No. S029843

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JAMES DAVID BECK and GERALD DEAN CRUZ, Defendants and Appellants.	(Alameda County Sup. Ct. No. 110467)

APPELLANT'S SUPPLEMENTAL BRIEF

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of Alameda

HONORABLE EDWARD M. LACY, JR.

WILLIAM T. LOWE
State Bar No. 83668
P.O. Box 871
El Cerrito, CA 94530
(510) 230-4285

Attorney for Appellant

DEATH PENALTY

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

FEDERAL CASES

TABLE OF AUTHORITIES

Pages

STATE CASES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

FEDERAL STATUTES

TABLE OF AUTHORITIES

Pages

STATE STATUTES

JURY INSTRUCTIONS

TEXT AND OTHER AUTHORITIES

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INTRODUCTION

In his Opening and Reply Briefs, appellant Cruz demonstrated that instructional error requires that the conviction of conspiracy in Count V must be reversed. (AOB, Argument VII.B.; ARB, Argument VII.A.) Cruz hereby clarifies and supplements that argument with additional authorities and argument demonstrating that the same error, under *People v. Swain* (1996) 12 Cal.4th 593, also requires reversal of the convictions for first-degree murder in Counts I-IV. In his Opening and Reply Briefs, Beck made the argument that this *Swain* error requires reversal of all five counts. (Beck AOB, ARB, Argument XII.A.) Cruz joined in that argument and hereby further supplements that joinder by these additional authorities and argument.

Cruz also identifies additional instructional error arising from the instructions regarding coconspirator liability which also requires reversal of the convictions of murder in Counts I-IV. This additional error arises from this Court's opinion in *People v. Chiu* (2014) 59 Cal.4th 155, in which it

was held that the "natural and probable consequences" doctrine does not support a verdict of first degree premeditated murder. The jury in appellant's case was erroneously instructed that the natural and probable consequences doctrine was a valid basis for finding appellant guilty of first-degree murder. Because on this record it cannot be determined from the verdicts which were returned that the jury based its verdicts in Counts I-IV on a valid legal theory, the convictions in those counts must be reversed.

Finally, Cruz submits an additional claim of prosecutorial misconduct arising from the prosecutor's argument to the jury in penalty phase which has not previously been raised in Cruz's AOB or ARB.

This Supplemental Brief is intended to supplement and augment the briefing heretofore filed in this case, without waiving or abandoning any claims made in the briefing to date, including Cruz's joinder in specific arguments made by Beck in his briefing.

ARGUMENT

VII[1]

INSTRUCTIONAL ERRORS REGARDING CONSPIRACY AND CO-CONSPIRATOR LIABILITY REQUIRE REVERSAL OF ALL FOUR CONVICTIONS OF FIRST DEGREE MURDER

Due to errors in the instructions given to the jury regarding conspiracy and coconspirator liability, the verdicts on Counts I-IV must be reversed.

Appellant incorporates herein by this reference his Opening and Reply Briefs, including Arguments I, II, VII and VIII, the Statement of Case

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[1] This argument supplements Argument VII in Cruz's AOB and ARB, and is therefore numbered accordingly.

and the Statement of Facts.

As demonstrated in the Opening and Reply briefs, *Swain*[2] error, i.e., that the instructions allowed for a legally invalid finding of conspiracy to commit murder based on implied rather than express malice, requires the reversal of the conspiracy verdict in Count V. Beyond that, however, that error also allowed the jury to find Cruz guilty of murder in Counts I-IV as a coconspirator based upon that same legally invalid finding of conspiracy. Because it cannot be determined beyond a reasonable doubt on the record before this Court whether the jury based its verdicts on Counts I-IV on an invalid finding of conspiracy or upon a legally valid theory, reversal of the murder convictions on those Counts is also required.

Moreover, since the filing of Cruz's Reply Brief this Court has determined, in *People v. Chiu, supra,* 59 Cal.4th 155, that a defendant cannot be convicted of first degree premeditated murder as an aider and abettor under the "natural and probable consequences" doctrine. (59 Cal.4th at 167.) The instructions given to Cruz's jury allowed the jury to base its verdicts of first degree murder against Cruz upon the "natural and probable consequences" doctrine as a co-conspirator. Under *Chiu,* that also constituted an invalid theory upon which to base first-degree murder convictions. Again, because it cannot be determined beyond a reasonable doubt on the record before this Court that the jury based its verdicts on Counts I-IV on a legally valid theory, the first degree murder convictions on those Counts must be reversed.

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[2] *People v. Swain, supra,*12 Cal.4th 593.

A. Summary of Facts[3]

As demonstrated in Cruz's Opening and Reply Briefs, the evidence at trial, from both the prosecution and the defense, demonstrated that all four codefendants in this trial (Cruz, Beck, LaMarsh and Willey), along with separately-tried codefendant Vieira and originally-charged-codefendant-turned-prosecution-witness Evans, were present at 5223 Elm at the time of the homicides of Raper, Colwell, Paris and Ritchey. However, there were conflicts in the evidence as to the individual responsibility for each of the four homicides.

All four defendants in this trial testified. Appellant denied killing anybody. In the prosecution's case, appellant was linked only with the homicide of Ritchey, and only by the testimony of Earl Creekmore and Kathy Moyers, whose identifications of the person who cut Ritchey's throat were subject to serious question. (See AOB 20-23.) The prosecution's case was that LaMarsh was solely responsible for the killing of Raper, and either Beck or Vieira was responsible for the deaths of Colwell and Paris. Willey, otherwise hostile to appellant, clarified the questionable identifications by Creekmore and Moyers by identifying Beck as the person who cut Ritchey's throat. While LaMarsh (also hostile to Cruz) testified that Cruz delivered the fatal blows to Raper's skull, this contradicted the testimony of Doctors Ernoehazy and Rogers, as well as of Cruz himself. Thus, the evidence adduced at trial left that question open, subject to the jury's evaluation of the evidence. There was no evidence produced at trial that appellant committed either the Colwell or Paris killings.

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[3] Based upon the Statement of Facts in the Opening Brief and discussions of the facts in the Opening Brief (e.g., Args. I, II, VII and VIII) and Reply Brief (e.g., Args. I, II, VII and VIII).

