SUPREME COURT COPY

IN THE 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.	Supreme Court No. S091915 Los Angeles Superior Court No. NA039358

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

SUPPLEMENTAL BRIEF

on behalf of

DANIEL NUNEZ

SUPREME COURT
FILED
FEB 28 2012
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DEATH PENALTY

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SUPPLEMENTAL BRIEF

on behalf of

DANIEL NUNEZ

INTRODUCTION

Appellant Daniel Nunez, pursuant to Rules 8.520(d) and 8.630(d), California Rules of Court, respectfully submits this Supplemental Brief for the Court's consideration. The argument designated Argument XX raises a new issue in the case, the importance of which was clarified by case law decided around the time of or subsequent to the filing of the Appellant's Opening and Reply Briefs.

The argument designated Supplemental Brief re Argument XII presents new, recently decided, authority bearing on Argument XII in Appellant's Opening and Reply Briefs.

The argument designated Supplemental Brief re Argument XVIII incorporates within the cumulative prejudice argument appellant's contention set forth in Argument XX, *supra*, to wit, that the trial court incorrectly and prejudicially instructed the jury that principals in the commission of a crime are "equally guilty." This contention is based upon a new argument and so was not previously set forth in Appellant's Opening and Reply Briefs.

ARGUMENT

XX.

THE TRIAL COURT COMMITTED FEDERAL CONSTITUTIONAL ERROR WHEN IT ERRONEOUSLY INSTRUCTED THE JURY THAT A PERSON WHO AIDS AND ABETS IS "EQUALLY GUILTY" OF THE CRIME COMMITTED BY A DIRECT PERPETRATOR. IN A PROSECUTION FOR MURDER, AN AIDER AND ABETTOR'S CULPABILITY IS BASED ON THE COMBINED ACTS OF THE PRINCIPALS, BUT THE AIDER AND ABETTOR'S OWN MENS REA AND THEREFORE HIS LEVEL OF GUILT "FLOATS FREE."

A. INTRODUCTION

Appellant was convicted of the first degree murders of Edward Robinson (count 1) and Renesha Ann Fuller (count 2).

In closing argument, the prosecutor argued for conviction under three theories of liability for first degree murder: murder committed (1) with premeditation and deliberation); (2) by shooting from a motor vehicle; (3) by use of armor-piercing ammunition. (14RT 3212.)

The prosecutor readily acknowledged that he had failed to prove the identity of the actual shooter. "I will be the first one to tell you that I did not prove to you who the actual shooter was. Whether it was defendant Nunez or defendant Satele." (14RT 3211:13-15.) The prosecutor argued that all three occupants of the car – appellant, Satele, and the deceased Juan Caballero – were principals and responsible for the crime

as principals, either as the actual shooter or as an aider and abettor, and referred the jurors to CALJIC No. 3.00. (14RT 3210:20-28-3211:2, 15-21.)

At both the guilt and penalty phases of appellant's trial, the trial court instructed the jury in the language of CALJIC No. 3.00, which states that those who aid and abet a crime and those who directly perpetrate the crime are principals and *equally guilty* of that crime. (CALJIC No. 3.00; 37CT 10754; 38CT 11081; 14RT 3177; 18RT 4418.)

That instruction incorrectly stated the law when it said that the actual killer and the aider and abettor are *equally guilty* of the crime. An aider and abettor of a homicide is not always guilty of the same crime or same degree of crime as the actual killer. Rather, an aider and abettor's guilt in a homicide prosecution, not involving felony murder or the natural and probable consequences doctrine, is based on the combined *acts* of all the principals, but on the aider and abettor's own mens rea. An aider and abettor may therefore be culpable for a lesser crime than the direct perpetrator and it is error to instruct the jury to the contrary. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1120; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164-1165; *People v. Nero* (2010) 181 Cal.App.4th 504, 515-518.)

Appellant was entitled to have the jury consider his culpability in light of his own mens rea in deciding his guilt of the crime of murder and, if found liable for murder, in determining the degree of murder for which he is liable. (*People v. Concha* (2009) 47 Cal.4th 653, 663.)

Defense counsel did not object with specificity to this instruction, but this failure has no legal consequence. As appellant explains below, it is settled law that a trial court has a duty to instruct the jury sua

sponte on general principles which are closely and openly connected with the facts before the court. (Pen. Code, § 1259; *People v. Gutierrez* (2009) 45 Cal.4th 789, 824; see *People v. Breverman* (1998) 19 Cal.4th 142, 154.)

Moreover, because the facts of these crimes demonstrate instances in which the liability of the actual killer may have been greater than the liability of appellant (the prosecution's proof of appellant's acts and mens rea at the time of the shootings was sparse and does not necessarily prove he possessed the joint operation of act and mental state required for proof of culpability), the instructional error may was not harmless beyond a reasonable doubt with regard to both the guilt and penalty verdicts.

