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SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT WILLIAM TUPUA SATELE'S REPLY BRIEF

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

THE HONORABLE TOMSON T. ONG, PRESIDING

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DEATH PENALTY

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APPELLANT WILLIAM TUPUA SATELE'S REPLY BRIEF

In this brief, appellant does not reply to those of respondent's arguments which 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 Satele's Opening Brief (AOB). References to respondent's brief are identified by the initials RB.

As used herein "appellant" refers to appellant William Tupua Satele, "Nunez" refers to co-appellant William Nunez. The use of the plurals "defendants" and "appellants" refers jointly to appellant and Nunez. AOB refers to Appellant Satele's Opening Brief, as distinguished from "Nunez's AOB."

Statutory references are to the Penal Code unless otherwise noted.

ARGUMENTS

GUILT PHASE ISSUES

I

THE FINDING BY THE JURY AND THE TRIAL COURT THAT BOTH APPELLANTS PERSONALLY FIRED THE WEAPON WAS A FACTUAL INCONSISTENCY THAT DEPRIVED APPELLANT OF 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. Introductory Statement

The finding by the jury and the trial court that both defendants personally fired the weapon was unsupported by and contrary to the evidence presented at trial because the only logical interpretation of the facts presented at trial was that only one person fired the rifle. The finding that both defendants *personally* fired the single weapon was caused by a poorly worded verdict form. This finding was made in spite of the fact that the prosecutor admitted he failed to prove who the shooter was.

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 appellant was the shooter. Reversal is required.

As will be explained in greater detail below, there are three flaws in respondent's argument regarding this issue:

First, respondent mischaracterizes appellant's argument by framing this as an issue of a lack of unanimity of a legal theory, when what appellant is arguing is that the jury reached impermissibly conflicting *factual* results.

Second, respondent fails to understand how this issue arose. Having failed

to appreciate the origins of the issue, respondent assumes 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 stretching the facts of the case to reach an unreasonable result.

Third, respondent fails to understand the difference between being properly liable for punishment under section 12022.53(d), which may attach vicariously, and the increased moral and legal consequences that may flow from *personally* using a weapon which causes the death of another individual.

B. Respondent Mischaracterizes This Issue.

Respondent incorrectly characterizes appellant's contentions by framing this issue as purely an issue of unanimity of legal theory. Thus, respondent argues that there is no error because a jury does not have to make a unanimous finding as to the *theory* of liability. (RB at pp. 106-107, citing *People v. Millwee* (1998) 18 Cal.4th 96, 160 (*Millwee*), and *People v. Pride* (1992) 3 Cal.4th 195, 249 (*Pride*).)

Millwee and *Pride* are concerned with whether the jury must unanimously agree on a theory of liability, such as whether a first degree murder is predicated on a theory of premeditated murder or felony murder.

However, the essence of appellant's claim is not that the jury had to be unanimous in the *legal* theory upon which it relied. Rather, the essence of this claim is that the verdicts rest on two *conflicting factual* theories, both of which cannot be true under the facts proven at trial, namely that each of the defendants was the actual shooter.

Having misstated the basis of this claim, respondent argues that a jury is not required to determine whether liability is based on the whether the defendant is the aider and abettor or the direct perpetrator. (RB at p. 107-108.) What respondent fails to appreciate is the fact that while a jury need not make the determination as to whether either defendant was the actual shooter or the aider and abettor it may not base its verdict on the finding that *both* defendants are the actual killer, when

the facts indicate that only one defendant acted in that role.

It is the possibility of inconsistent *factual* theories that was the evil in *In re Sakarias* (2005) 35 Cal.4th 140, and the argument appellant has presented is that the findings that both defendants personally fired the weapon violates the principles discussed in *Sakarias*. However, in spite of the fact that this is the essence of claim asserted here, respondent does not address *Sakarias* at all in discussing this issue. (Respondent only discusses *Sakarias* in a subsequent section of Respondent's Brief dealing with the issue of prosecutorial misconduct. (See RB at pp.142-145.) However, the *Sakarias* analysis is critical to an understanding of this issue.

Sakarias held it was contrary to principles of fundamental fairness for the prosecution to attribute to two defendants, *in separate trials*, a criminal act only one defendant could have committed. (*Sakarias*, *supra*, 35 Cal.4th at pp. 155-156, italics added in RB at pp. 142-143.) Appellant's point is that if only one defendant could have committed the act in question the fundamental unfairness of attributing that act to two defendants is the same whether the prosecution does so in one trial or two. While *Sakarias* discussed the result in the context of two trials, there is no reason in law or policy to limit the principles underlying *Sakarias* to a two-trial situation.

Sakarias is based on the premise that the 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).) Appellant submits that the foregoing rationale applies with equal force whether the two inconsistent results are obtained in two trials or in one trial as a result of a poorly worded verdict form.

For the foregoing reasons, respondent's contentions are premised on misunderstanding of the issue and, accordingly, are flawed.

C. Respondent Fails To Understand The Origins Of The Error.

In addition to failing to understand *nature* of the error, respondent has misunderstood how the error occurred. This latter failure is evident from the fact that respondent at no point discusses whether the forms were inaccurately phrased in such a manner that would cause the jury to make a finding of "personal use" even though the jurors did not really know which defendant actually fired the gun.

Penal Code section 12022.53, subdivision (d) allows for the imposition of a sentence enhancement on a defendant who *personally* uses a gun. Subdivision (e)(1) of that section allows for the enhancement to also be imposed *vicariously* on one who is a principal in the crime if that person also violated section 186.22(b)(1) by participating in activity for the benefit of a criminal street gang. Thus, if a defendant violates section 186.22, that defendant is *vicariously* liable for the 12022.53(d) enhancement if another principal uses a firearm *regardless* of the defendant's personal use of the weapon. Therefore, under the 186.22 scenario, a jury can find that one of two defendants personally fired a weapon, and that the other defendant is *vicariously* liable for the first defendant's act.

At trial, the prosecution relied solely on this theory of *vicarious* liability as to the weapon enhancement *because it was not proven who personally used the weapon.* Indeed, the prosecutor did not argue that both defendants fired the weapon and even conceded that he did *not* prove appellant fired the weapon, stating that he did not have to prove appellant fired the weapon for the enhancement to be found true. The prosecutor told the jury that because of the gang allegation the jurors should not be "thrown off" by the word "personal." (14RT 3214, 14RT 3222-3223.)

In short, the argument of the prosecutor was that the jury did not have to find that a particular defendant personally used the rifle for the enhancement to apply to both defendants. The prosecutor argued that because the enhancement would attach vicariously regardless of which defendant had actually fired the weapon, the allegation had been proven, and the jury should mark the appropriate

form finding "personal use" to have been found "true."

Under the prosecutor's theory, all that was needed for the section 12022.53, subdivisions (d) and (e) enhancement to apply was a verdict form permitting the jury to impose liability if it found that "a" defendant fired the weapon. However, instead of a form asking whether "a" defendant personally used the weapon, one form asked the jury if it found that appellant *personally* used the weapon, and another form asked the jury if it found that Nunez *personally* used the weapon. The jury marked the spaces indicating that each defendant personally used the weapon.

Thus, the question becomes whether the jury's act in checking the "true" spaces in the respective verdict forms means they intended to find actual personal use by both defendants, or whether they instead thought this was what they were supposed to do if they believed that one of the two defendants had used the weapon, under the instructions given to them, the arguments made, and the verdict form provided.

One argument made by the prosecutor at trial sheds particular light on this question. In the reply to Nunez's motion for a new trial, the prosecutor explained, "Defense counsel correctly states that there *was no evidence [Nunez] was the shooter*" and "I conceded this fact throughout the trial." (39CT 11190, quoted in RB at p. 106, italics added.)

If, as the prosecution conceded, there was no evidence that Nunez was the shooter, it necessarily follows that when the jury marked the space making this "finding" of personal use it was doing so *not* because it *believed* that it had been proven that Nunez actually fired any of the shots, but rather because this was the only option it had under the vicarious liability instructions and arguments presented and the verdict form before it.

With respect to firearm use, appellant is in the same position as Nunez. As will be explained below, the evidence as to the identity of actual shooter was virtually the same as to both appellant and Nunez, and the prosecutor also

conceded as to *appellant* he had not proven who the shooter was. (14RT 3210-3211.)

Therefore, it is clear that the jury found the personal use allegation to be true not because they believed appellant fired the shot, but because this was the only option presented to them. A recap of the evidence and an examination of respondent's analysis of that evidence will further demonstrate that this conclusion is the only logical one.

D. The Evidence Overwhelmingly Establishes The Fact That Only One Person Fired The Gun.

The People now argue that it was not "factually impossible" for both defendants to have been the actual shooters. (RB at p. 114.) There are three problems with this contention: 1) because the theory that both defendants were actual shooters was not a theory that the prosecutor presented or relied on when the issue was to be resolved, respondent is introducing a new theory of the crime on appeal and should be barred from doing so; 2) from the evidence introduced at trial, it is highly *improbable* that more than one defendant fired the weapon; 3) the distinction between "factually impossible" and "highly improbable" is legally meaningless and "not factually impossible" is not a proper standard under the Eighth Amendment guarantee of heightened reliability in death penalty cases.

1. Respondent Should Be Estopped From Presenting The Argument That Both Appellant And Nunez Were The Actual Shooters

Respondent's contention that both defendants actually fired the rifle violates an established rule of appellate procedure that requires when the parties have proceeded on one theory in the trial court, neither party "can change this theory for purposes of review on appeal." (*Jones v. Dutra Construction Co.* (1997)

57 Cal.App.4th 871, 877; 9 Witkin, *California Procedure* (4th ed. 1997), Appeal, § 399, 451-452.)

In his argument to the jury at the guilt/innocence phase, after discussing principles relating to aiding and abetting, the prosecutor argued that both defendants were guilty, and that it did not matter who the actual shooter was. The prosecutor acknowledged, "I will be the first to tell you that I did not prove to you who the actual shooter was." (14RT 3210-3211.) Later, he reiterated this statement, saying "

> . . . again, I'm the first to tell you I didn't prove who the actual shooter was, if you don't know who the actual shooter was – that jury instruction says the person that aided and abetted, you must also find they intended to kill .
>
> So, although I didn't show who the actual shooter was, all three intended to kill while they were in that car. . . ."

(14RT 3214.)

In short, at the guilt/innocence stage the prosecutor did not rely on the theory that both defendants had fired the shots, or that he had proven who actually fired the shots. The theory that appellant was the actual shooter was never presented to the jury as a matter of a tactical choice of the Deputy District Attorney. Therefore, the jury did not have to decide whether appellant was the shooter.

Indeed, even respondent's current arguments regarding the speed with which the bullets were fired is a departure from the prosecution's position at trial. Although respondent now argues it is speculation to conclude that the bullets were fired in a brief period of time (RB at p. 116), at trial the prosecutor argued that the four bullet wounds "could [have] happen[ed] in less than a second." (14RT 3240.)

The rule that a party may not change theories on appeal is so well established that as long ago as 1933 this court referred to it as "well-settled." Thus, in the venerable case of *Ernst v. Searle* (1933) 218 Cal. 233 this court stated:

> "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 ot the opposing litigant. [Citation.]

(*Id.* at p. 241.)

Allowing the prosecution to switch theories at this time would also create due process concerns because it would hamper appellant's ability to present a defense, which is an essential aspect 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.) In this case, appellant is hamstrung in his ability to present a defense because at trial he did not have to prove that he was not the shooter, because the prosecution was not trying to prove that he acted in that capacity.

Had he known that his *personal* use of the firearm would bear additional consequences – such as the trial court relying on personal use in imposing the death penalty - he could have attempted to defend against that charge. This would likely be a significant factor in his decision as to whether or not he would testify at trial.

However, at that time there was no need to present such a defense because the prosecution was not arguing he so personally used the weapon. Now that it is too late to defend against the charge, respondent argues it was proven appellant was the actual shooter, and he is forced to argue he did *not* personally use the weapon.

As a result, respondent should be estopped from arguing on appeal that the prosecution's case, as accept by the jury as true, was based on the theory that appellant personally used the weapon that fired the fatal shots.

2. It Is Highly Improbable That More Than One Defendant Fired The Weapon

As explained in Appellant's Opening Brief any impartial review of the evidence compels the conclusion that only one of the defendants personally fired

the weapon. Without again recounting that evidence in full (AOB pp. 32-33, 38-39), the most telling evidence as to this issue is the limited amount of time involved in this shooting. Because there was only one rifle used, the speed with which the shots were fired clearly indicated that one person fired the shots.

The evidence that gives the clearest picture as to the timing of the shots came from the testimony of Bertha Jacque who looked out of her bedroom window, saw Renesha's car, and then started walking to her bed. Before she reached the bed she heard the gunshots and "immediately ran" back to the window. However, getting to the window she could only see the tail lights of a car driving away. (5RT 983-984, 988-990.)

Respondent argues that although Bertha said the shots were fired "fast" she did not testify as to how rapidly they were fired. (RB at p. 116.) Whether the timing of the shots was "fast" or "rapid" is a distinction without a difference. While she may not have directly testified as to the exact number of seconds involved, the only logical inference is that it required only a few seconds at most for Bertha Jacque to run part way across her bedroom immediately after hearing the shots. Within those few seconds, all shots were fired and the getaway car from which they were fired was already driving away. Contrary to respondent's characterization (RB at p. 116, fn. 57), the fact that an extremely short time was required for all shots to be fired is not "speculation" but rather the compelling inference established by the evidence in the record.

Similarly, respondent notes that Vasquez testified that he heard the shots, describing them as "real fast." In an effort to diminish the impact of this testimony respondent argues that Vasquez did not *see* the shooting. (RB at p. 116.) Appellant submits that having heard the shots as "real fast," the fact that Vasquez did not *see* the shooters is irrelevant. A witness's personal knowledge may be based on the exercise of any of his or her senses, and is not limited to sight. Therefore, Vasquez's testimony that he heard the shots, and his estimation as to how fast they were fired, is based on personal perception as much as if he

had testified that he had *seen* the shots being fired. Finally, as respondent notes (RB at p. 116.), Frank Jacque also described the shooting in a manner that would create an inference of a single fast burst of shots, even if he did not break that span down into the precise number of seconds.

Thus, the independent testimony of three different witnesses confirms that the shots were fired within a matter of a few seconds at most. The only logical inference that can be drawn from this evidence is that one person fired the weapon. Appellant submits that it would not be a logical inference to conclude that one person fired a first burst of shots, handed the bulky rifle to the other person in a different part of the car, and that person took the time to have accurately taken aim and fired another burst of shots.

Indeed, it is this multiple shooter theory that requires not only speculation, but absurd speculation. No one testified that there even was a second burst of shots, nor was there any testimony regarding a delay between shots, and there is thus no evidence to support such a theory. Moreover, respondent does not and cannot explain why the shooters would engage in such an awkward and pointless exercise as passing a bulky rifle back and forth within the car in the middle of a drive-by shooting.

Furthermore, other evidence also corroborates this theory of one shooter. The medical examiner's testimony regarding the placement of wounds on Robinson and Fuller suggests that the shots were fired from essentially the same position. The crime scene evidence that the casings were found clustered together also supports the inference that the weapon was not moved any substantial distance between shots. (See AOB, p. 33.) Obviously, since the rifle shots were fired from a moving car, the fact that they all appeared to have been fired from approximately the same position indicates they were fired in a single, rapid burst and, equally obviously, by a single shooter.

Respondent argues that the position of the casings does not necessarily indicate that the rifle was not passed between the defendants during the shooting.

Respondent notes that between the movement of the Fuller's car rolling a short distance and the activity of the people who came to the aid of Robinson and Fuller, it is possible that the casings could have been moved from their original position, and therefore the cluster of casings could have been coincidental. (RB at p. 117.)

However, respondent is once again engaging in pure speculation in an attempt to counter the only logical inference from the evidence. While it is *possible* that the casings could have been inadvertently kicked or otherwise moved by people in the area, there is no *evidence* that this actually took place. Moreover, even if the casings were kicked or otherwise inadvertently moved from their original positions, it would seem highly unlikely that they would have been accidentally kicked or moved together into a cluster. Rather, random, multiple forces would be expected to move the casings in different directions.

Furthermore, the evidence showed that Jacques and Mr. Vasquez were attempting to aid the victims in the car, which rolled some distance down the street after the shots were fired, and that the shots were in fact fired from the middle of the street. Thus, none of these witnesses would have been in the area where the casings were found, and the police who arrived on the scene were all trained not to move evidence. Therefore, none of these forces would have caused the casings to group together as respondent speculates. Thus, while this scenario suggested by respondent is *possible*, it is highly unlikely.

Respondent characterizes the testimony of Vasquez that both defendants confessed to him as "strong" evidence that each defendant was the shooter. In fact, as set forth in appellant's opening brief [AOB at pp. 39-41], this evidence is far from "strong" for numerous reasons.

First, Vasquez was a jailhouse informant, one of the few classes of witnesses whose testimony is viewed as so inherently *unreliable* that special instructions are required to inform the jury to view the testimony with "caution and close scrutiny." (Pen. Code § 1127a.) Furthermore, the instruction on the credibility of a jailhouse informant specifically directs the jury to consider the

defendants made admissions that could implicate them in the crime. Rather, appellant asserts that based on the facts presented, the conclusion that both appellants fired the rifle is inherently *improbable*.

It is true that in some cases courts will not disturb an unreasonable jury finding that is nevertheless not factually impossible. However, "not impossible" is not a standard that satisfies the Eighth Amendment requirement of heightened reliability in capital cases. Rather, if the scenario relied upon for the imposition is death is highly improbable, even though legally possible, the verdict should be reversed.

Finally, some of respondent's recitations of fact do not appear to have any relevance to this issue.