The evidence at trial conclusively established only certain non-conclusive facts. Some of the evidence was uncontested — e.g., that appellant, the three codefendants in this trial, Vieira and Evans went to 5223 Elm Street in appellant's car; that Evans and LaMarsh entered the house while appellant parked the car; that after parking and exiting the car, appellant and the others heard sounds of trouble and possible violence from the house, at which point they went to the house; that there was a melee in and around the house, the exact initiation of which was the subject of conflicting evidence; that four people were killed in the melee; and that the same six people who came in appellant's car left the scene in appellant's car.

Beyond that, there was substantial evidence supporting conflicting theories as to, inter alia, who killed whom, whether there was a conspiracy, what target offense was intended at the formation of the conspiracy if there was one, what state of mind the actual killer of each victim entertained in committing the homicide, and what state of mind any of the defendants entertained as to the killings of any of the victims. There was substantial evidence that appellant did not kill anybody, did not conspire to kill anybody or to have anybody killed, did not aid and abet any of the actual killers, and had no intent to kill or otherwise act with malice, let alone act with the mens rea required for first degree murder. There was also substantial evidence that Cruz had an honest but unreasonable belief in the need to defend himself or others from imminent harm, and that he or the others acted in a heat of passion resulting from provocation. (See AOB 268-287.) These questions, among others, were left to be determined by the jurors from conflicting evidence.

As respondent has acknowledged, "the main issue at trial was who

committed the murders and whether there was a conspiracy to commit the murders. Since there was so much conflicting evidence, the prosecution's most persuasive ground for conviction was joint liability based on the conspiracy theory." (RB 160.)

B. Summary of Instructions and Verdicts

As explained in the Opening and Reply Briefs, the instructions given to the jury provided as an alternative theory for verdicts of first degree murder that Cruz was a co-conspirator to a target crime less than first-degree murder, for which the natural and probable consequences included murder by other co-conspirators. (See AOB VII.B; ARB VII.A.) The trial court instructed the jury concerning first-degree premeditated and deliberated murder, second-degree murder with either express or implied malice, aiding and abetting, and vicarious liability for murder committed in a conspiracy. (36RT:6484-6485, 6491-6500, 6507-6509; 8CT:1875-1876, 1894-1917,1937-1938.) The instructions regarding conspiracy and vicarious liability allowed the jury to assign the mental state, i.e., premeditation and deliberation, of an actual perpetrator of a first degree murder to a co-conspirator and to thereby find that non-perpetrator guilty of first-degree murder without finding that the non-perpetrator in fact acted with the mens rea for first degree murder, or even had an intent to kill. (See AOB VII; ARB VII.)

1. Instructions

The trial court instructed the jury that the necessary mental states for first degree murder and conspiracy to commit first-degree murder are malice aforethought, premeditation and deliberation. The trial court also instructed the jury that the necessary mental state for second-degree murder and conspiracy to commit second-degree murder is malice aforethought.

(36RT:6492-6493, 6507-6508; 8CT:1938.) However, the court erred by instructing the jury according to CALJIC No. 8.11 that malice could be either express or implied. (36RT:6492; 8CT:1896.) As appellant demonstrated in the Opening and Reply briefs, by allowing a guilty verdict on conspiracy to commit murder based upon a finding of implied malice, this instruction was erroneous and requires reversal of the conspiracy conviction in Count V. (AOB Argument VII.B; ARB Argument VII.A; *People v. Swain, supra,* 12 Cal.4th 593.)

Although the instructions given referred to both conspiracy to commit first degree murder and conspiracy to commit second degree murder, the verdict forms given to the jury provided only for a verdict on conspiracy to commit murder, without specification of degree. (See 9CT:2257, 2269, 2277-2278, 2284-2285.)

The trial court instructed the jury concerning co-conspirator liability according to CALJIC No. 6.11 that a defendant may be liable for crimes or acts of co-conspirators as follows:

> Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if such act or such declaration is in furtherance of the object of the conspiracy.
>
> The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy are [sic] the act of all conspirators.
>
> A member of a conspiracy is not only guilty of the particular crime that to his knowledge his confederates agreed to and did commit, but is also liable for the natural and probable consequences of any crime or act of a co-conspirator to further the object of the conspiracy, even though such crime or act was not intended as a part of the agreed upon objective and even though he was not present at the time of the commission of such crime or act.
>
> You must determine whether the defendant is guilty as a member of a conspiracy to commit the originally agreed upon crime or crimes and, if so, whether the crime alleged in Count I, II, III, and IV was perpetrated by co-conspirators in the furtherance of such

conspiracy and was a natural and probable consequence of the agreed upon criminal objective of such conspiracy.

(36RT:6500; 8CT:1916-1917.)

2. Prosecution Arguments to the Jury

The prosecution as much as conceded the weaknesses in the prosecution's case as to who did what by telling the jury that it did not need to be concerned with who did what, but could rely on theories of vicarious liability to convict all the defendants. (See 36RT:6531-6532; 37RT: 6729-6730,[4] 6745, 6756-6757; AOB Arg. VII.)

3. Verdicts

The jury found Cruz guilty of conspiracy to commit murder on Count V, but without specification of the degree of murder of the target crime. (38RT:6886; 9CT:2284-2285.) The jury also found Cruz guilty of four counts of first degree murder in Counts I-IV. However, the verdicts did

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[4] No doubt because of the conflicting evidence as to who the actual killer of any victim was, the prosecution argued to the jury that

> [The defense is] scared to death of that conspiracy, see. Why? *Because I don't have to tell you, prove to you, or care less about who killed who.* They're all liable together equally for all of the murders, regardless of who put a knife in who or who crushed whose skull, as co-conspirators or as aiders and abettors, under either one of those theories.
>
> Mr. Cruz is liable for the murder of Mr. Ritchey, he's liable for the murder of Mr. Raper, Miss Paris, Mr. Colwell. Mr. Beck is liable for the murder of Mr. Ritchey, Mr. Raper, Mr. Colwell, and Miss Paris. Mr. LaMarsh is liable for the murder of Colwell, Raper, Ritchey, and Paris. Mr. Willey's liable for the murder of Mr. Ritchey, Mr. Raper, Miss Paris, and Mr. Colwell. Each and every one of them singly and jointly. That's why they're scared to death of that conspiracy charge.