Misinstruction on elements of a crime is federal constitutional error. (*Neder v. United States* (1999) 527 U.S. 1, 144 L. Ed. 2d 35, 119 S.Ct. 1827; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.) The effect of such violation is measured against the harmless error test of *Chapman v. California* (1967) 386 U.S. 18, 24, which asks whether it has been demonstrated beyond a reasonable doubt that the jury verdict would have been the same in the absence of the misinstruction.

B. THE INSTRUCTIONS REGARDING THE LIABILITY OF PRINCIPALS GIVEN TO APPELLANT'S JURY

The trial court instructed the jury in the language of the pattern CALJIC instructions, defining a principal and the liability of a principal (CALJIC No. 3.00) and defining an aider and abettor (CALJIC No. 3.01), as follows:

> Persons who are involved in committing a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation[,] is equally guilty. Principals include:
>
> 1. Those who directly and actively commit the act constituting the crime, or
>
> 2. Those who aid and abet the commission of the crime. (CALJIC No. 3.00; 37CT 10754; 14RT 3177.)

> A person aids and abets the commission of a crime when he or she:
>
> (1) With knowledge of the unlawful purpose of the perpetrator, and
>
> (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and
>
> (3) By act or advice aids, promotes, encourages or instigates the commission of the crime.
>
> A person who aids and abets the commission of a crime need not be present at the scene of the crime.
>
> Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.
>
> Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting. (CALJIC No. 3.01; 37CT 10755; 14RT 3177-3178.)

The directive of these instructions is clear. The prosecution's evidence showed and the prosecutor argued that witness Joshua Contreras heard codefendant Satele say they "were out looking for niggers." The prosecutor argued that Satele was the shooter who shot and killed a black guy and a black girl in Harbor City with premeditation and deliberation or

by shooting with the intent to kill from a motor vehicle or by the use of armor-piercing bullets in murders that were at that time on the news. (7RT 1597; 8RT 1629-1630, 1700-1705; 14RT 3249.) If the jury found that appellant acted as an aider and abettor, then it was bound by the instructions to find him *equally guilty* of first degree murder without first determining whether appellant acted with the requisite mens rea for murder and the requisite mens rea for the Penal Code section 189 elements for first degree murder, i.e., murder committed with premeditation and deliberation or by discharging a firearm with the specific intent to kill from a vehicle or by the use of armor-piercing bullets.

The instructions on an aider and abettor's liability incorrectly stated the law. An aider and abettor's guilt in a murder prosecution is based on the combined acts of the principals, but on the aider and abettor's personal mental state, as appellant explains below. None of the instructions regarding the liability of principals corrects the misinstruction and misdirection.

C. THE *EQUALLY GUILTY* LANGUAGE OF THE AIDER AND ABETTOR INSTRUCTIONS MISDIRECTED THE JURY IN DETERMINING APPELLANT'S CULPABILITY FOR MURDER. AN AIDER AND ABETTOR'S GUILT IN A MURDER PROSECUTION IS BASED ON THE COMBINED ACTS OF THE PRINCIPALS, BUT ON THE MENTAL STATE OF THE AIDER AND ABETTOR.

Recently, in *People v. Concha* (2009) 47 Cal.4th 653, this Court was asked to determine whether a defendant may be liable for first degree murder when his accomplice is killed by the intended victim in the course of an attempted murder. In concluding that the defendant in such

circumstances may be convicted of first degree murder if he personally acted willfully, deliberately, and with premeditation during the attempted murder, the Court relied on the theory of liability known as provocative act murder, which the Court described as "not an independent crime with a fixed level of liability," but rather "simply a type of murder." (*Id.*, at p. 663.) Appellant was not prosecuted on a theory of provocative act murder and does not rely on *Concha* in that respect. What *Concha* does provide is a helpful path to understanding the extent and nature of accomplice liability in the context of a murder prosecution and an analytical framework that, when followed, shows why the trial court's instruction in this case that the actual killer and the aider and abettor are "equally guilty" was legally incorrect. Appellant relies on that particular aspect of *Concha*'s analysis.

Concha, in important part, relied and built upon this Court's earlier decision in *People v. McCoy* (2001) 25 Cal.4th 1111. In *McCoy*, this Court held that in some situations an aider and abettor may be guilty of a greater homicide-related offense than the actual perpetrator, reasoning that an aider and abettor was liable for the combined acts of the aider and abettor and the direct perpetrator, but that his guilt was based on his own mental state. (*Id.*, at p. 1118.)

Appellant first summarizes *Concha*'s conclusion in the words of the Court and then discusses the analytical framework that resulted in that conclusion.