For example, respondent notes that the prosecutor argued to the jury that he did not think the defendants were going to argue in closing argument that they got out of the car. (RB at p. 118, quoting 13RT 3081-3082.) The prosecutor's speculation as to whether the defendants were or were not going to argue that the shots were fired from outside the car obviously has no relation to how fast the shots were fired or who fired them.

Similarly, respondent notes that Robinson was standing near Fuller's car when he was shot but his body was found 10 feet from the trunk of that car and he had been shot three times. From this respondent concludes that one defendant fired a firearm from inside the car, and then the other defendant fired it from outside the car. (RB at p. 118.) Respondent apparently forgets Bertha Jacque testified that after she reached inside the car to turn off the engine, causing the car to start rolling, and therefore the car rolled from its original position long *after* the shots were fired and the defendants had departed. (5RT 1002.) Therefore, the distance between Robinson's body and the final location of the car has no relation to how quickly the shots were fired. Thus, these facts fail to support respondent's speculation that one person fired from inside the car, gave the gun to the other defendant standing outside the car, who then fired another burst of shots.

In another apparent attempt to justify the finding that both defendants fired the rifle, respondent states, "At any rate, during (sic) or seconds after Robinson was fatally shot from an unknown distance, while seated in the driver's seat of her parked car, Fuller was fatally shot in her left upper shoulder and right 'back' area." (RB at p. 118.) However, rather than support the conclusion of two shooters, these facts actually prove that there was only one shooter. This conclusion follows from the fact that, as respondent concedes, "during or seconds after" Robinson was shot, Fuller was also shot. If Fuller was shot "during" the time Robinson was shot, it necessarily means there was only one shooter. Even if Fuller was shot "seconds after" Robinson, it would still be far more likely that only one person fired the only weapon, rather than one person shooting Robinson and quickly handing the gun to the second shooter who then must take aim and shoot the second victim.

In summary, while it is perhaps not "factually impossible" for there to have been two shooters, it is extremely unlikely that more than one person fired all the shots, and even the facts recited by respondent tend to support the conclusion of one shooter.

E. The Difference Between Vicarious and Personal Liability.

Another flaw that runs through respondent's analysis of this issue is respondent's failure to understand the difference between there being sufficient evidence to find appellant subject to *vicarious* liability under the enhancement of section 12022.53, subdivisions (d) and (e) and sufficient evidence that *both* appellant and Nunez were the actual shooters. Respondent also fails to understand the different legal and moral culpability that attaches when a vicariously liable defendant is mistakenly found personally liable.

Briefly, a finding that there is evidence to support appellant's *vicarious liability* under section 12022.53, subdivisions (d) and (e) only shows that *someone* fired the rifle, that appellant was a principal, and that appellant violated section 186.22. There may be sufficient evidence of these three facts for the jury to render

a finding of *liability*, but that *does not equate* to a finding of personal use.

Likewise, the actual killer bears more moral opprobrium than one who is only guilty vicariously. As explained in Appellant's Opening Brief, a jury will be more inclined to sentence an actual killer to death, as the jury did in this case. (AOB at pp. 48-52.) Most importantly, in this case Judge Ong relied on the fact that appellant was the actual shooter in imposing the death penalty. (18RT 4596, 18RT 4596-4597.) The jury's imposition of the death penalty and Judge Ong's on-the-record statement establish prejudice from the erroneous finding.

Respondent contends that appellants' arguments regarding the improper wording of the jury form fail if this court determines that the jury received sufficient proof to find that *either* defendant could have fired the gun, regardless of who actually fired the gun. (RB at p. 110.) Once again, however, respondent fails to understand the nature of appellant's argument. Appellant acknowledges that there was sufficient evidence that "either" defendant fired the gun. For the purpose of imposing the sentence enhancement contained in section 12022.53, subdivision (d), the fact that "either" defendant shot the gun is sufficient. However, a finding that "either" defendant fired the gun is quite different than a finding that *both* fired the gun. It is the latter finding that creates the problem here because of the increased moral culpability that attaches to appellant if he is incorrectly perceived to be an actual shooter.

Similarly, respondent argues that there is overwhelming evidence to find each defendant *liable* for the weapon enhancement on the grounds of the discharge of the firearm. (RB at pp. 110-111.) However, appellant has never disputed this, and once again respondent has misunderstood the thrust of appellant's argument. Section 12022.53, subdivision (d) allows for the imposition of the enhancement on a defendant who personally uses a gun, and subdivision (e)(1) then allows for the enhancement to be imposed on a person even if he did not personally fire the weapon if that person is a principal in the charged crime and that person also violated section 186.22(b)(1), the street gang enhancement. Therefore, as

appellant has repeatedly said, the defendants could *each* be *liable* for that act even though only one *personally* committed the act giving rise to the liability. But the question presented by this issue is *not* whether there is overwhelming evidence to find they can both be held *liable* under the weapons enhancement, as respondent argues, but rather whether there was a proper finding of *actual, personal use* on the part of both defendants.

Respondent refers to the testimony of Contreras that both defendants were hard core gang members who kill people. (RB at p. 111.) However, even assuming Contreras's improper opinion testimony on this point were true, it is irrelevant to the question here. While Contreras's opinion may be some evidence that both defendants are the type of people who might commit murder, it is not relevant to prove which of the two fired the actual shots on this particular occasion, which is the issue involved herein.

Respondent again discusses cases holding that a jury need not reach unanimous agreement as to the legal theory of the case. (RB pp. 111-113.) As explained above, respondent again misunderstands appellant's argument. The error does not stem from the fact that the jury was not unanimous in legal theory. Rather, the jury reached two separate factual conclusions that are in conflict with each other and contrary to the evidence introduced, namely that both appellants actually fired the single rifle used.

In short, without agreeing on which legal theory liability was predicated, the jury could convict appellant of murder. The jury could also impose the firearm enhancement on both defendants without deciding which one actually fired the weapon. However, once the jury settled upon one factual theory – i.e., that Nunez was the actual killer-- it could not agree on a second factual theory that was in conflict with the first factual theory – i.e., that appellant was the actual shooter. Reversal is required.

F. Appellants Have Not Forfeited The Constitutional Aspects Of This Issue.

Respondent contends that appellant forfeited the Fifth and Eighth Amendment aspects of this claim because of his failure to argue these aspects of the issue below. (RB at p. 105.) This court should reject the contention that these claims are waived for several reasons.

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.) However, these cases 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 is similar to the analysis in which the court must engage in any case (*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 also 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*, *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.

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*[1] claim on appeal was properly preserved by *Wheeler* 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 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 Eight and Fourteenth Amendment claims because he did

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

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. (*People v. Thornton*, *supra*, 41 Cal.4th at p. 454.)

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 otherwise in prior 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 inconsistent finding of personal use of the firearm have not been forfeited.

Additionally, while a party's failure to object may preclude a party from asserting the issue, it is not a bar to the issue being resolved by an appellate court if that court sees a need to resolve the issue. As was stated in *People v. Williams* (1998) 17 Cal.4th 148, n. 6,

> In *Scott* [*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. (*Id.* at p, 161.)

Furthermore, as the facts relating to the contention are undisputed and there would probably be no contrary showing at a new hearing, the 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 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; *Pena v. Municipal Court* (1979) 96 Cal.App.3d 77, 80-81.)

Likewise, even assuming that the specific objection now asserted in the Opening Brief was not placed before the trial court, 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] ...."]; (See also *People v. Allen* (1974) 41 Cal.App.3d 196, 201, fn. 1; *People v. Norwood* (1972) 26 Cal.App.3d 148, 153.)

As explained by the Assembly Judiciary Committee comment following Evidence Code section 353: "Section 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.) Thus, an issue is not waived on appeal by the failure to object if the error is fundamental that it represents a deprivation of the right to due process of law. (*People v. Menchaca* (1983) 146 Cal.App.3rd 1019.)

In *People v. Knighten* (1980) 105 Cal.App.3d 128, 132, appellant argued that it was error for the trial judge to enter the jury room during deliberation, ostensibly to clarify a request from the jury for rereading of certain testimony. The conversation involving the judge 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 essence of the error was the deprivation of defendant's fundamental constitutional right to the assistance of counsel at a critical stage of the proceedings. (*Id.* at p. 132.)

Despite there being no objection by defense counsel, *Knighten* held that "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. (*Id.* at p. 132; 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.)

In this case, the facts relating to this issue are not in dispute, and therefore it is a pure issue of law. There is no reason why this court should not address the issue. (*People v. Brown* (1996) 42 Cal.App.4th 461, 475; *People v. Blanco* (1992)10 Cal.4th 1167, 1172.)

Likewise, it is well established that the failure to argue a federal basis for an objection 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.) Having raised the issue at the motion for a new trial on the grounds described in Appellant's Opening Brief, it is unlikely that the trial court would have reversed itself had appellant rephrased the issue to assert the due process or the reliability aspects of this claim.

In fact, an objection is sufficient if it fairly appraises the trial court of the issue it is being called on to decide. The objection will be deemed preserved ifthe 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, n. 5; see also *People v. Wattier* (1996) 51 Cal.App.4th 948, 953.) "Whether the [general] rule shall be applied is largely a question of the appellate court's discretion." (*People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172-1173.)

In conclusion, this court should not hold that appellant has forfeited the constitutional aspects of this claim and should instead address these aspects of the claim in resolving the issue.

G. Conclusion

The finding that both defendants personally fired the weapon was unsupported by and contrary to the evidence presented. The only logical interpretation of the evidence is that only one person fired the rifle. Because the prosecutor admitted he failed to prove who the shooter was, the People should not be allowed to assert at this time that it was proven that appellant was the actual shooter.

This error was aggravated when the trial court, in imposing the death penalty, relied in part on the fact that the jury determined that appellant was the shooter.

Finally, it must be noted that the determination that appellant was an actual shooter is essential to other positions argued by respondent. For example, in arguing that there was no prejudice resulting from the failure to give the requested instruction that guilt could not be proven by mere association, respondent relied on the contention that "there was overwhelming proof that Satele was a shooter." (RB at 199.)

Likewise, respondent argues that there was no error in failing to redact CALJIC No. 8.80.1 because "the jury necessarily found that each appellant was either the actual shooter or intended to kill the victims. (RB at 177.)

Similarly, in arguing that the conceded error in the instructions relating to the gang enhancement was harmless, respondent goes to great length to detail the admissions of appellant and Nunez, from which it could be inferred that they were both actual shooters. (RB pp. 173-174.)

In short, the determination that both appellants were the actual people who personally fired the shots is of consequence to several positions taken by respondent. Therefore, the jury "finding" of actual personal use had consequences beyond the immediate impact of this issue and was clearly prejudicial to appellant.

However, as shown, the evidence did not show appellant was the shooter, and that "finding" was based on the prosecutor's confusingly worded verdict form and his argument that the jury could make the dual finding on a vicarious liability basis. Accordingly, respondent's arguments that there was no prejudice, or that there was no error in failing to redact the instruction, are without merit."

As a result of the foregoing, reversal is required.

II.

BY FAILING TO INSTRUCT SUA SPONTE ON THE LESSER-INCLUDED OFFENSE OF IMPLIED MALICE MURDER OF THE SECOND DEGREE THE TRIAL COURT VIOLATED APPELLANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW, HIS SIXTH AMENDMENT RIGHT TO TRIAL BY AN IMPARTIAL JURY, AND HIS EIGHTH AMENDMENT RIGHT TO A RELIABLE DETERMINATION OF GUILT AND PENALTY IN A CAPITAL CASE

A. Introduction

As explained more fully in Appellant's Opening Brief (AOB at p. 59), appellant was charged with two counts of murder. Because several alternative theories were supported by the evidence, the court instructed the jury on three theories of murder in the first degree: 1) deliberate and premeditated murder; 2) murder by the use of armor-piercing ammunition; and 3) drive-by murder. The court also instructed the jury on the lesser-included offense of unpremeditated murder of the second degree and on the related special finding pertaining to the intentional discharge of a firearm from a vehicle.

However, the court failed to instruct the 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. (See CALJIC No. 8.31.) 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, his Sixth Amendment right to trial by jury, and his Eighth Amendment right to a reliable determination of guilt and penalty. Accordingly, the judgment must be reversed.

B. The Constitutional Issues Are Not Waived.

Respondent contends that the constitutional grounds urged in this argument are waived.

Appellant incorporates the principles discussed more fully above, which are equally applicable to the potential waiver of this issue. (*Ante*, at pp. 21-26.) However, in addition to the arguments set forth above, appellant notes that 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 request and/or objection from the defendant, it follows that the failure to make a specific request for such an instruction is not a waiver of the issue.

Indeed, requiring a specific objection in this case would have the de facto affect of abrogating the 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. Therefore, appellant has not waived the constitutional grounds regarding this issue.

C. The Doctrine Of Invited Error Does Not Apply

Respondent also claims that appellant's constitutional claims are procedurally barred under the doctrine of invited error. (RB at pp. 150-151.)

That doctrine is not applicable to this claim because that doctrine is only applicable when the defendant specifically asks for or objects to a particular instruction, the request is granted, and then the defendant seeks to complain on appeal that his request was granted. As explained in People v. *Wickersham* (1982) 32 Cal.3d 307:

> "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, italics added, overruled on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 200.)

An example of invited error may be found in *People v. Gallego* (1990) 52 Cal.3d 115, where the defendant requested that the court modify CALJIC No. 8.84.1 to inform the jury it could consider in sentencing "[w]hether or not execution as contrasted with life without possibility of parole will deter future acts of murder." After the court granted his request and gave the instruction, the defendant attempted to complain about the instruction upon his conviction. This court explained that the claim was precluded by the invited error doctrine because the defendant, through counsel, made a tactical decision to present expert evidence on deterrence, and also to request the instruction.

As explained by Witkin:

> Although the sua sponte duty to instruct on lesser included offenses exists even when the defendant objects to the instruction (supra, §611), 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.)

Indeed, even the cases relied on by respondent demonstrate that this case does not fall within the scope of invited error. For example, respondent quotes this court's decision in *People v. Bunyard* (1988) 45 Cal.3d 1189, 1234, which in

turn relied on the language from *Wickersham*, as set forth above, explaining that invited error is designed to prevent an accused from gaining a reversal because of an error made at his behest, where the defense counsel intentionally caused the trial court to err.

As explained in Appellant's Opening Brief and Respondent's Brief (AOB 64, RB 150, (13RT 3071, ll. 11-28), after the prosecutor argued that CALJIC No. 8.31 was not applicable, the court asked if the defense agreed. Counsel for appellant answered that he had his own requests, and the court stated it would address them later. Counsel for Nunez said he thought they had instructions for second degree murder included. The court then stated that second degree murder instruction was included in the other instructions. (13RT 3071.)

As a result, in this case, although respondent labels this exchange as the defense "tactically" agreeing that CALJIC No. 8.31 was not a proper instruction, there is no evidence that appellant asked the court not to give an instruction for second degree murder based on implied malice. Rather, it appears to be an issue that was overlooked when instructions were discussed. Because there is no reason to conclude that defense counsel requested the instruction not be given, or that the omission of the instruction was a tactical decision on the part of appellant's counsel, the doctrine of invited error is not applicable.

D. Substantial Evidence Supports The Need For CALJIC No. 8.31.

Respondent agrees with the proposition that a trial court has a sua sponte duty to instruct on general principles of law that are closely and openly connected with the evidence when there is "substantial" evidence supporting the instruction. (RB at p.148.) However, respondent contends that there was no error in not instructing the jury with CALJIC No. 8.31 because no substantial evidence supported that instruction. (RB 151.)

Respondent's contention is flawed for several reasons.

First, respondent states, "speculation of "one shooter" is not "substantial evidence" of implied malice for CALJIC No. 8.31 as to the "non-shooter[.]" (RB at p. 151.) This rationale is unpersuasive. First, the contention that there was one shooter is not "speculation." Rather, as explained above (*ante*, at p. 9-11), the conclusion that there was only one shooter is not merely supported but compelled by a great deal of evidence, including the testimony regarding the rapidity with which the bullets were fired, the fact that the casings were found clustered closely together, the nature of the wounds and the position from which they must have been inflicted, and the virtual impossibility (to say nothing of the absurdity) of two persons passing a large assault weapon from one defendant to another in the closed quarters of the car in the few seconds it took to fire all the shots.

Likewise, respondent dismisses as "speculation" appellant's contention that the shots were fired rapidly. (RB at p. 151.) Again, this is not "speculation, but is the only conclusion supported by the evidence, particularly the consistent testimony of the only percipient witnesses, all of whom described the shots as having been fired rapidly. Indeed, even respondent notes in another portion of respondent's brief that Bertha said the shots were fired "fast." (RB at p.116.) Nor is this conclusion dependent upon inferences made from circumstantial evidence. Rather, it is based on the direct evidence found in the testimony of three of the percipient witnesses the prosecution called to the stand, namely Bertha and Frank Jacque and Vasquez. Therefore, it is not "speculation" to believe the shots were fired rapidly.

Secondly, respondent notes that appellant did not testify, and there was no evidence of alibi or mitigation as to appellant. (RB at p. 152.) This contention again underscores the fact that respondent fails to grasp the nature of appellant's argument. Instructions on lesser-included offenses do not have to rely on a defendant's testimony of alibi or mitigation. In fact, a claim of alibi may *negate* the need for instructions on lesser included offenses because the defendant would be relying on an "all or nothing" defense.

Indeed, in this case the instruction in question was required because of evidence presented by the prosecution, namely the evidence relating to appellant or Nunez firing a rifle at Fuller and Robinson. The prosecution's own evidence suggested that the killing could have resulted from an intentional act, the natural consequences of the act were dangerous to human life, and the act was deliberately performed with knowledge of the danger to human life. Thus, the prosecution's own evidence compelled the court to give CALJIC 8.31.