(37RT:6729-6730 (emphasis added).)

not indicate whether he was found guilty as the actual killer of any of the four victims, as having aided and abetted an actual killer, or as a co-conspirator. (38RT:6882-6885; 9CT:2279-2285.) The verdicts are consistent with a variety of theories of liability, including the prosecution's argument that the theory did not matter. The general verdicts returned do not support any conclusion as to the various jurors' reasoning in returning those verdicts which would render the instructional errors harmless.

The jury also found the multiple murder special circumstance to be true. However, again no finding was included concerning whether appellant was the actual killer of any victim or had an intent to kill. (38RT:6885; 9CT:2292.)[5]

C. The Instructions Constituted Error Requiring Reversal of Counts I Through IV, the Special Circumstance and the Judgment of Death.

1. By allowing the first degree murder verdicts to be based upon a flawed conspiracy finding due to *Swain* error, the instructions allowed the verdicts in Counts I-IV to be based upon a legally invalid theory.

The instructions given to the jury allowed them to return verdicts of first degree murder against Cruz on Counts I-IV based upon vicarious liability as a co-conspirator. However, the jury finding of a conspiracy at the base of such vicarious liability was itself invalid due to *Swain* error in

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[5]Appellant demonstrated in the Opening and Reply Briefs that the trial court's instruction to the jury concerning the special circumstance in this case was also erroneous, requiring reversal of the sole special circumstance finding in this case, because it allowed the jury to return the special circumstance finding without finding that Cruz was either an actual killer or had an intent to kill. (AOB Argument VII.C; ARB Argument VII.B.)

the instructions, as demonstrated in Argument VII in Cruz's Opening and Reply Briefs. Beyond invalidating the conviction on Count V, the invalid finding of a conspiracy provided the jury with an invalid legal basis upon which to reach its verdicts in Counts I-IV. Thus, any finding of a conspiracy at the base of the assignment of co-conspirator liability was based on a legally invalid theory, and any verdict of first-degree murder resulting from that reasoning is likewise based on a legally invalid theory. These instructional errors violated Cruz's rights to due process and to a jury determination beyond a reasonable doubt of all of the elements of the crime of which he was convicted. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; U.S. Const. 5th, 6th and 14th Amends.)

Cruz did not directly argue in Argument VII in either the Opening or Reply Brief that the *Swain* error in the conspiracy instructions requires reversal of the murder convictions as well as of the conspiracy conviction. This was an oversight. Cruz did join[6] in Beck's Argument XII.A., which argued that the *Swain* error required reversal of all verdicts. (Beck AOB, pp. 224-238; Beck ARB, pp. 91-97.) In this supplemental brief Cruz reiterates that joinder of Beck's argument and clarifies his own contention that the remedy for the *Swain* error in the conspiracy instructions is reversal of all the verdicts in this case, not just that in Count V.

Reversal is required when a case is submitted to the jury on both valid and invalid legal theories, and the reviewing court cannot determine with certainty which theory the jury selected. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 526; *Yates v. United States* (1957) 354 U.S. 298, 312, overruled on other grounds, *Burks v. United States* (1978) 437 U.S. 1;

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[6] See Cruz's Notice and Motion Joining in Arguments in Co-appellant Beck's Opening Brief, filed 9/10/2007; Cruz ARB Arg. XVI.

Stromberg v. California (1931) 283 U.S. 359, 368; *People v. Chiu, supra*, 59 Cal.4th at p. 167; *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129; *People v. Green* (1980) 27 Cal.3d 1, 69-71.)

As shown in the Opening and Reply Briefs, to find the error under *Swain* harmless as to the conspiracy count itself, this Court would have to determine beyond a reasonable doubt that the conviction on Count V was based on a finding of conspiracy to commit murder with express malice/intent to kill. (AOB VII.B.; ARB VII.A.) Again, as shown in the Opening and Reply Briefs, such a finding cannot be made based either upon the verdicts themselves, which are general in nature, or upon the evidence in the record which shows the evidence on that issue to have been in substantial conflict. (AOB VII.B; ARB VII.A.)

To find the *Swain* error harmless as to Counts I-IV, on the other hand, this Court would have to determine beyond a reasonable doubt that the verdicts on those counts were not based upon an assignment of co-conspirator liability. Put another way, unless it can be determined beyond a reasonable doubt on the record before this Court that the jury based its verdicts on Counts I-IV on a legally valid theory that Cruz is guilty of premeditated and deliberate first degree murder, the convictions on those Counts must be reversed. (*People v. Chiu, supra*, 59 Cal.4th at p. 167; *People v. Guiton, supra*, 4 Cal.4th at pp.1128-1129; *People v. Green, supra*, 27 Cal.3d at pp. 69-71.) Because the jury returned general verdicts which did not identify the legal theory upon which each of the jurors based his or her verdict (see 9CT:2272-2301), and because the jury's verdict on Count V was for a conspiracy to commit murder without specification of degree, it cannot be determined beyond a reasonable doubt that the verdicts on Counts I-IV were based on a legally valid theory that Cruz was guilty of

premeditated murder. Reversal of the verdicts on those four counts is required. (*People v. Chiu*, *supra*, 59 Cal.4th at pp. 167-168; see also *Swain*, *supra*, 12 Cal.4th at p. 607.)

There is nothing else discoverable from the verdicts that would enable this Court to conclude that the jury necessarily found that appellant either was the actual killer of any victim or had an intent to kill any victim, let alone that he acted with the mens rea necessary for first degree murder in relation to any of the homicides. The theories of vicarious liability that the instructions included, and upon which the prosecutor relied heavily in argument to the jury (see 36RT:6531-6532; 37RT:6729-6730, 6745), did not require findings of express malice as to any specific codefendant, let alone premeditation and deliberation.

