Rather, as appellant explained in the opening brief, the instructional duty resided with the trial court. (AOB 149.)

In *People v. Jones* (2003) 30 Cal.4th 1084, this Court recognized that the trial court has a sua sponte duty to instruct the jury on the mental state required for accomplice liability when there is sufficient evidence to show that the defendant may have been an accomplice and not the actual killer, regardless of the prosecution's theory of the case. (*Id.*, at p. 1117.) If the evidence is such that the jury could convict the defendant as a principal or as an accomplice, and the defendant is charged with, as here, a special circumstance that does not require intent to kill by the principal, the jury must find intent to kill if they cannot agree that the defendant was the actual killer. (*Ibid.*, see also CALCRIM No. 702, "Bench Notes – Instructional Duty.")

The Attorney General does not explain why in the face of this instructional duty it would have this Court bar appellant's claim for failure to request a redaction below.

Respondent also contends that appellant's claim is barred by application of the invited error doctrine because the instruction, as given, was given at appellant's request. Respondent supports this contention with nothing more than a reference to the Reporter's Transcript (13RT 3045). (See RB 177.)

Respondent's citation is to the following colloquy among court and counsel over CALJIC No. 8.80.1

> THE COURT: [] 8.80.1.
>
> [COUNSEL FOR NUNEZ]: I got something missing here. That's not my next one.
>
> THE COURT: That's the special circumstances language, 8.80.1.
>
> [COUNSEL FOR SATELE]: That's – he didn't give us that one. Are you adding that one?
>
> [THE PROSECUTOR]: I gave you that one.
>
> [COUNSEL FOR SATELE]: The next one I have is 8.81.3.
>
> THE COURT: We have to have introductory language.
>
> [COUNSEL FOR SATELE]: I have that one listed.
>
> THE COURT: All right. [¶] It is a request by the defense?
>
> [COUNSEL FOR SATELE]: Right.
>
> THE COURT: Any objection?
>
> [COUNSEL FOR NUNEZ]: Do you have a copy of it.
>
> THE COURT: Mr. Millington [the prosecutor], you have none?
>
> [THE PROSECUTOR]: I have it in my set. No objection.
>
> [COUNSEL FOR NUNEZ]: You do? 8.80.1?
>
> THE COURT: Both People and Defense have it in their sets. I'm going to take it, there is no objection. It will be given.
>
> [COUNSEL FOR NUNEZ]: I just want to get a copy sometime. (13RT 3045:20-28 – 3046:1-14.)

Based on this colloquy, the Attorney General argues appellant requested CALJIC No. 8.80.1, failed to request the necessary redaction, and thus invited the court's giving of the erroneous instruction.

This Court explained the substance and application of the doctrine of invited error in *People v. Wickersham* (1982) 32 Cal.3d 307, as follows:

> The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal. However, because the trial court is charged with instructing the jury correctly, it must be clear from the record that defense counsel made an express objection to the relevant instructions. In addition, because important rights of the accused are at stake, it also must be clear that counsel acted for tactical reasons and not out of ignorance or mistake. (*Id.*, at p. 330.)

Appellant has noted that the Attorney General does not elaborate on what defense counsel said in the discussion on instructions that invoked application of the invited error doctrine. A review of the colloquy and *Wickersham*'s explication of the invited error doctrine reveal why the Attorney General is silent. Trial counsel's statements may reflect ignorance about the instruction, but they do not make an express objection to the instructions and they do not reveal any action taken for tactical reasons.

Respondent's contention that appellant is procedurally barred from pursuing this claim is rendered specious by the relevant law and the cold face of the record.

D. THE SPECIAL CIRCUMSTANCE FINDINGS MUST BE REVERSED BECAUSE THE FATALLY FLAWED INSTRUCTION ALLOWED THE JURY TO HOLD APPELLANT LIABLE UNDER A THEORY OF LIABILITY THAT WAS INCORRECT AS A MATTER OF LAW

Respondent contends the special circumstance findings should stand because (1) sufficient proof of intent to kill supported the findings (RB 178-181) and because (2) thirteen other instructions in the aggregate sufficiently advised the jury regarding the mental state findings it was required to make (RB 181-183).

These contentions must fail because the instruction allowed the jury to base its special circumstance findings upon a legally incorrect theory. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1121-1122, 1126-1129, applying *People v. Green* (1980) 27 Cal.3d 1, 62-74 [overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 239].)

In *Green*, this Court stated the general rule: "[W]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*People v. Green*, *supra*, 27 Cal.3d at p. 69.) This Court explained in *Guiton* why it is that presenting a jury in a criminal case with a legally incorrect theory generally requires reversal.

> "[¶] Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law – whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think their own

> intelligence and expertise will save them from that error. . . ." (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1125, quoting *Griffin v. United States* (1991) 502 U.S. 46, 59.)

Appellant discussed *Green/Guiton* error in the opening brief, incorporates that discussion here by reference, and respectfully refers the readers to the discussion, as supplemented here. (AOB 143-148.)

The Attorney General does not discuss *Green/Guiton* error in its response, but does argue that aspects of other instructions – *viz*., CALJIC Nos. 1.01, 3.01, 3.31, 3.31.5, 8.11, 8.20, 8.22, 8.25.1, 8.70, 8.71, 8.74, 8.81.3, 8.83.1 – in combination properly informed the jury of the mental state elements they were required to find in order to find the special circumstance allegations to be true. (RB 181-183.) This contention must fail because, as this Court and the U.S. Supreme Court have recognized in the excerpt reproduced above, jurors are not generally equipped to recognize that an option made available to them in an instruction rests upon a legally inadequate theory of law. Such being the case, there would be no reason for appellant's jury to have sifted through the instructions and cherry-picked aspects of the thirteen instructions respondent has cobbled together to determine the mental state findings it was required to find.

In addition, some of respondent's contentions with regard to the instructional string do not withstand scrutiny. Respondent, for example, contends that the special circumstance requirement that the aider and abettor must have acted with intent to kill may be found in the language of CALJIC No. 3.01 requiring proof the defendant had "the intent or purpose" of committing the charged crime. (RB 181.)

But intent to commit the charged crime is not synonymous with intent to kill. One of the alternative theories of murder on which the case was

presented to the jury was a killing committed with armor-piercing ammunition. That crime does not require an intent to kill, as the instruction given to appellant's jury made clear. (See 37CT 10768.)

This Court has recognized that "[a]n instructional error presenting the jury with a legally invalid theory of guilt does not require reversal, [] if other parts of the verdict demonstrate that the jury necessarily found the defendant guilty on a proper theory. (*People v. Guiton*, supra, 4 Cal.4th at p. 1130.)" (*People v. Pulido* (1997) 15 Cal.4th 713, 727; see also *People v. Calderon* (2005) 129 Cal. App. 4th 1301, 1307.)

In the opening brief, appellant explained that the jury findings for the personal gun use and the gang purpose enhancements do not operate to salvage the special circumstance findings. (AOB 155.) The jury found the weapon use enhancement to be true under a combination of instructions/prosecutorial argument/verdict forms that incorrectly stated or reflected the law. The gang benefit enhancement is similarly flawed by serious instructional error that allowed the enhancement to be found true based on appellant's status as a gang member rather than on the basis of his conduct and mental state as the law requires.

Respondent makes a single, conclusory statement concerning each of these enhancements. Respondent contends that in finding the gun use enhancement to be true, "the jury clearly found that appellants had 'intent to kill.'" (RB 182-183.) With regard to the gang enhancement, respondent contends "the jury obviously found that appellants had 'intent to kill' in finding the enhancement to be true." (RB 183.)

Because respondent's arguments regarding the enhancements fail to discuss the problems attending their validity, they are sophistic and should not be given any weight.

In addition to these comments regarding the enhancements, the Attorney General contends that sufficient proof of intent to kill justified the multiple murder special circumstance findings. (RB 178-181.) Respondent provides no authority to support its position that its view of the evidence satisfies the "other parts of the *verdict*" requirement described in *Guiton*. (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1130; italics added.) The gist of respondent's request is that this Court rely on respondent's pick of the contested evidence and find it sufficiently overcomes the presentation of the special circumstance to the jury on an incorrect theory of law. This formula appears problematic on its face even under evidentiary circumstances that strongly favor respondent.

In this case, however, a major part of the evidence "picked" by respondent as proving the mental state required for the special circumstance is contravened by "other parts of the verdict." For example, respondent contends the prosecution demonstrated appellant's consciousness of guilt to the jury when it played the surreptitiously recorded transport van tape in which appellant's comments regarding African-Americans are captured. In urging this argument upon this Court, respondent does not explain that the prosecution presented these comments and other race-related gang evidence in support of its theory that appellant was a gang member who participated in the homicide for gang-related racial reasons. And, respondent does not inform this Court as part of this discussion that the jury rendered verdicts soundly rejecting attempts to link the shootings and race. (38CT 10927-10928.)

In addition, although respondent begins by asserting "[t]here was evidence implicating both appellants as the shooter" (RB 178), respondent's factual recitation focuses upon Satele. Respondent's discussion of the evidence related to appellant is "consciousness of guilt" evidence, consisting of the race-related van comments (discussed above), appellant's flight from police the night after the shooting, and Yolanda Guajaca's purported attempt to have Ruby Feliciano corroborate appellant's alibi evidence. (RB 179.)

Respondent does not explain how flight from police and an attempt to corroborate an alibi fulfill the mental state requirements of the special circumstance finding in issue here. Appellant has discussed above why the race-related comments do not support respondent's position.

For these reasons and those appellant has set forth in his discussion of prejudice in the opening brief (AOB 149-156), appellant respectfully submits that reversal of the special circumstance findings and the death penalty is the appropriate remedy.

VI.

THE JURY FAILED TO FIND THE DEGREE OF THE MURDERS CHARGED IN COUNTS ONE AND TWO. BY OPERATION OF PENAL CODE SECTION 1157, THESE MURDERS ARE THEREFORE OF THE SECOND DEGREE, FOR WHICH NEITHER THE DEATH PENALTY NOR LIFE WITHOUT PAROLE MAY BE IMPOSED

A. INTRODUCTION

Penal Code section 1157 states that whenever a defendant is convicted of a crime that is "distinguished into degrees," the trier of fact, whether the jury or the court, must find the degree of the crime of which he is guilty. When the jury or the court fails to make that necessary determination, the degree of the crime is deemed to be of the lesser degree by operation of law. (Pen. Code, § 1157.)

Appellant's jury returned verdicts in Counts 1 and 2 finding him "guilty of the crime of willful, deliberate, premeditated murder, in violation of section 187(a) of the Penal Code."

Appellant contended in the opening brief that, by operation of Penal Code section 1157, both of the murders are of the second degree, an offense for which neither the death penalty nor a sentence of life without possibility of parole may be imposed. (AOB 157-179.)

Respondent contends: (1) Appellant has forfeited his constitutional claims (RB 92-93); (2) There was no section 1157 error (RB 93-96); (3) There was no prejudice (RB 97).

Appellant considers each of the Attorney General's claims in turn.

B. APPELLANT'S CLAIMS ARE NOT PROCEDURALLY BARRED

Respondent claims once again that appellant's constitutional claims were forfeited by inaction below. Appellant has discussed the cases upon which respondent relies in Section A of Argument X, *infra*, and respectfully refers the reader to that discussion.

Respondent also argues that appellant's claims failed to demonstrate a similarity between constitutional and section 1157 analyses. (RB 93.) Respondent is wrong.

In the opening brief, appellant pointed out that the record in appellant's case demonstrates that the verdicts in issue here were in fact defectively drawn. The prosecutor argued and the trial court instructed on three different theories of first degree murder and on unpremeditated murder of the second degree, but the verdict forms presented to appellant's jury were specific to only one theory of first degree murder. Appellant discussed there the concerns regarding the reliability of the verdicts created by defectively drawn verdict forms in the context of constitutional violations. (AOB 175-179.)

For these reasons, appellant's claims are not procedurally barred.

C. NEITHER THE LANGUAGE OF THE PENALTY PHASE VERDICT, NOR *MENDOZA*, NOR *SAN NICOLAS* BAR THE APPLICATION OF SECTION 1157 TO REDUCE THE DEGREE OF APPELLANT'S MURDER CONVICTIONS

In the opening brief, appellant discussed the general principles of law relevant to Penal Code section 1157 and the exceptions to it created by *People v. Mendoza* (2000) 23 Cal.4th 896, *People v. San Nicolas* (2004) 34 Cal.4th 614, 634-636, and *People v. Goodwin* (1988) 202 Cal.App.3d 940, upon which *San Nicolas* relied. (AOB 160-172.) Appellant then explained why the exceptions created by these cases do not apply to bar application of section 1157 to his case. (AOB 172-179.)

Respondent contends that appellant's case is indistinguishable from *People v. San Nicolas* and relies solely on *San Nicolas* in arguing that section 1157 does not apply. (RB 93.) In doing so, respondent appears to agree with appellant that *Mendoza* does not apply to bar application of section 1157. (AOB 173-174.)

In *San Nicolas*, this Court concluded in language adopting and modifying that in *Goodwin*, "'There is no logical reason to compel the fact-finder to articulate a numerical degree when, by definition, "first degree [murder]" and "[willful, deliberate, and premeditated killing]" are one and the same thing.' (*Goodwin*, *supra*, 202 Cal.App.3d at p. 947.) The statutory mandate of section 1157 was met even without the express use of the phrase 'first degree murder' in the verdict forms." (*People v. San Nicolas*, *supra*, 34 Cal.4th at p. 636.)

Thus, respondent argues that because the jury returned verdicts convicting appellant of the crime of "willful, deliberate, premeditated

murder," which is murder of the first degree pursuant to Penal Code section 189, section 1157 does not apply. (RB 93-94.)

But, the circumstances surrounding the verdict in *San Nicolas* differ in significant ways from appellant's case and *San Nicolas*'s bar on the application of section 1157 does not apply here.

Appellant observed in the opening brief that *San Nicolas* and *Goodwin*, the case upon which *San Nicolas* relies, held that section 1157 does not apply under certain specific conditions, *viz.*, when the verdict form specifies the degree through a "descriptive and definitive label" that "constitutes an acceptable alternative to specifying degree by number." (*People v. Goodwin*, *supra*, 202 Cal.App.3d at p. 947; *People v. San Nicolas*, *supra*, 34 Cal.4th at p. 636.) (AOB 169-172.)

In addition, both cases considered the verdict before it in the context of the instructions and other circumstances of the trial for the purpose of ensuring that there could be no question the degree of the crime it was imputing to the verdict was the only possible finding of degree to be made.

In appellant's case, the record shows that the verdicts respondent would have this Court find to be "definitively" verdicts finding murder of the first degree are in reality defectively drawn verdict forms. The prosecutor argued and the trial court instructed on three different theories of first degree murder and on unpremeditated murder of the second degree, but the verdict forms presented to appellant's jury were specific to only one theory of first degree murder. (See AOB 175.)

The prosecution's reliance on alternative theories of first and second degree murder, the corresponding instructions given the jury, and the limitations in verdict form language provided for the jury's use establish that

the purpose of the "willful, deliberate, premeditated" descriptive was not intended to provide an alternative descriptive for the degree of the murder but was in fact a defect in the drawing of the verdict itself. In the circumstance of appellant's case, it is not possible to state of the verdicts finding appellant guilty of willful, deliberate, premeditated murder, as the *Goodwin* court stated of the verdict before it, "There is nothing uncertain or ambiguous in the jury's findings," because it cannot be said here that the purpose of the finding was to describe the degree of the crime. (*People v. Goodwin*, *supra*, 202 Cal.App.3d at p. 947.)

Finding the murders in Counts 1 and 2 to be of the first degree would mean that application of section 1157 would be barred by a defectively drawn verdict form. Such a result offends common sense and violates principles of statutory interpretation applied by this Court in construing section 1157 in *Mendoza*. It would ignore the obvious purpose of section 1157, which is to ensure that where a verdict other than first degree is permissible, the jury's determination of degree is clear. (*People v. Mendoza*, *supra*, 23 Cal.4th at p. 910.) Finding the murders to be of the first degree would produce absurd and unjust results because it may not be reasonably said under these circumstances in which the jury was instructed on multiple theories and degrees of murder that appellant was not convicted of a crime which is distinguished into degrees. (*Id.*, at p. 911.)

The Attorney General responds to this contention by attempting to validate a first degree murder conviction based on all theories relied upon by the prosecutor despite the restrictive premeditated language of the defectively worded verdict forms. Thus, respondent argues that section 1157 should not apply because the jury also convicted appellant of first degree

drive-by murder and that the demonstration of that may be found in the jury's specific verdict findings that appellant personally and intentionally discharged a gun at the victims and committed the murders for gang purposes. (RB 94-95.) Respondent does not inform this Court as part of this argument that the gun use enhancements have been challenged as the product of correlating incorrect statements of the law by the prosecutor in argument, in the instructions given the jury, and in defectively worded verdict forms. (See Argument I, *supra.*) Nor does respondent inform this Court that the gang purpose enhancement is manifestly the product of an incorrect instruction. (See Argument IV, *supra.*)

The Attorney General next argues that the jury also convicted appellant of first degree murder based on the remaining theory of first degree murder argued by the prosecutor – murder by armor-piercing ammunition – based on proof the fatal bullets were armor-piercing ammunition and the argument of the prosecutor. (RB 95-96.) Respondent provides no legal support for its novel position that a selected piece of evidence and the prosecutor's argument serve as the equivalent of a valid verdict.

But, most importantly, the Attorney General does not explain how its arguments regarding the alternative theories upon which the prosecution relied satisfies the requirement in both *San Nicolas* and *Goodwin* that the "descriptive and definitive labels" that constitute "an acceptable alternative" to the numerical degree designation appear on the actual verdict form itself. (AOB 171, 173; *People v. San Nicolas*, *supra*, 34 Cal.4th at p. 636; *People v. Goodwin*, *supra*, 202 Cal.App.3d at p. 947.) Neither of these theories is included within the "descriptive and definitive label" present in the verdicts, *viz.*, "willful, deliberate, and premeditated" murder.

D. PREJUDICE

Respondent argues that appellant was not prejudiced by the guilt phase verdict, in part because the penalty phase verdict forms contained the following language "We, the Jury, [] having found the defendant . . . guilty of first degree murder. . . ." (RB 91, 97-101.)

In his opening brief, appellant explained that any claim that the language of the penalty phase verdict form completes, clarifies, or in any way demonstrates the jury's intention to convict appellant of first degree murder runs afoul of *San Nicolas* and *Goodwin.* Both require that the factual alternatives to the numerical degree appear on the actual verdict form itself. (*People v. San Nicolas*, *supra*, 34 Cal.4th at p. 635; *People v. Goodwin*, *supra*, 202 Cal.App.3d at pp. 946-947.) Hence, the language on the penalty phase verdict setting the degree of the murder at the first degree may not be used to supplement the omission in the guilt phase verdict. (AOB 169-172.)