Furthermore, there was no evidence to suggest that either defendant or the gang to which they allegedly belonged had any animus toward the victims of the homicides in this case, and it therefore remained possible that the jury might conclude the shootings resulted from a reckless attempt to frighten the victims but not to necessarily kill them. The jury may also have entertained doubts about other elements of first degree murder, but nevertheless believed the killing resulted from an intentional act, the natural consequences of which were dangerous to human life, and the act was deliberately performed with a conscious disregard for human life. Under these circumstances, a properly instructed jury would have convicted of second degree murder based on a theory of implied malice.

It has long been the rule that instructions relating to lesser included offenses are required where the evidence is susceptible to an interpretation which, if accepted by the jury, would render the defendant guilty of the lesser offense rather that the charged offense. (*People v. Morales* (1975) 49 Cal.App.3d 134, 139-140; *Hooper v. Evans* (1982) 456 U.S. 605) If the prosecution's case presents evidence that supports both the greater and the lesser offense, the jury must be instructed as to both. Thus, a jury may find the lesser simply because it is not convinced of the prosecution's case, and the jury need not look to evidence from the defense for something akin to alibi. In brief, reversal is required on this basis without regard to the defense case.

Respondent also contends that it was "indisputably established at trial that the defendants participated in the deliberate, premeditated, and cold-blooded

murders of the two victims for the benefit of their gang," and therefore there was no error in not giving the instruction." (RB at p. 154.) Respondent lists numerous facts in an attempt to support this contention, including the "use of armor piercing bullets for well-aimed shots that killed both victims," the fact that the defendants were hardcore gang members who kill enemies, and the fact that they bragged about the shooting. (RB at p. 154.) The contention is absurd.

The first fallacy of this position is that there was no direct evidence regarding the mental state of either defendant, so the idea that it was "indisputably established" at trial that the defendants acted "cold-bloodedly" and with premeditation and deliberation is a fantasy on respondent's part. Appellant acknowledges that Vasquez's testimony might provide some support for respondent's position, but for reasons stated previously his testimony was highly unreliable as a matter of law. (*Ante*, at pp. 12-14.) Furthermore, even if his testimony or Contreras's were to be believed, it is still a far cry from reality to contend that a first degree mental state was "indisputably established." Respondent claims far more than the evidence can possibly support.

Moreover, none of respondent's allegations really address the issue in question. Even if there was evidence supporting a first-degree theory, the lesser-included instruction must still be given if there is substantial evidence which could *also* have supported the description of second degree murder described in CALJIC No. 8.31, namely an act performed with a conscious disregard for human life, rather than a deliberate and premeditated murder. Contrary to respondent's argument, the facts in evidence are equally consistent with the theory of second degree murder as they are with premeditation.

Respondent's conclusions do not follow from the evidence cited in their support. For example, the fact that the rifle contained armor piercing bullets does not logically reflect on his specific mental state when the shots were actually fired. If he or Nunez spotted Robinson and Fuller and immediately lifted the rifle and fired the shots on a whim and without premeditation—a scenario equally possible

as the prosecution's first-degree theory-- the fact that the rifle contained a certain type of bullet at that moment would be irrelevant to the question of whether the shooting was premeditated. Likewise, the allegation that appellant was a gang member does not preclude a finding that the shooting was a rash act without premeditation. Nor does it preclude a finding that appellant engaged in an intentional act, the natural consequences of which were dangerous to human life, with a conscious disregard for human life. Therefore, even if it were true that appellant was a hard-core gang member, that fact would not negate the possibility of second degree murder.

Similarly, the preposterous testimony of a paid prosecution witness that appellant and Nunez subsequently boasted about the killing-- to a total stranger and member of a rival gang-- does not mean there was not substantial evidence from which a jury could have convicted appellant of second degree murder. First, the admissions quoted by respondent do not reflect on mental state. For example, the statements, "I did that" or "we AK'd them" are equally consistent with a rash act, a lack of intent, an intent to commit an assault, and a premeditated murder. In fact, the statement that "the guy looked at him wrong so he turned around and blasted him" may support a spur of the moment shooting without premeditation.

Second, they would be just as likely to brag about the crime whether it was first or second degree murder. Indeed, as noted above, the prosecution's gang expert testified that gang members may boast about their exploits to gain respect. Therefore, even if the murder was second degree, a gang member may want to enhance his status after the fact by bragging about the offense and exaggerating the facts to enhance his gangster image. As a result, the fact that appellant may have boasted about being involved in this crime is equally consistent with having been guilty of either first or second degree murder.

In this case, the jury rejected the hate crimes allegation, which may have provided a greater basis for premeditation and deliberation, as that type of crime would have required the defendant to consider his motives and act upon them. It

is accordingly quite possible that a properly instructed jury might have rejected premeditation and deliberation elements and concluded that a second degree murder verdict best encompassed the circumstances of the crime. Consequently, the court erred in not instructing the jury with CALJIC No. 8.31.

E. The Error Was Not Harmless

Respondent contends that the failure to give CALJIC 8.31 to the jury was harmless for several reasons. Respondent is wrong.

In support of this contention, respondent claims that the "evidence of intent to kill was 'overwhelming[.]'" (RB at p. 155.) This is simply not true; to the contrary, the shooter's intent and the intent of the non-shooter remain a mystery even now. Admittedly, there was ample evidence that either appellant or Nunez fired the fatal shots. However, the evidence of intent of the non-shooter-- and even the shooter himself-- was ambiguous at best. Neither defendant testified, and there was no evidence of what conversation took place in the car prior to the shooting. There was also no evidence of any prior relationship between the defendants and the victims, and thus no basis from which to speculate as to a motive. The mere fact that one occupant of a car suddenly fires a rifle at total strangers on the street is not "overwhelming" evidence of intent to kill on the part of the other occupants or even the shooter.

While the jury *could* have found intent to kill, the evidence equally supports a finding that the actions were a spur-of-the-moment offense, committed rashly and immediately upon seeing two targets of opportunity.

Thus, while the jury *may* find the requisite intent, the evidence is subject to multiple inferences and is not overwhelming.

Because the evidence is subject to differing inferences, the jury must be instructed as to any crimes that may fall within that range of interpretations, and this includes second degree murder.

F. Conclusion

In summary, by failing to instruct sua sponte on the lesser-included offense of implied malice murder of the second degree the trial court violated appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process of law, a jury trial, and a reliable determination of the penalty in a capital case

Accordingly, reversal of the convictions set forth in counts 1 and 2 is required.

III.

THE COURT VIOLATED CONSTITUTIONAL RIGHTS WHEN IT OMITTED ESSENTIAL ELEMENTS FROM THE GANG ENHANCEMENT INSTRUCTION, AND THE ENHANCEMENT MUST THEREFORE BE REVERSED

A. Introduction

The jury found to be true two sentence enhancement allegations attached to Counts I and II; namely, that appellant had committed the murders for the benefit of a criminal street gang. (Pen. Code, § 186.22, subd. (b)(1).) 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.

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 at 168-172.) Alternatively, respondent contends evidence of a gang purpose was so overwhelming any instructional error was harmless. (RB at 172-174.) Respondent also argues appellant's federal constitutional claims are barred by his failure to assert them below (RB at 163) and further contends appellant suffered no further prejudice as a result of the court's misinstruction. (RB at 175.) Respondent is wrong on all counts.

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, see AOB at pp. 74-75.)

As appellant explained in the opening brief, the court's error 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 at p. 76.)

Respondent agrees the trial court gave the wrong instruction (RB at p. 158-162), and respondent admits that the instruction given did not contain two of the statutory elements of the enhancement. However, respondent contends the given instruction was "adequate" and that the jury received instructions on the missing elements elsewhere. (RB at pp. 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.)

On the other hand, under the express terms of the statute in issue, section 186.22, subd. (b)(1), the enhancement has elements not contained in the substantive offense, namely whether the crime was committed in order to benefit the gang and with the specific intent to promote the criminal conduct of other gang members. These were elements that had to be proven beyond a reasonable doubt, and therefore the jury should have been instructed that it had to find those elements, as well. However, as will be discussed, there was nothing in the instructions given that would have told the jury that it had to find these elements.

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 at p. 168-172.) However, respondent does not stop to explain why any reasonable juror would choose to abandon the instruction's clear directive regarding the elements which must be established in order to return a finding on something for which it did not receive instructions, and apply instead the complex and strained construction respondent urges this Court to accept as an adequate instruction.

For example, respondent makes a convoluted argument that the jury could have found the missing specific intent element from the instruction's inclusion of the word "willfully." Respondent takes the word "willfully" from paragraph two of the instruction and, although he acknowledges it "usually defines a general criminal intent," nevertheless contends that a reasonable juror who read the term "willfully" in combination with the definition of "active participation"[2] in paragraph five of the instruction would 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 at p. 168.) Alternatively, respondent makes the equally outlandish assertion that a reasonable juror would have deduced the need for the missing specific intent element (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. 1.00; and (3) by extracting from the language of CALJIC No. 3.01 the conclusion that the mental state required for liability as an aider and abettor is specific intent. (See RB at pp. 168-169.)

While respondent's arguments perhaps deserve some credit for creativity, it does not seem very likely that a reasonable juror would parse the given instruction

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[2] 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.)

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 argue, as respondent does, that a reasonable juror would set aside the clear language of the instruction and take a detour 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. Respondent argues the jury could have arrived at this missing element through a synthesized reading of CALJIC Nos. 1.00, 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 at p. 170-171.) According to respondent's thinking, a reasonable jury would know from the elements of "active participation" in CALJIC No. 6.50 (i.e., that the charged defendant must have a current relationship with a gang and must devote substantial time to the 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. 1.00) that it had to find beyond a reasonable doubt that appellant committed the murder in association with a gang.

However, nothing in the instructions given informed the jury of the need to find the missing elements. For example, there is nothing in CALJIC No. 6.50, which was given to the jury, that would tell the jury that in order find the enhancement true it had to find that appellant intended to benefit the gang, as opposed to committing the crime for his own purposes. Nor is there anything in

the instruction that would have required to jury to find the specific intent to promote the criminal conduct of other gang members. The fact that the jury was instructed with specific intent for other acts does not mean they would have assumed that specific intent was required for this allegation. Likewise, CALJIC NO. 3.01 tells the jury that in order to find liability as an aider and abettor, it had to find that the person intended to commit the crime. However, one could intend to commit a crime without intending to benefit a gang. Therefore, none of the instructions contain any of the missing elements of the enhancement.

In urging this construction, respondent again fails to explain why a reasonable juror would depart from the plain language of the instruction he or she was given. Thus, CALJIC No. 6.50 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. Nothing in this instruction suggests that the juror should also find other missing elements, such as specific intent.

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, association findings of the enhancement (RB at pp. 169, 171). Once again, however, 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.)

In fact, the presumption of an official duty being properly performed applies to jurors in the performance of their duties. (Evid. Code, § 664; *People v. Cruz* (2001) 93 Cal.App.4th 69, 73.) To assume that the jurors violated their oath to follow the judge's instructions would run afoul of this presumption, although respondent has offered no evidence or reason to rebut that presumption.

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 cannot replace correct jury instructions when it comes to determining what elements the jury thought that it had to find in order to determine that the enhancement had been proven.

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

In their respective opening briefs, both appellants contended 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. (Nunez AOB 132-133, joined by appellant at AOB p. 329.) *Chapman* analysis compels reversal unless respondent has "prove[d] beyond a reasonable doubt that the error . . . did not contribute to" the jury's verdict. (*Id.* at p. 24.)

Respondent, however, contends the proper standard is the harmless-error standard announced in *People v. Watson* (1956) 46 Cal.2d 818, 836. *Watson* requires reversal if it is "reasonably probable" that the trier of fact would have reached a result more favorable to the defendant but for the error. (*Id.* at p. 836.) Respondent is wrong; the applicable standard is *Chapman.*

Respondent relies on *People v. Sengpadychith* (2001) 26 Cal.4th 316, 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.[3] 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 at p. 158-159.)

However, appellant did not predicate his claim that *Chapman* was the appropriate governing standard for this instructional error on *Apprendi* grounds. Instead, appellant's claim is based upon *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 at p. 78.) The United States Supreme Court has concluded in a series of cases that various forms of instructional error are federal constitutional 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 alternative theories of guilt, one of which was invalid[4]. (*Hedgpeth v. Pulido* (2008) ___ U.S. ___; 129 S.Ct. 530; 172 L.Ed.2d 388, "*Pulido*".)

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[3] 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.)

[4] *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 ' "

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 *Chapman* harmless-error review was appropriate in *Pulido*, *Neder*, *Roy*, *Pope*, and *Rose*, *supra*, *Chapman* 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.)

D. The Instructional Error Was Not Harmless Beyond A Reasonable Doubt

Unlike errors subject to the standard of *People v. Watson*, *supra*, 46 Cal.2d at 836, which are only reversible if it is reasonably probable that the defendant would have obtained a better result in absence of the error, instructions that omit elements of the offense or which fail to instruct on all elements of an offense should be tested under the standard for federal constitutional error, namely the harmless error analysis of *Chapman v. California* (1967) 386 U.S. 18. (*Neder v. United States* (1999) 527 U.S. 1; People v. Cummings (1993) 4 Cal.4th 1233, 1313; *People v. Breverman* (1998) 19 Cal.4th 142, 194., dis. opn. Kennard, J.) *Chapman* analysis, which is the proper standard for federal constitutional error,

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'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.)

compels reversal unless respondent 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 at p. 172.) Respondent is wrong.

In the opening brief (AOB at pp. 78-79), 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 the resolution 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 West Side Wilmas (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) the foregoing suggests that a properly instructed jury would not have found the sentence enhancement to be true; and (6) 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 respond to or argue a single one of these points and thereby essentially concedes them. (*People v. Adams* (1983) 143

Cal.App.3d 970, 992.) Instead, respondent simply recites evidence pertaining to gang customs and culture and the defendants' gang membership and to Ernie Vasquez's highly improbable testimony that both appellant and Nunez individually divulged their guilt to him during his single jailhouse contact with each of them. (RB at pp. 172-174.) Respondent falls far short of carrying the burden of showing the instructional error was 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 Nunez 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. Appellants Did Not Forfeit Their 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, as well as the 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 the *Apprendi* 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.)

Respondent argues these contentions lack merit. (RB at pp. 163-165.) Once again, respondent is wrong.

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, an offense with which he had not been charged. 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. (Nunez AOB at pp. 135-138, AOB at p. 329; *Jackson v. Virginia* (1979) 443 U.S. 307, 314; *Gautt v. Lewis* (9th Cir. 2007) 489 F.3d 993.)

Respondent again has no response to 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 at p. 163.) However, 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.

3. Appellant's 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 at p. 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. As explained above (*ante*, at p. 29), is the sua sponte duty of the trial court to give correct instructions on the elements of an offense or enhancement allegation. Accordingly, an erroneous instruction affecting a defendant's substantial rights require no objection or other trial court action by the defendant to preserve the issue for appeal. 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*, *supra*, 38 Cal.4th 412, 441 fn. 17; *People v. Wilson*, *supra*, 43 Cal.4th 1, 13-14 fn. 3.)

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. (*United States v. Gaudin* (1995) 515 U.S. 506, 509-510; *Evenchyk v. Stewart* (9th Cir. 2003) 340 F.3d 933-939; *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.)

Respondent presents only a general contention of forfeiture. Although the very authority upon which respondent relies explicitly states no trial court action on defendant's part is required to preserve the claim, due to the trial court's instructional obligations and the misinstruction's effect on appellant's substantial rights, respondent fails to respond to appellant's assertion that his constitutional claims are cognizable on appeal for the reasons set forth 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.) Accordingly, 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 enhancement allegations 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-year-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 V 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 plead and proved. [sic]" (37CT 10788; 14RT 3200-3201.)

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, the prosecutor's statement and the instruction were both manifestly incorrect statements of the law. 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.

Respondent merely contends this claim fails because there was no instructional error and, if there was error, the error was harmless under *Watson*. (RB at p. 175.) However, 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 pertaining to counts 1 and 2 must be reversed. In addition, 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.

IV

IN FAILING TO REDACT PORTIONS OF CALJIC NO. 8.80.1, 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

As explained in Appellant's Opening Brief (AOB p. 84), the jury finding that the multiple murder special circumstance allegation was true was based upon a version of CALJIC No. 8.80.1 that incorrectly stated the law regarding accomplice intent and allowed the jury to apply the special circumstance to aiders and abettors without the required intent to kill.

The pattern instruction contains different sections that apply to different special circumstances, and provisions that are not applicable to the special circumstance involved in a particular case are supposed to be redacted. However, the court failed to properly redact the instruction in this case. As a result, the instruction incorrectly informed the jury that the special circumstance could be found to be true if the jury believed appellant was a major participant in the crime and acted with reckless indifference, a provision that is only applicable to felony murder cases and not to the multiple murder special circumstance alleged in this case.

As given, CALJIC 8.80.1 instructed the jury that if it was unable to decide whether the defendant was the actual killer or an aider and abettor, it could not find the special circumstance to be true unless it was satisfied beyond a reasonable

doubt that the defendant, with the intent to kill, aided and abetted any actor in the commission of the murder in the first degree, *or with reckless indifference to human life and as a major participant, aided and abetted the crime.* Thus, under this instruction the jury could find the special circumstance to be true if it found merely reckless indifference to life, when in fact it was required to find an intent to kill.

Because the prosecutor expressly acknowledged the fact that he had not proven who the actual killer was, it is not possible that the jury could have made the finding that appellant was the actual killer. Therefore, this instruction allowed the jury to convict on two theories, one of which was improper and therefore violative of the principles explained in *People v. Guiton* (1993) 4 Cal.4th 1116 and subsequent cases. (See AOB at pp. 90-93.) There is nothing in the verdict form which would make it possible to determine which theory the jury relied upon, and reversal is therefore compelled.