" . . . [A] defendant is liable for murder when the actus reus and mens rea elements of murder are satisfied. The defendant or an accomplice must proximately cause an unlawful death, and the defendant must personally act with malice. Once liability for murder is established in

a provocative act murder case, **or in any other murder case**, the degree of murder liability is determined by examining the defendant's personal mens rea and applying *section 189*. Where the individual defendant personally intends to kill and acts with that intent willfully, deliberately, and with premeditation, the defendant may be liable for first degree murder for each unlawful killing proximately caused by his or her acts, including a provocative act murder. Where malice is implied from the defendant's conduct or where the defendant did not personally act willfully, deliberately, and with premeditation, the defendant cannot be held liable for first degree murder." (*People v. Concha*, *supra*, 47 Cal.4th at pp. 663-664; italics in the original; boldface added.)

The Court began its analysis in *Concha* by defining murder, its required acts and mental states, and the effect of adding accomplice liability to the calculus.

"Murder is the unlawful killing of a person with malice aforethought. ([Pen. Code], § 187.) Murder includes both actus reus and mens rea elements. To satisfy the actus reus element of murder, an act of either the defendant *or an accomplice* must be the proximate cause of death. [Citations omitted.]" (*People v. Concha*, *supra*, 47 Cal.4th at p. 660.)

"For the crime of murder, as for any crime other than strict liability offenses, 'there must exist a union, or joint operation of act and intent, or criminal negligence. ([Pen. Code], § 20.)" (*People v. Concha*, *supra*, 47 Cal.4th at p. 660.) "To satisfy the mens rea element of murder, the defendant must *personally* act with malice aforethought. ([*People v.*] *McCoy* [(2001) 25 Cal.4th 1111,] 1118.)" (*Id.*, at p. 660; italics added.)

In *People v. McCoy*, upon which *Concha* relied, the Court recognized that an aider and abettor may harbor a greater mental state than that of the direct perpetrator and thus be culpable of a greater crime than the actual perpetrator. The Court based this conclusion on the premise that an aider and abettor's mens rea is personal and may be different from that of the direct perpetrator. (*People v. McCoy*, *supra*, at pp. 1117-1118.) """[A]lthough joint participants in a crime are tied to a 'single and common *actus reus*,' 'the individual *mentes reae* or levels of guilt of the joint participants are permitted to float free and are not tied to each other in any way. If their *mentes reae* are different, their independent levels of guilt . . . will necessarily be different as well.' " ' (Dressler, Understanding Criminal Law [(2d ed. 1995)], § 30.06 [C], p. 450, fns. omitted.)" (*People v. McCoy*, *supra*, 25 Cal.4th at pp. 1118-1119.)

McCoy concluded that an aider and abettor's liability is "thus vicarious only in the sense that the aider and abettor is liable for another's actions as well as that person's own actions." (*People v. McCoy*, *supra*, 25 Cal.4th at pp. 1118.) "[W]hen an accomplice chooses to become a part of the criminal activity of another, she says in essence, 'your acts are my acts. . . .'" (Dressler, Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem (1985) 37 Hastings L.J. 91, 111, fn. omitted.) (*People v. Prettyman* (1996) 14 Cal. 4th 248, 259.) "But that person's own acts are also her acts for which she is also liable. Moreover, that person's mental state is her own; she is liable for her mens rea, not the other person's." (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1120.) In sum, "[a]ider and abettor liability is premised on the combined acts of all the principals, but on the aider and abettor's own mens rea. If the

mens rea of the aider and abettor is more culpable than the actual perpetrator's, the aider and abettor may be guilty of a more serious crime than the actual perpetrator." (*Ibid.*)

In *People v. Samaniego* (2009) 172 Cal.App.4th 1148, which was filed before but in the same year as *Concha*, the Court of Appeal (Second District, Division Two) determined that the legal principles regarding aider and abettor liability set forth in *McCoy* required the finding that "CALCRIM No. 400's direction that '[a] person is equally guilty of the crime [of which the perpetrator is guilty] whether he or she committed it personally or aided and abetted the perpetrator who committed it' (CALCRIM No. 400, italics added), while generally correct in all but the most exceptional circumstances, is misleading here and should have been modified." (*People v. Samaniego, supra*, 172 Cal. App. 4th at p. 1165.)

Samaniego said:

> Though *McCoy* concluded that an aider and abettor could be guilty of a greater offense than the direct perpetrator, its reasoning leads inexorably to the further conclusion that an aider and abettor's guilt may also be less than the perpetrator's, if the aider and abettor has a less culpable mental state. [Citation.] Consequently, CALCRIM No. 400's direction that "[a] person is equally guilty of the crime [of which the perpetrator is guilty] whether he or she committed it personally or aided and abetted the perpetrator who committed it" . . . , while generally correct in all but the most exceptional circumstances, is misleading here and should have been modified. (*Samaniego, supra*, 172 Cal.App.4th at pp. 1164-1165.)