Beyond the non-specificity of the verdicts, the record demonstrates that the prosecutor specifically relied upon vicarious liability as co-conspirators in his argument to the jury. (36RT:6531-6532; 37RT:6729-6730; 6745, 6755, 6757; See AOB VII; ARB VII.) Moreover, as noted above, respondent has acknowledged "Since there was so much conflicting evidence, the prosecution's most persuasive ground for conviction was joint liability based on the conspiracy theory." (RB 160.) Further, issues involved in the various instructional errors, such as whether Cruz was an actual killer of any of the victims, or what his mental state and intent were at the various stages of the events, were vigorously contested at trial and the subject of conflicting testimony. (See, e.g., ARB Arg. VII.) Consequently, the instructional error cannot be held harmless beyond a reasonable doubt. (See *Neder v. United States* (1999) 527 U.S. 1, 19.[7])

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[7] "If, at the end of [a thorough examination of the record], the (continued...)

In fact the substantial conflicts in the evidence in the record suggest that the verdicts in Counts I-IV were based upon co-conspirator liability. The evidence did not conclusively establish that any specific defendant killed or intended to kill any particular victim; rather, the evidence in that regard was conflicting. For example, appellant testified that he did not kill anyone; the prosecution theory was that he killed Ritchey; Willey testified Beck killed Ritchey; LaMarsh testified Cruz killed Raper; the prosecution theory was that LaMarsh killed Raper; no evidence suggested Cruz killed either Paris or Colwell, but rather that either Beck or Vieira killed one or both, or even that Evans killed one of them.[8]

Moreover, the questions from the jurors during deliberations indicated that they were deliberating on the conspiracy count and the homicide counts on the basis of the conspiracy finding first before considering the homicide counts separately from the conspiracy. First, the jurors asked, "If we find a defendant guilty of conspiracy to commit murder and proceed to completing the individual murder counts, does the finding of first, second degree murder need or have to be the same for all four

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[7](...continued)

> court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error – *for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding* – it should not find the error harmless."

[8] See, e.g., the testimony of Michelle Mercer (26RT:4531-4533, 4551-4552, 4554-4557) and Sheri Trammel (24RT:4301-4302), concerning admissions of Evans in this regard, as well as appellant's testimony that he saw Evans in the kitchen of the Elm Street house during the fighting there, at a time during which Evans claimed to have already left the house. (29RT: 5103-5104; 30RT:5187, 5230.)

counts?" (37RT:6833.[9]) A few days later, another note asked,

> If we cannot reach an agreement on a conspiracy charge *and begin to consider the individual charges of murder*, should an individual who feels that a defendant is guilty of conspiracy put that feeling aside and only consider the direct evidence linking the defendant and a specific victim or hold their feeling that if the defendant is guilty of conspiracy the defendant is guilty of the crimes against all the defendants?

(38RT:6835 (emphasis added).[10])[11] These juror questions, and their sequence, suggest that, where a conspiracy was found, the verdicts on Counts I-IV were based upon that finding and the assignment of coconspirator liability.

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[9] The trial court's response to this question was, "No." (37RT:6835.)

[10] The trial court's response to this question was:

> If the jury does not find a particular defendant guilty of conspiracy, neither the jury, nor any individual juror, can find a defendant guilty of a crime based on the theory that it was an act done in the furtherance of the alleged conspiracy. However, the failure to find a defendant guilty of conspiracy does not preclude the juror, any individual juror, from determining whether the defendant is guilty of any crime on any individual victim as an aider and abettor.
> I refer you back to CALJIC 3.00 and 3.01, which you have with you in the jury room, which defines aiding and abetting. Any juror who believes an individual defendant did not aid and abet a particular crime can only consider that defendant's guilt as to that crime based on that defendant's own commission of that crime which can be based on direct or circumstantial evidence.

(38RT:878.)

[11]The trial court's responses to these questions did not address or cure the instructional errors at issue.

2. By allowing the first degree murder verdicts in Counts I-IV to be based upon the "natural and probable consequences" doctrine, the instructions allowed those verdicts to be based on a legally invalid theory.

For the same reasons set forth above regarding reversal of Count I-IV due to error under *People v. Swain*, those four counts must also be reversed for error under *People v. Chiu, supra.* As determined by this Court in *Chiu*, "a defendant cannot be convicted of first degree premeditated murder under the natural and probable consequences doctrine." (59 Cal.4th at 167; *People v. Rivera* (2015) 234 Cal.App.4th 1350, 1356-1357 [applying *Chiu* holding to co-conspirator liability[12]].) The natural and probable consequences instruction given in this case and quoted above thus

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[12] . . . [T]he error in *Chiu* was imposing aider and abettor liability for first degree murder under the natural and probable consequences doctrine. The error here is imposing uncharged conspiracy liability for first degree murder also under the natural and probable consequences doctrine. In these contexts, the operation of the natural and probable consequences doctrines is analogous. This analogy appeared in *Chiu* itself, when the court was cataloguing examples of the natural and probable consequences as follows: "The natural and probable consequences doctrine was recognized at common law and is firmly entrenched in California law as a theory of criminal liability. ([*People v.*] *Prettyman* [1996] 14 Cal.4th [248,] at pp. 260-261; *People v. Durham* (1969) 70 Cal.2d 171, 181-185 & fn. 11; cf. *People v. Kauffman* (1907) 152 Cal. 331, 334 [conspiracy liability]; [citation].)" (*Chiu, supra*, 59 Cal.4th at p. 163.) Thus, when the California Supreme Court in *Chiu* was explaining the natural and probable consequences doctrine, it understood its applicability to both aiding and abetting and conspiracy theories.

(*People v. Rivera, supra*, 234 Cal.App.4th at p. 1357.)

allowed the jury to find appellant guilty of first degree murder under an invalid theory, without finding that he had "act[ed] with the mens rea required for first degree murder." (*Chiu, supra*, 59 Cal.4th at p.167.)