B. The Doctrine Of Invited Error Does Not Bar This Claim

Respondent argues that the doctrine of invited error prohibits appellants from raising this issue. Respondent states, "Appellants never requested that CALJIC No. 8.80.1 be redacted. It was given at their request. (13RT 3045; 37CT 10778)" (RB at p. 177.) Respondent asserts that because appellants did not raise the claims based on the Fifth, Sixth, Eighth, and Fourteenth Amendments below, appellants are prohibited from arguing these constitutional errors at this stage. (RB at p. 177.)

Neither of these contentions have merit.

First, as noted previously (*Ante*, at pp. 29-31.), in order for the doctrine of invited error to apply it must be clear that counsel acted for tactical reasons and not out of ignorance or mistake. The duty to properly instruct the jury belongs to the court, not to defense counsel, and counsel's mere acquiescence or failure to object to an incorrect instruction does not trigger the invited error doctrine. (See

People v. Barraza (1979) 23 Cal.3d 675, 684.) A review of the record in this case demonstrates that defense counsel did not make a tactical decision not to redact the instruction, but merely requested that the standard instruction be given in some form.

At the time that jury instructions were discussed, the trial court ran through the requested instructions in numerical order. When the court reached CALJIC 8.80.1, Mr. McCabe, counsel for Nunez, stated, "I got something missing here. That's not my next one." (13RT 3045.)

Mr. Osborne, counsel for appellant, stated, "That's – he didn't give us that one. Are you adding that. [sic.]" (13RT 3045.)

Mr. Millington, the prosecutor stated, "I gave you that one." (13RT 3045.)

The court then asked if it was requested by the defense, and Mr. Obsborne replied, "Right." (13RT 3045.)

The court then stated that it was being given as requested by both the defense and prosecution. (13RT 3046.)

From the foregoing, it is clear that the administration of the unredacted version of CALJIC No. 8.80.1 was not the result of a tactical decision by appellant's counsel. Indeed, from the colloquy in the record, it is not entirely clear that it was the defense that requested the instruction. Mr. McCabe seemed unaware of the instruction, and Mr. Osborne asked whether the *prosecutor* was "adding" the instruction, thus suggesting that the instruction was the prosecutor's idea. It clearly appears that the instruction surprised both defense counsel, and that, at most, Mr. Osborne acquiesced in the giving of the instruction. Plainly, the defense did not request that the unredacted version be given at all, much less making such a request on tactical grounds, and thus it is clear that the invited error doctrine does not apply.

Similarly, and contrary to respondent's contention, appellant is not precluded from raising the constitutional aspects of this issue. As explained above (*ante*, at p. 29), a trial court has a sua sponte duty to give correct instructions

independent of any request or objection of the defendant. Because this duty does not depend on any request and/or objection from the defendant, it follows, a fortiori, that the failure to make a more specific objection is not a waiver of the issue. As also noted above (*ante*, at p. 29), requiring a specific objection in this case would have the de facto effect of abrogating 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.

C. The Jury Did Not Necessarily Find That Appellant Was The Actual Shooter And/Or Had The Intent To Kill

Respondent argues that this claim must fail "if this court agrees with respondent that the jury *necessarily* found sufficient evidence to find 'intent to kill' as to both appellants, regardless of whether they were actual shooters or accomplices." (RB at p. 178, italics added.) Respondent then recites a long list of facts from which, respondent believes, this court *could* conclude (or the jury could have concluded) that there was sufficient evidence to find intent to kill. (RB at pp. 178-180.)

After poring over all of this evidence, respondent states "The foregoing evidence showed both appellants *could* have been the shooter. The evidence at trial plainly established that the shooter intended to kill, based upon the use of armor piercing bullets, the well-aimed shots, and the gang motive." (RB at p. 180, italics added.) Thereafter, respondent concludes "In other words, the jury *necessarily* found both appellants had the intent to kill the victims, regardless of who fired the fatal shots." (RB at p. 180, italics added.)

The fallacy of respondent's argument that the jury *could* have concluded both appellants fired the shots ignores the overwhelming evidence that only one defendant fired the rifle. Without repeating that evidence in full, this included evidence as to the speed with which the bullets were fired and the physical evidence from the scene of the crime. (See *ante*, at pp. 10-12.) Because it would

have been unreasonable for the jury to have reached this conclusion, the jury had to find intent to kill as to both appellants.

It is also noteworthy that respondent argues that this claim fails if this court finds that the jury "*necessarily* found sufficient evidence to find 'intent to kill' *as to both appellant*, regardless of whether they were actual shooters or accomplices." (RB at pp. 177-178, italics added.) Conversely, if this court does agree the jury "necessarily" found these facts, the claim should prevail. However, while a jury *could* draw an inference of intent on the part of one of the appellants from some of the facts on respondent's list, none of the facts recited, either individually or collectively, *compel* the conclusion the jury "necessarily" must have found intent to kill on the part of both appellants, which is what respondent argues is required to rebut this claim.[5]

An examination of the facts relied upon by respondent do not demonstrate that the jury *could* have concluded that both defendants fired the shots.

For example, respondent refers to Vasquez's testimony that appellant bragged about having committed the offense. (RT at p. 178-179.) Insofar as respondent relies on appellant's admissions as necessarily establishing his role as the shooter and/or his intent to kill, there are several flaws with this contention.

First, as explained previously, Vasquez's testimony reporting appellant's and Nunez's supposed hearsay statements to him was inherently unreliable. Vasquez was a paid snitch who received a reward in exchange for his testimony against these two defendants, and even apart from this, the content of his testimony—that he just happened to meet both codefendants in two separate jails and both confessed to him, even though they were members of a rival gang-- was

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[5] Appellant has previously shown (*ante*, at pp. 5-7.) that the "true" finding on the personal firearm use allegation as to both defendants was based not on the jury's belief that both defendants actually fired the gun, but rather on the prosecutor's confusingly worded verdict form and his argument that the jury could make the dual finding on a vicarious liability basis. Accordingly, that finding does not assist respondent's argument.

incredible. However, even if Vasquez's testimony were to be taken at face value, the statements he quotes are ambiguous with respect to who was the actual shooter. For example, the statements Vasquez attributed to appellant were that "we did that" *or* "I did that" and that "I AK'd them" *or* "we AK'd them." (RB at pp. 178-179, 6RT 1199-1200, 1203-1204, 1208-1211.) However, these quotes reflect the fact that Vasquez did not know whether appellant was using the first person singular, meaning that he personally shot the victims, or the plural, which would mean that he was part of a group, one of whom fired the shots. If this statement is interpreted to mean that he was not the actual shooter, a finding of intent is not a necessary conclusion.

Secondly, as the prosecution's expert witness explained, and as the prosecutor himself argued to the jury, in gang drive-by shooting there is a driver, a shooter, and a lookout. (9RT 2104, 14RT 3211.) In such a situation, a gang member describing the events may say, "We shot them," without regard to which role he personally played in the shooting. Therefore, these statement do not compel the conclusion that appellant was the shooter or that appellant had the intent to kill. If the jury were to conclude from this evidence appellant was the lookout, it could then have a doubt as to whether intent had been proven as to the non-shooter.

Third, even assuming arguendo that the jury believed that appellant said "I did that" or "I AK'd them"-- a fact of which even Vasquez himself was not convinced and for which there was therefore at least a reasonable doubt as a matter of law— there was evidence at trial, presented by the prosecution's expert witness, that gang members often brag about their exploits to gain status. (9RT 1938.) Therefore, even if the jury *could* have believed that appellant made the statement, it did not *necessarily* have to accept appellant's alleged braggadocio as the truth.

Indeed, in claiming that appellant was personally confessing to being the actual shooter, respondent notes that in the same statement where appellant confessed to being the shooter, appellant claimed to be alone in the car when he

shot Fuller and Robinson, and that Nunez was in his house at the time[6]. (RB at p. 178., referring to 8RT 1707; 7RT 1615-1622; 8RT 1626-1628, 1631, 1699-1711, 1747-1749.) However, it is known that appellant *was not alone* in the car. If respondent is contending this statement of appellant's is the accurate version of the events, it clears Nunez of *any* culpability, a result with respondent would obviously dispute. Thus, this is undeniably an example of appellant *exaggerating* his role in the offense. In short, once again, the jury *could* accept this statement as proof that appellant was the actual shooter, but it is not necessary that the jury reach this decision.

Fourth, as appellant has argued previously, because the prosecution's theory at trial was that it had not proven who acted as the shooter, respondent must be estopped from arguing on appeal that the evidence necessarily established the fact that both appellant and Nunez were the shooters. (*Ante*, at pp. 7-9)

Nor does the other evidence cited by respondent prove appellant was the shooter or that appellant had the requisite intent.

For example, respondent argues that the day after the murders appellant fled from the car where the murder weapon was found, and claims that this is evidence of appellant's supposed intent to kill. (RB at p. 179.) However, while this evidence might logically create an inference that appellant was involved in some crime which might prompt a gang member to flee from the police, it is hardly conclusive evidence as to either appellant's specific role in the crime or his intent on the night of the crime. Evidence that appellant fled the car the day *after* the crime is not evidence that he was in the car on the night of the crime. It must also be remembered that when the police stopped the car and found the weapon, Nunez was the driver of the car, appellant and another person were the two

[6] This is based on a statement from the interrogation of Contreras by Neff and Millington on February 2, 1999. After Conteras denied making the statement at trial, he was impeached with the tape of that interrogation. (8RT 1626-1628, 1707, 1747, Exhibits 39 and 45.)

passengers, and all three fled. Obviously, respondent would not argue that this showed that the unknown passenger was the shooter or had the intent to kill Robinson and Fuller. Either the inference applies to all three occupants of the car or it applies to none of them. Thus, the inference cannot be drawn as to appellant.

In a further attempt to bolster the contention that appellant had the intent to kill, respondent notes that "[u]nlike Nunez, who gave alibi testimony Nunez [sic] exercised his constitutional right by refusing to testify in his defense."[7] Appellant assumes respondent intended the second "Nunez" to refer to appellant, but even so, respondent's point eludes appellant. The mere fact that Nunez testified and presented an alibi defense while appellant did not is obviously irrelevant to prove Nunez was not the shooter, nor does appellant's exercise of his right to remain silent provide a basis for the jury to "necessarily" find that appellant was the shooter. Indeed, in spite of Nunez's alibi testimony, respondent continues to maintain that the jury necessarily found intent to kill on the part of Nunez. The conflict in respondent's positions speaks volumes regarding the irrelevancy of this argument in establishing evidence of intent to kill.

The remaining facts recited by respondent are presented by respondent to demonstrate that the jury necessarily found that Nunez was the actual shooter and had the intent to kill. Because this relates primarily to Nunez, appellant will not analyze those facts in detail. However, it should be noted that a similar analysis would apply, namely, even if the jury *could* have inferred intent to kill from the evidence cited by respondent, but the jury would not *necessarily* have to infer intent to kill from this evidence.

C. The Error Was Not Harmless

Respondent contends that the error in giving an unredacted form of CALJIC 8.80.1 was harmless because the jury "presumably knew that it had to

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[7] For clarity, it should be noted that Nunez did testify, but appellant did not.

find 'intent to kill'" on the basis of other instructions. (RB at p. 181.) Respondent is wrong for several reasons.

First of all, respondent's position contradicts well-established California law. This court has frequently held that, on appeal, a jury must be presumed to have followed the instructions it was given. (*People v. Prince* (2007) 40 Cal.4th 1179, 1295; *People v. Bennett* (2009) 45 Cal.4th 577, 596; *People v. Hamilton* (2009) 45 Cal.4th 863, 957.). However, respondent's argument rests upon the *contrary* assumption: namely, that the jury did *not* follow its instructions. Nothing in CALJIC No. 8.80.1 suggested that the jury should look to other instructions for additional elements not listed in that instruction. Indeed, had the jury gone outside 8.80.1 and imported into that instruction elements from other instructions, as respondent contends it must have done, the jury would have clearly violated its oath to follow the instructions it was given by the court.

Likewise, as noted above (*ante*, at p. 42), Evidence Code section 664 creates a presumption that an official duty has been properly performed, and this presumption applies to the jury's performance of its duties.

Consequently, respondent's position thus has no legal merit and is flatly contrary to the well-established law of this state.

Furthermore, this argument is pure speculation, as there is no evidence to suggest the jury looked to any other instructions as an aid to interpreting CALJIC No. 8.80.1.

Likewise, none of the specific instructions mentioned by respondent this do, in fact, provide instructions on this missing element of intent to kill. For example, respondent notes that the jury was given instructions pursuant to CALJIC No. 8.22 where the jury was told that a killing by armor-piercing ammunition is first degree murder. (RB at p. 181, 37CT 10768.) However, this instruction allows for a conviction of first degree murder *without* a finding of intent to kill and thus does nothing to support respondent's position.

In conclusion, the instruction allowed the jury to return a true finding to the multiple murder special circumstance based on a determination appellant was a major participant who acted with reckless disregard in lieu of necessarily finding he acted with the intent to kill. Because the law does not permit the special circumstance to be imposed unless the defendant possessed the intent to kill, this was prejudicial error. Accordingly, reversal of the multiple murder special circumstance finding and the judgment of death are required.

V

THE COURT'S ERRONEOUS INSTRUCTION AS TO THE PERSONAL FIREARM USE ENHANCEMENT VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

A. Introductory Statement

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. Appellant argued that the enhancements were imposed because defective instructions failed to distinguish the proof necessary to determine the actual shooter on the one hand and the aider and abettor on the other and also failed to define the term "intentionally and personally discharged a firearm." (See AOB, Argument V.) Respondent contends there was no error in the instruction given. (RB 184-188.)

Appellant also argued that the instructions additionally created a impermissible presumption that relieved the prosecution of proving 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 it found 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 at pp. 108-109.) Respondent contends there was no burden-shifting as to the gun-use findings (RB at pp. 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 at p. 190).

Also, the instructions were subject to an interpretation that allowed the jury to find the enhancement to be true on a legally invalid theory, namely that appellant was liable for the enhancement because he had been charged as a principal. (AOB at pp. 111-114.) These incorrect statements of the law were not corrected by other properly given instructions. (AOB at p. 114-115.) Respondent

argues appellant's reading of the instruction is "strained" and that other instructions corrected the misinstruction. (RB 188.)

Appellant also argued that the instructional errors were reinforced by the prosecutor's argument (AOB at p. 99) 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. Respondent contends the prosecutor correctly stated the applicable law in argument. (RB at p. 188-189.) In his topic heading, respondent contends there was no defect in the verdict form; but in his substantive text he argues 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).

Respondent is wrong on all counts.

B. Respondent's Two-Shooter Theory Contradicts the Theory On Which The Case Was Tried, and Respondent Must Be Estopped From Asserting It

As explained above (*ante*, at pp. 8-11), at trial, the prosecutor presented (1) substantial evidence that only one shooter shot and killed Edward Robinson and Renesha Fuller and (2) admitted he had presented insufficient evidence to prove the identity of the shooter. In colloquy with court and counsel and in argument to the jury, the prosecutor freely acknowledged that this was the state of the evidence. (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 the victims. (AOB at pp. 32-33, 38-39.) As discussed above (*ante*, at pp. 9-12), 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 a rapid manner.

Despite the District Attorney's clear and unambiguous renunciation of the two-shooter evidence provided by Ernie Vasquez in its prosecution of this case[8], the Attorney General 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 the prosecution's reliance on the single-shooter theory, and instead asks that this court embrace and rely upon the two-shooter scenario rejected by the prosecution in ruling on appellant's claims of error.

Moreover, 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

[8] 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; italics added.)

> 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.

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 at p. 102-103.)

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.) This court further explained that in order to find an aider and abettor who is not the shooter liable under subdivision (e), "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.)

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 at pp. 102-103.)

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, because 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 that a 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.)

Respondent's contention that subdivision (e) imposes liability for gun use on both appellants regardless of who did the actual shooting (RB at p. 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. "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 in that the substantive offense punishes for the crime and the enhancement punishes for a particular manner of killing. In the case of the gun

use enhancement, the statutory language explicitly requires that the jury find the actual shooter beyond a reasonable doubt.

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

D. The Prosecution Successfully Argued That Appellant Was Liable For The Enhancement On The Basis Of A 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 Nunez, 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 Nunez 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, appellant contended in the opening brief that the prosecutor incorrectly stated the law, 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.

Respondent relies upon the same series of "unanimity cases" cited and discussed in the preceding sections (RB 189) and 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 based upon a correct understanding of the law. (RB 188-189.)

Appellant has explained in the previous section that these cases do not apply to the enhancement and respectfully refers the reader to that discussion.

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 juror 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 at pp. 108-111.)

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." (37CT 10788; 14RT 3200-3201.)

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. The instruction then required that the jury find that appellant was in fact a principal in the commission of the crime from the fact appellant had been *charged* as a principal in the crime. A reasonable jury could have interpreted the instruction as a direction to find appellant was a principal if it was convinced appellant had been *charged* as a principal. Alternatively, a reasonable jury could have interpreted the instruction as a direction to find appellant was a principal if he was charged as a principal, unless appellant proved the contrary. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 517.)

Respondent contends "there was no improper burden-shifting on the gun-use charge because 'there is no reasonable likelihood that the jury misconstrued or misapplied' the modified CALJIC No. 17.19 instruction." (RB at p. 193.) Respondent presents a litany of selected portions of jury instructions (RB at pp.