In addition to, and dispositive of the issue, is the fact that the penalty phase verdict may not be used to "complete" the guilt phase verdict within the meaning of Penal Code section 1164, *supra*, though it may appear the trial court retained jurisdiction and control over the jury. In *People v. Bonillas* (1989) 48 Cal.3d 757, 774, this Court explained that the commencement of the penalty phase trial and the receipt of penalty phase evidence effectively discharged a jury over whom the trial court had otherwise retained jurisdiction and control. *Bonillas* defined the "effect" to which it referred as "the 'incalculable and irreversible' effect of exposing the jury to improper influences." (*Ibid.*) Stated simply, "the guilt phase ended when the penalty phase commenced, and it was thereafter too late to permit the jury to complete its guilt phase verdict." (*Ibid.*) Accordingly, the guilt phase jury in

appellant's case was effectively discharged with the commencement of the penalty phase trial. Therefore, the language of the penalty phase verdict in this case may not be used to complete the guilt phase verdict by establishing the murder as of the first degree.

Respondent does not address these contentions at all, but merely states in conclusory language that appellant was not prejudiced by the guilt phase verdicts because they were, in essence, corroborated by the penalty phase verdicts and because all of the theories under which the murders were prosecuted were first degree murder theories. (RB 97, 100.) In addition, respondent recites selected jury instructions requiring jury unanimity on first degree murder before making such a finding in another attempt to argue the defectively drawn verdict form complied with section 1157. (RB 98-100.)

Respondent's contentions must fail. Both *San Nicolas* and *Goodwin* establish that Penal Code section 1157 does not apply to reduce the degree of an offense when the verdict form specifies the degree through a "descriptive and definitive label" that "constitutes an acceptable alternative to specifying degree by number." (*People v. Goodwin, supra*, 202 Cal.App.3d at p. 947; *People v. San Nicolas, supra*, 34 Cal.4th at p. 636.)

In so holding, *Goodwin* observed of the case before it, "'[t]here is nothing uncertain or ambiguous in the jury's findings." The Court noted that the finding within the verdict was made in connection with the verdict finding the crime, as opposed to jury findings made in connection with either an enhancement or other special finding. (*People v. Goodwin, supra*, 202 Cal.App.3d at p. 947; quoting *People v. Anaya, supra*, 179 Cal.App.3d at p. 832.) In addition, no uncertainty or ambiguity attended the conclusion the conviction was for first degree burglary because that conclusion was

consistent with the parties' stipulation, which the trial court had expressed to the jury, that under the facts of the case the burglary, if found, could only be burglary of the first degree. (*People v. Goodwin*, *supra*, 202 Cal.App.3d at pp. 946-948.)

Here, in contrast, uncertainty and ambiguity attend the verdicts because the verdicts, on their face, were defectively drawn.

In his opening brief, appellant explained why barring application of section 1157 would offend the general design of verdicts, principles of statutory construction embraced by this Court in *Mendoza*, and common sense. Appellant respectfully refers the reader to that discussion, which appellant incorporates here by reference. (AOB 172-179.)

For the reasons stated herein, appellant respectfully submits that by operation of Penal Code section 1157 the crimes of which he was convicted in Counts 1 and 2 are second degree murder, for which neither a sentence of death or life in prison without the possibility of parole may be imposed.

VII.

The Trial Court Erred in Allowing the Prosecution to Present Testimony That Lawrence Kelly Offered Someone $100.00 to Testify the West Side Wilmas Gang Gets Along with African-Americans. This Error Deprived Appellant of Due Process of Law and a Reliable Determination of the Facts Required in a Capital Case by the Eighth Amendment

A. Introduction

The trial court allowed prosecution witness Glenn Phillips to testify on rebuttal that Westside Wilmas (WSW) member Lawrence Kelly (Puppet) offered Warren Battle $100.00 to testify that WSW members get along with African-Americans. The prosecutor's stated purpose in eliciting this evidence was to impeach Kelly, who had denied making the statement during cross-examination by the prosecutor. (10RT 2413-2414; 13RT 2991.)

At the hearing on the admission of this evidence, appellant objected to the proffered testimony under Evidence Code section 352. (13RT 2979.) The trial court admitted the evidence as proper impeachment evidence. (13RT 2996.)

In the opening brief, appellant argued that the admission of this evidence was error because (1) efforts by a third person to fabricate evidence are not admissible without proof the defendant authorized the fabrication; and because (2) a party may not cross-examine a witness for the purpose of eliciting something to be contradicted. (AOB 180-191.)

B. APPELLANT'S CONSTITUTIONAL CLAIMS ARE NOT PROCEDURALLY BARRED

Respondent claims appellant has forfeited his constitutional claims by inaction below. (RB 121, 127, 129.)

Respondent has made a similar contention with each of its arguments. Appellant has addressed these contentions and the law upon which respondent relies in Section A of Argument X, which he incorporates here by reference. The case law establishes, for example, that, where an issue may not have been properly preserved at trial, an appellate court may review an issue in an exercise of its own discretion; that issues relating to the deprivation of fundamental constitutional rights or to pure questions of law are reviewable without proper preservation below. For these reasons, appellant respectfully submits this issue is not procedurally barred.

C. PHILLIPS' TESTIMONY THAT KELLY OFFERED BATTLE MONEY TO TESTIFY WSW MEMBERS AND AFRICAN-AMERICANS "GET ALONG" WAS NOT PROPER REBUTTAL EVIDENCE

Respondent contends Phillips' testimony that Kelly offered money to an African-American to testify that WSW and African-Americans "get along" was proper rebuttal evidence because it impeached Kelly's contrary testimony. (RB 127-128.)

The Attorney General's argument, however, fails to consider or address the very reason the trial court's ruling was incorrect.

In his opening brief, appellant explained that because the prosecution had no evidence linking either appellant or Satele to the $100 offer and the "we get along" statement, the proffered testimony was admissible only if it could be used to impeach Kelly. Evidence Code section 780, subdivision (i), permits impeachment of a witness to show "[t]he existence or nonexistence of any fact testified to by him." However, in this circumstance, the prosecutor's examination of Kelly regarding whether he had tried to bribe a witness was not a question designed to lead to admissible evidence because the prosecution lacked the necessary evidence linking the bribe attempt to appellant or Satele. (AOB 182-185.)

The only reason the prosecutor could have had in asking this question of Kelly was to elicit the very testimony complained of here, evidence neither material nor relevant enough to the case to be otherwise admitted.

The law is well settled that a party may not introduce evidence for the purpose of making otherwise inadmissible evidence admissible. In *People* v. *Luparello* (1986) 187 Cal.App.3d 410, 426, the Court of Appeal said: "The fact that a topic is raised on direct examination and may therefore appropriately be tested on cross-examination, however, does not amount to a license to introduce irrelevant and prejudicial evidence merely because it can be tied to a phrase uttered on direct examination."

For these reasons, the challenged testimony did not constitute proper rebuttal evidence and the trial court erred in ruling it admissible. Because respondent's discussion on this issue fails to address the point of error, it is flawed and does not withstand scrutiny.

D. PREJUDICE

Respondent contends appellant was not prejudiced by the admission of Phillips' testimony because the verdicts establish the jury disbelieved his alibi evidence, because appellant revealed in the surreptitiously recorded van conversation his own personal animus toward African-Americans, because appellant admitted to Vasquez that he had personally shot the victims. (RB 131-132.)

Appellant explained in his discussion of prejudice in the opening brief (AOB 185-191) that Kelly, a defense witness, testified to other things helpful to the defense. Kelly said that the firearm used in the shooting was a gang weapon kept at LaShawn's house and available to any WSW member who could take it for any purpose. (10RT 2402-2404.) Kelly also said that Joshua Contreras was always under the influence of methamphetamines, that he was paranoid, that his mind played tricks on him. (10RT 2048-2049.) Kelly also said he was present at the playground with Satele, Caballero, appellant, and Contreras, and that he did not hear the incriminating conversation Contreras reported overhearing. (10RT 2410-2411, 2442-2444.)

When the trial court incorrectly allowed Kelly to be impeached by Phillips' testimony, the jury would likely have taken a jaundiced view of all of the testimony by the discredited Kelly. Moreover, the evidence tended to suggest appellant may have been involved in the attempt to dissuade a witness.

For these reasons and the reasons set forth in the opening brief (AOB 185-191), appellant respectfully submits he was prejudiced by the error and reversal of the judgment of conviction is the appropriate remedy.

VIII.

THE TRIAL COURT ERRED IN REFUSING APPELLANT'S REQUEST FOR AN INSTRUCTION INFORMING THE JURY THAT BEING IN THE COMPANY OF SOMEONE WHO HAD COMMITTED THE CRIME WAS AN INSUFFICIENT BASIS FOR PROVING APPELLANT'S GUILT. THIS ERROR HAD THE EFFECT OF DEPRIVING APPELLANT OF THE RIGHT TO DUE PROCESS OF LAW AND THE EIGHTH AMENDMENT RIGHT TO A RELIABLE DETERMINATION OF THE FACTS IN A CAPITAL CASE, THEREBY REQUIRING A REVERSAL OF THE JUDGMENT AND DEATH PENALTY VERDICT

A. INTRODUCTION

Appellant asked that the trial court give the following pinpoint instruction.

> Merely being in the company of a person believed to have committed a felony is not sufficient to sustain a guilty verdict. (38CT 10868.)

In denying appellant's request for this instruction, the trial court violated appellant's right to due process of law and the Eighth Amendment right to a reliable determination of the facts in a capital case. Accordingly, reversal of the judgment and death penalty verdict is warranted.

B. APPELLANT'S CONSTITUTIONAL CLAIMS ARE NOT PROCEDURALLY BARRED

As is the case with each of appellant's claims of error, the Attorney General contends appellant has forfeited these claims by inaction

below. Respondent bases its contention on the same case authority it has relied upon on each occasion. (RB 197.)

Appellant has discussed respondent's reliance on these cases in Section A of Argument X, *infra*, and incorporates that discussion here by reference. As discussed there, the case law establishes, for example, that where an issue may not have been properly preserved at trial, an appellate court may review an issue in an exercise of its own discretion; that issues relating to the deprivation of fundamental constitutional rights or to pure questions of law are reviewable without proper preservation below. For these reasons, appellant respectfully submits this issue is not procedurally barred.

C. THE RELEVANT LAW AND ITS APPLICATION TO APPELLANT'S CASE

The Attorney General appears to have misapprehended appellant's claim of error as respondent argues a legal point that does not apply.

Appellant predicated his claim on law that has been well settled by this Court – that a defendant is entitled to a pinpoint instruction on request. (See, e.g., *People v. Saille* (1991) 54 Cal.3d 1103, 1119; AOB 193-197.)

The Attorney General inexplicably responds that a trial court has no sua sponte duty to give pinpoint instructions. (RB 197.) Because appellant did not base his claim on the trial court's sua sponte obligation to provide the instruction, respondent's position is irrelevant and without merit.

Respondent also contends the trial court properly refused the defense instruction because the instruction duplicated CALJIC No. 3.01. (RB 197-198.)

Appellant discussed this very matter in the opening brief and pointed out that the requested instruction and CALJIC No. 3.01 did not serve the same purpose. (AOB 197-203.)

CALJIC No. 3.01 is the pattern instruction defining aiding and abetting. As given in this case, the instruction informed the jury, "Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting." (37CT 10755.)

The requested instruction, on the other hand, made no reference to aiding and abetting. Rather, its purpose and language directed the jury's analysis to appellant's theory of defense and to the weight of the evidence required for a determination of guilt by pointing out that merely being in the company of a person believed to have committed a felony is not sufficient to sustain a guilty verdict. Appellant's requested instruction made no reference to presence at the scene of a crime. (See AOB 197-199.)

In addition, the two instructions serve different purposes. CALJIC No. 3.01 defines the role of the aider and abettor as a participant in the crime. The requested pinpoint instruction, on the other hand, focused on the amount of evidence required to establish guilt by specifying that being with someone believed to have committed a felony is not enough. CALJIC No. 3.01 focuses on a defendant's presence at the scene of the crime. The requested instruction focused on the defendant's association with a person who committed a felony. CALJIC No. 3.01 bars an inference of guilt from presence at the crime scene. The requested pinpoint instruction informs that

guilt may not be inferred from a defendant's association with "a person believed to have committed a felony" and thus warned against imputing guilt on the basis of association.

For these reasons, the defense-proffered instruction did not duplicate CALJIC No. 3.01 and its refusal on that ground was error.

D. PREJUDICE

The Attorney General contends error, if any, was harmless. Once again, respondent strings together a series of instructions given to appellant's jury and claims the instructions in the aggregate provided the equivalent of the requested instruction without explaining how that was so. (RB 199.) In the absence of elaboration, respondent's string of instructions does not inform the discussion and amounts to no more than a string of instructions.

The requested pinpoint instruction was important to appellant's defense because there was little direct evidence of the events of the shooting. The prosecutor presented no evidence regarding the identity of the shooter and certainly no evidence as to specific acts by appellant or of his mental state at the time of the shooting. The prosecution compensated for this shortcoming with evidence of appellant's gang membership, appellant's association with fellow gang members Satele, Caballero, and Contreras on the night of the shooting as described above, on the race-based misconduct attributed to appellant and members of his gang, including fellow WSW member Lawrence Kelly. The prosecutor did not tie Kelly to the shooting incident, but he presented evidence of purported witness tampering by Kelly despite the fact

no evidence linked such activity to appellant, Satele, or the gang. In addition, the prosecution presented a gang expert's opinion testimony that if three WSW members were in the area of the shooting with a loaded weapon, their intent was to try and kill someone. (9RT 2102-2103.)

As appellant explained in the opening brief, he was prejudiced by the refusal of the trial court to give this instruction. (AOB 203-204.) The prosecution's evidence of the events of the shooting was spare. There was evidence that Caballero was driving and conflicting evidence as to whether the shooter was Satele or Nunez. The prosecutor repeatedly stated during the colloquy over jury instructions and in argument to the jury that he had not proven the identity of the actual killer. In fact, the state of the evidence was so spare as to the identity of the actual killer that the jury could have as readily found that any one of the purported occupants of the car, including Caballero the driver, was the actual shooter.

Respondent counters appellant's claim regarding the state of the evidence by pointing once again to the suspect testimony of Ernie Vasquez that appellant admitted his participation in the crime and to gang evidence. Respondent's contentions lack merit. The testimony of Ernie Vasquez is not just implausible. It is suspect for good reason and seriously lacks reliability. (See AOB 9-13.) And, the presence of gang evidence in this trial is one of the reasons why, as appellant has explained above, the requested pinpoint instruction should have been given to the jury.

In addition to evidence that Caballero was the driver, the prosecution relied on its gang expert's opinion that gang drive-by shootings typically involved a driver, a lookout, and a shooter in arguing for conviction. Where the prosecution's case lacked evidentiary force, however, was in the

absence of evidence regarding the conduct of appellant, Satele, or Caballero with regard to the shooting. And, this weakness in the prosecution's case went directly to the issue of guilt because not only was the prosecution unable to prove who actually shot, it was also unable to prove the nonshooters in the car had the requisite mens rea for guilt as accomplices. The pinpoint instruction requested by the defense was directed at this very point because it expressly told the jury that appellant's guilt could not rest on appellant's mere presence in the company of an individual or individuals believed by the jury to have committed a felony either before, during, or after the shooting.

As such, the requested instruction would have focused the jury's attention on facts that directly impacted appellant's criminal liability and the weaknesses in the prosecution's case. The requested instruction would thus have had an impact on the jury's determination of appellant's guilt beyond a reasonable doubt. "An error in instruction which significantly misstates the requirement that proof of guilt be beyond a reasonable doubt 'compels reversal unless the reviewing court is able to declare a belief that it was harmless beyond a reasonable doubt.'" (*People v. Deletto* (1983) 147 Cal.App.3d 458, 472, quoting *Chapman v. California* (1967) 386 U.S. 18, 24.)

Respondent contends that because appellant forfeited his constitutional claims by inaction below, the error is prejudicial only if the defendant would have obtained a more favorable result in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; RB 198-199.)

However, as appellant has noted above, his constitutional claims were not waived and the erroneous denial of the pinpoint instruction was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

IX.

THE PROSECUTOR'S MISCONDUCT IN ARGUMENT VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS AND COMPELS REVERSAL

A. APPELLANT'S CLAIMS ARE NOT PROCEDURALLY BARRED

Appellant contended in the opening brief that the prosecutor created misconduct in argument when he vouched for prosecution witness Ernie Vasquez and thereby deprived appellant of the Due Process right to a fair trial, as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution. (AOB 205-210; respondent's discussion at RB 133-141.)

Vasquez was a key witness for the prosecution. He claimed to have obtained seriatim jailhouse admissions from both appellant and Satele. He was present at the scene soon after the fatal shooting. He testified he saw Juan Carlos Caballeros at the wheel of a car with other occupants in the vicinity prior to the shooting.

The prosecutor used Vasquez' identification of Caballeros as the car's driver to argue that appellant and Satele were the other occupants of the car based on evidence appellant and Satele were with Caballeros before and after the time of the shooting. In making this argument, the prosecutor personally guaranteed Vasequz' identification was true. Trial counsel objected to the prosecutor's guarantee, which brought about an exchange with the court that appellant and respondent view differently.

The record shows the following:

> [THE PROSECUTOR]: He identified Curly [Caballero] as the driver of that Buick. Isn't it amazing that Curly just happened to be with Speedy [appellant] and Wil-Bone [Satele] earlier and it was brought out that he was with them later, that Ernie Vasquez hit the nail on the head? He identified Curly. What a coincidence. Because I guarantee that is the truth. What he testified to was corroborated.
>
> [COUNSEL FOR NUNEZ]: Objection. The District Attorney's guarantee.
>
> THE COURT: I'm sorry?
>
> [COUNSEL FOR NUNEZ]: District Attorney's guarantee that is the truth.
>
> THE COURT: Your objection is improper argument. Please make a legal basis.
>
> Sustained. Carry on.
>
> [THE PROSECUTOR]: He told you he testified to information that was corroborated everywhere else. (14RT 3232:5-20.)

Appellant read this colloquy and believed the trial court had overruled the defense objection because the court had determined that trial counsel had stated an improper objection without legal basis. In the opening brief, appellant contended the trial court had overruled the objection and, moreover, had done so in language that implied the defense objection lacked a legal basis. (AOB 205.)

Respondent contends the trial court sustained the objection. (RB 135 fn. 60.)

These differing views of the colloquy suggest that the court's comments likely created an ambiguity for the jury as well and that some if not

all of the jurors received the prosecutor's guarantee at face value. It would also appear they created an ambiguity for the prosecutor because the prosecutor vouched again in rebuttal argument, *infra*. In a circumstance such as this, appellant's claims are not procedurally barred.