As set forth above, reversal is required when a case is submitted to the jury on both valid and invalid legal theories, and the reviewing court cannot determine with certainty which theory the jury selected. (*Sandstrom v. Montana, supra*, 442 U.S. at p. 526; *Yates v. United States, supra*, 354 U.S. 298, 312; *Stromberg v. California, supra*, 283 U.S. at p. 368; *People v. Chiu, supra*, 59 Cal.4th at p. 167; *People v. Guiton, supra*, 4 Cal.4th at pp. 1128-1129; *People v. Green, supra*, 27 Cal.3d at pp. 69-71.) Instructional errors that omit, misdescribe or presume one element of an offense are judged by federal constitutional harmless-error review. (*Neder v. United States, supra*, 527 U.S. at p. 9.) Unless it can be determined beyond a reasonable doubt on the record before this Court that the jury based its verdicts on Counts I-IV on a legally valid theory that Cruz is guilty of premeditated and deliberate first degree murder, the convictions on those Counts must be reversed. (*People v. Chiu, supra*, 59 Cal.4th at p. 167; *People v. Guiton, supra*, 4 Cal.4th at pp.1128-1129; *People v. Green, supra*, 27 Cal.3d at pp. 69-71.)

To find the error under *Chiu* harmless in this case, this Court would have to determine beyond a reasonable doubt that the verdicts in Counts I-IV were not based on co-conspirator liability under the natural and probable consequences doctrine but upon a finding that appellant acted with the mens rea for first degree murder. As with the error under *Swain*, because of the general nature of the verdicts, this determination cannot be made. Again, the record suggests that the verdicts in Counts I-IV were in fact based upon co-conspirator liability and the natural and probable

consequences doctrine and that the error directly contributed to the verdicts on those Counts.

As set forth above, the prosecutor specifically relied upon vicarious liability as co-conspirators in his argument to the jury. (36RT:6531-6532; 37RT:6729-6730; 6745, 6755, 6757; See AOB VII; ARB VII.) Moreover, again as noted above, respondent has acknowledged "Since there was so much conflicting evidence, the prosecution's most persuasive ground for conviction was joint liability based on the conspiracy theory." (RB 160.) Further, appellant's mental state and intent at the various stages of the events, including at the formation of the conspiracy, were vigorously contested at trial and the subject of conflicting testimony. (See, e.g., ARB Arg. VII.) Consequently, the instructional error cannot be held harmless beyond a reasonable doubt. (See *Neder v. United States*, *supra*, 527 U.S. 1, 19.[13])

As set forth above, the evidence of intent to kill by any specific codefendant, let alone premeditation and deliberation by Cruz, cannot be said to be overwhelming in this case.

As set forth above, the theories of vicarious liability that the instructions included, upon which the prosecutor relied heavily in argument to the jury (see 36RT:6531-6532; 37RT:6729-6730, 6745), did not require findings of express malice as to any specific codefendant, let alone findings of premeditation and deliberation.

As set forth above, the questions from the jurors during deliberations indicated the likelihood that the verdicts were reached on the basis of findings of conspiracy and coconspirator liability.

Because the jury returned general verdicts which did not identify the

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[13] See fn. 7, *ante*.

legal theory upon which each of the jurors based his or her verdict (see 9CT 2272-2301), and because the jury's verdict on Count V was for a conspiracy to commit murder without specification of degree, it cannot be determined beyond a reasonable doubt that the verdicts on Counts I-IV were based on a legally valid determination that Cruz acted with the mens rea required for first degree murder.[14] As in *Chiu*, reversal of the verdicts on those four counts is required. (59 Cal.4th at pp. 167-168; see also *Swain, supra*, 12 Cal.4th at p. 607.)

D. Conclusion

Due to flaws in the instructions allowing conviction of first degree murder on invalid legal theories, the convictions on Counts I-IV cannot stand. As a further consequence of the *Swain* error in the conspiracy instructions, the alternative offered to the prosecution in *Chiu* and *Rivera*, i.e., modification of the murder convictions to second-degree murder,[15] is not available. Finally, because the only special circumstance charged or found was for multiple counts of murder, reversal of Counts I-IV requires

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[14] In Respondent's Brief, it was argued that the instructional error as to conspiracy was harmless as to Count V because other findings, primarily the convictions of first degree murder, necessarily indicated that the jury had expressly found that Cruz harbored the intent to kill. (Resp. Br. at pp. 263-275.) Aside from the flaws in that argument demonstrated in Cruz's Reply Brief (ARB Arg. VII), *People v. Chiu* also fatally undermines respondent's argument, for the convictions of first-degree murder themselves cannot stand, let alone support a conclusion that the jury necessarily found an intent to kill on the part of Cruz. Nor, conversely, can the fatally flawed verdict on Count V for conspiracy to commit murder resolve the flaw in the natural and probable consequences theory presented as to Counts I-IV.

[15] See *People v. Chiu, supra*, 59 Cal.4th at p. 168; *People v. Rivera, supra*, 234 Cal.App.at p. 1359.

the reversal of the special circumstance finding and the judgment of death.

XVII[16]

THE PROSECUTOR ENGAGED IN MISCONDUCT DURING THE PENALTY PHASE IN VIOLATION OF THE FIRST, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRING REVERSAL OF THE SENTENCE OF DEATH

The prosecutor engaged in prosecutorial misconduct during his penalty phase closing argument to the jury. The prosecutor's misconduct denied Cruz his rights to due process, fundamental fairness, effective assistance of counsel, a fair and reliable determination of penalty and the separation of church and state. It violated Cruz's right to not to be convicted or sentenced except on the basis of evidence adduced against him, undercut the jurors' sense of responsibility for imposing the death penalty, and infected his sentencing hearing with such unfairness as to make his death sentence a denial of due process. (*Caldwell v. Mississippi* (1985) 472 U.S. 320; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; *Darden v. Wainwright* (1986) 477 U.S. 168, 181; *United States v. Schuler* (9th Cir. 1986) 813 F.2d 978, 981; *United States v. Carroll* (5th Cir. 1982) 678 F.2d 1208, 1210.)

With respect to capital cases, moreover, the high court has emphasized that the constitutional concern for reliability in capital sentences requires exacting scrutiny of prosecutors' penalty-trial arguments. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 328-334, 337-341.) In

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[16]This Argument is numbered in sequence to the Arguments in appellant Cruz's Opening and Reply Briefs. The last numbered argument in the Reply Brief is XVI.

exercising that scrutiny, courts must determine whether the prosecutor's comments conveyed inaccurate or misleading information to the jury in violation of the Eighth Amendment or were so inflammatory as to violate the Due Process Clause of the Fourteenth Amendment. (*Id.* at pp. 328-334; *Darden v. Wainwright, supra*, 477 U.S. at pp. 178-183; see also *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585 [Eighth Amendment requirement of reliability in capital sentencing proceedings mandates that a death verdict not be based on "constitutionally impermissible or totally irrelevant" factors].)