192-193), but fails to explain how those instructions in the aggregate make it reasonably unlikely that the jury misconstrued or misapplied the very clear instruction administered by the court that it was required to find appellant was a principal from the fact he had been charged as a principal. Respondent cites to *People v. Romero* (2008) 44 Cal.4th 386, 415-416 (RB at p. 193), in which this court declined to find burden-shifting in pattern CALJIC instructions Nos. 2.01, 2.02, 8.83, 8.83.1, none of which are in issue here.

Appellant also contended the instruction allowed the jury to find the personal gun use enhancement to be true because he was a "person charged as a principal in commission of the offense" and a gang benefit enhancement had been pled and proved. (AOB at pp. 112-113.) Appellant pointed out 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 at pp. 104-105.)

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. 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 has previously discussed the deficiencies in the language of the verdict form (*Ante*, at pp. 5-7, AOB at pp. 33-34), and the fact that the verdict form led to an improper finding of personal use of the firearm on the part of both defendants.

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 a little 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.
>
> 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.)

In short, and contrary to respondent's representation, the prosecutor expressly told the jury that they could find both defendants liable for the "personal" use of the gun because both were proved to be gang members. The prosecutor never informed the jurors that they could find both defendants vicariously liable if both were found to be principals.

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 at p. 190.) This is a curious 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 the end justifies the means.

The language of the verdict forms mattered. They failed to provide the jury with the legally available range of verdict options. The language made no provision for finding any defendant liable for the enhancement as an accomplice 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 invalid.

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 is wrong.

Respondent supports its contention with a reference to *People v. Thornton* (2007) 41 Cal.4th 391, 462-463. (RB at p. 184.)[9] However, *Thornton* does not help respondent. In *Thornton*, this court considered a *Batson*-Wheeler[10] 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

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[9] 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 this issue as discussed above at pp. 21-23.)

[10] *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).

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.

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.)

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 III of the opening and reply briefs, appellant contended the trial court erred 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 has explained that the personal firearm use instruction given his jury and the prosecutor's corresponding misdirection in argument together 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 cannot 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.)

Respondent argues there was no gang benefit instructional error and therefore no corresponding prejudice requiring reversal of the gun use finding. (RB at p. 175.) In Argument III 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

Respondent presents two pro forma conclusory arguments regarding prejudice. Specifically, respondent contends that because the evidence was "overwhelming" that 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. (AOB at pp. 116-117.) Furthermore, contrary to respondent's contention, the evidence was not overwhelming that both defendants were the principals. (RB at p. 195.) As the prosecutor admitted, he had not proven which of the defendants fired the fatal shots. Therefore, the evidence may have been overwhelming that one defendant was a principal, but was at best inconclusive as to whether both were principals or one was a principal and the other an aider and abettor.

Because the jury did not properly determine facts that were essential for the verdict, a reversal of the judgment is required.

VI

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

When a crime is divided into degrees, upon the failure of a jury to find the degree of the crime, Penal Code section 1157 mandates that the crime is deemed to be of the lesser degree. The failure of the jury in this case to designate "the degree" of the crime requires a reversal of the conviction for first degree murder and the consequences which flow from a conviction for that degree of murder, namely, the death penalty and/or life in prison with the possibility of parole.

A. This court Should Reconsider The Holding Of *People v. San Nicolas* (2004) 34 Cal.4th 614

In disputing the argument presented by appellant in his Opening Brief, respondent argues that the instant case is indistinguishable from *San Nicolas*, a fact which appellant originally recognized in his opening brief. (RB at p. 93, AOB at p. 118.) The problem with the respondent's argument is that appellant presented numerous reasons why this court should reconsider *San Nicolas*, and respondent has not addressed any of those arguments other than to urge this court to rely on a recent precedent which reversed a long history of strict adherence to the letter of section 1157. Briefly, the reasons for overruling *San Nicolas* included the following:

· The jury is empowered to find a lesser degree of guilt than the facts or the instructions establish. This stems from the power inherent in the jury of finding the defendant guilty of *a lesser degree of the offense* than that shown by the uncontradicted evidence, an essential element of the right to a

jury trial. (*People v. Gottman* (1976) 64 Cal.App.3d 775, 780, see AOB at pp. 120-122.)

· Unlike *People v. Mendoza* (2000) 23 Cal.4th 896, where the only theory of the case was felony murder, which is necessarily first degree murder, and where the jury had no option but to convict for first degree murder or acquit, the jury in this case had the option of convicting of a lesser offense. (See AOB at pp. 127-131.) In extending *Mendoza* to cover all types of murder, the *San Nicolas* court overlooked this unique aspect of felony murder.

· *San Nicolas* is inconsistent with the rule that criminal juries render general verdicts, as opposed to special verdicts where the jury finds the facts and the court determines the conclusion. As explained, this is an inherent aspect of the jury's inherent power to acquit a defendant against the weight of the evidence and "in the teeth of both the law and facts." (See AOB at pp. 134-137.)

· The plain language of section 1157 requires the jury to find the *degree* of the offense, *not just the facts*, a fact which raises numerous issues of statutory construction not addressed by either *San Nicolas* or respondent. (see AOB at pp. 138-140.)

· Numerous other rules of statutory interpretation support the position that San Nicolas was incorrectly decided. (See AOB at pp. 141-145.)

In summary, in spite of the fact that appellant has demonstrated numerous flaws with the reasoning of *San Nicolas*, respondent has not addressed any of those contentions. This court should reconsider *San Nicolas* in light of the arguments presented in Appellant's Opening Brief.

B. Other Arguments Presented By Respondent Are Unavailing.

Other aspects of respondent's arguments are also unavailing. For example, respondent argues that "when the foreperson signed the verdict form finding

appellants guilty of willful, deliberate, and premeditated murder (15RT 3457-3458; 38CT 10925-10940), the jury clearly knew that it was making a specific 'first degree' finding." (RB at p. 94.)

This is a conclusory statement that is not supported by either law or logic. The jury is not skilled in law, and there is no reason why a lay jury would understand the consequences of making a particular finding of fact. In any event, the statute calls for the jury to find the degree of the offense. It does not call on the jury to recite the facts. (Pen. Code, § 1157.)

"It is a cardinal rule that a court is not justified in ignoring the plain words of a statute unless it clearly appears that the language used is contrary to what, beyond question, was the intent of the Legislature." (*Cisneros v. Vueve* (1995) 37 Cal.App.4th 906, 910, citations omitted.)

Taking a somewhat different tack, respondent argues that the jury received instructions on drive-by murder, which is a form of first degree murder. (RB at p. 94.) The problem with this contention is that this was a theory of liability for first degree murder, but the jury did not make any finding as to whether this was the theory it was adopting in reaching its verdict. Therefore, it cannot be said whether or not the jury found first degree murder based on this fact.

In fact, even respondent apparently does not believe it is a foregone conclusion that the jury concluded that this murder arose from a drive-by shooting. In another argument, respondent claimed "....the jury could find that appellants had enough time to fire the murder weapon from *outside* their car..." (RB at p. 118, italics added.) Because section 189 makes it first degree murder if the killing is committed "by means of discharging a firearm from a motor vehicle" if the shooter was outside the car, as respondent suggests was possible, it would not necessarily be first degree murder by reason of this theory. Therefore, while this is a theory that the jury *could* have adopted, there is no indication in the form of a specific finding that it was in fact adopted, and the facts giving rise to that theory were not necessarily conclusively established.

Respondent argues that another theory of first degree murder arises from the fact that armor piercing ammunition was used, a fact that potentially triggers first degree murder under section 189. (RB at p. 95.) However, while there was "unimpeached proof" that the shots were fired from an AK-47, and there was evidence that the bullets "were designed to pierce armor in military operations" (RB at pp. 95-96), neither of these facts are sufficient to establish first degree murder as a matter of law. Rather, for first degree murder it must be proven that there was "*knowing* use of ammunition designed primarily to penetrate metal or armor." (Pen. Code, § 189.) As applied to this case, while here was "no dispute" the bullets were armor piercing bullets, there was no evidence that either defendant knew the nature of the bullets. Therefore, it was not established beyond question that the defendants were guilty of first degree murder based on that theory. Similarly, the mere use of an assault weapon, without knowledge that it contained armor piercing ammunition, does not establish liability for first degree murder. Once again, while this was a *theory* presented to the jury, the jury never made a finding as to whether this theory was true. The fact that this theory was argued to the jury is not a substitute for a finding of degree as required by the statute.

Likewise, respondent notes that "in the verdict forms, the jury made specific findings that appellants 'personally and intentionally discharged' a gun at both victims resulting in the murders. (38CT 10926-10934; 15RT 3458-3481.)" (RB at p. 95.) To the extent that respondent relies on this fact to justify omitting the degree of the offense from the verdict form there are two flaws. First, the finding that the defendants "personally and intentionally discharged" the firearm is not the equivalent of a finding of first degree murder. A defendant can discharge a firearm in a rash moment without deliberation. Therefore, this finding is not a substitute for a finding of the degree of the offense. Secondly, as discussed previously (*ante*, at pp. 5-7), this finding itself was error resulting less from a jury finding of the fact of personal use than from a poorly worded verdict form.

In another attempt to excuse the jury from expressly finding the degree of the offense, respondent notes that the guilt phase jury made a specific finding that appellants committed the murders with the "specific intent" to "promote, further or assist" their gang. (RB at p. 95.) This is simply not relevant to the question of the degree of offense. The gang allegation could attach equally to first or second degree murder. Therefore the "true" finding on the gang allegation does not indicate that the jury believed this offense was in the first degree.

Finally respondent argues that the jury was presented with three distinct theories of first degree murder. (RB at p. 96.) However, it is not known which, if any, theory the jury adopted. The fact that three theories of first degree murder were *argued* is not a substitute for a finding of degree by the jury.

Respondent attempts to argue that there was no prejudice because "[t]he jury expressly found appellants guilty of 'first degree' murder on counts 1-2. (38CT 10941-10944.)" (RB at p. 97.) This supposed "finding" appeared on the penalty phase verdict form and thus was not "found" until the end of the penalty phase, after the guilt verdicts had been rendered. There are two flaws with this contention. First, if the jury must find the degree of the offense, and not merely the facts supporting that degree, as this court always held prior to *San* Nicolas, then the failure to do so rendered the offenses to be second degree murder as a matter of law at the time of the verdicts at the guilt/innocence phase of the trial. From that moment on, the court lacked jurisdiction to even hold a penalty phase trial, and any subsequent "findings" of the penalty phase trial were a nullity. (See AOB at pp. 123-127.)

Second, the language of the penalty phase verdict form states, "having found the defendant . . . guilty of first degree murder." This is not a "finding" by the jury, but an incorrect statement of supposed fact on the verdict form, which was not prepared by the jury at all. The insertion of this language in the verdict form was the result of the Deputy District Attorney's interpretation of the earlier verdict and his addition of a fact that the jury did not find. Indeed, if respondent

needs to rely on the penalty verdict for the finding of degree, that is a tacit admission that the first verdict was not adequate, and therefore any subsequent proceedings were null and void. (See AOB at pp. 123-127.)

In may be true, as respondent notes, that "[s]ection 1157 does not include any language demanding that a capital jury make a "degree" finding before penalty phase commencement." (RB at p. at p. 97.) However, while that section does not require a finding of degree *at the penalty phase*, it does require that the jury "must find the degree of the crime" at the time the verdict is rendered. (Pen. Code, § 1157.)

Finally, respondent argues that "in capital cases where there is no separate first degree finding at the guilt phase, but there is a specific finding on the verdict form that is tantamount to a finding of first degree murder ...a defendant suffers no prejudice under section 1157 when the jury expressly finds at a penalty phase that the killing was "first degree" murder." (RB at p. 101.) This is nothing more than a restatement of the holding of *San Nicolas*, which appellant has acknowledged. Respondent once again does not address any of the flaws in *San Nicolas* set forth above. Appellant submits that based on the previous arguments *San Nicolas* should be overruled.

As appellant has explained, *San Nicolas* ignores the plain words of the statute that the jury must find the *degree*. It allows for an alternative finding as satisfactory in spite of the fact that an express finding of the degree of the offense had been a requirement from *People v. Travers* (1887) 73 Cal. 580 until *San Nicolas*.

Conclusion

In summary, appellant urges this court to reconsider *People v. San Nicolas* in light of the foregoing arguments and to conclude that the jury's failure to "find the degree of the crime" rendered the crimes of which appellants were convicted to be murders of the second degree.

VII

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO PRESENT TESTIMONY THAT LAWRENCE KELLY OFFERED A WITNESS $100 TO TESTIFY THE WEST SIDE WILMAS "GET ALONG" WITH AFRICAN-AMERICANS. THIS ERROR DEPRIVED APPELLANT OF DUE PROCESS OF LAW AND A RELIABLE DETERMINATION OF THE FACTS REQUIRED BY THE EIGHTH AMENDMENT IN A CAPITAL CASE

The trial court erred in overruling the defense objection to the testimony of prosecution witness Glenn Phillips to the effect that Lawrence Kelly offered Warren Battle $100 to testify that members of the West Side Wilmas Gang "get along" with African-Americans.

A. Appellants Have Not Forfeited This Claim.

Respondent claims the constitutional aspects of this issue are forfeited because they were not raised at trial. (RB at p. 197.) Under the principles discussed more fully above (*ante*, at pp. 21-27), this issue is not waived. Appellate courts have the power of to review an issue in spite of a party's failure to perfectly preserve that issue; there is an exception to the waiver rule regarding issues relating to the deprivation of fundamental, constitutional rights; and there is another exception to the waiver rule that provides that an objection may be excused when the issue involved is a pure question of law. Finally, because, as noted above, whether the waiver rule is to be applied is largely a question of the appellate court's discretion, this court should address the constitutional aspects of this issue.

B. Phillips' Testimony Was Not Proper Rebuttal Evidence.

The first flaw in respondent's argument is respondent's failure to address the rule discussed in Appellant's Opening Brief (AOB at p. 158), that "[a] party

may not cross-examine a witness upon collateral matters for the purpose of eliciting something to be contradicted. [Citations] This is especially so where the matter the party seeks to elicit would be inadmissible were it not for the fortuitous circumstance that the witness lied in response to the party's questions." (*People* v. *Lavergne* (1971) 4 Cal.3d 735, 744.)

This is precisely what occurred in this case. Kelly was called by the defense to present testimony as to several facts, including: the fact that appellant personally had no racist tendencies; the fact that all the gang members had access to the rifle used in the murders; and the fact that prosecution witness Joshua Contreras was frequently under the influence of methamphetamine. (See AOB at p. 155.) On cross-examination, the prosecution asked Kelly if he had offered someone money to testify that the West Side Wilmas get along with African-Americans. Kelly denied that he had done so. (10RT 2413.) Thereafter, the prosecution called Glen Phillips to testify that he heard Kelly offer Warren Battle, a African-American employee of Phillips, $100 to testify that "we" get along with African-Americans. (13RT 2978-2979.)

Obviously, the only reason why the prosecutor originally asked Kelly about this attempt to purchase testimony was to get in the testimony of Phillips after Kelly denied the fact. Equally obvious is the fact that had Kelly not denied this fact, Phillips' testimony on this point would not have been admissible on its own; it became admissible solely because of Kelly's denial. Because Kelly's offer to Phillips was not an issue in this case, it is a classic collateral issue. Therefore, this is exactly within the rule explained in *People* v. *Lavergne*.

Respondent also dismisses the likelihood of potential confusion caused by this evidence in a conclusory manner. (RB at p. 127.) However, as explained in Appellant's Opening Brief (AOB at pp. 161-162), there actually was demonstrable confusion when the prosecutor misstated the purpose for which this evidence was offered, arguing that it was offered to prove Kelly tried to bribe Warren Battle to testify falsely, when, in fact, the evidence was originally offered not for the truth of

that matter, but as a demonstration of a contradiction in Kelly's testimony as a means of questioning Kelly's credibility. If the prosecutor was actually either wrong or disingenuous in his explanation to the jury about the use of this evidence, clearly there would be a danger of confusion to a lay jury which might similarly misuse this evidence of wrongful conduct of appellant's fellow gang member as evidence of appellant's guilt.

Finally, respondent argues there was no prejudice in admitting this evidence. Respondent makes several arguments in support of this contention (RB at pp. 127-128), all of which are unavailing. None of the reasons suggested by respondent dispel the likelihood of prejudice discussed in Appellant's Opening Brief. (AOB at pp. 161-163.)

For example, respondent argues that the evidence was not "unduly prejudicial" because Kelly was not on trial. (RB at p. 127.) To the contrary, the fact that Kelly was not on trial *increases* rather than diminishes the likelihood of potential prejudice and confusion. The only people against whom the evidence could be used were appellant and Nunez. The prejudice does not accrue to the witness, but to the defendant on trial.

Similarly, respondent contends the evidence was not unduly prejudicial because in Phillips' alleged quotation of Kelly asking Battle to say that "'we' get along," the meaning of the word "we" was never defined and Kelly admitted he was a member of the same gang as appellant. (RB at p. 127.) Again, these are facts that *increase* the danger of prejudice. With the term "we" undefined and the jury knowing that Kelly was in the same gang as appellant, the danger is increased that this attempted bribe would be attributed to appellant and/or Nunez. As explained in Appellant's Opening Brief (AOB at p. 157), evidence of efforts by a third person to fabricate evidence are admissible against the defendant *only* if done in the defendant's presence and/or the defendant authorized the conduct of such a third person. Because these elements were never shown below, attributing the bribe

itself to appellant would be improper. However, with the term "we" left undefined, the jury was likely to improperly attribute these acts to appellant.