Later, during his rebuttal argument, the prosecutor once again introduced his personal views into the case concerning what appellant may have said about African-Americans during his secretly recorded van conversation with Satele by saying, "I will back up my words" and "I will stake my reputation on it." (14RT 3404-3405.) The trial court sustained trial counsel's objection to the prosecutor's "guarantee."

Appellant is not procedurally barred from raising his state and federal claims under the following authorities. In *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, this Court reasoned that in circumstances where the question whether the defendants had preserved their right to raise the issue on appeal was close and difficult, the Court would assume the defendants had preserved that right. (*People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1007 fn. 8.) In *Lewis and Oliver*, the question of proper preservation of the issue was a legal one. In appellant's case, the question arises from a factual ambiguity, but this Court has applied the same principle in assuming defendants have preserved the issue where the facts are in conflict. (*People v. Champion* (1995) 9 Cal.4th 879, 908 (question as to whether defendant abandoned his motion); *People v. Fudge* (1994) 7 Cal.4th 1075, 1106-1107 (question as to whether defendant timely moved for continuance).)

And, in *People v. Thornton* (2007) 41 Cal.4th 391, 462-463, this Court considered a *Batson-Wheeler* claim in connection with the selection of an alternate to replace a sitting juror. This Court noted that the defendant had

not raised a *Batson-Wheeler* challenge at trial and had therefore forfeited the claim. This Court, however, chose to consider and rule upon the merits of the defendant's claim. (*Ibid.*)

For these reasons, appellant is not procedurally barred from raising his state and federal claims on the basis of the court's ruling here.

Respondent further contends that appellant's failure to seek a correcting admonition bars his claim. (RB 134.)

In this case, however, the trial court's chilling reaction to trial counsel's first vouching objection made it apparent that a request for an admonition would have been futile. The court said: "Your objection is improper argument. Please make a legal basis. [¶] Sustained. Carry on." The trial court's admonition to counsel made it unlikely that the court was inclined to grant a request for an admonition and explains why counsel did not ask for an admonition in connection with his objection during rebuttal argument. "To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise the point is reviewable only if an admonition would not have cured the harm caused by the misconduct." (*People v. Earp* (1999) 20 Cal.4th 826, 858.) Under the circumstances present here, the request for an admonition would not have cured the harm and review is not procedurally barred.

B. THE PROSECUTOR COMMITTED MISCONDUCT BY INVOKING HIS PERSONAL PRESTIGE AND REPUTATION

In *People v. Huggins* (2006) 38 Cal.4th 175, this Court stated the general rule regarding misconduct.

> The general rule is that improper vouching for the strength of the prosecution's case "'involves an attempt to bolster a witness by reference to facts outside the record.'" (*People v. Williams* (1997) 16 Cal.4th 153, 257, italics omitted.) Thus, it is misconduct for prosecutors to vouch for the strength of their cases by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it. (See, e.g., *People v. Ayala* (2000) 24 Cal.4th 243, 288; *Williams*, *supra*, at p. 257; *People v. Medina* (1995) 11 Cal.4th 694, 756-758.) (*People v. Huggins*, *supra*, 38 Cal.4th at pp. 206-207.)

As appellant explained above and in the opening brief, the prosecutor vouched for the credibility of a key prosecution witness with the words, "I guarantee that is the truth." The prosecutor also vouched for the accuracy of the prosecution's version of appellant's statements in the van by saying, "I will back up my words" and "I will stake my reputation on it."

Despite the well-known prohibition against prosecutorial vouching, the prosecutor thus expressly invoked his reputation and personal prestige, as this Court has defined vouching in the cases set forth above.

C. THE PROSECUTOR'S VOUCHING COMMENTS WERE PREJUDICIAL

"Improper remarks by a prosecutor can '"so infect[] the trial with unfairness as to make the resulting conviction a denial of due process."' (*Darden v. Wainwright* (1986) 477 U.S. 168, 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642; *cf. People v. Hill* (1998) 17 Cal.4th 800, 819.) Under state law, a prosecutor who uses deceptive or reprehensible methods to persuade either the court or the jury has committed misconduct, even if such

action does not render the trial fundamentally unfair. (*People v. Hill*, *supra*, 17 Cal.4th at p. 819; *People v. Berryman* (1993) 6 Cal.4th 1048, 1072; *People v. Price* (1991) 1 Cal.4th 324, 447.) (*People v. Carter* (2005) 36 Cal.4th 1114.)

Respondent argues that appellant was not prejudiced by the vouching comments. (RB 136-142.)

Respondent first contends appellant's due process rights to a fair trial were not violated because the prosecutor conceded to the jury he had failed to prove the identity of the shooter in the face of contrary evidence both defendants were the shooters. (RB 137-139.) Respondent does not link this observation to any of the prosecutor's vouching comments and, if there is a link that appellant has failed to discern, it appears to be a very attenuated one.

Appellant believes the prosecutor's vouching did infect the trial with unfairness so as to make the resulting conviction a denial of due process. Here, the prosecutor vouched for the credibility of Ernie Vasquez, arguably its key witness in terms of connecting appellant and Satele to the shooting. It was Vasquez who linked appellant and Satele to the shooting by testifying that both had admitted the shooting to him and that he had seen Caballero driving a car with other occupants in the vicinity of the shooting on more than one occasion prior to the shooting. Vasquez, however, suffered from severe credibility problems because he too had been charged with criminal conduct, because he had received many financial and legal benefits for his testimony, and because of the extraordinary nature of his claim that both appellant and Satele had independently, and without his solicitation, admitted firing the shots the very first time each met him. (See AOB 9-13.)

When trial counsel objected to the prosecutor's "guarantee," the prosecutor was speaking of Vasquez' identification of Caballero as the driver of the car on the night of the shooting. The gist of this point of the prosecutor's argument was that Vasquez' identification of Caballero corroborated Joshua Contreras' statement to detectives that Caballero, appellant, and Satele were together earlier in the evening before the shooting and again at the park after the shooting. The clear inference to be drawn from such information is that appellant and Satele were the occupants of the car driven by Caballero in the general area of the shooting. Joshua Contreras' statements to law enforcement were thus critical to the prosecution's case, but they too were plagued by trustworthiness issues because Contreras subsequently repudiated them. (See summary of Contreras statements at AOB 13-17.)

So, when the prosecutor "guaranteed the truth" of Vasquez' identification and spoke of corroboration with factual references to Contreras' statements to law enforcement, the prosecutor was effectively rehabilitating the credibility of both Contreras and Vasquez. Information provided by both of these men in statements to law enforcement and in their trial testimonies formed the thrust of the prosecution's theory of the case. The credibility of each was suspect for the reasons described in the pages of the opening brief cited above.

For these reasons, appellant believes the prosecutor's improper vouching infected the trial with unfairness to a degree that denied appellant a fair trial warranting reversal of the judgment of conviction. (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 642.) Because the trustworthiness of information obtained from Vasquez and Contreras was directly associated

with the severe flaws attached to the credibility of each, the prosecutor's vouching may not be said to have been harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Appellant also believes the prosecutor's improper vouching constitutes misconduct under state law because the law is well settled that a prosecutor may not invoke his personal prestige and reputation in vouching for a witness. (*People v. Huggins*, *supra*, 38 Cal.4th at pp. 206-207.) This experienced trial prosecutor would have been aware that he was not permitted to vouch for the credibility of his witnesses. The prosecutor would also have been aware that the credibility of both Contreras and Vasquez was suspect and aware also that information credited to both was essential to his case. In short, they were the weak links in the prosecution's case, and so the prosecutor vouched directly for Vasquez in a way that permitted him to also corroborate information provided by Contreras. Viewed in this context, the vouching appears to be calculated and not happenstance. And, then, of course, the prosecutor repeated the vouching in connection with the van conversation during rebuttal argument. This second instance of vouching demonstrates either that the prosecutor understood that the court overruled trial counsel's objection to the prosecutor's "guarantee," or the prosecutor was confused by its ambiguity, or the prosecutor acted in flagrant disregard of the ruling. Bad faith on the part of the prosecutor is not a prerequisite for appellate relief. (*People v. Hill*, *supra*, 17 Cal.4th at p. 822.)

A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the State. (*People v. Kelley* (1977) 75 Cal.App.3d 672, 690.) As the United States

Supreme Court has explained, the prosecutor represents "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Berger v. United States* (1935) 295 U.S. 78, 88; *People v. Espinoza* (1992) 3 Cal. 4th 806, 820.)

Here, it seems the prosecutor resorted to reprehensible methods to attempt to persuade the jury that Vasquez and Contreras were credible people and that the information attributed to them was sufficiently substantial to support the convictions. The error was not harmless under the test of *People v. Watson* (1956) 46 Cal.2d 818, 836.) It is precisely because the credibility of both Vasquez and Contreras was so suspect and because their information so instrumental to the prosecution's contention that appellant was a passenger within the car driven by Caballero that a result more favorable to appellant would have been reached in the absence of the vouching.

For the reasons stated here and in the opening brief, appellant respectfully submits the judgment of conviction must be reversed.

X.

GUILT AND PENALTY PHASE VERDICTS WERE RENDERED AGAINST APPELLANT BY A JURY OF FEWER THAN TWELVE SWORN JURORS; THE RESULTING STRUCTURAL TRIAL DEFECT REQUIRES REVERSAL

Appellant contended in the opening brief that the trial court's failure to swear all of the jurors (specifically Jurors 4965, 8971, and 2211) as required by Code of Civil Procedure section 232, subdivision (b), resulted in a structural trial defect requiring reversal of guilt and penalty phase verdicts. (AOB 211-229.)

Respondent contends (1) appellant's constitutional claims were not preserved by trial court action below; (2) Jurors 4965, 8971, 2211 took an adequate "trial juror" oath; (3) appellant was not prejudiced by the omission. (RB 79-90.)

A. APPELLANT'S CLAIMS ARE COGNIZABLE ON APPEAL

Respondent first claims that appellant's constitutional claims are procedurally barred. (RB 84-85.)

Respondent relies on *People v. Lewis* (2008) 43 Cal.4th 415 ,490 fn. 19; *People v. Wilson* (2008) 43 Cal.4th 1, 13-14 fn.3; *People v. Thornton* (2007) 41 Cal.4th 391, 462-463; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1008 fn. 8. (RB 85.)

But, these cases upon which respondent relies do not support respondent's position that appellant's claims are forfeited. In these cases, as

appellant will explain more fully below, this Court has considered and ruled upon a defendant's federal claims when the facts are undisputed and the legal analysis similar (*People v. Lewis*; *People v. Wilson*, *infra*) and when the appellate claim is of the kind that requires no trial court action to preserve it (*People v. Wilson*; *People v. Boyer* (2006) 38 Cal.4th 412, 441 fn. 17, *infra*). This Court has considered and ruled upon a defendant's federal claim when the question as to whether the defendant has preserved his claim by trial court action is close and difficult because of ambiguity in the law (*People v. Lewis and Oliver*, *infra*). And, in *People v. Thornton*, *infra*, this Court considered and ruled upon the merits of a defendant's claim even after determining the claims have been forfeited by inaction below.

Thus, in *People v. Lewis*, the Attorney General claimed that a defendant's state constitutional challenge against the seating of a prospective juror had been waived by a failure to object at trial. This Court ruled the claim was not forfeited because the defendant's state constitutional claim was based on the same facts underlying the federal claim and required a legal analysis similar to that required by the federal claim. (*People v. Lewis*, *supra*, 43 Cal.4th at p. 490 fn. 19; citing *People v. Williams* (1997) 16 Cal.4th 635, 666-667 (federal Due Process Clause requires sentencing jury to be impartial to same extent that Sixth Amendment requires jury impartiality at guilt phase; California Constitution requires the same); *People v. Yeoman* (2003) 31 Cal.4th 93, 117 (defendant's *Batson*[15] claim on appeal was properly preserved

[15] *Batson v. Kentucky* (1986) 476 U.S. 79 (federal constitutional guaranty of equal protection of the laws applied to jury selection).

by *Wheeler*[16] motion at trial because claim raises pure question of law on undisputed facts).)

In *People v. Wilson, supra*, 43 Cal.4th at p. 13 fn. 3, this Court articulated the standard to be applied in determining whether a defendant has properly preserved an issue for purposes of appeal by quoting from *People v. Boyer* (2006) 38 Cal.4th 412, 441 fn. 17:

> As to this and nearly every claim on appeal, defendant asserts the alleged error violated his constitutional rights. At trial, he failed to raise some or all of the constitutional arguments he now advances. "In each instance, unless otherwise indicated, it appears that either (1) the appellate claim is of a kind (e.g., failure to instruct sua sponte; erroneous instruction affecting defendant's substantial rights) that required no trial court action by the defendant to preserve it, or (2) the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional legal consequence of violating the Constitution. To that extent, defendant's new constitutional arguments are not forfeited on appeal. [Citations.] [¶] In the latter instance, of course, rejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional 'gloss' as well. No separate constitutional discussion is required in such cases, and we therefore provide none."

In *People v. Thornton*, this Court considered a *Batson-Wheeler* claim in connection with the selection of an alternate to replace a sitting juror. This Court noted that the defendant had not raised a *Batson-Wheeler* challenge

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[16] *People v. Wheeler* (1978) 22 Cal.3d 258 (state constitutional right to jury drawn from representative cross-section of the community).

at trial and had therefore forfeited the claim. This Court, however, chose to consider and rule upon the merits of the defendant's claim. Similarly, this Court ruled the defendant had forfeited his associated Eighth and Fourteenth Amendment claims because he did not present them to the trial court. Again, however, this Court chose to consider and rule upon the merits of the defendant's constitutional claims.

In *People v. Lewis and Oliver*, this Court considered the question of whether the trial court erred in granting the prosecution's motion to excuse a prospective juror based on his views of capital punishment. The defendants claimed the trial court's ruling violated their right to an impartial sentencing jury under the Sixth and Fourteenth Amendments. (*People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1006.) The Attorney General argued, as respondent does here, that the defendants had forfeited their claim by failing to take action at trial. (*Id.*, at p. 1007 fn. 8.) This Court took note that the law was unclear as to whether the defendants' claim was procedurally barred because it had in fact held conversely in separate cases. The Court then held that because the question whether the defendants had preserved their right to raise the issue on appeal was close and difficult, the Court would assume that the defendants had preserved that right. (*Ibid.*; quoting *People v. Champion* (1995) 9 Cal.4th 879, 908 fn. 6.)

In light of the rules and principles articulated in these cases, appellant's federal claims regarding the trial court's failure to properly administer the oath to all members of his jury have not been forfeited.

B. PROSPECTIVE JURORS 4965, 8971, AND, IN PARTICULAR, JUROR 2211 DID NOT TAKE AN "ADEQUATE 'TRIAL JUROR' OATH"

Respondent does not dispute that the trial court failed to administer the oath required by Code of Civil Procedure section 232, subdivision (b), to Jurors 4965, 8971, and 2211. (RB 85.)

Code of Civil Procedure section 232, subdivision (b), governs the swearing of trial jurors. (*People v. Chavez* (1991) 231 Cal.App.3d 1471, 1484.) It provides:

> As soon as the selection of the trial jury is completed, the following acknowledgment and agreement shall be obtained from the trial jurors, which shall be acknowledged by the statement, "I do":
>
> Do you and each of you understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render according only to the evidence presented to you and to the instructions of the court. (Code Civ. Proc., § 232, subd. (b).)

Respondent contends, however, that Jurors 4965, 8971, and 2211 nonetheless took an "adequate 'trial juror' oath" (RB 79) when they took the prospective juror's oath (Code Civ. Proc., § 232, subd. (a));[17] in

[17] Code of Civil Procedure section 232, subd. (a) states: "You, and each of you, do understand and agree that you will accurately and truthfully answer all questions propounded to you concerning your qualifications and competency to serve as a trial juror in the cause now pending before this court, and that failure to do so may subject you to criminal prosecution."

combination with the alternate juror's oath;[18] and answered "No" to Question 226 on the jury questionnaire. (RB 85-87.)

Question 226 on the juror questionnaire asked:

> If you are selected as a jury, you must render your verdict based solely on the evidence, and the law as given you by the Court, free of any passion, prejudice, sympathy or bias, either for or against Daniel Nunez and William Satele, or the State. Do you have any difficulty accepting this principle?
>
> Yes___ No___ (26CT 7508.)

Where Juror No. 2211 is concerned, however, respondent's contention suffers from a fatal defect because, as the Attorney General acknowledges, albeit only when separate parts of respondent's argument are read together, respondent is unable to identify Juror No. 2211's jury questionnaire (RB 83 fn. 47) and so respondent's contention that all three jurors took an "adequate trial oath" rests on respondent's *presumption* that Juror No. 2211 responded "No" to question 226 (RB 84). Since respondent's *presumption* is no more than *speculation* by another name, respondent in essence asks this Court to find the jury was properly sworn on a flawed premise.

Moreover, respondent's contention can only prevail if this Court were willing to place its imprimatur on a statement such as this one by respondent: "In other words, the answers and signatures under penalty of

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[18] The court administered the following oath to alternate jurors: "You understand and agree that you will act as an alternate juror in the case now pending before this court by listening to the evidence and instructions of this court, and will act as a trial juror when called up to do so." (4RT 856-857.)

perjury to Question 226 (by prospective jurors 4965, 8971, and 2211) were a stronger declaration of commitment to (and understanding of) a trial juror's duty than the trial-juror oath in subdivision (b) of section 232 of the Code of Civil Procedure." (RB 86.) Such a representation that Juror 2211 answered Question 226 (and answered it in the negative, at that) when respondent is unable to identify the actual questionnaire is insupportable.

In short, assuming arguendo that respondent's contention that the prospective and alternate jurors' oaths taken by the jurors plus a negative response to Question 226 amounts to the equivalent of the trial juror's oath set forth in Code of Civil Procedure 232, subdivision (b), respondent's contention must fall of its own weight by respondent's inability to demonstrate that Juror 2211 in fact answered Question 226 in the negative.

But, in addition, respondent's claim lacks merit because the language of the prospective juror's oath to be truthful in answering questions during the jury selection process and the language of the alternate juror's oath to listen to the evidence and the trial court's instructions and to act as a trial juror when called upon to do so and the language of Question 226 in combination do not serve to inform the juror of his duties and obligations nor do they secure his agreement to carry out those duties and obligations. The parts of respondent's formula do not properly inform the jury to determine the facts only from the evidence and the law only from the court in reaching the verdict. And, as is true of a contention that CALJIC No. 1.00 provides the required admonition, an important component of the oath, the juror's agreement to base his or her verdict only upon the facts and the law, is absent. (See discussion of CALJIC No. 1.00 at AOB 221-222.)