Appellant incorporates herein by this reference his Opening and Reply Briefs, including the Statement of Case and the Statement of Facts.

A. Prosecutor's References to the Bible

The prosecutor, as was his usual practice in penalty closing argument,[17] made extensive argument concerning the effect of the Judeo-Christian Bible on the jurors' decision of whether to impose the death penalty:

> I want to briefly talk about a subject that is, I want to make clear to you, is not aggravating in any sense of the word. The only reason I mention it is because maybe some of you that had a little problem with the subject of religion. Again this is not aggravating in any way.
>
> You know, when you hear the opponents of the death penalty talking, they invariably bring up passages from the Bible, as do the proponents. And the opponents always say, "Well, the Bible says 'Thou shalt not kill' and it says 'Vengeance is mine saith the Lord.'" But right after the passage about vengeance is mine [sic] Paul, who is speaking, says, "The ruler bears not the sword in vain for he is the

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[17] The prosecutor used almost this identical argument in at least three other cases. (See *People v. Slaughter* (2002) 27 Cal.4th 1187, 1208-1209; *People v. Vieira* (2005) 35 Cal.4th 264, 309 (conc. & dis. opn. of Kennard, J.); and during the Beck penalty phase closing argument. (45RT:8310-8312; See Beck AOB Arg. XV.A.)

minister of God, a revenger to execute wrath upon him that do it evil." Now, when he's talking about the ruler he's talking about the government there.

The first five books of the Old Testament I believe are called the Torah in the Judeo-Christian ethic, and they start off in – with the book of Genesis where it says "Adam, human being, whoever sheds the blood of man by man shall his blood be shed, for in his image did God make man." Now, the opponents of the death penalty say that's all well and good but God didn't punish Adam for killing Cain and – or Abel.

And, in any event, the most important concepts in that are that capital punishment for murder is necessary in order to preserve the sanctity of human life, and only the severest penalty of death can underscore the severity of taking a life.

There are several other passages in the Bible that speak of death or killing, so forth. The most interesting, I think, is Exodus, Chapter 21, Verse 12 through 14. It says, "Whoever strikes another man and kills him shall be put to death. But if he did not act with intent but they met by act of God, the slayer may flee to a place which I will appoint for you." This is the Lord speaking. In other words, if it's an accidental type killing, it wasn't done with intent, there's a sanctuary, there's a haven. It's kind of like life in prison without possibility of parole.

But the Lord goes on to say, "If you didn't do this intentionally, then there's a sanctuary" – well, I'm sorry, that was my words. It goes on to say, "If a man has the presumption to kill another by treachery, you shall take him even from my altar to be put to death." The Lord says if you kill by treachery, there's no sanctuary. "Take him from my altar and put him to death."

Now, again that's not aggravation. It's just in the event any of you have any concerns about where religion fits in, hopefully that will be of some assistance to you.

(41RT:7530-7531.)

B. References to the Bible and a higher authority constitute prosecutorial misconduct

It is well settled that arguments during the penalty phase of a capital trial claiming that the Bible and the Judeo-Christian God sanction the imposition of the death penalty constitute prosecutorial misconduct. This

Court has recognized the improper nature of such argument numerous times. (See *People v. Sandoval* (1992) 4 Cal.4th 155, 193-194; *People v. Wrest* (1992) 3 Cal.4th 1088, 1107; *People v. Slaughter, supra*; *People v. Wash* (1993) 6 Cal.4th 215, 260; *People v. Freeman* (1994) 8 Cal.4th 450, 515; *People v. Vieira, supra*, 35 Cal.4th 264; see also *Cunningham v. Zant* (11th Cir. 1991) 928 F.2d 1006, 1019-1020.)

The prosecutor's argument denied Cruz a fundamentally fair trial of his penalty phase as guaranteed by the Eighth and Fourteenth Amendment to the United States Constitution. (*Sandoval v. Calderon* (9th Cir. 2001) 241 F.3d 765, 776 ["the prosecution's invocation of higher law or extra-judicial authority violates the Eighth Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is to consider in reaching a verdict."].) Argument that religious authority supports or mandates the prosecution's case for imposition of the death penalty in a particular case undercuts the jury's sense of responsibility for imposing the death penalty. The Supreme Court has disapproved of an argument tending to transfer the jury's sense of sentencing responsibility to a higher court. (See *Caldwell v. Mississippi, supra*, 472 U.S. at pp. 328-334, 337-341.) A fortiori, delegation of the ultimate responsibility for imposing a sentence to divine authority undermines the jury's role in the sentencing process. (*People v. Wrest, supra*, 3 Cal.4th at p. 1107; accord, *People v. Sandoval, supra*, 4 Cal.4th at p. 193.) Such argument also violates the principle that "[p]enalty determinations are to be based on the evidence presented by the parties . . . ." (*Id.* at p. 194.)

Biblical references in penalty phase argument also violate the capital

defendant's federal and state constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art I, §§ 7(a), 15), a fair jury trial (U.S. Const., 6th and 14th Amends.; Cal. Const., art I, §§ 15, 16), freedom from cruel and unusual punishment (U.S. Const. 8th and 14th Amends.; Cal. Const. art. I, § 17), and separation of church and state (U.S. Const., 1st and 14th Amends.; Cal. Const., art. I, § 4). (See *People v. Sandoval*, *supra*, 4 Cal.4th at pp. 193-194; *People v. Hill* (1992) 3 Cal.4th 959, 1016-1017 (conc. opn. of Mosk, J.); see also, e.g., *Lee v. Weisman* (1992) 505 U.S. 577, 587 ["It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" (citing *Lynch v. Donnelly* (1984) 465 U.S. 668, 678)]; see also Gary J. Simson and Stephen P. Garvey, *Knockin' on Heaven's Door: Rethinking the Role of Religion in Death Penalty Cases*, 86 Cornell L. Rev. 1090, 1110-1120 (2001).)