Respondent's contention that the danger of confusion is mitigated by the fact that appellant and Kelly are in the same gang indicates that respondent does not understand how a jury is likely to misuse evidence of misconduct of other gang members. The danger of prejudice and confusion is *increased* by the fact that Kelly and the defendants are in the same gang because the prosecution expert witnesses explained to the jury that gang members act on behalf of the gang. Therefore, co-membership in the same gang will create a danger of prejudice, rather than dispel it.

Contrary to respondent's argument (RB at p. 127), the fact that other witnesses also testified that appellants got along with African-Americans does not alleviate the prejudice from this error. Kelly testified as to other important facts relied on by the defense—notably, that Contreras was a frequent methamphetamine user, thereby suggesting that his testimony was unreliable due to the influence of methamphetamine on Contreras's mental state. However, with Kelly's testimony improperly impeached by evidence of an attempt to improperly influence a possible witness, the jury would be likely to improperly dismiss other aspects of his testimony.

C. Conclusion

In summary, the trial court erred in overruling the defense objection to the rebuttal testimony by Glenn Phillips to the effect that Lawrence Kelly offered Warren Battle $100 to testify that members of the West Side Wilmas Gang "get along" with African-Americans. Because this evidence improperly undermined the credibility of a defense witness, and because of the likelihood of confusion of the issues, appellant was prejudiced by the introduction of this evidence, requiring a reversal of the judgment of conviction

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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

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 guilt as an aider and abettor. 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. This Claim Is Not Waived

Respondent claims the constitutional aspects of this issue are forfeited because these claims were not raised at trial. (RB at p. 197.) Respondent is wrong.

Under the principles discussed more fully above (*ante*, at pp. 21-27), this issue is not waived. These principles include the fact that an appellate court has inherent power to review an issue in spite of a party's failure to perfectly phrase that issue; the fact that there is an exception to the waiver rule regarding issues relating to the deprivation of fundamental, constitutional rights; and the fact that there is an exception to the waiver rule that provides that an objection may be excused when the issue involved is a pure question of law. Finally, because, as noted above, whether the waiver rule is to be applied is largely a question of the appellate court's discretion, this court should address the constitutional aspects of this issue.

B. The Court Erred In Refusing The Requested Instruction

Respondent argues that it was not error for the trial court to refuse the requested instruction because "[a] trial court has no *sua sponte* duty to give amplifying or pinpoint instructions." (RT at p. 197.) Respondent is wrong.

It is true that a trial court does not have a *sua sponte* duty to give pinpoint instructions. However, that is not the question presented here. Rather, this case deals with the duty of a court to give pinpoint instructions *on request.* The duty to give *requested* instructions is different from the duty to give instructions *sua sponte.* As explained in Appellant's Opening Brief (AOB at pp. 166-167), a defendant is entitled to a pinpoint instruction *upon request.* (See also *People v. Saille* (1991) 54 Cal.3d 1103, 1119; *People v. Castillo* (1997) 16 Cal.4th 1009, 1019.) Respondent's failure to address the duty of a trial court to give pinpoint instructions when requested to do so should be regarded as a concession as to that issue. (*People v. Adams*, *supra*, 143 Cal.App.3d 970, 992.)

Respondent further contends that the trial court did not err in refusing the requested instruction because the principle of law reflected in the requested instruction was similar to the language contained in CALJIC No. 3.01 and, respondent claims, was sufficient to inform the jury of the principle contained in the requested instruction. (RB at pp. 197-198.) However, CALJIC No. 3.01 informed the jury that merely being present *at the scene of the crime* is not sufficient for aiding and abetting liability. Nothing in the instruction even began to address the question of whether being *in the company* of Nunez and Caballero might be sufficient for such an inference.

Moreover, because of the testimony of the gang expert and the nature of gang cases, appellant's association with Nunez and Caballero would be an incriminating fact in itself *beyond mere presence.* Julie Rodriguez, the prosecution's gang expert explained that when gang members go on a shooting mission there are three roles: a driver, a lookout, and a shooter. Combined with the evidence presented as to how gangs gain status and operate, the jury could

infer that appellant's being in the company of Caballero and Nunez – a fact beyond mere presence at the crime - was evidence of his guilt. The instructions given would not correct this false impression, which was why the requested instruction was needed.

In summary, as explained in Appellant's Opening Brief (AOB, at pp. 169-170), the standard instruction prohibits an inference of guilt from mere proximity to the crime, whereas this requested instruction prohibits the inference of guilt by association. Because of the danger of the jury accepting an inference based on association, as opposed to mere presence, the trial court erred in refusing the defense request for this instruction.

C. Appellant Was Prejudiced By The Denial Of This Requested Jury Instruction.

Respondent argues that appellant was not prejudiced by the denial of this request. This argument is based on the contention that the trial court gave numerous other instructions informing the jury as to relevant principles of law connected to the case. (RB at p. 199.) For example, respondent notes that the jury was given instructions relating to the burden of proof, witness credibility, informant testimony, the elements of the charged offenses, and numerous other instructions. (RB at p. 199.)

However, as previously explained, none of the instructions listed by respondent relate to the principle contained in the requested instruction. None of them deal with whether being in the presence of someone who committed the crime is a sufficient basis for a finding of guilt. They cannot seriously be viewed as adequate substitutes for the requested instruction.

Respondent again refers to the supposed "overwhelming evidence" of appellant's guilt and contends this rendered the denial of requested instruction harmless. (RB at p. 199.) However, while it may be true that the evidence that *either* appellant or Nunez fired the fatal shots was overwhelming, the evidence

regarding the intent of the non-shooter was ambiguous. Furthermore, if the crime was the result of a rash, spur-of-the-moment act by the shooter, whose identity the prosecutor admitted he had not proven, the issue of guilt of the non-shooter was far from overwhelming. Thus, it is important that the jury be told that merely being in the presence of the shooter was not a sufficient basis for a finding of guilt. This is particularly true in gang cases, such as this case, where the action of one gang member is likely to be attributed to his fellow gang member. The other evidence of guilt was not "overwhelming. As previously explained (AOB, at pp. 39-40), the prosecution's two main witnesses, Contreras and Vasquez, both had credibility problems which may have given the jury pause in reaching its decision.

Respondent also contends that because there was "overwhelming proof" that appellant was the shooter, he was not prejudiced. (RB 199-200.) This contention is utterly without merit. As noted previously (*ante*, at p. 7-9), the evidence was at best ambiguous as to which defendant fired the shot, and the prosecutor admitted he had not proven who fired the shots. As previously explained, (*ante*, at pp. 7-9), a party is not allowed to present one theory at trial and another on appeal. Because the People at trial argued that they had not proven who the shooter was, respondent is estopped from now arguing that the evidence "overwhelmingly" proved appellant was the shooter.

Because respondent argued that the constitutional aspects of this claim have been waived, respondent only addressed the question of prejudice under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, holding that an error is reversible only if it is reasonably probable that the defendant would have obtained a better result in absence of the error. (RB at pp. 129-131.)

However, because this error adversely impacted appellant's constitutional rights, the error must be evaluated under the standard of *Chapman v. California*, *supra*, 386 U.S. 18. As discussed in Appellant's Opening Brief (AOB at pp 176-177) it cannot be shown that the error was harmless beyond a reasonable doubt. Therefore, the conviction entered below must be reversed.

IX

THE TRIAL COURT ERRED IN REFUSING APPELLANT SATELE'S REQUEST TO GIVE THE JURY LIMITING INSTRUCTIONS REGARDING EVIDENCE THAT ONLY APPLIED TO CO-APPELLANT NUNEZ

The trial court erred in refusing appellant's request to give the jury limiting instructions informing the jury that certain evidence only applied to co-appellant Nunez. In particular, as detailed in Appellant's Opening Brief, the facts giving rise to the instructions contained in CALJIC Nos. 2.04 and 2.05 related to the testimony that Nunez tried to influence the testimony of Ruby Feliciano and Esther Collins. Because this evidence only applied to co-appellant Nunez, appellant requested that the jury be instructed only to consider that evidence as to Nunez. This request was denied, and the denial was reversible error.

A. Appellant Has Not Forfeited This Claim.

Respondent again claims the constitutional aspects of this issue are forfeited because they were not raised at trial. (RB at p. 197.) Once again, respondent is wrong.

Under the principles discussed more fully above (*ante*, at pp. 21-27), this issue is not waived. These principles include the fact that an appellate court has inherent power to review an issue in spite of a party's failure to perfectly phrase that issue; the fact that there is an exception to the waiver rule regarding issues relating to the deprivation of fundamental, constitutional rights; and the fact that there is an exception to the waiver rule that provides that an objection may be excused when the issue involved is a pure question of law. Finally, because, as noted above, whether the waiver rule is to be applied is largely a question of the appellate court's discretion, this court should address the constitutional aspects of this issue.

B. Respondent's Arguments Are Misplaced

Respondent argues that the denial of the requested instruction was proper because "'a trial court need not give a pinpoint instruction if it merely duplicates other instructions.' (*Whisenhunt, supra*, 44 Cal.4th at p. 220.)" (RB at p. 203.) However, the instruction requested by appellant's counsel was not duplicative of other instructions. None of the instructions given at any time in the trial informed the jury that the evidence giving rise to these instructions related only to Nunez.

The instructions given to the jury at the end of trial regarding evidence that *was* limited in its scope specifically stated that "*at the time*" certain evidence was admitted the jury was instructed that it could not be used for "*any purpose other than the limited purpose for which it was admitted,*" and the jury could not consider the evidence for any other purpose. (CALJIC Nos. 207 - Evidence Limited to One Defendant – and 2.09 Evidence Limited as to Purpose -, given at 37 CT 10725, 10722, 14 RT 3162-3163.)

However, as explained in Appellant's Opening Brief (AOB at pp. 183-184), at the time that the evidence giving rise to CALJIC Nos. 2.04 and 2.05 was introduced, the jury *was not* informed of its limited use. As a result, the crucial aspect of the instruction appellant was requesting – i.e., that the jury be informed this evidence could only be used against Nunez – had not been explained to the jury in other instructions. In fact, by restricting limiting instructions to evidence for which an instruction had been given at the time of the admission of the evidence, and by not giving a limiting instruction at the time of the introduction of the evidence of Nunez's alleged behavior, CALJIC Nos. 2.07 and 2.09 as given had the *opposite* effect. In other words, because there had been no limiting instruction given at the time the evidence was introduced, the jury could naturally assume it was not limited in any way and could therefore be used against appellant.

Respondent further argues that there was no error or prejudice because the evidence giving rise to CALJIC Nos. 2.04 and 2.05 involved the actions of Nunez.

Therefore, appellant would not be prejudiced by CALJIC Nos. 2.04 and 2.05. (RB at pp. 207-208.) There are several problems with this contention. First of all, the argument overlooks the primary purpose for rules of evidence in the common law system. The law recognizes that unless the evidence is properly controlled through its admission or instructions as to its proper use, there is a grave danger of the jury misusing that evidence. Indeed, the essence of jury instructions is that the jury *needs* to be either sheltered from certain evidence or guided in the use of the evidence because a lay jury is not versed in law or logic.

Thus, numerous rules of evidence are premised on the fact that the jury will *not* instinctively know how to consider certain items of evidence. For example, Evidence Code section 352 allows for *relevant* evidence to be excluded if there is a danger that the jury may be confused by the introduction of that evidence. This rule of exclusion may prohibit the introduction of relevant evidence in spite of the fact that the jury could simply be instructed at to the proper use of the evidence.

Likewise, the traditional rule against character evidence, codified in Evidence Code section 1101 is not based on theory that character is irrelevant, but on view that "it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." (*Michelson v. United States* (1984) 335 U.S. 469, 476.) As a result, some character evidence must be excluded and the jury needs to receive instructions as to how to use the evidence that it does receive.

Indeed, the entire body of law relating to jury instructions is premised on the belief that the jury would not know how to use *admissible* evidence without clear guidance from the trial court. If the jury instinctively could follow rules of logic underlying jury instructons, there would be no need for any jury instructions beyond those relating to burden of proof. Thus, even when evidence is relevant the jury needs guidance in explaining how that evidence may be used.

The need for proper limiting instructions that is required for admissible evidence is even *greater* when the evidence is *inadmissible* against one defendant,

but is only being allowed for use against the other defendant solely because they are being tried together. Under those circumstances, the jury must be instructed both as to the proper use of the evidence and as to which defendant the evidence relates.

Furthermore, in a gang case such as this one, there is a grave danger of guilt by association, i.e., that the jury will infer one defendant's guilt from evidence applicable solely to the other defendant. In such a case, it is imperative that the jury be informed that it must restrict its application of evidence admitted solely against one defendant to that defendant only.

Respondent argues CALJIC Nos. 1.02, 2.07, 2.08, 17.00, and 17.31 "adequately conveyed to the jury" that this evidence did not relate to appellant. Respondent's argument is based on the premise that because the jury was instructed with CALJIC No. 17.31, which told the jury to disregard an instruction that applies to facts that do not exist, appellant was not prejudiced. (RB at pp. 207-209.) The problem with this argument is that the jury is only told to disregard instructions *when there are not supporting facts for those instructions*. However, the supporting facts for CALJIC Nos. 2.04 and 2.05 *did* exist. Therefore, the reason the requested instruction was necessary was not that CALJIC Nos. 2.04 and 2.05 should be disregarded because the supporting evidence did not exist. Rather, the question is if the jury found the facts exist, how should those facts be used? CALJIC No. 17.31 gives no guidance on this matter.

Respondent contends that "[a]s the trial court ruled, given the "neutral" language therein, CALJIC No. 2.04 did not require a limiting instruction that it only applied to Nunez. (13RT 3017.)" (RB at p. 207.) However, the "neutrality" of the instruction's language is the *exactly* the problem. Only one defendant engaged in the actions which made the instructions necessary. Consequently, the instruction regarding the use of that evidence should *not* be neutral, but rather it *should* limited to the person to whom this evidence relates.

As respondent notes, the trial court was concerned with "potentially

prejudicing Nunez's defense by pinpointing to the jury proof of Nunez's consciousness of guilt." (RB at pp. 207-208.) However, it is cold comfort to appellant that the court permitted its concern that Nunez might be prejudiced to prejudice appellant instead. What respondent and the trial court fail to realize is that this evidence was admissible *only* because it related to Nunez's consciousness of guilt. There is nothing wrong with pinpointing evidence to its proper use. The trial court must either neutralize potential prejudice to appellant that arises because of the joint trial or it must grant separate trials.

Ironically, had Nunez been tried alone, the jury would have been instructed with these pinpoint instructions and they would have only applied to Nunez. By consolidating the trial, Nunez received a benefit in that the form of the pinpoint instruction which should have been applicable only to him was diluted, while appellant received a detriment in the form of an instruction that permitted the jury to use against him evidence that should not have applied to him at all.

As explained in Appellant's Opening Brief (AOB at pp. 186-187), the danger of jury confusion in this case arises from the inherent dangers in conspiracy cases that the acts of one defendant may be attributed to the other. This is even more so in gang cases where gang members are claimed to be acting for the benefit of the gang, and the lines of individual responsibility are so blurred as to create the danger that innocent or less culpable defendants will be found guilty simply because of their association with others.

In summary, the evidence giving rise to CALJIC Nos. 2.04 and 2.05 only related to Nunez. Therefore, the jury should have been informed of the fact that they could only consider that evidence as to Nunez, and the failure to so inform the jury greatly prejudiced appellant. Reversal is required.

X

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO PRESENT REBUTTAL EVIDENCE THAT APPELLANT ALLEGEDLY STRUCK ANOTHER INMATE WHILE IN COUNTY JAIL.

The trial court abused its discretion in allowing the prosecutor to present rebuttal evidence that appellant struck another inmate in county jail. This evidence was admitted in violation of Evidence Code section 352 and also constituted improper rebuttal evidence. Because of its highly prejudicial nature, the error compels reversal of the judgment.

A. The Constitutional Aspects Of This Issue Are Not Waived.

Respondent claims the constitutional aspects of this issue are forfeited because these claims were not raised at trial. (RB at p. 197.)

Under the principles discussed more fully above (*ante*, at pp. 21-27), this issue is not waived. These principles include the fact that an appellate court has inherent power to review an issue in spite of a party's failure to perfectly phrase that issue; the fact that there is an exception to the waiver rule regarding issues relating to the deprivation of fundamental, constitutional rights; and the fact that there is an exception to the waiver rule that provides that an objection may be excused when the issue involved is a pure question of law. Finally, because, as noted above, whether the waiver rule is to be applied is largely a question of the appellate court's discretion, this court should address the constitutional aspects of this issue.

B. Respondent's Arguments Are Misplaced

Respondent completely fails to address the core of appellant's argument, i.e., the fact that there was no evidence from which it could be inferred that appellant's alleged assault on another inmate was motivated by racial animosity.

Unless this incident can be traced to racial animosity, it has no relevance. Appellant was allegedly involved in an altercation with an Asian inmate, and there were no racial epitaphs spoken or other evidence of a racial motive as to the incident in issue here. Therefore, it was mere speculation to attribute a racial motive in this particular altercation to appellant. (See AOB at p. 194.)

Because Evidence Code section 352 requires a balancing of the probative value of the evidence against its prejudicial effect, respondent's failure to address the actual probative value of the evidence dooms his argument. Respondent's conclusion that the evidence was necessary to rebut appellant's defense evidence that he was not hostile to African-Americans is necessarily flawed because half of the equation – the probative nature – was never analyzed.

Respondent argues that appellant was not prejudiced by this evidence because he had been charged with killing people in a drive-by shooting, an act more violent than the alleged assault. (RB at p. 129.) However, the fact that the alleged crime was more egregious than the improper character evidence does not negate the fact that a jury may be prejudiced by the evidence in question. The jury's job was to determine whether appellant committed the murders. Presumably, at the time the improper evidence was introduced, the jurors had not made up their minds about the charged offense. The assault evidence created an image of appellant as a violent racist. The inferences drawn by the jurors from such evidence influenced the jurors to conclude that it was more likely that appellant committed the murder than they would have been had the evidence not been introduced. Therefore, the fact that the murder was more serious than the character evidence did not negate the prejudicial impact of that evidence.