Respondent also substantially relies on *People v. Carter* (2005) 36 Cal.4th 1114 and on *People v. Lewis* (2001) 25 Cal.4th 610 in arguing the trial jurors were properly sworn. Both *Carter* and *Lewis* concern the trial court's failure to properly administer the oath of truthfulness on penalty of perjury to prospective jurors set forth in subdivision (a) of Code of Civil Procedure section 232. (*People v. Carter, supra*, 36 Cal.4th at p. 1174-1177; *People v. Lewis, supra*, 25 Cal.4th at pp. 629-631.) In contrast, appellant's claim is founded upon a violation of subdivision (b), the oath in which the juror swears to derive the facts only from the evidence adduced at trial and apply it only to the law provided by the court.

As appellant explained in the opening brief, there is a distinction in the prejudice from improperly administered oaths under subdivisions (a) and (b). The voir dire process permits court and counsel to evaluate the prospective juror's biases. The defendant has no equivalent means by which to determine whether the juror who was not sworn under subdivision (b) will determine the facts from evidence adduced at trial and apply it to the law as provided only by the court. (See AOB 227-228.)

In the opening brief, appellant also discussed the decision in *People v. Cruz* (2001) 93 Cal.App.4th 69 in the context of his argument that neither the required oath nor its equivalent was administered to the jurors. (AOB 219-224.) The jury in *Cruz* was given a version of the juror's oath that failed to ask the jury to follow the instructions of the court. The Court of Appeal declined to find error, holding that the jurors had a separate duty, independent of that embedded within the juror's trial oath, to follow the court's instructions. (*Id.*, at p. 73.)

Appellant discussed various reasons why the holding in *Cruz* was problematic. (AOB 222-224.) Appellant respectfully requests that this Court take note that respondent refutes none of appellant's assertions and therefore impliedly concedes them. In addition, respondent relies on *Cruz* in arguing for the adequacy of the oaths administered at trial only to make the point that "jurors decide the facts and the court instructs them on the law." (RB 86.)

C. STANDARD OF REVIEW AND PREJUDICE

Respondent contends harmless error analysis under *Lewis* is appropriate without ever addressing why a case considering error under subdivision (a) of Code of Civil Procedure 232 sets the governing standard of review.

As appellant has discussed above, the juror's oath set forth in subdivision (a) requires prospective jurors to answer all questions concerning their qualifications and competency both accurately and truthfully. In *Lewis*, prospective jurors completed written juror questionnaires, which they signed under penalty of perjury, before they were administered the oath in subdivision (a) in open court. This Court found the prospective jurors should have been sworn under subdivision (a) before they filled out the questionnaires, but concluded there was no prejudice in this matter where the thrust of the issue was timeliness. The jurors were sworn under subdivision (a) before they were personally questioned in open court and the defendant did not assert the jurors carried out their duty to answer truthfully when completing the questionnaires and when answering in open court. And, the

Court found nothing in the record that suggested voir dire examination was inadequate. (*People v. Lewis*, *supra*, 25 Cal.4th at p. 631.)

As appellant pointed out above and in the opening brief in his discussion of the governing standard in light of *Cruz* and *Lewis*, voir dire examination affords a defendant the opportunity to mitigate any prejudice flowing to him from an omitted or improperly administered subdivision (a) oath. (AOB 227-229.) But no such opportunity for mitigation is available to the defendant whose jurors are not correctly given the subdivision (b) oath.

People v. Carter, upon which respondent also relies in arguing for harmless error review (RB 87-89), is also a case in which the oath in issue is the oath of truthfulness to prospective jurors, i.e., the subdivision (a) oath. (*People v. Carter*, *supra*, 36 Cal.4th at pp. 1175-1177.) These cases are distinguishable for the reasons set forth above and in the opening brief at pages 224-229 explaining why reversal of the judgment of conviction is the appropriate remedy.

Respondent does not discuss *People v. Pelton* (1931) 116 Cal.App.Supp. 789, in which the court held that reversal was the appropriate remedy because a conviction by an unsworn jury is a nullity. (*Id.*, at p. 791.) The jury that convicted Pelton was not sworn. *Pelton* discerned that certain kinds of trial errors were "mere irregularities which may be waived by failure to object," and cited as examples irregularities in summoning the jury or placing the jury in charge of a deputy where the sheriff was disqualified. The court noted that these kinds of irregularities were not "fundamental." (*Ibid.*)

Pelton said "[W]hen we consider the requirement to swear a jury to try a cause, we are dealing with a fundamental, in the absence of which, there is, in fact, no legal jury." (*Ibid.*)

In the opening brief, appellant contended that if a failure to swear the jury renders a conviction a nullity, it follows that a defendant's constitutionally protected right to a unanimous verdict operates to render a conviction a nullity when it is reached by a jury with even one member who is not properly sworn. (See AOB 216.)

Respondent relies on *Cruz*' placement of the prejudice burden upon the defendant, which is derived from *Cruz*' premise that jurors have a trial duty independent of that embedded in the oath set forth in subdivision (b). Appellant has explained why that reasoning (and the consequent burden placement) is flawed. (See AOB 226-228.) Respondent addresses none of these contentions and merely reiterates the analysis set forth in *Cruz*.

For the reasons set forth here and in the opening brief, appellant respectfully submits that reversal of the judgment of conviction is the appropriate remedy here.

PENALTY PHASE ISSUES

XI.

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT IT WAS REQUIRED TO SET ASIDE ALL PRIOR DISCUSSIONS RELATING TO PENALTY AND BEGIN PENALTY DELIBERATIONS ANEW WHEN TWO JURORS WERE REPLACED BY ALTERNATE JURORS AFTER THE GUILT VERDICT HAD BEEN REACHED AND THE PENALTY CASE HAD BEEN SUBMITTED TO THE JURY. THIS ERROR DEPRIVED APPELLANT OF THE RIGHT TO A JURY DETERMINATION OF THE PENALTY AND THE RIGHT TO DUE PROCESS OF LAW

A. INTRODUCTION

On two occasions during penalty phase deliberations, sitting jurors (Jurors No. 9 and 10) were replaced by alternate jurors. On each of these occasions, the trial court failed to instruct the jury that it was required to set aside and disregard all prior discussions relating to penalty and to begin penalty deliberations anew. Appellant's Fourteenth Amendment right to due process of law, his Sixth Amendment right to an impartial jury, and his Eighth Amendment right to a reliable determination of penalty were violated when the trial court failed to properly instruct the jury in this manner. Reversal of the penalty phase verdicts is required.

B. THE DOCTRINE OF INVITED ERROR DOES NOT APPLY TO BAR APPELLANT'S CLAIM; NOR IS APPELLANT'S CLAIM OTHERWISE PROCEDURALLY BARRED

Respondent first claims that appellant is procedurally barred from pursuing his claim by the doctrine of invited error. (RB 213-216.)

This Court explained the substance and application of the doctrine of invited error in *People v. Wickersham* (1982) 32 Cal.3d 307, as follows:

> The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal. However, because the trial court is charged with instructing the jury correctly, it must be clear from the record that defense counsel made an express objection to the relevant instructions. In addition, because important rights of the accused are at stake, it also must be clear that counsel acted for tactical reasons and not out of ignorance or mistake. (*Id.*, at p. 330.)

Thus, in order for the doctrine of invited error to apply to bar appellant's claim, the record must show an express objection to the instruction and a clear indication that counsel acted for tactical reasons. Nothing in the record makes this required showing.

The Attorney General first claims that appellant "requested" CALJIC No. 17.51.1 and offers a citation to the record (38CT 11119). There, the written instruction does show an X for the box "Requested by Defendant." However, respondent fails to direct the Court's attention to the preceding page (38CT 11118), where the same instruction, annotated "(2nd reading)," shows the instruction was "Given on Court's Motion." This instruction appears to be

the one that would have been given at the time the second sitting juror, *viz.*, Juror No. 9, was replaced.

Thus, to the extent that a defense request for the instruction is a necessary predicate to the application of the invited error doctrine, respondent's invited error assertion may apply to one of the two occasions on which the court gave the challenged instruction. But even if such were the case, the second prong of the predicate is absent because the record does not support a finding that trial counsel expressly requested the giving of CALJIC No. 17.51.1 for a tactical reason.

In addition, any indication the defense requested the giving of CALJIC No. 17.51.1 is undercut by countervailing evidence. First, appellant notes that the parties did not discuss the instruction to be given to the jury at either of the times a juror was actually replaced. (See, e.g., 18RT 4467-4471, 4489-4492.)

The only discussion regarding an instruction pertaining to the substitution of jurors occurred at the very end of a general discussion on penalty phase instructions to be given to the jury and the topic was introduced into the discussion by the court. But first, the record shows the parties did not discuss either CALJIC Nos. 17.51 or 17.51.1 in the context of defense-requested instructions. Such a discussion would suggest the defense requested the challenged instruction. (See, e.g., 17RT 4219-4224.)

Instead, at the end of the discussion regarding penalty phase instructions in general, the court made the following reference to juror substitution in the penalty phase:

> Any other instructions? [¶] All right, hearing none. I will tell you there is only one other instruction, it's the substitution of juror during penalty phase, 7.51 [sic], assuming

that we get to that particular information, let me just read the instruction. We may have to read that instruction, given that that is the case, tomorrow morning for all counsel shall we say. 9:15, all right, to set up. Thank you, very much. (17RT 4224:13-20.)

Thus, the only discussion concerning an instruction pertaining to juror substitution was introduced by the court and the specific instruction referenced by the court, "7.51," appears not to be an accurate number, and so it is impossible to identify the instruction to which the court was referring. The only thing in the record that is clear is that nothing in the record establishes that counsel for appellant made an express request for CALJIC No. 17.51.1 for tactical reasons, as the Attorney General inexplicably would have this Court find. The doctrine of invited error does not apply to bar appellant's claim.

Respondent alternatively contends that appellant forfeited his claim because he failed to request the proper clarifying instruction. (RB 214.) Significantly, in so claiming, respondent implicitly acknowledges that a trial court must instruct the jury to begin its deliberations anew when an alternate juror replaces a deliberating juror. (RB 212-231.) Accordingly, the parties are in agreement that in giving CALJIC No. 17.51.1 in place of CALJIC No. 17.51 the trial court selected and gave the wrong pattern instruction on the two occasions it seated alternate jurors in the place of deliberating jurors.

Respondent argues that appellant had an affirmative duty to request CALJIC No. 17.51. Respondent further argues defense counsel should have known CALJIC No. 17.51 was the appropriate instruction because appellant's trial took place after this Court's decisions in *People v.*

Cain (1995) 10 Cal.4th 1 and *People v. Collins* (1976) 17 Cal. 687, which set forth the controlling legal principles. (RB 214.)

Respondent's contentions must fail. Respondent provides no authority to support its claim appellant was required to request a clarifying instruction. (RB 213-215.) Moreover, appellant had no such duty in light of this Court's consistent recognition that the trial court must instruct on general principles of law relevant to and governing the case, even without a request from the parties. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.)

Respondent analogizes appellant's claim to that made in *People v. Proctor* (1992) 4 Cal.4th 499, 536-537. In *Proctor*, this Court rejected a defendant's claim that the instruction given his reconstituted jury did not "embody all elements of the instruction" required by *Collins*. (RB 218-219.) Closer review, however, shows that *Proctor* is readily distinguishable. The trial court in *Proctor* told the jury it should "start from scratch" so that the newly seated juror "has the benefit of your thinking as well as give him an opportunity for his input also." In affirming the conviction, this Court relied on the substance of that language. The trial court instructed:

> [It] would be helpful and in connection with commencing your deliberations again, that you kind of start, start from scratch, so to speak, so that Mr. Rhodes has the benefit of your thinking as well as given him an opportunity for his input also. (*People v. Proctor*, *supra*, 4 Cal.4th at p. 536.)

While the trial court's instruction in *Proctor* may have used alternative language to that in the instruction, the thrust of the *Proctor* instruction parallels that of the pattern instruction. (CALJIC No. 17.51; see AOB 236.) Both inform that the jury must start anew or begin deliberations

anew so that the newly added juror and the remaining jurors will have an opportunity to share their thinking.

The function of the instruction is, of course, to ensure the parties' right to a verdict reached only after full participation of the twelve jurors who return the verdict by specifically instructing the jurors they must being deliberations anew. Respondent additionally contends the instruction's function is adequately met by the court's instruction to the jury that "[y]our function *now*" is to deliberate "with" the replacement juror, and "[e]ach of you *must participate fully* in the other deliberations." (18RT 4470, 4491; RB 218-219; emphasis added in RB.)

But, a review of the instruction given the jury shows that respondent has misconstrued the instruction. The court did not instruct the jury that its function now was to deliberate with the replacement juror. Rather the court instructed the alternate juror that he must accept the guilt phase findings and verdicts and then continued: "Your function now is to determine along with the other jurors, in the light of the prior verdict or verdicts, and findings, and the evidence at law, what penalty should be imposed." (38CT 11119; 18RT 4470.)

The court instructed as follows:

> Members of the Jury:
>
> A juror has been replaced by an alternate juror.
>
> The alternate juror was present during the presentation of all of the evidence, arguments of counsel, and reading of instructions, during the guilt phase of the trial. However, the alternate juror did not participate in the jury deliberations which resulted in the verdicts and findings returned by you to this point. For the purposes of this penalty phase of the trial, the

> alternate juror must accept as having been proved beyond a reasonable doubt those guilty verdicts and true findings rendered by the jury in the guilt phase of this trial. Your function now is to determine along with the other jurors, in the light of the prior verdict or verdicts, and findings, and the evidence and law, what penalty should be imposed. Each of you must participate fully in the deliberations, including any review as may be necessary of the evidence presented in the guilt phase of the trial. (CALJIC No. 17.51.1; 38CT 11119; 18RT 4470.)

Thus, the court instructed the replacement juror that his function was to determine along with the other jurors what penalty should be imposed. And, the court instructed the jury that "[e]ach of you must participate fully in the deliberations." But, this last aspect of the instruction is silent as to the time when the duty to participate fully in the deliberations begins. In contrast with the instruction given in *Proctor*, the trial court here never instructed the jury that it must start anew, start from scratch, start over, begin its deliberations anew, or otherwise provide the jury with the latter's functional equivalent. And, as appellant has noted above, the trial court in *Proctor* elaborated upon its direction to start from scratch with the explanation that the jury must start anew or begin deliberations anew so that the newly added juror and the remaining jurors would have an opportunity to share their thinking. Such an explanation would help to clarify any ambiguity in the instruction to start from scratch by explaining the reason for the requirement. No equivalent explanation was given to appellant's jury.

Respondent also claims the jury that returned the penalty phase verdicts understood the principle that it must reach its verdict through common shared deliberations. (RB 219-220.) Respondent claims the jury reached this understanding by following the applicable instructions. (RB

219). Respondent further claims the jury followed the applicable instructions because it had taken an oath to do so. (RB 220.) However, recognizing that its argument was defective on its face because penalty phase replacement jurors 8971 and 2211 had, as the result of the trial court's omission, never taken the trial juror's oath (see Argument X in the opening brief and this reply brief), respondent constructs the following argument. Respondent contends that because Jurors 8971 and 2211 took an alternate juror's oath to act as a trial juror when called upon to do so and because Jurors 8971 and 2211 were present when the initial group of trial jurors took the trial juror's oath and because the court instructed the penalty phase jury that the vote for a death verdict had to be unanimous, the penalty phase jury knew it had to begin its deliberations anew. (RB 220.)

Thus, the Attorney General asks this Court to find appellant's jury was properly instructed that it should begin deliberations anew after a replacement juror was seated because the alternate jurors had been present when the trial juror's oath was administered and because an instruction requiring unanimity for a death verdict had been given. This contention relies on events that are seriously attenuated in logic and relevance and must be rejected. A unanimity requirement is not the functional equivalent of a charge to begin deliberations anew and presence at the administration of an oath-taking is not the functional equivalent of taking a sworn oath.

C. THE FAILURE TO INSTRUCT THE NEWLY RECONSTITUTED JURY TO BEGIN DELIBERATIONS ANEW WAS PREJUDICIAL

The Attorney General further argues that if there was error, it was harmless. (RB 222-231.)

In the opening brief, appellant set forth the chronological sequencing of penalty phase deliberations. (AOB 237-239) Appellant observed that the cold face of the record showed that the jury had deliberated for the equivalent of two-and-a-fraction days before the first reconstitution of the jury occurred. Immediately prior to the seating of the new Juror No. 10, the jury had declared itself divided at 10 to 2 and at an impasse. In a little over two hours *after* the reconstituted jury began its deliberations, the jury was again at an impasse but its numbers had shifted to 10 to 1. Because the jury ultimately fixed the penalty at death for appellant it is reasonable to infer that the shift in jury numbers from 10 to 2 to 10 to 1 following the replacement of a deliberating juror and in the absence of an instruction for jurors to begin deliberations anew was adverse to appellant's interests.

The second reconstitution of the jury occurred on the morning of the next court day. Jury deliberations began at 10:45 a.m. with a newly seated Juror No. 9. Within fifty minutes, the jury delivered unanimous death verdicts against both appellant and Satele.

The immediacy with which each of the two reconstituted juries reached a reportable decision (first, the 11 to 1 split, and then the death verdicts) against both defendants is powerful evidence that these two incarnations of the jury had not disregarded prior deliberations and deliberated anew as appellant was entitled to have the jury do. Rather, the extremely short

timeframes suggest that the majority's view carried in the absence of meaningful deliberation that included the views of the jury's most recent member. (See *People v. Renteria* (2001) 93 Cal.App.4th 552, 556-561 [failure to give newly reconstituted jury mandatory instruction that it must disregard its previous deliberations and begin deliberations anew constituted reversible error]; AOB 238-240.)

The gist of the Attorney General's argument is that the brevity of the deliberations proves nothing. (RB 228, 230.) Respondent first summarizes penalty phase evidence, the events comprising the seating of the replacement jurors, and instructions respondent finds relevant. (RB 222-230.) Respondent then summarily contends there were no complicated factual issues for the jury to resolve regarding the penalty phase evidence and further summarily contends the guilt phase evidence was overwhelming. Respondent concludes that, because of the state of the guilt and penalty phase evidence, the two-hour time frame following the replacement of Juror No. 10 that resulted in a shift from a 10-2 to an 11-1 vote and the 50-minute time frame following the replacement of Juror No. 9 that resulted in the death verdicts allowed the jury adequate time to deliberate anew.

Respondent relies on *People v. Leonard* (2007) 40 Cal.4th 1370, a single defendant case involving a felony murder prosecution for six murders and two robberies occurring in the course of two incidents. (RB 230.) In that case, a jury that had been properly instructed to begin its deliberations anew following the seating of a replacement juror deliberated for two-and-one-half hours before returning its guilt-phase verdict. On appeal, the defendant complained that although the jury had been properly instructed to begin its deliberations anew, the brevity of the deliberations indicated the jury had not

done so. In the absence of countervailing evidence, this Court assumed the jury had followed the trial court's instructions and started afresh and on that basis rejected the defendant's claim. (*Id.*, 40 Cal.4th at p. 1413.)