For these reasons, religious arguments have been condemned by virtually every federal and state court to consider their challenge. (See *Coe v. Bell* (6th Cir. 1998) 161 F.3d 320, 351; *Bennett v. Angelone* (4th Cir. 1996) 92 F.3d 1336, 1346; *Cunningham v. Zant*, *supra*, 928 F.2d at pp. 1019-20; *United States v. Giry* (1st Cir. 1987) 818 F.2d 120, 133; *Commonwealth v. Chambers* (Pa. 1991) 599 A.2d 630, 643-644; *People v. Eckles* (Ill.App. 1980) 404 N.E.2d 358, 365; *State v. Wangberg* (Minn. 1965) 136 N.W.2d 853, 854-55.)

This error is so significant that at least one court has held this argument to warrant reversal per se. (*Commonwealth v. Chambers*, *supra*, 599 A.2d at p. 644].) In *Chambers*, the prosecutor argued that "As the Bible says, 'the murderer shall be put to death.'" (*Id.* at p. 643.) This comment is

almost identical, in essence if not in length, to the argument made against Cruz where the prosecutor said several times that the Bible mandated the death of the murdered unless the killing was accidental or unintentional.

In *Sandoval*, this Court described the error in this argument in the following terms:

> Here, the prosecutor paraphrased a passage of the Bible that is commonly understood as providing justification for the imposition of the death penalty. Such argument is improper. "The closing statements of counsel should relate to the law and the facts of the case as each side interprets them." (*People v. Hawthorne*, *ante*, 43, at p. 60 [14 Cal.Rptr.2d 133, 841 P.2d 118].) Though not expressly identified as such, the passage was unmistakably biblical in style and readily recognizable by persons schooled in the Christian religion. The prosecutor "may state matters not in evidence that are common knowledge, or are illustrations drawn from common experience, history, or literature." (*People v. Love* (1961) 56 Cal.2d 720, 730 [16 Cal.Rptr. 777, 366 P.2d 33.) He may not, however, invoke higher or other law as a consideration in the jury's sentencing determination. (*Jones v. Kemp* (N.D.Ga. 1989) 706 F.Supp. 1534, 1559; *Commonwealth v. Chambers* (1991) 528 Pa. 558 [599 A.2d 630, 644].) The argument here was clearly improper by exhorting the jury to consider factors outside section 190.3 in making its penalty determination. [¶] Penalty determinations are to be based on the evidence presented by the parties and the legal instructions given by the court. Reference by either party to religious doctrine, commandments or biblical passages tending to undermine that principle is improper. We recognize that the defense must be allowed some latitude in its presentation of mitigating evidence. Nevertheless, we do not understand that latitude to include exhortation of religious canons as a factor weighing against the death penalty. If the defense were to present such argument, it would be subject to objection by the prosecution and possible like-kind argument in rebuttal. (See *United States v. Robinson*, *supra*, 485 U.S., at pp. 31-34 [99 L.Ed.2d at pp. 30-33].) What is objectionable is reliance on religious authority as supporting or opposing the death penalty. The penalty determination is to be made by reliance on the legal instructions given by the court, not by recourse to extraneous authority. (*Jones v. Kemp*, *supra*, 706 F.Supp. 1534, 1559.)

(*Sandoval*, *supra*, 4 Cal.4th at pp. 193-194.)

For these reasons, the prosecutor's argument was highly improper and violated the state and federal constitutions.

C. The misconduct should be addressed on the merits

Defense counsel failed to object to the prosecutor's improper Biblical argument. However, the issue should not be deemed waived because this Court has addressed similar claims on the merits in other capital cases (see, e.g., *People v. Freeman*, *supra*, 8 Cal.4th at p. 516; *People v. Wash*, *supra*, 6 Cal.4th at pp. 260-261; see *id.* at p. 276 (conc. & dis opn. of Mosk, J.)); failure to do so here would violate Cruz's rights to due process and equal protection on appeal (U.S. Const., 8th and 14th Amends.).

Cruz's claim should also be addressed on the merits because invoking Biblical authority as mandating a death verdict was "plain error." (*People v. Wash*, *supra*, 6 Cal.4th at pp. 276-279 (conc. & dis. opn. of Mosk, J.).) This Court's failure to reach the merits of the issue, and to find prejudicial misconduct, "would subvert both justice and the appearance of justice." (*Id.* at p. 279.)

Even if (arguendo) the issue is deemed waived, Cruz's claim must be addressed in the context of ineffective assistance of counsel. Since this Court has done so in other capital cases, failure to do so here would deny appellate due process and equal protection. Defense counsel's failure to object to such clear misconduct was inexcusable and violated Cruz's Sixth and Fourteenth amendment rights to the effective assistance of counsel. (See *id.*, at pp. 281-282 (conc. & dis. opn. of Kennard, J.).)

If this Court determines that the failure to object precludes review of the misconduct, trial counsel's ineffectiveness leads to the same conclusion.

Where there could be no satisfactory tactical reason or other explanation for defense counsel's failure to object to the prosecutor's improper tactics on a matter of fundamental importance to a fair trial, ineffective assistance of counsel is established and the only question is whether the failure to object was prejudicial. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218; *People v. Pope* (1979) 23 Cal.3d 412, 425-426.)

The misconduct here was focused on a crucial and closely balanced portion of the case, and was very likely to have tipped the balance to Cruz's prejudice. As a result, Cruz was convicted in violation of his right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and article I, section 15 of the California Constitution (*Strickland v. Washington* (1984) 466 U.S. 668, 684-686; *People v. Pope*, *supra*, 23 Cal.3d at pp. 422-424), as well as his right to a reliable conviction in a capital case under the Eighth Amendment of the United States Constitution (*Beck v. Alabama* (1980) 447 U.S. 625, 637), and his right to a fundamentally fair trial under the Fourteenth Amendment. (*People v. Ledesma*, *supra*, 43 Cal.3d at p. 215 [purpose of right to counsel is protection of fundamental right to fair trial and reliable verdict].)