In conclusion, the erroneous introduction of this evidence was prejudicial t appellant, thereby requiring a reversal of the judgment of conviction entered below.

XI

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

The prosecutor committed several forms of misconduct in closing argument, including vouching for the veracity of a prosecution witness and presenting inconsistent factual arguments to the jury, thereby depriving appellant of his due process right to a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

A. Appellant Is Not Barred From Presenting This Issue.

Appellant contended in the opening brief that the prosecutor engaged in misconduct in argument when he vouched for prosecution witness Ernie Vasquez, thereby depriving appellant of the Due Process right to a fair trial, as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution. (AOB at pp. 201-205.)

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

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

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 [Nunez] 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.
MR. MCCABE: Objection. The District Attorney's guarantee.
THE COURT: I'm sorry?
MR. MCCABE: 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, however, contends the trial court sustained the objection. (RB at p. 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 Nunez 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. In *People v. Lewis and Oliver*, *supra*, 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).)

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 at p. 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 the claim 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. This was clear misconduct.

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.)

In spite of the foregoing authorities, respondent argues that appellant was not prejudiced by the vouching comments. (RB at p. 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 at p. 137-139.) Respondent does not explain how the prosecutor's concession lessens the impact of the prosecutor's vouching comments and, if there is a link that appellant has failed to discern, it must be a very attenuated one.

In any event, the prosecutor's vouching plainly infected 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 the key witness in terms of connecting appellant and Nunez to the shooting. It was Vasquez who linked appellant and Nunez to the shooting by testifying that both had admitted the shooting to him and that he had seen Caballeros 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 Nunez had independently admitted firing the shots.

When trial counsel objected to the prosecutor's "guarantee," the prosecutor was speaking of Vasquez' identification of Caballeros 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 Caballeros corroborated Joshua Contreras' statement to detectives that Caballeros, appellant, and Nunez 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 Nunez

were the occupants of the car driven by Caballeros 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 10-12, 14.)

As a result, 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 above. (*Ante*, at pp. 12-13.)

For these reasons, 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 further submits that 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 an occupant within the car driven by Caballeros 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.

D. The Prosecutor Committed Misconduct By Presenting Factually Inconsistent Arguments At The Guilt/Innocence And Penalty Phases

Respondent denies that the prosecutor committed misconduct when, at the guilt phase, he argued "that both appellants were surely involved in the shooting murder," while at the penalty phase he "point[ed] out to the same jury... that the evidence tended to show what one particular co-defendant was more likely the actual 'shooter' or killer." (RB at p 142.)

This is not what happened. It is not true that the prosecutor merely argued at the guilt phase that both defendants were "involved" in the murders, and then later argued that appellant was the likely shooter. Rather, at the guilt/innocence phase that he expressly stated that he *did not know and had not proven* who fired the shots. Later, at the penalty phase he argued that appellant was the shooter. (14RT 3214, 3222-3223, 17RT 4293-4295) In fact, at the penalty phase he specifically designated the roles of the three people in the car stating that Caballero was the driver, Nunez the lookout, and appellant the shooter, the three roles which the prosecution's gang expert, Julie Rodriguez, explained were typical of a drive-by shooting.

Thus, the prosecutor changed his position from stating at the guilt phase that he did not know and had not proven who fired the shots to stating at the penalty phase that appellant was the only shooter and Nunez was the lookout. Contrary to respondent's argument, these are completely inconsistent positions.

Respondent further argues that "the jury in this case was not required to unanimously agree on which appellant was the "shooter" and which appellant was the "aider" as long as the jury found each appellant guilty beyond a reasonable doubt of liability for being a shooter as defined by the gun-use statute. (RB at p. 143.)

While it is certainly correct that jury was not required to make a finding at either stage as to who the shooter had been, that does not give the prosecutor

license to argue two different and inconsistent factual theories at different stages of the trial. And while the jury was not required to make a finding as to who fired the shots, the jury and the court would naturally attach greater culpability and opprobrium to the actual shooter than to a mere accomplice. (*Ante*, at p. 19.)

In fact, in *In re Sakarias*, *supra*, 35 Cal.4th 140, the two defendants had both been convicted of participating in a attack on the victim, perpetrated with a hatchet and a knife. The misconduct consisted of the same prosecutor attributing to each defendant the fatal hatchet blows to the victim. The *Sakarias* jury was likewise not required in either defendant's case to determine the identity of which defendant inflicted the hatchet blows. Nonetheless, the act of attributing that act to each defendant in separate trials, and the greater moral culpability that was created by that attribution, was the misconduct that was fatal to the conviction in that case.

It was misconduct for the prosecutor to switch positions and argue at the penalty phase, without any additional evidence, that appellant fired the shots.

E. Appellant Was Prejudiced By This Inconsistent Argument.

Respondent argues that appellant was not prejudiced by this inconsistent argument because some of the conflicting evidence tended to show appellant was the actual shooter, namely appellant's admissions that he shot the victims. The problem with this argument is that if there is only one shooter, as Mr. Millington argued at the penalty phase, appellant's liability for that role cannot rest solely on the evidence of appellant's alleged admissions because Nunez made the identical admission.

Respondent further argues that "the jury received powerful proof to convict each appellant for the firing of their AK-47 to benefit their gang's criminal purpose." (RB at p. 145.) There are three problem with this contention.

First, as discussed above (*ante*, at pp.9-11), while the jury may have received powerful proof that *one* of the defendants fired the weapon, and that both were liable under the prosecutor's vicarious liability theory, the evidence

overwhelmingly showed that only one was the actual shooter.

Secondly, even assuming arguendo, there was "powerful proof" that each defendant fired the rifle, this would still be inconsistent with Mr. Millington's penalty phase argument that only appellant fired the shots. Indeed, there may be powerful proof that *one* fired the shots, but as discussed above, there is no powerful proof that *both* defendants fired the shots. In fact, as admitted by the prosecutor at trial, he had not proven which defendant fired the shots.

Third, if the prosecutor did not prove which of the defendants fired the shots, a fact that the prosecutor freely admitted at the guilt phase, then the prosecutor's penalty phase argument that appellant was the shooter improperly increased appellant's moral culpability at the stage where that moral culpability has the most impact – i.e., at the time the jury determined what penalty to impose.

A prosecutor's first obligation is to serve truth. (*United States v. Leung* (C.D.Cal. 2005) 351 F.Supp.2d 992, 997; *People v. Garcia* (1993) 17 Cal.App.4th 1169, 1181.) The evil in allowing the pursuit of two inconsistent and irreconcilable theories at different times is that one theory must necessarily be false. "Because inconsistent theories render convictions unreliable, they constitute a violation of the due process rights of any defendant in whose trial they are used." (*Stumpf v. Mitchell* (6th Cir. 2004) 367 F.3d 594, 613.) Furthermore, a prosecutor's assertion of inconsistent theories tends to undermine society's confidence in the fairness of the process. (*People v. Watts* (1999) 76 Cal.App.4th 1250, 1262; *Thompson v. Calderon* (9th Cir. 1996) 109 F.3d 1358, 1371.)

In the case of *In re Sakarias*, *supra*, 35 Cal.4th 140 this court explained that when "the available evidence points clearly to the truth of one theory and the falsity of the other, only the defendant against whom the false theory was used can show constitutionally significant prejudice." (*Id.* at p. 156.) As noted, because both defendants made admissions which can equally be interpreted as admitting they were each the actual shooter, and because there was no additional evidence showing that appellant was, in fact, the shooter, the evidence does not clearly point

to appellant as having been the one who fired the shots. Therefore, appellant was prejudiced by this argument.

As the foregoing discussion demonstrates, it is clear that the prosecutor committed misconduct by vouching for the veracity of a prosecution witness and presenting inconsistent factual arguments to the jury, thereby depriving appellant of the Due Process right to a fair trial, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

XII

GUILT AND PENALTY PHASE VERDICTS WERE RENDERED AGAINST APPELLANT BY A JURY OF FEWER THAN TWELVE SWORN JURORS, AND 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, 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 at pp. 209-226.)

Respondent contends (1) appellant's constitutional claims were not preserved by objection or other action below; (2) Jurors 4965, 8971, 2211 took an adequate "trial juror" oath; and (3) appellant was not prejudiced by the omission. (RB at p. 79-90.) Respondent is wrong on all counts.

A. Appellant's Claims Are Cognizable On Appeal

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

Under the principles discussed more fully above (*ante*, at pp. 21-27), this issue is not waived. These principles include the fact that an appellate court has inherent power to review an issue in spite of a party's failure to perfectly phrase that issue; the fact that there is an exception to the waiver rule regarding issues relating to the deprivation of fundamental, constitutional rights; and the fact that there is an exception to the waiver rule that provides that an objection may be excused when the issue involved is a pure question of law. Finally, because, whether the waiver rule is to be applied is largely a question of the appellate court's discretion, this court should address the constitutional aspects of this issue.

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 at p. 85.)

Code of Civil Procedure section 232, subdivisions (a) and (b), govern 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 at p. 79) when they took the prospective juror's oath (Code Civ. Proc., § 232, subd. (a));[11] in combination with the alternate juror's oath; and answered "No" to Question 226 on the jury questionnaire. (RB at pp. 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.)

[11] The oaths provided for in Code of Civil Procedure section 232, subds. (a) and (b) are reproduced in Appellant's Opening Brief at p. 209.

Where Juror No. 2211 is concerned, however, respondent's contention suffers from a fatal defect because, as respondent acknowledges, albeit only when separate parts of its argument are read together, respondent is unable to identify Juror No. 2211's jury questionnaire (RB at p. 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 at p. 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 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 at p. 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.

In addition, respondent's claim lacks merit because the language of the prospective juror's oath requiring the juror 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, when combined with the language of Question 226,

still 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. Respondent's formula does not properly require the jury to determine the facts only from the evidence and apply the law obtained only from the court in reaching the verdict. And, as is true of CALJIC No. 1.00, 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. 1.01 at AOB 218-219.)

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 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 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). Briefly, subdivision (a) only obligates the prospective jury to answer questions regarding his or her qualifications and competency to serve as a juror. Subdivision (b) obligates a juror to truly try the case and render a true verdict according to the evidence presented. 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 the law as provided only by the court. (See AOB 223-224.)

In the opening brief, appellant also discussed the decision in *People v. Cruz*, *supra*, 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's opening brief discussed various reasons why the holding in *Cruz* was problematic. (AOB 223-224.) Appellant respectfully requests that this court take note that respondent refutes none of appellant's assertions and therefore impliedly concedes them[12].

C. Standard Of Review And Prejudice

Respondent contends harmless error analysis under *Lewis* is appropriate without ever explaining why a case considering error under subdivision (a) of Code of Civil Procedure 232 sets the governing standard of review in a case where the defect was the failure to administer the oath described in subdivision (b).

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 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, voir dire examination affords a defendant the opportunity to mitigate any prejudice flowing

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[12] 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 at p. 86.)

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.

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 at p. 213.)

Respondent relies on *Cruz*'s language placing the burden of showing prejudice upon the defendant. This burden flows from the *Cruz* court's reliance on the presumption that the jurors properly performed their official duty under Evidence Code section 664, with the burden of disproving that presumption on the defendant. (*Cruz*, at pp. 73-74.) Appellant has explained why that reasoning (and the consequent burden placement) is flawed. (See AOB 219-221.) 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

XIV

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.

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 instruct the jury that it was required to set aside and disregard all prior discussions relating to penalty and to begin penalty deliberations anew after two jurors were replaced by alternate jurors.

A. The Doctrine Of Invited Error Is Not Applicable

Respondent contends that appellant has forfeited this issue by reason of the doctrine of invited error. Respondent argues that appellant requested that the jury be instructed with CALJIC No. 17.51.1 and therefore cannot raise the issue of the propriety of that instruction on appeal. (RB at pp. 213-214.)

As previously noted (*Ante*, at pp. 29-31.), because the trial court is charged with instructing the jury correctly, in order to be precluded from raising an issue on appeal by reason of the invited error doctrine it must be clear from the record that counsel acted for tactical reasons and not out of ignorance or mistake. There is nothing in this record that would support such a conclusion.

First, it is not clear from the record that the instruction was actually requested by the defense. Although the instruction sheet in the Clerk's Transcripts

for CALJIC No. 17.51.1 has an "X" in the box "Requested by Defendant" (38CT 11119), when one examines the record, it does not appear that appellant, in fact, requested that instruction as a tactical matter. This is apparent from a review of the proceedings when instructions were discussed at trial. When the instructions requested by the defense were discussed, there was no mention of either CALJIC No. 17.51.1 or 17.51. Rather, the only two instructions discussed were those requested by appellant relating to sympathy. It was expressly stated on the record that appellant was not requesting any other instructions. (17RT 4219-4221.) Nor was there any mention of these instructions when the court and parties discussed the instructions requested by Nunez. (17RT 4221-4224.) Thus, the record is at best ambiguous with respect to whether this instruction was actually requested by the defense.

Secondly, the record does not even begin to suggest that the defense would have had any tactical reason for requesting this instruction. After discussing the instructions requested by both defendants, the court asked if there were any more defense requests, and hearing none, the court mentioned "substitution of juror during death penalty phase," referring to this instruction as "7.51," and stating that the court would read that instruction if needed. (17RT 4224.) This further suggests that the instruction was not requested by the defense but rather by the court. Moreover, at that point, long before there was any indication that some jurors would have to be replaced, the instructions that were to be given in the event of that possible contingency occurring were not matters that would be of great concern to either the court or parties. Therefore, it is even less likely that the instruction given was given as a result of a defense tactical decision.

From the foregoing, it is not clear that appellant requested this instruction or that the request was made as a tactical matter, and therefore the error of invited error is not applicable.

B. The Flaw In Respondent's Contentions.

Respondent does not dispute the contention that a trial court must instruct the jury that it begin its deliberations anew when a seated juror is excused and replaced by an alternate jury, nor does respondent dispute= that the court failed to do so in this case. Therefore, it is clear that the trial court committed error in its selection of instructions when the alternate jurors were seated.

Respondent notes that in Appellant's Opening Brief appellant discussed the importance of understanding the difference between CALJIC Nos. 17.51 and 17.51.1. (AOB at p. 241.) However, rather than addressing the difference between these two instructions, respondent merely notes that this trial occurred after *People v. Cain* (1995) 10 Cal.4th 1 and *People v. Collins* (1976) 17 Cal. 687, and therefore appellant's trial counsel had the opportunity to consider the differences between the instructions before this trial. (RB at p.214.)

This argument fails to address the issues presented here. Becausethe trial court has a duty to correctly instruct the jury, whether trial counsel was diligent in reviewing instructions does not excuse the trial court's failure to fulfill its obligations.

Respondent relies on *People v. Proctor* (1992) 4 Cal.4th 499, noting that "in *Proctor*, this court denied a claim that the instruction did not 'embody all elements of the instruction required by' *Collins*. (*Proctor*, *supra*, 4 Cal.4th at pp. 536-537.)" (RB at p. 218.)

However, respondent also quotes from *Proctor,* which explained that the trial court in that case instructed the jury:

> [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. Rhoades has the benefit of your thinking...."

(RB at p. 218, quoting *Proctor* at p. 536.)

This quotation does not aid respondent and actually supports appellants' position. While the trial court in *Proctor* did not give the jury the *exact* instruction

appellant contends is necessary, the court did tell the jury to start over "from scratch." This court affirmed the result after referring to this aspect of the instruction. Therefore, if anything, *Proctor* stands for the proposition that the jury *must* be told to start deliberations anew, even if the exact wording of that instruction is not cast in stone.

Telling the jury to start from scratch *is* the same as telling the jury to begin deliberations anew. Indeed, in many other areas the law shies away from a talismanic approach which demands that an exact phrase be recited. Rather the tendency is to allow for wording of instructions or admonitions which incorporate the essence of the message that must be conveyed.

For example, before a suspect is questioned he must be given the admonitions set forth in *Miranda*[13]. However, so long as the suspect is informed of the essence of those warnings, the fact that they are not worded perfectly will not render a subsequent admission or confession a violation of *Miranda* so as to require its suppression. (*People v. Bradford* (2008) 169 Cal.App.4th 843, 846.)

Likewise, instructions which convey the gist of essential principles to the jury will often suffice, even if aspects of the instruction are debatably less than perfect. (*People v. Wimberly* (1992) 5 Cal.App.4th 773, 793.)

Respondent argues that the trial court did instruct the jury that "[y]our function *now*" is to deliberate "with" the replacement juror, and "[e]ach of you *must participate fully* in the deliberations." (18RT 4470, 4491 [italics added].)" (RB at pp. 218-219.) Respondent concedes that the court did not tell the jury that it had to begin deliberations anew, but contends that this instruction was "adequate." (RB at p. 219, Italics in RB.)

To the contrary, the instruction as quoted by respondent is devoid of the most crucial element required by the proper instruction-- namely, a statement directing the jury to start its deliberations anew *in order to have* the full and equal

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[13] *Miranda v. Arizona* (1966) 384 U.S. 436.

participation of all jurors. Contrary to respondent's argument, the fact that the court used the word "now" in the instruction (RB at p. 219) did nothing to convey this crucial requirement that the jury must throw out all previous deliberations and start over. Without such an instruction, the original jurors could very well participate in further deliberations, even though they had already reached his or her conclusion, based on full and complete deliberations that had already occurred.

In summary, the instruction given to the jury was devoid of the crucial element instructing the jury to begin deliberations anew. As will be shown, there is every reason to conclude that the jury did not begin the deliberative process anew and that the replacement jurors were not given the opportunity to participate fully.