Appellant's claim is, of course, markedly different. Appellant's claim is that his jury was *not* properly instructed. *Leonard*'s claim was that the brevity of deliberations alone constituted prima facie evidence a properly instructed jury failed to begin its deliberations anew. Thus, *Leonard*'s controlling reasoning that absent evidence to the contrary a properly instructed jury is presumed to have begun its deliberations anew is not applicable here. *Leonard* does not impose upon appellant the burden of producing evidence that his jury did not follow an instruction it was never given (i.e., did not begin its deliberations anew), although respondent appears to suggest that such is the case. (See, e.g., RB 219-220.)

And, where time alone is concerned, *Leonard* differs because it involved the guilt of a single defendant, who was prosecuted on a relatively simple theory of liability, *viz.*, felony murder, for multiple murders occurring in two separate incidents, and a jury deliberation time of 2.5 hours. The present case, on the other hand, involved death penalty determinations for two defendants involving evidence appellant discusses below and penalty phase jury deliberation times of two hours following the replacement of the first juror (resulting in a shift from 10-2 to 11-1) and 50 minutes following the final replacement of a juror (resulting in death verdicts).

As to the matters for the jury's consideration, respondent's conclusory assessment that the penalty phase evidence was not complicated is incorrect. Sixteen witnesses, among them two expert witnesses, testified. (See summary at AOB 32-39.) The jury had to decide the truth of alleged

aggravating factors concerning whether appellant's possession of a staple constituted the crime of possession of a weapon and whether his act of unlocking his handcuffs and performing jumping jacks on the transport bus before recuffing himself constituted the crime of attempted escape, and decide also the weight of such conduct as an aggravating penalty factor. Although the jury was required to accept the guilt phase verdicts and findings it was also authorized to consider guilt phase evidence for its impact on the penalty phase verdicts, e.g., to resolve issues related to lingering doubt and the weight of the guilt phase evidence as aggravating factors for a death verdict.

In addition, respondent's determination that the guilt phase evidence was overwhelming is equally conclusory. To the extent the guilt phase evidence was relevant to penalty phase deliberations, the evidence as to appellant's separate culpability was in no way overwhelming. Appellant has explained in the context of many of the guilt phase instructional issues that the inaccurate statements of law contained in the instructions and the prosecution's related argument resulted in blurring the mental state issues related to the actual shooter and the accomplice. Appellant's role and separate culpability were relevant for consideration by a penalty phase jury.

Taking all of these circumstances into account, the trial court's error in failing to instruct the penalty phase jury to begin its deliberations anew after it replaced each of two jurors was not harmless. For the reasons appellant explained in the opening brief, the brevity of the jury deliberations is a relevant consideration and respondent has failed to show otherwise. (AOB 237-241; *People v. Renteria* (2001) 93 Cal.App.4th 552, 557; *People v. Collins* (1976) 17 Cal.3d 687, 694, overruled on other grounds in *People v. Boyette* (2002) 29 Cal.4th 381, 462 fn. 19.)

Accordingly, for the reasons set forth in the opening brief and this reply brief, appellant respectfully submits the trial court created error of constitutional proportion when it failed to correctly instruct the jury that fixed his penalty at death that it was required to disregard its prior deliberations and begin deliberations anew when the court replaced Juror No. 9 and Juror No. 10 with alternate jurors. The error was prejudicial as explained above and reversal of the penalty phase verdicts is warranted.

XII.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR UNDER *WITHERSPOON V. STATE OF ILLINOIS* (1968) 391 U.S. 10 AND *WAINWRIGHT V. WITT* (1985) 469 U.S. 412, VIOLATING APPELLANT'S RIGHTS TO A FAIR TRIAL, IMPARTIAL JURY, AND RELIABLE PENALTY DETERMINATION AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BY EXCUSING A PROSPECTIVE JUROR FOR CAUSE DESPITE HER WILLINGNESS TO FAIRLY CONSIDER IMPOSING THE DEATH PENALTY

A. INTRODUCTION

In the opening brief, appellant contended the trial court committed reversible error under *Witherspoon v. Illinois* (1968) 391 U.S. 510 and *Wainwright v. Witt* (1985) 469 U.S. 412, violating appellant's rights to a fair trial and impartial jury, and reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments, by excusing a prospective juror (Juror No. 2066) for cause despite her willingness to fairly consider imposing the death penalty. (AOB 243-252.)

In *Witherspoon*, *supra*, the United States Supreme Court held that a sentence of death violated the Sixth and Fourteenth Amendments and could not be carried out where the jury that recommended it was chosen by excluding venire persons for cause simply because they voiced general objections to the death penalty.

In *Adams v. Texas* (1980) 448 U.S. 38, the Court clarified its holding in *Witherspoon* by explaining that prospective jurors could not be excluded from service simply because their views on the death penalty would impact "what their honest judgment of the facts will be or what they may

deem to be a reasonable doubt." (*Id.*, at p. 50.) Rather, a prospective juror who opposed capital punishment could be discharged for cause only where the record showed him unable to follow the law as set forth by the court. (*Id.*, at p. 48; see also *People v. Stewart* (2004) 33 Cal.4th 425, 447 [performance of juror who might find it difficult to vote to impose death not substantially impaired under *Witt*, unless juror unwilling or unable to follow court's instructions]; *People v. Heard* (2003) 31 Cal.4th 946.) Moreover, as the Supreme Court later made plain in specifically reaffirming *Adams*, if the state seeks to exclude a juror under the *Adams* standard, it is the state's burden to prove the juror meets the criteria for dismissal. (*Wainwright v. Witt*, *supra*, 469 U.S. 412, 423.)

B. APPELLANT'S CLAIM IS NOT PROCEDURALLY BARRED BY INACTION BELOW

As is true with each issue briefed, the Attorney General claims appellant has forfeited constitutional claims by inaction below. (RB 45-49.)

Appellant has discussed the legal authorities upon which respondent relies in Section A of Argument X, which discussion appellant incorporates here by reference. Under the principles set forth in those cases, the issue is not waived under exceptions to the waiver rule that allow an appellate court to review, inter alia, an issue pertaining to the deprivation of fundamental constitutional rights; to review issues to which a party has failed to make specifically phrased objections; to review issues involving a pure question of law; or to review issues in the court's discretion.

C. JUROR NO. 2066 DID NOT MEET THE CRITERIA FOR DISMISSAL

In *People v. Stewart* (2004) 33 Cal.4th 425, this Court elaborated upon the criteria for dismissal under *Witt* in clear, plainly worded terms:

> [T]he circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will "substantially impair the performance of his [or her] duties as a juror" under *Witt, supra*, 469 U.S. 412, 105 S.Ct. 844. . . . A juror might find it very difficult to vote to impose *the death penalty,* and yet such a juror's performance still would not be substantially impaired under *Witt,* unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*Stewart, supra*, at p. 447)

In the opening brief, appellant pointed out that in both her responses to the jury questionnaire and in voir dire with court and counsel Juror No. 2066 expressed her generalized opposition to the death penalty, but also stated her intention to follow the law as given to her by the court. (AOB 246-251.)

Thus, Juror No. 2066 acknowledged that although she was "strongly opposed to the death penalty," there were "rare cases where a death sentence was appropriate." (3RT 620.) And, while the prospective juror stated she "wouldn't want to vote for" the death penalty (3RT 620-621) or could not vote for death (3RT 621), she also said she would do her best to "follow the instructions on the law and do what the law requires" based upon her determination of the facts (3RT 622.) Juror No. 2066 also said she was

not "at ease with voting for the death penalty" should she be required to do so and that she would look at alternatives "first before choosing the death penalty." (3RT 622-623.) The juror also said if the evidence warranted the imposition of the death penalty she would be able to vote for death with the knowledge that life without possibility of parole was available. (3RT 623.) She also said that if she was "confronted with the decision about death and other alternatives," she would not "automatically" choose the alternatives, but "would have to see what the other alternatives were." (3RT 623-624.) The juror also indicated she would never vote for death, but also indicated there could be a case so bad that she could vote for the death penalty, although she would not want to do so. (3RT 625-626.)

Juror No. 2066 thus explained her generalized opposition to the imposition of the death penalty, but said there were factual circumstances in which she could vote for the death penalty and also stated her willingness to apply the law as given to her by the trial court.

In *People v. Heard* (2003) 31 Cal.4th 946, this Court concluded a prospective juror was wrongly excused for cause under analogous circumstances as exist here. In *Heard*, the prospective juror's answers on the jury questionnaire indicated a philosophical opposition to the death penalty, but on voir dire, the juror said he would do "whatever the law states." (*Id.*, at p. 960.)

Respondent contends *Heard* is distinguishable because the record presents "overwhelming evidence" that Juror No. 2066 was death-disqualified under *Witt*. (RB 55-56.) Respondent presents a solitary example of this "overwhelming evidence," noting that the juror told the trial court she could not or would not vote for the death penalty. (RB 56.) But, as appellant

has indicated in the summary of the juror's voir dire responses presented above, when either the trial court or counsel explained the legal principles involved or probed into the juror's willingness to consider and impose the death penalty or its alternatives, the juror indicated an intention and willingness to follow the law and carry out her duties as a juror.

Accordingly, despite respondent's attempts to prove the contrary, Juror No. 2066 was not properly death-disqualified under *Witt* and the factual circumstances present here are analogous to those this Court recognized as error in *Heard.*

In addition, the Attorney General inexplicably contends that appellant has claimed that the circumstances here are indistinguishable from those set forth in *People v. Stewart, supra.* Having raised this spurious claim, respondent proceeds to argue that *Stewart* is factually distinguishable. (RB 54-55, citing Nunez AOB pages 245-246, 249-250, 252.) A simple review of the AOB pages referenced by respondent show that appellant relied upon *Stewart* in order to explain the governing law, but never claimed that *Stewart* governed because it was factually indistinguishable. In so contending, respondent raises and slays a straw man for reasons that do not inform the discussion.

Witherspoon held that it is not permissible to excuse prospective jurors "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction," as long as they could obey their oath to follow the law. (*Id.*, at p. 522.) It logically follows that a jury panel is skewed in favor of death when all prospective jurors who are morally or philosophically opposed to the death penalty are allowed to be eliminated for cause despite their stated willingness to abide by

the court's instructions regarding the law. A jury trial under such circumstances impacts the reliability of the decision to impose the death penalty, in violation of the Eighth and Fourteenth Amendments, which impose greater reliability requirements in capital cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334); *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-85; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

For the reasons set forth in the opening brief and this reply brief, appellant respectfully submits the trial court erred in granting the prosecution's challenge for cause to Prospective Juror No. 2066.

XIII.

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO BE TRIED BY A FAIR AND IMPARTIAL JURY WHEN IT ERRED IN OVERRULING APPELLANT'S CHALLENGE FOR CAUSE AGAINST JUROR NO. 8971 FOR IMPLIED BIAS AND MISCONDUCT

A. INTRODUCTION

During the jury selection process, Juror No. 8971 had separate conversations with two other potential jurors during which he advocated putting all gang members on an island and letting them take care of each other. Each of the two potential jurors reported his conversation with Juror No. 8971 to the court because the conversations violated the court's order against discussing a subject connected with the trial. (4RT 737-738, 742-744; AOB 254.)

When the court inquired of Juror No. 8971, the juror admitted making the reported statement about gang members, but said he made them to only one juror. He also said the conversation occurred in a different physical venue than reported by the two jurors, suggesting the possibility of yet a third inappropriate discussion between Juror No. 8971 and a potential juror. The juror also said he had held these opinions about gangs since 1981. (4RT 747-748; AOB 254.)

The trial court denied the defense motion to excuse Juror No. 8971. (4RT 751-752; AOB 255.)

B. Appellant's Claim Is Not Procedurally Barred by Inaction Below

Respondent first contends that appellant has failed to preserve his claim of error regarding the court's failure to remove Juror 8971 because trial "counsel never expressed dissatisfaction with prospective juror 8971." (RB 68-69.)

In the opening brief, appellant explained what this Court has required from defendants complaining of erroneous denials of challenges for cause: "To preserve a claim based on the trial court's overruling a defense challenge for cause, a defendant must show (1) he used an available peremptory challenge to remove the juror in question; (2) he exhausted all of his peremptory challenges or can justify the failure to do so; and (3) he expressed dissatisfaction with the jury ultimately selected. (*People v. Cunningham* (2001) 25 Cal.4th 926, 976; *People v. Crittenden* (1994) 9 Cal.4th 83, 121.)" (*People v. Maury* (2003) 30 Cal.4th 342, 380.)

Appellant then explained that he had met this requirement because he had exhausted all of his peremptory challenges and because he had expressed dissatisfaction with the jury ultimately selected. (AOB 257.) In support of this assertion, appellant presented evidence that the defense had exhausted the six peremptory challenges to which it was entitled in the selection of alternate jurors (4RT 855) and that counsel for appellant expressed his dissatisfaction with the "result of the picking," i.e., with the jury ultimately selected (4RT 870). (AOB 255.)

The Attorney General disagrees and claims that both appellant and Satele failed to express specific dissatisfaction with Prospective Juror No. 8971 after the jury was finally constituted. (RB 68-70.) The Attorney

General claims: "Nunez' counsel said that he was not satisfied with the selection procedure and 'not satisfied with the result of the picking' due to that process, but Nunez' counsel never expressed dissatisfaction with prospective juror 8971." (RB 69-70.) As to Satele, the Attorney General suggests that Satele's counsel stated he was satisfied with the jury. (RB 69; 4RT 870.)

The Attorney General's claims lack merit. *Cunningham*'s requirement that dissatisfaction be expressed was in fact met. *Cunningham* requires that the defendant communicate to the court his "dissatisfaction with the jury ultimately selected," and not, as the Attorney General contends, specific "dissatisfaction with prospective juror 8971" (RB 69-70; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 976.). Here, counsel for Nunez said, "I'm not satisfied with the result of the picking. . . ." (4RT 870.) Counsel's statement was a clear expression of "dissatisfaction with the jury ultimately selected," and met *Cunningham*'s requirement. Respondent's multiple efforts to suggest that appellants failed to preserve the issue for review by failing to state a specific objection to Juror 8971 after his selection as an alternate juror lack merit as no such expression of dissatisfaction specific to an individual juror is required.

Furthermore, the record shows that respondent's suggestion that Satele expressed satisfaction with the jury is not supported by the record. Counsel for Satele Mr. Osborne responded, "Yes, your Honor," to the following question from the court, which expressly excluded counsel's evaluation of "the jury ultimately selected." The trial court inquired: "All right, Mr. Osborne, I don't know if you like or dislike the composition of the jurors, but are you satisfied in the way and procedure of which the jurors were picked?" (4RT 870:2-4.) Thus, Mr. Osborne's expression of satisfaction

concerned the jury selection method employed by the court and was in no way an expression of satisfaction with "the jury ultimately selected."

Respondent also claims that appellant has not met *Cunningham*'s requirement that he must have either exhausted all of his peremptory challenges or can justify his failure to do so. (RB 69.) Respondent claims that appellant had two remaining peremptory challenges at the time Juror No. 8971 was seated as alternate Juror 2 and that appellants used the two remaining peremptory challenges to remove other prospective alternate jurors instead of Juror No. 8971. (RB 69.) Respondent additionally claims that appellants failed to remove Juror No. 8971 with their two remaining peremptory challenges in spite of the trial's court express invitation to remove the juror with a peremptory challenge. (RB 69.) Respondent does not contend that appellant had unused peremptory challenges at the end of the jury selection process. Rather, respondent's argument relates to timing.

Respondent appears to argue by innuendo that appellants have forfeited review of the issue because they failed to remove Juror No. 8971 through the timely exercise of a peremptory challenge immediately upon the juror's seating as an alternate juror, even when invited to do so by the trial court, despite the fact that an "invitation" by the court is not a necessary predicate to the exercise of a peremptory challenge.

The record on appeal, however, discloses that respondent juxtaposes two discrete acts to make it appear that the court invited the defense to excuse the juror with a peremptory challenge during the period in the selection process when peremptory challenges were being exercised. Instead, the trial court's invitation to remove the juror by peremptory challenge was a discrete act, taken when the court denied the defendant's

challenge for cause against the juror and made at a point in time much before the alternate jurors were selected. (4RT 751-752.)

And, any argument that appellant has forfeited review because he did not remove the juror via peremptory challenge when he could have is specious because *Cunningham* requires only that peremptory challenges be exhausted, and not that the peremptory challenges be used in a particular manner or chronological sequence. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 976.) As noted, respondent does not assert that appellant failed to exhaust his peremptory challenges.

Respondent also contends that appellant forfeited review because trial counsel refused the trial court's offer to increase the number of peremptory challenges from six to ten. (RB 69.) A review of the record reveals that the trial court erred in its calculation of the number of peremptory challenges permitted each side and, when informed of the error, immediately sought to correct it by offering each side ten challenges, which would have exceeded the statutory authorization for peremptory challenges in the selection of alternate jurors. (See Code Civ. Proc., § 234; peremptory challenges equal number of alternate jurors called.) Counsel for appellant correctly declined the court's offer. The court thereupon corrected itself and said it would "follow the rule." (4RT 854:1-11, 26-28.)

This contention by the Attorney General is therefore specious in that it is based upon trial counsel's correct refusal of an offer the trial court subsequently realized it was not authorized to make and which it immediately retracted.

Respondent additionally contends once again that appellant's constitutional claims are not sufficiently preserved. (RB 68.)

Respondent has made a similar contention with each of its arguments. Appellant has addressed these contentions and the law upon which respondent relies elsewhere, for example, in Section A of Argument X, which he incorporates here by reference. The case law establishes, for example, that, where an issue may not have been properly preserved at trial, an appellate court may review an issue in an exercise of its own discretion; that issues relating to the deprivation of fundamental constitutional rights or to pure questions of law are reviewable without proper preservation below.

For these reasons, appellant respectfully submits this issue is not procedurally barred.

C. THE TRIAL COURT'S FINDINGS AND CONCLUSIONS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

In the opening brief, appellant explained that the trial court's findings and conclusions regarding prospective Juror No. 8971 was not supported by substantial evidence. (AOB 257-260.)