There was no reasoned tactical basis for defense counsel's failure to object to the argument. He did not make a tactical choice to answer in kind with biblical or other religious quotations or argument (41RT:7535-7560) as was the case in, e.g., *Slaughter*, *supra*, 27 Cal.4th at p. 1230, and *Wash*, *supra*, 6 Cal.4th at p. 260. His failure to object cannot be excused by positing a tactical choice not to object during argument. In fact, he did object at another point during the prosecution's argument. (41RT:7532.) Moreover, he could have objected prior to the argument, to prevent a repetition of this improper argument which this prosecutor had used in

other cases before Cruz's trial, including the separate trial of a codefendant in this case, Vieira. He could have objected and asked for mistrial, or at the least for an instruction to the jury that the argument was improper and that consideration by the jurors of biblical "principles" in reaching a verdict of death would violate California's death penalty law as well as its constitution and the Constitution of the United States. If such steps would not have protected Cruz's rights and prevented prejudice from this argument, the only conclusion to be drawn is that objection would have been futile and the misconduct is fully preserved for this appeal.

There was no conceivable benefit to Cruz from defense counsel's failure to take steps to prevent, challenge, or remedy the improper argument. Given the harm done to Cruz's statutory and constitutional rights, and the lack of any benefit, defense counsel's failure to act appropriately cannot be determined to have been a reasonable tactical decision.

In light of the defense case in mitigation and the inherently prejudicial nature of the prosecutor's misconduct, it cannot be said "with reasonable confidence that, without the prosecutor's egregious misconduct and defense counsel's ineffective assistance, the jury would have returned a verdict of death." (*People v. Wash*, *supra*, 6 Cal.4th at p. 286 (conc. & dis. opn. of Kennard, J.).) The death judgment must therefore be reversed.

D. Prejudice

Because of the highly improper nature of the argument, and because of the intended and probable impact on the jury of the argument that the Bible required, or even supported, the death penalty in this case, this Court should apply a per se reversal rule as adopted by the Pennsylvania courts in *Chambers*:

> More than allegorical reference, this argument by the prosecutor advocates to the jury that an independent source of law exists for the conclusion that the death penalty is the appropriate punishment for Appellant. By arguing that the Bible dogmatically commands that "the murderer shall be put to death," the prosecutor interjected religious law as an additional factor for the jury's consideration which neither flows from the evidence or any legitimate inference to be drawn therefrom. We believe that such an argument is a deliberate attempt to destroy the objectivity and impartiality of the jury which cannot be cured and which we will not countenance. Our courts are not ecclesiastical courts and, therefore, there is no reason to refer to religious rules or commandments to support the imposition of a death penalty.

(*Chambers*, *supra*, 599 A.2d at p. 644.)

If not regarded as reversible per se, still the constitutional violation requires reversal unless respondent can establish beyond a reasonable doubt that it had no effect upon the outcome of the penalty trial. (*Chapman v. California* (1968) 386 U.S. 18.) Respondent cannot meet that burden.

While the prosecutor claimed that he wasn't arguing that the biblical support constituted aggravation, he was unquestionably presenting it for the jurors' consideration in reaching their decision. He had used the argument before in at least two other penalty phases (*Slaughter*, *Vieira*) and he used it again in Beck's penalty phase. He apparently thought it was helpful to his case, that it supported his argument for death, that it provided some extra-legal moral basis for the jury to return a verdict of death, and that it reduced

the jurors' responsibility for the decision. That he thought it important that these points be made to the jury is shown by the substantial amount of his argument which he devoted to biblical exhortations.[18] Cruz submits that in assessing the effect of this misconduct, this Court should look to the effect which the prosecutor intended. (See, e.g., *People v. Powell* (1967) 67 Cal.2d 32, 57; *People v. Cruz* (1964) 61 Cal.2d 861, 868.) If he considered that he could affect the penalty verdict by his misconduct, this Court should presume that he succeeded, and hold the People responsible for his actions.

Even if this Court were to determine that the error is one of state law only and assess the prejudicial effect under *People v. Brown* (1988) 46 Cal.3d 432, 449, because the improper effect of the argument was fully intended by the prosecutor, respondent should not be heard to argue that he failed.

As a result of the prosecutor's improper and unconstitutional argument, the judgment of death must be reversed.

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[18] The prosecutor's argument took up approximately 24 pages of reporter's transcript, 41RT:7509-7534. The biblical argument took up almost 2 of those pages, 41RT:7530-7531.

CONCLUSION

For all of the foregoing reasons, and for the reasons stated in Appellant's Opening and Reply Briefs, Cruz's convictions and death judgment must be reversed, and the death judgment vacated permanently.

DATED: January 30, 2016

Respectfully submitted,

WILLIAM T. LOWE
Attorney for Appellant Cruz

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

I, WILLIAM T. LOWE, am the attorney assigned to represent appellant, GERALD DEAN CRUZ, in this automatic appeal. I conducted a word count of this brief using the office computer software. On the basis of that computer-generated word count, I certify that this brief is 8650 words in length excluding the tables and certificates.

Dated: January 30, 2016

WILLIAM T. LOWE

DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Cruz**
Case Number: **No. S029843**
Alameda County Superior Court No. 110467

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; that my business address is P.O. Box 871, El Cerrito, CA 94530.

On February 1, 2016, I served the attached

DECLARATION AND MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF; APPELLANT'S SUPPLEMENTAL BRIEF

by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and by sealing and depositing said envelope(s) in a United States Postal Service mailbox at El Cerrito, California, with postage thereon fully prepaid.

DAVID M. BASKIND
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

ANDREW PARNES
P. O. Box 5988
Ketchum, ID 83340
(Appellate Counsel for Beck)

Margo Hunter Parisi
Habeas Corpus Resource Center
303 Second Street, Ste. 400 South
San Francisco, CA 94107

Kathleen M. Scheidel
Office of the State Public Defender
1111 Broadway, 10th Floor
Oakland, CA 94607

Mr. Gerald Cruz (Appellant)
H-54802
CSP - SQ 5-EY-45
San Quentin, CA 94974

California Appellate Project
101 Second Street, Suite 600
San Francisco, California 94105

Alameda County Superior Court
1225 Fallon Street
Oakland CA 94612

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 1, 2016, at El Cerrito, California.

WILLIAM T. LOWE