C. Appellant Was Prejudiced By The Failure Of The Trial Court To Instruct The Newly Reconstituted Jury To Begin Deliberations Anew.

In disputing the existence of prejudice, respondent dismisses as speculation appellant's argument that "[t]here is a natural tendency among people to not want to re-harsh matters that have previously been reviewed and possibly resolved" (AOB at p. 242.) Respondent argues that "[s]uch speculation cannot form the basis for a successful attack on the verdict or judgment. (*People v. Anderson* (1990) 52 Cal.3d 453, 483.)" (RB at p. 219.)

If by "speculation" respondent means the attempt to understand how a jury *might* be influenced by certain evidence or instructions, then in every analysis of prejudice there is some degree of "speculation."

In fact, California law regarding the evaluation of prejudice from juror misconduct or other errors occurring during deliberations actually *compels* "speculation." Evidence Code § 1150 provides :

> Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or

> conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. *No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.*

Section 1150 is the codification of the traditional rule that allows evidence as to any matter that *could have* affected a juror, but forbids evidence *as to the actual impact* of such evidence on the minds of the jurors. (e.g. *People v. Stokes* (1894) 103 Cal. 193, 196-197.) Thus, the rule is that a court *cannot* consider evidence of what the jury actually "felt" or thought or how the jurors understood the instructions. (*People v. Lindberg* (2008) 45 Cal.4th 1, 53)

As a result, courts necessarily have to engage in an analysis of how jurors as people will "normally" act. For example, in *People v. Horning* (2004) 34 Cal.4th 871 the trial court allowed a criminalist to testify that the forensic evidence was not conclusive. Rejecting the defendant's contention the evidence should have been excluded as irrelevant and unduly prejudicial, this court explained that had the evidence been excluded the jury "would *naturally* wonder if" any testing had been done on the bullets. (*Id.* at pp. 900-901, italics added.) Similarly, in *People v. Ewoldt* (1994) 7 Cal.4th 380, in describing the possible prejudice from the introduction of evidence of a defendant's prior uncharged bad acts, this court stressed the danger "that the jury *might have been inclined* to punish defendant for the uncharged offenses..." (*Id.* at p. 405, italics added.) Likewise in *People v. Harris* (1998) 60 Cal.App.4th 727, the court approved of the exclusion of evidence on the ground that it was "remote, inflammatory and nearly irrelevant and *likely to confuse the jury and distract it from the consideration of the charged offenses*. (*Id.* at p. 741, italics added.)

Stating that a jury "would naturally wonder" about something (*Horning*), "might have been inclined" to be influenced (*Ewoldt*), or was "likely to [be]

confuse[d]" (*Harris*) is no more than an attempt to evaluate how the jury might be affected by the evidence or instruction in issue.

In referencing *People v. Leonard* (2007) 40 Cal.4th 1370, respondent suggests that appellant is contending that the newly constituted jury was required to deliberate for the same length of time as the original jury. (RB at p. 219.) After arguing that the new jury need not deliberate the identical time that the former jury deliberated, respondent begins to list the complexity of the issues facing the newly constituted jury, including victim impact evidence, other misconduct by Nunez, and other evidence. (RB at pp. 223-224, 227.) Respondent then recites lengthy sections of the instructions given to the newly constituted jury, and rehashes the events leading up to the substitution. (RB at pp. 224-226.) Respondent then concludes that "50 minutes was adequate time for the jury to deliberate anew and reach a verdict." (RB at p. 230.)

In reality, respondent has created a straw man. Appellant *did not* suggest that the newly constituted jury had to spend the *same* amount of time in deliberations. However, while appellant does not suggest any set time, a review of how quickly the newly constituted jury reached its decisions does shed light on to whether it is *likely* that the jurors started their task from the beginning.

As detailed in Appellant's Opening Brief (AOB at pp. 243-24), in order to reach penalty verdicts, after the last alternate juror was seated, the jury had to review the penalty phase testimony of 16 witnesses, including testimony from two experts witnesses concerning the psychological and social backgrounds of the defendant and victim impact of evidence. The jury had to decide whether co-appellant Nunez had committed two crimes as possible factors in aggravation. The jury may also have had to consider issues from the guilt trial that may have had an impact in the penalty phase, such as the presence of any possible lingering doubt. It was necessary to review this evidence, and reach a life versus death decision for two defendants. Under respondent's theory—which is at least as

speculative as appellant's-- all of these deliberations and decisions occurred within the course of fifty minutes. (38CT 10941-10944, 18RT 4497-4403.)

Thus, respondent's argument, based on *People v. Ledesma* (2006) 39 Cal.4th 641, that "[d]efendant provides no reason for us to doubt that the jury in this case was able to follow the court's instructions" has no application here because there is strong evidence that the jury could not have resolved all of these issues in fifty minutes. Furthermore, *Ledesma* is distinguishable because it addressed completely different issues. In *Ledesma* the jury was informed it had to start deliberations anew after one of its members was replaced. The issue in *Ledesma* was whether the entire panel had to be discharged during the penalty phase after the court found misconduct on the part of one juror requiring his removal. Thus, in *Ledesma* the misconduct of the one juror was not related to the ability of the rest of the jury to deliberate fairly and fully. In contrast, here the incorrect instruction was given to the entire newly constituted jury. The language from *Ledesma* quoted by respondent referred to the fact that the defendant had suggested no reason why the rest of the jury had to be discharged, as the misconduct was only related to one juror. It is not relevant here.

Appellant has shown two reasons why the error should be regarded as prejudicial. First, the error in instruction in this case was directed to the entire jury. Second, the extremely brief period that the new jury deliberated in relation to the numerous questions that it had to resolve is a very strong indication that the specific error – the failure to tell the jury to begin deliberation anew – created a situation where the jury did not in fact begin deliberations from the start.

Respondent refers to the instructions given relating to lingering doubt, the "mercy instruction," and a "sympathy instruction," all given at the request of appellants, as noted by respondent. Respondent notes that the Alternate Jurors 2 and 4 were present when these instructions were given. Therefore, respondent contends the juror were instructed within the meaning of *People v. Cain* (1995) 10 Cal.4th 1. (RB at pp. 220-221.)

It is submitted that these instructions do not take the place of the instruction in *Cain*. *Cain* involved an instruction that informed the jury that after an alternate was seated it had to begin its deliberations anew and had to set aside all past deliberations. (*Id.* at pp. 64-65.)

Lingering doubt, mercy instructions, and sympathy instructions have nothing to do with these principles, and therefore giving these instructions did not cure any harm by the failure to properly instruct the jury to begin deliberations anew.

Finally, respondent relies on what respondent labels as "the overwhelming" nature of the guilt phase evidence.

There are two problems with this contention. First, assuming arguendo that there was overwhelming evidence at the guilt phase, this does not excuse an error in instructions in the penalty phase. (RB at p. 230.) The penalty phase verdict must rely on evidence and instructions from the penalty phase, not on overwhelming evidence of guilt. The question for the penalty phase jury was, given the fact that the defendants had been proven guilty, what penalty should be imposed?

The volume of evidence as to guilt is not relevant to the penalty determination. This follows from the following hypothetical: If six witnesses testified that appellant was in the car from which the bullets were fired, rather than one witness testifying as to that fact, there would be greater evidence of guilt. However, having been seen by six witnesses rather than one does not increase his culpability, the crux of the penalty phase determination. This is because the decision to impose the death, unlike the guilt determination, is "inherently moral and normative, not factual." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79 Therefore, it does not depend on the volume of evidence.

Secondly, it is subject to serious dispute as to whether the guilt phase evidence was "overwhelming." As noted above (*ante*, at pp 12-13, 36), while there was a great deal of evidence in terms of volume, there were many problems with the evidence which could give a jury pause before voting to execute two people based on that evidence. In any event, if respondent is assuming that the jury relied on this claimed overwhelming evidence, the jury would still have to discuss that huge volume of evidence and begin the discussion of that evidence anew. Considering the vast amount of evidence in question, it is unlikely they could have done so in 50 minutes.

Respondent quotes from *People v. Leonard*, *supra*, 40 Cal.4th 1370, which stated that "[T]he brevity of the deliberations proves nothing." (*Id.* at p. 1413, RB 230.) There are two problems with reliance on that case. First, that statement must be viewed in its context. In *Leonard*, the newly constituted jury deliberated for 2 and a half hours, roughly three times the amount of time involved here. (*Ibid.*) Furthermore, the jury in *Leonard* did not have to deal with the same level of complexity caused by the potential decision to impose the death penalty on two individuals.

More importantly, in *Leonard*, unlike the present case, the jury was informed that it had to begin deliberations from the start. (*Ibid.*) It was in that context that the court stated there was no reason to believe that the jury had disregarded its instructions, and that the length of deliberations did not prove the jury did not follow the directions given. In this case, where the jury was not informed of this important principle, the brevity of deliberations speaks volumes about whether the jury began the process anew.

D. Conclusion

For the foregoing reasons, appellant submits that the penalty verdict must be set aside because of the failure of the trial court to instruct the jury to begin deliberations anew and disregard deliberations after the substitution of two jurors.

XV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY EXCUSING A PROSPECTIVE JUROR FOR CAUSE DESPITE HER EXPRESSED WILLINGNESS TO CONSIDER IMPOSING THE DEATH PENALTY

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 for cause despite her willingness to fairly consider imposing the death penalty.

In *Witherspoon v.* Illinois, supra, 391 U.S. 510 the Supreme Court established the bedrock principle that a sentence of death violated the Sixth and Fourteenth Amendments where potential jurors were excluded merely because they voiced general objections to the death penalty, so long as the potential juror's reservations about capital punishment would not prevent him or her from making an impartial decision, and the potential juror indicated that he or she could obey the oath to follow the law. (*Id.* at p. 513.)

Adams v. Texas (1980) 448 U.S. 38 explained that a juror could not be excused because of his views unless the record showed him *unable* to follow the law as set forth by the court, and that it is the state's burden to prove the juror meets the criteria for dismissal. (*Id.* at p. 48, see also *People v. Stewart* (2004) 33 Cal.4th 425 - the burden of demonstrating this standard is satisfied as to each of the challenged jurors is on the prosecution.)

A. Appellants Have Not Forfeited This Claim.

Respondent claims the constitutional aspects of this issue are forfeited because they were not raised at trial. (RB at p. 197.)

Under the principles discussed more fully above (*ante*, at pp. 21-27), this issue is not waived. These principles include the fact that an appellate court has

inherent power to review an issue in spite of a party's failure to perfectly phrase that issue; the fact that there is an exception to the waiver rule regarding issues relating to the deprivation of fundamental, constitutional rights; and the fact that there is an exception to the waiver rule that provides that an objection may be excused when the issue involved is a pure question of law. Finally, whether the waiver rule is to be applied is largely a question of the appellate court's discretion, this court should address the constitutional aspects of this issue.

B. The Trial Court Erred In Excusing Prospective Juror No. 2066 For Cause.

Respondent concedes that a juror may be removed for cause only when the juror indicates that he or she "in no case would vote for capital punishment, regardless of his or her instructions." (RB at p. 49, *Morgan v. Illinois* (1992) 504 U.S. 719, 728.) However, it is clear from the proceedings below that Prospective Juror No. 2066 *did not* indicate that she "in no case would vote for capital punishment, regardless of his or her instructions." Rather, in the questionnaire she filled out, in response to Question 230(b) she answered "no" to the question of whether her views would cause her to "refuse to find the special circumstance(s) true" to prevent the penalty phase from taking place. (23CT 6585.)

Likewise, in a follow-up question, Question 230(d) she answered "no" to the inquiry of whether "in the penalty phase" her capital punishment views would cause her to "automatically refuse to vote in favor the penalty of life imprisonment without the possibility of parole and automatically vote for a penalty of death[.]" (23CT 6585.)

In response to Question 230(e) she wrote "I might" as to whether her "yes" answer to Question 230(c) would "change" if (prior to voting) she were "instructed and ordered by the court" that she "must consider and weigh" the evidence and the aggravating and mitigating factors regarding the facts of the crime and the background and character of the defendant. (23CT 6586.)

Finally, she explained that while she was "strongly opposed" to the death penalty, she believed there are rare cases where a death sentence should be imposed for a deliberate murder. (23CT 6586.) She repeated this view when questioned by the trial court. (3RT 620.) Then, when asked if she would be able to impose the death penalty, she replied that she would be "hesitant." Thus, in these questions alone she indicated that she would be able to vote for the death penalty and would follow instructions.

Many of the other responses she gave also indicate that this was a potential juror who did not favor the death penalty, but not only indicated that she would vote for it in some situation, but in other ways was likely to be a "prosecution-biased" juror.

Thus, the question in this case becomes whether Prospective Juror No. 2066 so indicated that she could not vote for the death penalty in any case.

As respondent notes, there are many reasons to suspect that Prospective Juror No. 2066 would have been a sympathetic juror from the prosecution's perspective, as noted by respondent. For example, she stated that she was a "conservative" Republican who believed that the gun allegation could have affected her ability to be fair and impartial. (23CT 6567-6568.) Presumably, one could infer as a conservative, the gun allegation would make her more inclined to convict, if this were inclined to affect her ability to be fair. She also stated she would automatically distrust a member of a gang, and leaned towards believing that a gang member would automatically lie. (23CT 6578-6580.) This would make her inclined to disbelieve appellants and some of the witnesses who testified on their behalf.

As a result, this is not a situation where it can be said that "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 424.)

The answers of Prospective Juror No. 2066's were similar to those of

prospective jurors who were found to have been wrongfully excused for cause in other cases. She expressed philosophical qualms about the death penalty, but she stated that she could return a verdict of death. This is indistinguishable from the juror in *People v. Heard* who likewise expressed anti-death penalty views on the juror questionnaire, but then reconsidered his views based on the trial court's explanation of the law. Furthermore, No. 2066 clearly stated that if she were ordered to consider aggravating factors, she would do so. This is the type of juror the state should want on a jury – willing to follow the law in spite of personal beliefs, able to change his or her mind to follow the instructions of the court, and honest enough to express views that may not be popular in the particular setting.

While the prospective juror had responded to the questionnaire with answers that could indicate a bias against the death penalty, this is not a sufficient basis for a challenge for cause when she ultimately indicated a willingness and ability to impose the death penalty when allowed to expand upon her answers after hearing the court's explanation of the law.

A jury panel is skewed in favor of death when all jurors who may have moral qualms about the death penalty, even when those jurors have indicated a willingness to follow the law, have been removed. This further impacts the reliability of the decision to impose the death penalty, in violation of Eighth and Fourteenth Amendments, which impose greater reliability requirements in capital cases. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305; *Gilmore v. Taylor*, *supra*, 508 U.S. 333, 334; *Johnson v. Mississippi*, *supra*, 486 U.S. 578, 584-585; *Zant v. Stephens*, *supra*, 462 U.S. 862, 879.)

As a result of the foregoing, it is apparent that the trial court erred in granting the prosecution's challenge for cause to Prospective Juror No. 2066 from the pool after a challenge by cause from the prosecution.

XVI.

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 at pp. 262-279.) At the time appellant filed his opening brief, a trial court's decision to remove a deliberating juror was reviewed on appeal for abuse of discretion. (AOB at p. 269.)

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. In *People v. Wilson* (2008) 44 Cal. 4th 758 this court stated:

> 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 [citation] 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" [citation], 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."

(*Id* at p. 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. [citation] 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. entails a more comprehensive review, and considers whether the trial court's reasons are manifestly supported by the evidence on which the court actually relied to find juror misconduct. 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 aat pp. 272-273.)

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 support respondent's description of the situation.

The record shows that at a point 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.) 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.)

Thus, 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 believe.

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 appellant 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 Nunez 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 appellant agreed, noting that Juror No. 10 had said several times in the course of the hearing that the jury had reached a verdict.[14] (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

[14] 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.)

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 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 court actually relied. 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 articulations of its ruling below. The record of reasons provided by the court are not supported by the evidence to a demonstrable reality.

Following the hearing with Juror No. 10, summarized in the opening brief (AOB 264-268), the defense 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 Nunez 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.[15]

(18RT 4455:23 to 4456:1-25; emphasis added.)

Following the court's ruling, counsel for appellant 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. 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 another juror issue, counsel for Nunez 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.

---

[15] 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.)

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 Nunez 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 appellant 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.

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.

XVII

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, 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. 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.

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 ace 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 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.)

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 287-289.)

In particular, the record 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 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 jury 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

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 which he incorporates here by reference. (*Ante*, at pp. 21-27.) 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.

XVIII

APPELLANT JOINS IN ALL CONTENTIONS RAISED BY HIS CO-APPELLANT THAT MAY ACCRUE TO HIS BENEFIT

Appellant William Satele joins in all contentions raised by his co-appellant 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 herein, it is respectfully submitted on behalf of defendant and appellant WILLIAM SATELE that the judgment of conviction and sentence of death must be reversed.

DATED:

Respectfully submitted,

_____

DAVID GOODWIN
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CERTIFICATE OF WORD COUNT

Rule 8.630, subdivision (b)(1)(C), 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 47,593 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 2003 software which was used to prepare this document, I certify that the word count of this brief is 47,593 words.

DATED:

Respectfully submitted,

_____

DAVID GOODWIN

PROOF OF SERVICE BY MAIL (C.C.P. SEC. 1013.A, 2015.5)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the aforesaid county; I am over the age of eighteen years and not a party to the within entitled action; my business address is P.O. Box 93579, Los Angeles, Ca 90093-0579

On June 2009, I served the within **Appellant William Satele's Reply Brief** on the interested parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles , California
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I declare under penalty of perjury that the foregoing is true and correct.

David H. Goodwin