In ruling on the defense motion to excuse the juror for cause, the trial court found that Juror No. 8971 had spoken with but one juror about his views regarding gangs during the jury selection process. In fact, two jurors (Jurors No. 9825 and 6582) reported having heard virtually similarly biased statements from Juror No. 8971 in separate private conversations. (4RT 737-738, 742-744; AOB 258.) During his hearing with the court, Juror No. 8971 explained his views regarding the disposition of gang members to an island and that explanation corroborated the versions reported by Jurors No. 9825 and 6582. Juror No. 8971 reported to the court that he had made this

statement to only one juror in a conversation that occurred on the courthouse balcony. Jurors No. 9825 and 6582 each described having separate private conversations in a different locale. (AOB 258.) Accordingly, the court's finding Juror No. 8971 inappropriately shared his biased views about gangs with only one juror was not supported by substantial evidence. Moreover, because the jurors described conversations taking place in three different locations, there is a reasonable likelihood the juror shared his biased views with yet a third prospective juror.

Respondent does not argue otherwise. (RB 70-78.)

The trial court also found that the juror's statements about gangs was an "innocuous comment" about "issues in society," amounting to "idle comment while waiting for the case to go forward." (4RT 751-752, 753; AOB 258.) Appellant explained that this finding was not supported by substantial evidence. Juror No. 8971 had seriatim conversations about gangs with at least two separate jurors, in violation of the court's express order to the contrary. The juror's intentional and repeated violation of the court's order constitutes substantial evidence the juror had a biased concern, a preoccupation with that concern, and either a willingness to act upon or perhaps even an inability to control acting upon that preoccupation. There was no equivalent evidence the comment was "innocuous" or "idle." (AOB 258.)

In addition, the fact that Juror No. 8971 had held these biased views for 19 years by his own admission and had shared them with two or more jurors in violation of the trial court's express admonition constitutes additional substantial evidence the comments were not "innocuous" and "idle," as the trial court concluded. (AOB 258.)

Respondent recites juror questionnaire responses made by Juror No. 8971 to questions concerning his views on gangs in arguing the juror's views were neither entrenched nor biased. (RB 71.) Respondent does not, however, explain how these questionnaire responses render the obvious bias reflected in the juror's comments to the other jurors unbiased, or render the longevity of the juror's adherence to these biased views less entrenched, or render the juror's willingness to repeatedly communicate these views to other jurors anything less than an act of misconduct. It is significant that the subject of the juror's views amounted to more than a discourse on gangs in general. The juror's views involved a resolution of a perceived gang "problem" through the disposition of gang members and, as noted, these views had been held for a long duration. (AOB 258-259.) Respondent's contentions do not show that the trial court's conclusion the juror's statements were "innocuous" and "idle" was adequately supported by substantial evidence.

At the time of the hearing with Juror No. 8971 concerning the comments in issue here, the trial court never inquired of the juror as to his impartiality. Accordingly, in the opening brief, appellant argued that the conclusion of the juror's fairness and impartiality inherent in the court's refusal to excuse the juror for cause was not sufficiently supported by the evidence. (AOB 259.)

Respondent argues the juror's impartiality may be found in the juror's responses to the questionnaire, but once again respondent does not explain how those responses refute the obvious bias toward gang members expressed in the juror's post-questionnaire comments and conduct. (RB 72-73.) The Attorney General also points to other questionnaire responses concerning Juror No. 8971's prior service as a jury foreperson; prior service as

a member of the U.S. Air Force; prior service as a "special court martial" juror; and prior legal training in "government law." (RB 72.) But, respondent once again, fails to explain how those extraneous factors ensured the juror's impartiality and fairness in this case.

What the record does show is what has been previously discussed in the briefing. (AOB 258-259.) Juror No. 8971 committed misconduct through his deliberate and intentional discussions of a prohibited topic with other prospective jurors. His questionnaire responses and other personal but extraneous credentials relied upon by respondent fail to rehabilitate the lack of impartiality and fairness reflected in the juror's biased comments.

Respondent also states that the trial court was "assured (*by words, demeanor, and tone*) that prospective juror 8971 was merely uttering a general statement that had nothing to do with his ability to be a fair juror in this trial." (RB 73; emphasis added.) However, in the supporting transcript pages cited by respondent (4RT 746-752), the record is silent as to the juror's demeanor and tone. The trial court made no finding in this regard and did not state its reliance on the juror's demeanor and tone in making this finding. Respondent further points to the trial court's ruling on the matter of this juror in the context of the new trial motion in which the court appears to indicate that in the hearing related to the challenge for cause Juror No. 8971 indicated he could be fair and impartial, listen to the evidence, and apply the law as instructed by the court. (RB 73-74.) However, a review of the record of the court's hearing with Juror No. 8971 shows the court never inquired of the juror whether he could be fair and impartial, listen to the evidence, and apply the law as instructed by the court. (4RT 746-748.) Thus, respondent's

advocacy on this point is unsupported by substantial evidence and any such conclusory finding by the trial court is unsupported by substantial evidence.

D. THE PENALTY VERDICTS, IN WHICH JUROR NO. 8971 PARTICIPATED, MUST BE REVERSED

Juror No. 8971 was seated as a juror (Juror No. 10) during penalty phase deliberations. He was thus a member of the jury that returned multiple death verdicts against appellant. (38CT 10941-10944; 18RT 4463, 4470, 4497-4498; AOB 255.)

This Court has held that "[t]he denial of a peremptory challenge to which defendant is entitled is reversible error when the record reflects his desire to excuse a juror before whom he was tried. (*People v. Armendariz* (1984) 37 Cal.3d 573, 584.)" (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1087.) This Court further reasoned: "Since the erroneous denial of a challenge for cause compels the defense to use a peremptory challenge, a similar analysis applies to denial of a challenge for cause. (*People v. Coleman* [(1988)] 46 Cal.3d 749, 770-771.)" (*People v. Bittaker*, *supra*, 48 Cal.3d 1087.)

Respondent, however, inexplicably contends that *Bittaker*'s reversible error standard does not apply and that, instead, appellant's claim is subject to scrutiny for prejudice under harmless-error analysis. (RB 75-76.) Respondent's reliance on *Coleman* and *Bittaker* is misplaced. In *Coleman*, this Court considered the matter of an erroneous ruling on a challenge for cause that resulted in the temporary inclusion of a prospective juror, who became neither a regular nor alternate member of the jury eventually

empanelled, and where there was no indication the juror's biased opinion infected other members of the sitting jury. Under those factual circumstances, this Court ruled that an erroneous ruling on a challenge for cause that results in the temporary inclusion of a prospective juror is subject to harmless-error analysis. (*People v. Coleman, supra*, 46 Cal.3d at p. 768-769.) In *People v. Bittaker*, this Court followed *Coleman*'s ruling. (*People v. Bittaker*, *supra*, 48 Cal.3d at p. 1088.)

The contrast with the fact patterns in *Coleman* and *Bittaker* are obvious. Juror No. 8971 was a member of the penalty phase jury that returned death verdicts adverse to appellant. Appellant's penalty phase case was thus tried to a jury that included a juror to whom he properly had objected. Accordingly, the wrongful denial of appellant's challenge for cause was reversible error and the penalty phase verdicts must be reversed.

Appellant here additionally addresses, for the sake of argument and in an abundance of caution, the factual arguments respondent raises in connection with its harmless-error analysis.

The Attorney General first contends that the defense must have believed Juror No. 8971 could be fair because they did not remove him with their available peremptory challenges; they did not request additional peremptory challenges; they did not express dissatisfaction with the juror after he was seated; and they did not express concern about the fact he was a "'mixed' African-American." (RB 76-77.)

Respondent has raised some of these same contentions before and appellant has addressed them above, but here discusses each in turn. Appellant did not remove Juror No. 8971 with his available peremptory challenges, but appellant also exhausted his peremptory challenges. Appellant

has shown the juror had a bias and has also shown that the trial court's ruling denying appellant's challenge for cause was not supported by substantial evidence. Had the trial court ruled correctly on the challenge for cause, appellant's use of peremptory challenges would not be in issue. Nevertheless, appellant did what is required of him by law, *viz.*, he exhausted his preliminary challenges. Respondent's contention that Juror No. 8971 was a seated member of the penalty phase jury because defense counsel believed him to be fair and impartial is no more than speculation, made even more spurious by the defense efforts to challenge the juror for cause and to move for mistrial on the denial of the challenge for cause.

Appellant used the number of peremptory challenges statutorily available to him. It was the trial court's miscalculation regarding the number of available peremptory challenges that led to the court's offer of more peremptory challenges. The record also shows, however, the court decided to "follow the law" and quickly rescinded the offer of more peremptory challenges. Appellant did not express dissatisfaction with the juror after he was seated because any such request would have been futile in light of the court's denials of the defense challenge for cause and subsequent motion for mistrial. Appellant did not express concern about the juror's African-American racial background because such expression would have been highly improper and against the law absent a relevant nexus, as respondent well knows.

Moreover, none of these factors logically relate to the conclusion the Attorney General would have this Court find, i.e., that these facts demonstrate that appellant believed Juror No. 8971 was fair and impartial. Appellant's challenge for cause to the juror on the basis of the

juror's bias and appellant's subsequent motion for mistrial constitute substantial evidence the defense did not find the juror to be fair and impartial.

For the reasons stated herein and in the opening brief, appellant respectfully submits that Juror No. 8971 had an entrenched bias against gang members and shared that bias in comments with other prospective jurors, that the trial court therefore erred in its denial of the defense challenge for cause, that the trial court's findings regarding the juror's lack of bias are not supported by substantial evidence, and that reversal of the penalty phase verdicts is therefore warranted if harmless error were the appropriate standard (*Chapman v. California* (1967) 386 U.S. 18, 24), which, as appellant has explained above, it is not.

XIV.

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO JURY TRIAL AND TO DUE PROCESS OF LAW WHEN IT DISCHARGED JUROR NO. 10 IN THE ABSENCE OF EVIDENCE SHOWING MISCONDUCT TO A DEMONSTRABLE REALITY

A. THIS COURT HAS RECENTLY MADE CLEAR THAT IN JUROR REMOVAL CASES THE RECORD MUST SHOW A JUROR'S INABILITY TO PERFORM AS A JUROR TO A DEMONSTRABLE REALITY

In the opening brief, appellant contended the trial court violated appellant's right to jury trial and to due process of law when it discharged Juror No. 10, a deliberating juror, pursuant to Penal Code section 1089. (AOB 261-277.) (The discharge of this Juror No. 10 resulted in the seating of the alternate juror (No. 8971), discussed in the previous argument, as her replacement.) At the time appellant prepared and filed his opening brief, a trial court's decision to remove a deliberating juror pursuant to section 1089 was reviewed on appeal for abuse of discretion. (AOB 275.)

Since then, as the Attorney General correctly indicates (RB 234-237), this Court has stated that the "more stringent demonstrable reality standard" is the appropriate standard of review in juror removal cases.

> Although we have previously indicated that a trial court's decision to remove a juror pursuant to section 1089 is reviewed on appeal for abuse of discretion (see, e.g., *People v. Leonard* [(2007)] 40 Cal.4th [1370], 1409), we have since clarified that a somewhat stronger showing than what is ordinarily implied by that standard of review is required. Thus, a juror's inability to perform as a juror must be shown as a "demonstrable reality"

> (*People v. Cleveland* (2001) 25 Cal.4th 466, 474), which requires a "stronger evidentiary showing than mere substantial evidence" (*id.* at p. 488 (conc. opn. of Werdegar, J.)). As we recently explained in *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052: "To dispel any lingering uncertainty, we explicitly hold that the more stringent demonstrable reality standard is to be applied in review of juror removal cases. That heightened standard more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury." (*People v. Wilson* (2008) 44 Cal. 4th 758, 821.)

This Court has characterized "[s]ubstantial evidence" as a "deferential" standard. (See, e.g., *People v. Carter* (2005) 36 Cal.4th 1114, 1140.) "Although 'substantial' evidence is not synonymous with 'any' evidence . . , the standard is easily satisfied." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 363, p. 413.)

In contrast, the demonstrable reality test is more rigorous and disciplined. In *Barnwell*, this Court explained the difference between the substantial evidence inquiry and the demonstrable reality test. The substantial evidence review is as follows:

> A substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence of solid value upon which a reasonable trier of fact could have relied in reaching the conclusion in question. Once such evidence is found, the substantial evidence test is satisfied. (See *People v. Johnson* (1980) 26 Cal.3d 557, 578.) Even when there is a significant amount of countervailing evidence, the testimony of a single witness that satisfies the standard is sufficient to uphold the finding. (*People v. Barnwell, supra*, 41 Cal.4th at p. 1053.)

The more severe demonstrable reality inquiry is less deferential and considers whether the trial court's reasons are manifestly supported by the evidence on which the court actually relied to find juror misconduct:

> The demonstrable reality test entails a more comprehensive and less deferential review. It requires a showing that the court as trier of fact did rely on evidence that, in light of the entire record, supports its conclusion that bias was established. It is important to make clear that a reviewing court does not reweigh the evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied.
>
> In reaching that conclusion, the reviewing panel will consider not just the evidence itself, but also the record of reasons the court provides. A trial court facilitates review when it expressly sets out its analysis of the evidence, why it reposed greater weight on some part of it and less on another, and the basis of its ultimate conclusion that a juror was failing to follow the oath. In taking the serious step of removing a deliberating juror the court must be mindful of its duty to provide a record that supports its decision by a demonstrable reality. (*People v. Barnwell*, *supra*, 41 Cal.4th at pp. 1053-1054.)

In his opening brief, appellant contended that the trial court's finding that Juror No. 10 had been influenced by her conversations with her mother and her friend was unsupported by the evidence under the substantial evidence test. (AOB 268, 276.)

Appellant now asserts that the trial court's conclusion that Juror No. 10 had been influenced by outside sources is not supported in the record to a demonstrable reality.

B. THE RECORD DOES NOT ESTABLISH TO A DEMONSTRABLE REALITY THAT JUROR NO. 10 COMMITTED MISCONDUCT WARRANTING REMOVAL

Appellant provided a summary of the factual events leading up to the trial court's removal of Juror No. 10 in the opening brief. (AOB 264-268.)

This Court made clear in *Barnwell* that a reviewing court's task is to scrutinize the trial court's ruling to see that it is manifestly supported by the facts. And, so, appellant supplements the factual summary in the opening brief with a more detailed account of the trial court's various restatements of its ruling below.

But, first, aspects of the Attorney General's factual summary require correction.

1. Aspects of the Attorney General's Factual Summary Require Correction

The Attorney General states that Juror No. 10 appeared to be "seeking extrinsic or expert religious views during her penalty deliberations" because Juror No. 10 called her mother who was "at church." (RB 243 fn. 92; citing to 18RT 4451.) The record does not manifestly support respondent's construct of the situation.

The record shows that at a point in time when she believed the case was done, Juror No. 10 called her mother and learned from her cousin that her mother was at church. (18RT 4448:4-6, 4451:11-14.) During their subsequent conversation, Juror No. 10 told her mother the purpose of her call was to see how her mother was doing. (18RT 4451:15-16.) They talked about

various things and at the end of the conversation Juror No. 10 responded to her mother's question about how the case was going by saying, "it's done." (18RT 4451:18-24.) Juror No. 10 then reported the following colloquy with her mother in which she said, "I have some issues and some stuff that I have to work out, and she said, well, just pray; and, you know, *which we don't agree on that*; but then that's neither here nor there." (18RT 4451:26-28 to 4452:1; emphasis added.) In direct response to the court's questions, Juror No. 10 also said she did not share her concerns about the issues or her views regarding the death penalty with her mother. (18RT 4452:2-9.)

This record makes it very clear that Juror No. 10 was not seeking extrinsic or expert religious views in calling her mother, as respondent would have this Court speculate. The record shows, instead, that Juror No. 10 called her mother to see how her mother was doing; that the talk about the case arose at the end of the conversation and was incidental to the conversation; that the juror believed the case was "done" at the time; that the juror told her mother in general that she had "some stuff" to work out; that her mother suggested she pray on it; and that the juror described her reaction to the suggestion as, "you know, which we don't agree on that."

The record, therefore, fails to show to a demonstrable reality that the juror was calling her mother for the purpose of seeking religious views and respondent's factual construct must be rejected.

Respondent also asserts that Juror No. 10 exposed the entire jury to extrinsic matters by informing the jurors that her mother and her friend "'sided with her doubts' as to the death penalty." (RB 243.)

The record does not establish this to a demonstrable reality. Instead, the record shows that the "sided-with-her-doubts" language had its

source not in the responses by Juror No. 10 to the court's questions, but in the written note of the jury foreman, which stated in relevant part, "Jury member No. 10 [] stated that she had confided with her friends and mother and that they sided with her doubts. Possibly replacing her would be appropriate." (18RT 4443-4444.)

The record shows that prior to removing Juror No. 10, the trial court heard in seriatim from the jury foreperson (Juror No. 6) and from Juror No. 10. In the portion of the hearing involving the jury foreperson, the court confirmed that the foreperson had authored the written note in question in which the foreperson informed the court (1) the jury was at an impasse and, in a subsequent addendum written some minutes later, (2) that Juror No. 10 had spoken with her mother. (18RT 4443:9-28 to 4444:1-17.) As to Juror No. 10's conversation with her mother, the foreperson said: "She admitted to us right at the table, and it was brought to my attention as we left – the other jurors brought it to my attention – and said they didn't think that was right and – " (18RT 4444:3-12.) The trial court made no further inquiry of the foreperson regarding Juror No. 10's statements.

As to respondent's assertion that Juror No. 10 "violated a court order for the third time by intentionally informing the other jurors that her mother and her friend 'sided with her doubts' as to the death penalty," the record does not support that conclusion. Juror No. 10 reported that she did not discuss her views about the issues or about the death penalty with her mother. In colloquy with the court, the foreperson only said, "she admitted to us right at the table," that she had talked to her mother. (18RT 4444:6.)

The foreperson did not report that the jurors had been exposed to the opinions of mother or friend and it would appear neither court nor counsel,

including the prosecutor, came away from the hearing with the foreperson sufficiently concerned about the jury's exposure to extrinsic matters to request or hold a hearing with the other jurors or to have the jury admonished about consideration of extrinsic matters introduced by Juror No. 10. (See, e.g., court's admonition to jury after replacement of Juror No. 10; 18RT 4470.)

Beyond the foreperson's written comment that Juror No. 10 reported that her friend and mother had "sided with her doubts," the record is silent as to any specific comments by Juror No. 10 that might have led to the foreperson's written statement.

On the other hand, the record does show that Juror No. 10 expressly reported that she did not talk about her concerns about the case with her friend (18RT 4450:12-14) or her mother (18RT 4452:2-9). Juror No. 10 said she made a gesture to her friend indicating her vote and that her friend made a statement about the death penalty, but the record is silent as to the content of the friend's statement. And, the record is silent as to the effect, if any, of the friend's statement upon Juror No. 10. (18RT 4450:10-28 to 4451:1-8.)

Respondent's factual construction that Juror No. 10 exposed the entire jury to extrinsic matters is manifestly unsupported by the record and must be rejected.

Respondent also asserts that after Juror No. 10 exposed the death penalty beliefs of her mother and friend to the jury, the jury changed its unanimous agreement for the death penalty to a 10-2 impasse for the death penalty. (RB 244.)

The record does not support respondent's claimed version of events. Instead, the record shows that Juror No. 10 told the court they had

reached a verdict late Wednesday (18RT 4448:4-6) and that she told her friend the jury was going to turn in the verdict the next morning (18RT 4450:1-9). The record also shows that there was consensus among the court and all counsel that the jury had, in the words of the prosecutor, come "to some sort of decision." (18RT 4453:1-2.) Counsel for appellant also concluded that the jury may have reached a decision and asked the court to seek clarification on this point. (18RT 4453-4454.) Counsel for Satele agreed, noting that Juror No. 10 had said several times in the course of the hearing that the jury had reached a verdict.[19] (18RT 4454-4455.)

At this point, the court ruled there was no verdict and further ruled Juror No. 10 had committed misconduct, which required her removal from the jury. (18RT 4455-4456.) Thereafter, both defense counsel periodically revisited the matter and reiterated that Juror No. 10's description of events very much suggested the jury had reached a verdict, that the verdict might have been an impasse, and that it was important that the trial court make the necessary inquiry. The trial court refused all requests for further inquiry. On each of these occasions, the trial court responded to counsel's comments with a restatement of its ruling, which appellant has set forth in the following section.

For the purposes of the present discussion, however, the point appellant makes is that the record shows to a demonstrable reality that Juror No. 10's responses to the court's inquiry, the jury foreperson's responses and

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[19] The record reveals that the jury resumed its deliberations at 9:30 a.m. the Thursday morning (following the Wednesday afternoon Juror No. 10 said the jury had reached a verdict) and that at 10:10 a.m. the jury foreman reported the jury was at a 10-2 impasse on the penalty verdict. (38CT 11132; 18RT 4443; AOB 262-263.)

notification of impasse, and the temporal proximity of the events created a confusion as to the status of the penalty verdict, and that the trial court refused the repeated requests to have the matter clarified. On the other hand, the record very clearly does not support to a demonstrable reality respondent's contention that Juror No. 10 caused the jury to change its unanimous vote for the death penalty to a 10-2 deadlock. Accordingly, this flawed factual construction must be rejected.

2. The Trial Court's Various Restatements of Its Ruling

Barnwell explained that under the demonstrable reality standard the reviewing court must be assured that the trial court's conclusion is manifestly supported by the evidence upon which the trial court actually relied. Accordingly, the reviewing court therefore must consider not only the evidence, but also the record of reasons provided by the trial court. (*People v. Barnwell*, *supra*, 41 Cal.4th at p. 1053.)

In this case, the trial court provided multiple restatements of its ruling. These restatements show that although the court initially concluded Juror No. 10 had committed misconduct by discussing the case with nonjurors, in its final restatement of its ruling, the court found Juror No. 10 had committed misconduct because she had been influenced by outside sources. Appellant reproduces the court's various articulations of its ruling below. As appellant will explain below, the record of reasons provided by the court is not supported by the evidence to a demonstrable reality.

Following the hearing with Juror No. 10, which appellant summarized in the opening brief (AOB 264-268), counsel for appellant and counsel for Satele asked the court to inquire and clarify whether the jury had in fact reached an impasse at the close of the day on Wednesday, prior to Juror No. 10's conversations with her mother and friend. The trial court refused. (18RT 4453-4455.)

Counsel for appellant summarized the results of the hearing with Juror No. 10, as follows:

> [Juror No. 10] apparently received no advice from anybody or no statement from anybody except that apparently the most that happened when the lady pointed a hand, she indicated that one hand was the verdict, and I don't find anything indicating that she was acting upon any suggestions or advice or even received any, but only made that one comment. Thank you. (18RT 4455:10-18.)

As noted above, the trial court made numerous separate statements regarding its ruling, revisiting it after defense counsel sought to have the court clarify whether Juror No. 10 in fact held her conversations after the jury had reached the impasse late Wednesday that became the subject of the written notification of impasse on Thursday morning. Prior to removing Juror No. 10, the court said:

> All right. This court, based upon what Juror No. 10 has described for this court, finds that there is juror misconduct. The fact that the juror maybe believed that there is a verdict, it is actually a taking of a vote. Jurors take several votes and continue deliberating. The only time they have a verdict is when they sign the verdict form. The fact that they may have taken a vote, even if they're at an impasse, did not mean there was a verdict.

> *Now that she has discussed the matter with outside parties*, it effectively takes away the opportunity for this court to even give further instructions or further readbacks, and that taints the process, that closes it; and the only thing that I can say is that it happened not in the guilt phase, but at the penalty phase on Wednesday night, specifically or [sic] Wednesday after adjournment; and the only thing that she disclosed to the jurors, as I understand from her statement, is that *she said she confided in her mother and a friend.*
>
> So therefore, based upon the case of *People v. Daniels*, 52 Cal.3d 815, *this court finds based upon the juror's demeanor, and also based upon the juror's comments*, that there is misconduct on the juror's part pursuant to Penal Code section 1089 – misconduct – I believe it's 1089 or the applicable section of the Penal Code – there's grounds for substituting an alternate. This court believes that the juror is guilty of misconduct, and guided by Supreme Court case of *People vs. Daniel.*
>
> I will do one more inquiry of Juror No. 10 before I excuse her. Would you please bring Juror No. 10 back.[20] (18RT 4455:23 to 4456:1-25; emphasis added.)

Following the court's ruling, counsel for Satele raised once more the question of whether the jury had reached an impasse and whether that may have preceded Juror No. 10's conversations with her mother and friend. (18RT 4457.)

In response to counsel's request, the court stated:

> Thank you. And that is covered for the record. Just to let you know, that does not change the court's opinion, because the court is forever disclosed [sic] from doing further readbacks and reading instructions and allowing for the juror to participate.

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[20] When Juror No. 10 was brought back before the court, the court made no further inquiry. Instead, the court admonished the juror concerning discussions about the case with others. (18RT 4458-4459.)

> Even if the jury is at impasse 10 to 2, that does not foreclose the court from sending them back with more instructions or otherwise more deliberation. Therefore, the juror has committed misconduct. (18RT 4457:27-28 to 4458:1-7.)

Subsequently, after the court dealt with a separate juror issue, counsel for appellant asked that the court inquire whether the jury had reached a verdict late Wednesday. (18RT 4467.)

The court responded:

> Mr. McCabe, just so that the record on appeal is clear, because Mr. Anthony has raised the same issue, I will give you the same response. The jury is at an impasse, and then this issue with No. 10 comes up. Regardless of whether it's Wednesday or Thursday, it forecloses this court from reading further instructions, having further readback, to have them deliberate further. In this court's humble opinion, okay, that juror has committed misconduct, regardless of what – there is no verdict unless all 12 people agree. There is an impasse. It is hung.
>
> But that *juror took it upon herself to talk to members of the family or friends*; and therefore, this court's ruling stands, and that it is inconsequential whether they have an agreement of 10 to 2. It forecloses this court from ordering them into further deliberation. She has committed misconduct. We can argue all we want. I'm not going to ask that question of the foreperson. (18RT 4467:16-28 to 4468:1-5; emphasis added.)

Counsel for appellant explained that he believed it was improper to remove a juror when the jury had reached an impasse and he understood the jury to have been at an impasse before Juror No. 10 had a discussion with anyone. (18RT 4468.)

The court stated:

> Thank you. You've made your comment, and so that the appellate court time line is clear, they're hung at 10:00 a.m. on Thursday, and *she spoke with the family members* on Wednesday night. (18RT 4468:18-21; emphasis added.)

Counsel for Satele sought to clarify the record by reminding the court that Juror No. 10 had said the jury was at an impasse on Wednesday before she went home. (18RT 4468.)

The court replied:

> Even if there was an impasse on Wednesday night, okay, on Thursday – let me just share with you just so that the record is clear – even if there's an impasse on Wednesday night, and even if they have an agreement, okay, and that there's nothing done on Thursday except for writing the form – even if that is the case, it forecloses this court from having had the opportunity to read further instructions, to be able to, you know, read further testimony, to be able to get this jury to further deliberate. So that is all inconsequential. (18RT 4469:3-12.)

The court began the next trial day by revisiting its ruling regarding Juror No. 10. Although the court's earlier rulings appeared to pinpoint Juror No. 10's misconduct as talking with her mother and her friend, this ex post facto statement of ruling was revisionist in that the court now identified the misconduct as: "Juror No. 10 has been influenced by outside sources." The court stated:

> []The court then ruled and again rules and clarifies as follows: Last Friday, June 30, the year 2000, in excusing Juror No. 10 for misconduct, the court *based on her demeanor and statements*, found good cause to discharge the juror, and the juror's conduct raised a presumption of prejudice similar to those found in *People vs. Daniels*. Moreover, the court

> additionally found that the jury impasse at 10 to 2, coupled with *Juror No. 10 being influenced by outside sources, her mother and friend,* precluded this court from offering to have Juror No. 10 continue to deliberate with the other 11 jurors after offering more instruction or readbacks.
>
> Effectively, Juror No. 10 tied this court's hands from offering further instructions as recommended by the California and U.S. Supreme Court in *People vs. Keenan*, 46 Cal.3d 478, 534, particularly the footnote 27, and *Lowenfield vs. Phelps*, 484 U.S. 231, a 1988 Supreme Court case, or readbacks to see if the jurors need more information to continue to deliberate because *Juror No. 10 has been influenced by outside sources.*
>
> The court, exercising its discretion upon the evidence received indicating juror misconduct, excused Juror No. 10 and replaced her with Alternate No. 2. (18RT 4473:5-27; emphasis added.)

3. The Trial Court's Reasons for Removing Juror No. 10 Are Not Established to a Demonstrable Reality

Here, the trial court stated it relied upon Juror No. 10's demeanor, statements, discussions with her mother and friend, and the fact she had been influenced by others.

As to the juror's demeanor, beyond its generalized reference to the juror's demeanor, the court made no specific finding regarding demeanor evidence. And, the record is otherwise silent regarding the juror's demeanor. Neither defense counsel, nor the court, nor the prosecutor commented about the juror's demeanor. The Attorney General, in its respondent's brief, does not identify anything about the juror's demeanor that would support the court's finding to a demonstrable reality. Moreover, a plain reading of the

record shows that Juror No.10 answered the court's questions directly and fully and reveals no coyness or effort to prevaricate.

This Court stated in *Barnwell*: "A trial court facilitates review when it expressly sets out its analysis of the evidence, why it reposed greater weight on some part of it and less on another, and the basis of its ultimate conclusion that a juror was failing to follow the oath. In taking the serious step of removing a deliberating juror the court must be mindful of its duty to provide a record that supports its decision by a demonstrable reality." (*People v. Barnwell*, *supra*, 41 Cal.4th at p. 1054.)

Nothing in the record supports the court's decision to remove Juror No. 10 on the basis of her demeanor to a demonstrable reality.

Where the juror's statements and the fact and substance of her discussions with her mother and her friend are concerned, appellant discussed in the opening brief the trial court's removal of Juror No. 10 in the context of case law, including the cases relied upon by the trial court, *People v. Daniels* (1991) 52 Cal.3d 815; *People v. Keenan* (1988) 46 Cal.3d 478; *Lowenfield v. Phelps* (1988) 484 U.S. 231, and the then prevailing abuse of discretion standard. (AOB 269-277.)

Appellant believes his factual contentions there and their application to the law are equally applicable under the demonstrable reality standard and so incorporates that discussion here by reference. Appellant pointed out that Juror No. 10 did not initiate the discussion of the case with either her mother or her friend. (AOB 271.) At the time she spoke with both of them, Juror No. 10 believed her conversation was about a completed event, i.e., a vote she had cast earlier in the day. Therefore she was reporting what she had done, not seeking input about how to vote. As a result, there was no

reasonable likelihood she was influenced by either her mother or her friend. (AOB 272.)

When, during the court's voir dire of Juror No. 10, the court twice appeared to suggest that she engaged in these conversations in an effort to either resolve a question in her mind about how to vote or to reach a decision about how to vote, Juror No. 10 quickly and firmly made it clear that was not the case on each occasion. (AOB 272.)

> The Court: 'But you told her [mother] what you're thinking about making –
>
> Juror No. 10: *No, No, No, No. We had already reached the verdict. Wednesday night we had reached the verdict.* (18 RT 4448; italics added.)

> The Court: So did you talk [with friend] about what was not sitting right with you?
>
> Juror No. 10: *Wait a minute. Wait a minute. No. I didn't talk about what was not sitting right with me*, but she [friend] said – She said what decision did you make? (18 RT 4450; italics added.)

Juror No. 10 did not discuss the facts of the case or specific evidence in the case with either her mother or her friend or her concerns about the vote. These facts establish the juror's intent at the time of the conversations was not to disobey the court's order. (AOB 272-273.)

And, where, in the trial court's final restatement of its ruling, the court found for the first time that Juror No. 10 had been influenced by her mother and her friend, the court once again failed to provide a record of the reasons that led it to make that finding. (See 18RT 4473:5-27.) Appellant's

own scrutiny of the record failed to find any support for the court's finding. On the contrary, appellant found that the thrust of the juror's discussions with her mother and with her friend essentially amounted to a report that the case was done, the voting complete. The juror received no input from her mother beyond the suggestion that she pray, a suggestion with which the juror voluntarily told the court she did not agree. (18RT 4451:28.) With her friend, the juror indicated her vote by gesture and heard her friend's views on the death penalty, but the trial court never inquired what those views were or whether those views affected the juror. (18RT 4450-4451.) The record is otherwise silent as to how the court might have come to conclude the juror was influenced by either her mother or her friend.

The Attorney General argues that Juror No. 10 sought some religious guidance from her mother (RB 243 fn.92), but appellant has shown above that that contention is manifestly unsupported by the record. Alternatively, respondent contends that the juror influenced other jurors and caused the jury to change its vote. (RB 243-244.) Again, appellant has explained above that that contention is similarly manifestly unsupported by the record.

Accordingly, for the reasons set forth here and in the opening brief, appellant respectfully submits that the trial court erred in removing Juror No. 10. None of the trial court's reasons for removing the juror is supported in the record to a demonstrable reality.

The removal of Juror No. 10 was prejudicial for the reasons discussed in the opening brief in Arguments XIV and XV, which appellant incorporates here by reference.

4. Trivial Violations That Do Not Prejudice the Parties Do Not Require Removal of a Sitting Juror

With regard to the trial court's and the Attorney General's contentions that Juror No. 10 either influenced other jurors or was influenced by other jurors, as a general rule, juror misconduct "raises a presumption of prejudice that may be rebutted by proof that no prejudice actually resulted." (*People v. Cooper* (1991) 53 Cal.3d 771, 835; *People v. Holloway* (1990) 50 Cal.3d 1098, 1108.) The ultimate issue of whether jurors were influenced by exposure to prejudicial matters is resolved by reference to the substantial likelihood test, an objective standard. In effect, the reviewing court must examine the extrajudicial matter and then judge whether it is inherently likely to have influenced the juror. (*People v. Marshall* (1990) 50 Cal.3d 907, 950-951; see also *People v. Holloway, supra*, at pp. 1109-1110.)

Trivial violations that do not prejudice the parties do not require removal of a sitting juror. (*People v. Wilson, supra*, 44 Cal.4th at p. 839.) "Among the factors to be considered when determining whether the presumption of prejudice has been rebutted are 'the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued.'" (*People v. Loot* (1998) 63 Cal.App.4th 694, 698.)

Appellant has explained above that the record shows to a demonstrable reality that Juror No. 10 believed the case was "done" at the time she spoke briefly with her mother and friend; that she did not discuss specific matters of evidence or of concern with either her mother or her friend; that she did not solicit the discussion about the case with either mother or

friend; that she reported by hand gesture her vote; that she listened to her friend's unsolicited personal view of the death penalty; that the record fails to support the finding that Juror No. 10 was in any way influenced by her contacts with either mother or friend; that the record fails to support a conclusion that extrinsic matters introduced by Juror No. 10 influenced other jurors. Neither court nor counsel suggested Juror No. 10 was not candid with the court during the hearing. To the contrary, the record on its face suggests Juror No. 10 was forthcoming in her responses to the court's questions.

There is no evidence to suggest that actual prejudice occurred such as would warrant the removal of Juror No. 10.

Accordingly, the evidence does not establish to a demonstrable reality that Juror No. 10 was either influenced by extrinsic matters or caused other jurors to be influenced by extrinsic matters. The trial court erred in removing Juror No. 10 from the jury during penalty phase deliberations.

C. APPELLANT'S CONSTITUTIONAL CLAIMS ARE NOT FORFEITED

Respondent claims appellant has forfeited his constitutional claims by inaction below. (RB 241.)

Respondent has made a similar contention with each of its arguments. Appellant has addressed these contentions and the law upon which respondent relies elsewhere, as in Section A of Argument X, which he incorporates here by reference. The case law establishes, for example, that, where an issue may not have been properly preserved at trial, an appellate court may review an issue in an exercise of its own discretion; that issues

relating to the deprivation of fundamental constitutional rights or to pure questions of law are reviewable without proper preservation below. For these reasons, appellant respectfully submits this issue is not procedurally barred.

XV.

THE TRIAL COURT'S REMOVAL OF JUROR NO. 9 VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO JURY TRIAL AND TO DUE PROCESS OF LAW AND IS NOT MANIFESTLY SUPPORTED TO A DEMONSTRABLE REALITY BY THE EVIDENCE

A. THIS COURT HAS RECENTLY MADE CLEAR THAT IN JUROR REMOVAL CASES THE RECORD MUST SHOW A JUROR'S INABILITY TO PERFORM AS A JUROR TO A DEMONSTRABLE REALITY

In the preceding argument concerning the trial court's removal of Juror No. 10 (Argument XIV), appellant explained that this Court has recently made clear that the record must show the juror's inability to perform as a juror to a demonstrable reality. (*People v. Wilson* (2008) 44 Cal.4th 758, 821; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1053-1054.) Appellant incorporates that discussion here by reference because the demonstrable reality standard governs appellant's claim regarding the court's removal of Juror No. 9.

In the opening brief, appellant did argue that Juror No. 9's removal was subject to review under the demonstrability reality standard of *People v. Cleveland* (2001) 25 Cal.4th 466, 474.) (AOB 282-289.)

Both *Wilson* and *Barnwell* made clear that *Cleveland*'s demonstrable reality standard is the appropriate standard of review in juror removal cases. (*People v. Wilson, supra*, 44 Cal.4th at p. 821; *People v. Barnwell, supra*, 41 Cal.4th at pp. 1053-1054.)

B. THE RECORD DOES NOT ESTABLISH TO A DEMONSTRABLE REALITY THAT JUROR NO. 9 WAS UNABLE TO PERFORM HER DUTY AS A JUROR

Appellant has set forth the events leading up to the court's removal of Juror No. 9 from the jury in the opening brief and explained there why it is apparent that at the time of her discharge Juror No. 9 was the lone holdout juror. (AOB 278-282.)

The trial court made the following record with regard to its removal of Juror No. 9:

> [] The court finds good cause to excuse Juror No. 9. Just so that record is perfected, the court has considered Penal Code section 1089 and Code of Civil Procedure 233, which is formerly Penal Code section 1123, and this court finds that this juror's unable to perform her duty; and given that she had two years ago lost a child at five months because of stress at work, and given the stress that this case has caused upon her throughout this trial – she has suffered one hemorrhage, and now she is having pains again starting Friday – to ask her to continue on to endanger her life and also the life of her unborn child, if that is the ultimate risk, would be – would be a high price to pay for jury duty.
>
> And so based upon the court's exercise of its discretion, the court finds good cause that this juror is unable to perform the juror's duty because she's sick. I mean, she's got a stomach ache that's related to that pregnancy, and I'm excusing her. (18RT 4483:19-28 to 4484:1-8.)

The demonstrable reality standard of *Cleveland*, *Barnwell*, and *Wilson* requires that the evidence manifestly support the record of the court's reasons to a demonstrable reality.

In a hearing with court and counsel, Juror No. 9 confirmed she wrote the following note to the court:

> Your Honor, respectfully, I am asking if I may be removed from this case. I feel the high amount of stress this case created will be detrimental to the health of my unborn child, as well as toward myself. Because I am considered high risk in this pregnancy, I want to make sure I do everything possible to increase my chances of being able to carry this baby full term. I wish to thank you for your time, effort, and compassion in the rendering of your decision. Sincerely [name omitted]. (18RT 4479.)

Juror No. 9 stated she was in the third month of her pregnancy and impliedly acknowledged that the trial recessed for three days in the second month of her pregnancy because she had had a hemorrhage. (18RT 4478:24-27.) Her medical doctor subsequently cleared her for further jury service. (18RT 4479:22-24.)

In response to leading questions from the court, Juror No. 9 said she had experienced a miscarriage two years earlier, losing her baby at five months, which she attributed to job-related stress. (18RT 4480:5-9.)

Again, in response to the court's leading questions during this hearing held on a Monday, Juror No. 9 said she experienced stress the previous Friday and that her continued participation in deliberations would cause her stress. (18RT 4480:10-15.) She believed it would be in her best interests and the best interests of her unborn child if she were excused from the case. (18RT 4480:16-19.) It was her opinion that she would be unable to perform her duties as a juror. (18RT 4480:20-25.)

The juror reported that on the previous Friday, she began to feel the pains she had felt in the past. She tried, but was unable to see a doctor, and was going to try again today. (18RT 4481:3-13.)

Appellant here reiterates that the record fails to support the trial court's reasons for discharge of Juror No. 9 to a demonstrable reality. (See AOB 286-288.)

The trial court found the juror had lost a child at five months two years earlier, which loss the juror attributed to stress, and this finding is supported by the record.

The record, however, does not support the trial court's finding that the juror's trial-related stress was linked to the following – "she has suffered one hemorrhage, and now she is having pains again starting Friday." (18RT 4483:27-28.) Nor does the record support the court's finding "that this juror is unable to perform the jury's duty because she's sick. I mean, she's got a stomach ache that's related to that pregnancy, and I'm excusing her." (18RT 4484:6-8.)

The record shows that the juror's treating physician attributed the juror's earlier hemorrhage to a hemorrhagic cyst and not to stress. (3SuppCT 817; 17RT 4225.) Thus, the court's reliance on this factor is not supported by evidence of a demonstrable reality.

The court also found the juror was unable to continue because she was sick with pains related to her pregnancy. Juror No. 9, however, said she experienced pains on the Friday before the Monday morning hearing. The juror gave no indication the pains continued throughout the weekend and were ongoing. (18RT 4481:6-7.) Thus, the court's reliance on this factor is not supported by evidence of a demonstrable reality.

The court also excused the juror because the risk to her life and that of her child was too high a price to ask: "to ask her to continue on to endanger her life and also the life of her unborn child, if that is the ultimate

risk, would be – would be a high price to pay for jury duty." (18RT 4483:28 to 4484:1-3.)

Juror No. 9 did tell the court in her written note that she is "considered high risk in this pregnancy." (18RT 4479:6-7.) But beyond that statement, the record discloses no evidence supporting to a demonstrable reality the court's finding that asking the juror to continue to deliberate would "endanger her life and also the life of her unborn child."

As a result of the matters discussed here and in the opening brief (AOB 282-288), appellant respectfully submits that the trial court's reasons for removing the sole holdout juror from appellant's trial are not supported to a demonstrable reality by the evidence. Accordingly, there is no basis on which to conclude Juror No. 9 was unable to fulfill her duty as a juror justifying her removal from the jury.

C. APPELLANT'S CONSTITUTIONAL CLAIMS ARE NOT FORFEITED BY INACTION BELOW

Respondent claims appellant has forfeited his constitutional claims by inaction below. (RB 251-252.)

Respondent has made a similar contention with each of its arguments. Appellant has addressed these contentions and the law upon which respondent relies elsewhere, as in Section A of Argument X, which he incorporates here by reference. The case law establishes, for example, that, where an issue may not have been properly preserved at trial, an appellate court may review an issue in an exercise of its own discretion; that issues relating to the deprivation of fundamental constitutional rights or to pure

questions of law are reviewable without proper preservation below. For these reasons, appellant respectfully submits this issue is not procedurally barred.

XVI.

THE COURT ERRED IN ALLOWING THE JURY TO MAKE MULTIPLE MURDER SPECIAL CIRCUMSTANCE FINDINGS AS TO EACH COUNT

In the verdict forms for each defendant, the jury found true the multiple murder special circumstance in relation to both Counts 1 and 2. (38CT 10932.) Because there can only be one multiple murder special circumstance under the factual circumstances present here, allowing the jury to make two multiple murder special circumstance findings improperly inflated appellant's culpability and would have made the jury more likely to improperly impose the death penalty in violation of appellant's right to due process of law.

The Attorney General acknowledges and concedes that allowing the jury to make multiple murder special circumstance findings as to each count constitutes an error of law, but argues the error was harmless. Respondent relies upon *People v. Marshall* (1996) 13 Cal.4th 799, 855, in which this Court concluded that "duplicative multiple-murder special circumstances is harmless where, as here, the jury knows the number of murders on which the special circumstances are based." (RB 232-233.)

Respondent does not address the arguments to the contrary presented in appellant's Opening Brief, which appellant incorporates herein, explaining the prejudicial impact of the error in this case. (AOB 290-293.) As appellant explained there, a summary conclusion that appellant was not prejudiced would not be appropriate in this case because the prosecution's

case lacked definitive evidence as to appellant's role in the shooting. The prosecutor admitted he lacked the evidence to prove appellant was the actual killer, whose mens rea was arguably inferable from the act of killing. Proof that appellant was the aider and abettor who acted with the requisite mens rea to be held liable for the murders and the special circumstances was plagued by jury instructions that incorrectly stated the law and verdict forms that incorrectly reflected the legally available verdict options and the findings to be made by the jury.

Appellant has explained in the briefing that the trial court gave a legally incorrect jury instruction regarding the special circumstance mens rea requirement for the aider and abettor, regarding the gang benefit enhancement, and the personal weapon use enhancement. As a result of these errors, the jury found that both Satele and appellant personally and intentionally shot Robinson and Fuller. These latter enhancement findings are in conflict with the weight of the evidence there was but one actual killer. Viewed from such a perspective, the additional factor of a second multiple murder special circumstance greatly increased the danger the jury would improperly inflate appellant's culpability. Thus, it is highly probable that at least some of the jurors would have weighed two special circumstances more heavily against appellant than would have been the case had only one special circumstance been found. (See *People v. Harris*, *supra*, 36 Cal.3d at p. 67; *People v. Allen*, *supra*, 42 Cal.3d at p. 1273.)

For all the foregoing reasons, allowing the jury to make two multiple murder special circumstance findings under the factual circumstances present here was prejudicial to appellant's penalty phase trial, warranting reversal of the penalty phase verdicts.

XVII.

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

A. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE SECTION 190.2 IS IMPERMISSIBLY BROAD

Respondent contends appellant provides no compelling basis for this Court to reconsider its denial of a claim that the special circumstance statute (Pen. Code, § 190.2) is impermissibly broad. (RB 256.)

Because this issue has been fully briefed by the parties (AOB 296-297; RB 256), appellant submits this claim on the basis of his argument presented in his opening brief.

B. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE SECTION 190.3 (A) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Respondent contends appellant provides no compelling basis for this Court to reconsider its denial of his claim that Penal Code section 190.3 is arbitrary and capricious. (RB 256.)

Because this issue has been fully briefed by the parties (AOB 298-300; RB 256), appellant submits this claim on the basis of his argument presented in his opening brief.

C. California's Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentencing and Deprives Defendants of the Right to a Jury Determination of Each Factual Prerequisite to a Sentence of Death; It Therefore Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

Respondent contends appellant provides no compelling basis for this Court to reconsider its denial of his claim that California's death penalty system lacks adequate safeguards. (RB 256.)

Because this issue has been fully briefed by the parties (AOB 300-301; RB 256), appellant submits this claim on the basis of his argument presented in his opening brief.

C.1. Appellant's Death Verdict Was Not Premised on Findings beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated

Respondent contends appellant provides no compelling basis for this Court to reconsider its denial of his claim concerning burden of proof, trial by jury, and unanimity. (RB 256.)

Because this issue has been fully briefed by the parties (AOB 301-310; RB 256-257), appellant submits this claim on the basis of his argument presented in his opening brief.

C.2. THE DUE PROCESS AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSES OF THE STATE AND FEDERAL CONSTITUTION REQUIRE THAT THE JURY IN A CAPITAL CASE BE INSTRUCTED THAT THEY MAY IMPOSE A SENTENCE OF DEATH ONLY IF THEY ARE PERSUADED BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING FACTORS EXIST AND OUTWEIGH THE MITIGATING FACTORS AND THAT DEATH IS THE APPROPRIATE PENALTY

Respondent contends appellant provides no compelling basis for this Court to reconsider its denial of his claim as to burden of proof concerning aggravation and mitigation factors. (RB 257.)

Because this issue has been fully briefed by the parties (AOB 311-313; RB 257), appellant submits this claim on the basis of his argument presented in his opening brief.

C3. CALIFORNIA LAW VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY FAILING TO REQUIRE THAT THE JURY BASE ANY DEATH SENTENCE ON WRITTEN FINDINGS REGARDING AGGRAVATING FACTORS

Respondent contends appellant provides no compelling basis for this Court to reconsider its denial of a claim that a jury's aggravating findings must be in writing. (RB 257-258.)

Because this issue has been fully briefed by the parties (AOB 314-316; RB 257-258), appellant submits this claim on the basis of his argument presented in his opening brief.

C4. CALIFORNIA'S DEATH PENALTY STATUTE AS INTERPRETED BY THE CALIFORNIA SUPREME COURT FORBIDS INTER-CASE PROPORTIONALITY REVIEW, THEREBY GUARANTEEING ARBITRARY, DISCRIMINATORY, OR DISPROPORTIONATE IMPOSITIONS OF THE DEATH PENALTY

Respondent contends appellant provides no compelling basis for this Court to reconsider its denial of his claim involving inter-case proportionality review. (RB 258.)

Because this issue has been fully briefed by the parties (AOB 316-317; RB 258), appellant submits this claim on the basis of his argument presented in his opening brief.

C5. THE PROSECUTION MAY NOT RELY IN THE PENALTY PHASE ON UNADJUDICATED CRIMINAL ACTIVITY; FURTHER, EVEN IF IT WERE CONSTITUTIONALLY PERMISSIBLE FOR THE PROSECUTOR TO DO SO, SUCH ALLEGED CRIMINAL ACTIVITY COULD NOT CONSTITUTIONALLY SERVE AS A FACTOR IN AGGRAVATION UNLESS FOUND TO BE TRUE BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY

Respondent contends appellant provides no compelling basis for this Court to reconsider its denial of his claim involving the use of unadjudicated criminal activity. (RB 258.)

Because this issue has been fully briefed by the parties (AOB 318-319; RB 258), appellant submits this claim on the basis of his argument presented in his opening brief.

C6. THE USE OF RESTRICTIVE ADJECTIVES IN THE LIST OF POTENTIAL MITIGATING FACTORS IMPERMISSIBLY ACTED AS BARRIERS TO CONSIDERATION OF MITIGATION BY APPELLANT'S JURY

Respondent contends appellant provides no compelling basis for this Court to reconsider its denial of his claim involving "use of restrictive adjectives" as to mitigating factors. (RB 258.)

Because this issue has been fully briefed by the parties (AOB 320; RB 258), appellant submits this claim on the basis of his argument presented in his opening brief.

C7. THE FAILURE TO INSTRUCT THAT STATUTORY MITIGATING FACTORS WERE RELEVANT SOLELY AS POTENTIAL MITIGATORS PRECLUDED A FAIR, RELIABLE, AND EVENHANDED ADMINISTRATION OF THE CAPITAL SANCTION

Respondent contends appellant provides no compelling basis for this Court to reconsider its denial of his claim involving instructions on mitigating factors. (RB 259.)

Because this issue has been fully briefed by the parties (AOB 320-323; RB 259), appellant submits this claim on the basis of his argument presented in his opening brief.

D. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS

Respondent contends appellant provides no compelling basis for this Court to reconsider its denial of his claim involving principles of equal protection. (RB 259.)

Because this issue has been fully briefed by the parties (AOB 323-325; RB 259), appellant submits this claim on the basis of his argument presented in his opening brief.

E. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Respondent contends appellant provides no compelling basis for this Court to reconsider its denial of his claim that Penal Code section 190.2 is arbitrary and capricious. (RB 256.)

Because this issue has been fully briefed by the parties (AOB 326-328; RB 259), appellant submits this claim on the basis of his argument presented in his opening brief.

XVIII.

THE CUMULATIVE EFFECT OF THE MULTIPLE ERRORS AT TRIAL RESULTED IN A TRIAL THAT WAS FUNDAMENTALLY UNFAIR; THE COLLECTIVE THRUST OF THE ERRORS, REINFORCED BY PROSECUTORIAL ARGUMENT AND DEFECTIVE VERDICT FORM LANGUAGE, OBSCURED THE JURY'S DUTY TO JUDGE APPELLANT ON HIS INDIVIDUAL CULPABILITY AND, IN PARTICULAR, WITH REGARD TO THE NECESSARY MENS REA DETERMINATIONS

In the opening brief, appellant explained why the cumulative effect of the instructional errors and flawed language in verdict forms on key jury determinations, as well as the state of the prosecution's evidence, resulted in a trial that was fundamentally unfair. Appellant pointed out that, in particular, the cumulative trial errors obscured the jury's duty to judge appellant on his individual culpability. Appellant concluded that as a result of the errors, he was denied a fair trial, the verdicts are inherently unreliable, and reversal of the convictions and death penalty are required. (AOB 329-337.)

The Attorney General does not reply to the specifics of appellant's cumulative error argument. Rather, the Attorney General makes the generalized contention that any guilt or penalty phase cumulative error claim cannot succeed because there was either no error or, at the most, harmless error during the guilt phase trial (RB 211) and no error of significance or prejudice at the penalty phase trial (RB 260).

Appellant respectfully submits that the Attorney General's gloss on the state of the trial errors and the state of the evidence is not reasonably supported by the record and the briefing and respectfully refers the reader to his discussion of cumulative error at pages 329 to 337 of the opening brief.

XIX.

APPELLANT JOINS IN ALL CONTENTIONS RAISED BY HIS COAPPELLANT THAT MAY ACCRUE TO HIS BENEFIT

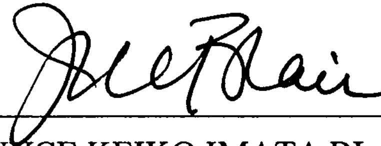
Appellant Daniel Nunez joins in all contentions raised by his coappellant that may accrue to his benefit. (Rule 8.200, subdivision (a)(5), California Rules of Court ["Instead of filing a brief, or as a part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related appeal."]; *People v. Castillo* (1991) 233 Cal.App.3d 36, 51; *People v. Stone* (1981) 117 Cal.App.3d 15, 19 fn. 5; *People v. Smith* (1970) 4 Cal.App.3d 41, 44.)

CONCLUSION

For the reasons set forth in the opening brief and this reply brief, it is respectfully submitted on behalf of defendant and appellant DANIEL NUNEZ that the judgment of conviction and sentence of death must be reversed.

DATED: 4 May 2009

Respectfully submitted,



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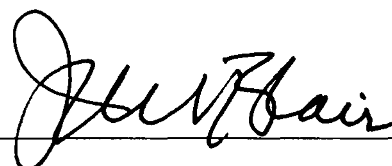
CERTIFICATE OF WORD COUNT

Rule 8.630, subdivision (b)(1), California Rules of Court, states that an appellant's reply brief in an appeal taken from a judgment of death produced on a computer must not exceed 47,600 words. The tables, the certificate of word count required by the rule, and any attachment permitted under Rule 8.204, subdivision (d), are excluded from the word count limit.

Pursuant to Rule 8.630, subdivision (b), and in reliance upon Microsoft Office Word 2007 software, which was used to prepare this document, I certify that the word count of this brief is 49,825 words.

DATED: 4 May 2009

Respectfully submitted,



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PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to the within entitled action. I am an employee of Bleckman & Blair, Attorneys at Law, and my business address is Suite 3 Ocean Plaza, 302 West Grand Avenue, El Segundo, California 90245.

On **6 May 2009**, I served the

APPELLANT'S REPLY BRIEF
on behalf of Appellant Daniel Nunez
in People v. Daniel Nunez and William Satele (S091915; NA039358),

on the interested parties in said action by placing_____ the original/_XX_ true copies thereof, enclosed in sealed envelope(s) addressed as stated on the attached mailing list, _XX_ WITH POSTAGE/DELIVERY FEE fully prepaid, at El Segundo, California, with
_XX_ United States Postal Service
_XX__ United Parcel Service

I am "readily familiar" with the firm's practice of collection and processing documents for mailing. It is deposited with the U.S. Postal Service/United Parcel Service on that same day in the ordinary course of business. I am aware that, on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit on mailing affidavit.

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_XX_ (State) I declare under penalty of perjury that the foregoing is true and correct.

____(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on 6 May 2009, at El Segundo, California.

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S091915; LASC NA039358

Doc: **Appellant's Reply Brief** on behalf of Appellant Daniel Nunez

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