The language of CALCRIM No. 400 in issue in *Samaniego*, like the language of CALJIC No. 3.00 in issue here, provided: " 'A person

may be guilty of a crime in two ways. One, he or she may have directly committed the crime. . . . Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is *equally guilty* of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it.' " (*People v. Samaniego*, *supra*, 172 Cal.App.4th at pp. 1162-1163.)

Soon after *Concha* was filed, in *People v. Nero* (2010) 181 Cal.App.4th 504, the Court of Appeal (Second District, Division Three), considered whether an aider and abettor may be less culpable than the direct perpetrator and, in reliance on *McCoy*, concluded that an aider and abettor's liability may be greater or less than the direct perpetrator's. *Nero* concluded that *McCoy*'s principles that aider and abettor liability is "premised on the combined acts of all the principals, but on the aider and abettor's own mens rea" (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1120) and *McCoy*'s reliance on the notion that each person's mens rea "floats free" (*id.*, at p. 1121) controlled, and that there was therefore no reason for a different outcome when the actual killer was guilty of a greater crime than the aider and abettor. (*People v. Nero*, *supra*, 181 Cal.App.4th at p. 515.) Because each person's mens rea "floats free," the court reasoned, each person's level of guilt would "float free." (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1121.)

As noted, *Samaniego* concluded that the *equally guilty* language of CALCRIM No. 400 was "generally correct in all but the most exceptional circumstances," but misleading in the factual circumstances before it and should have been modified. (*People v. Samaniego*, *supra*, 172 Cal.App.4th at pp. 1164-1165.) *Samaniego* thus sought to limit the scope

of claims of error directed at the instruction. The state of the evidence in *Samaniego* was that there were no eyewitnesses to the actual shooting and therefore no evidence as to which defendant was the direct perpetrator. As the prosecutor in appellant's case acknowledged, he had presented evidence from which the jury could find that Satele and appellant were in the car from which the killing shots were fired, but he had failed to prove the identity of the actual shooter.

In *Nero*, the jury was instructed with the *equally guilty* language of CALJIC No. 3.00, as was appellant's jury. (*People v. Nero*, *supra*, 181 Cal.App.4th 512.) In *Nero*, the evidence was such that the identities and actions of the direct perpetrator and the aider and abettor were clear, but the evidence regarding the aider and abettor's mens rea was not clear. Although the *Nero* jury had been given a number of other standard instructions that suggested the aider and abettor's mens rea was not tied to that of the direct perpetrator, the jury still questioned whether it could find the aider and abettor guilty of a greater or lesser offense than the direct perpetrator. This observation led *Nero* to conclude that the *equally guilty* language of the pattern instructions (CALJIC No. 3.00; CALCRIM No. 400) was misleading even in unexceptional circumstances and required modification.[1] (*Id.*, at p. 518 ["We believe that even in unexceptional

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1 CALJIC No. 3.00 and CALCRIM No. 400 have now been revised to incorporate language reflecting the holdings in *People v. McCoy*; *People v. Samaniego*; and *People v. Nero*.

CALJIC No. 3.00 (Fall 2011 Edition), for example, reads in relevant part: "Each principal, regardless of the extent or manner of participation is [equally guilty.] [guilty of a crime.] [] [¶] [When the crime charged is [either] [murder] [or] [attempted murder] [_____], the aider and abettor's guilt is determined by the combined acts of all the participants as well as

circumstances CALJIC No. 3.00 and CALCRIM No. 400 can be misleading."].)

In sum, *McCoy*, *Concha*, *Samaniego*, and *Nero* establish that a defendant charged with murder can be held vicariously liable for the actus reus, but not for the mens reas of an aider and abettor, because, as each of these cases has recognized, the mens rea of the aider and abettor "floats free," with the consequence that the level of guilt of the aider and abettor "floats free." They also establish that appellant's jury was incorrectly and misleadingly instructed under CALJIC No. 3.00 regarding appellant's liability as an aider and abettor in the murders of Robinson and Fuller. Reversal of the convictions is therefore required.

D. THE *EQUALLY GUILTY* LANGUAGE OF THE AIDER AND ABETTOR INSTRUCTIONS MISDIRECTED THE JURY IN DETERMINING THE *DEGREE* OF APPELLANT'S MURDER LIABILITY. AN AIDER AND ABETTOR'S MURDER LIABILITY IS DETERMINED BY EXAMINING THE DEFENDANT'S PERSONAL MENS REA AND BY APPLYING PENAL CODE SECTION 189

In *Concha*, four assailants, including the defendants, attempted to murder their intended victim, but during the assault, the intended victim stabbed one of the assailants to death in self-defense. A

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that person[']s mental state. If the aider and abettor's own mental state is more culpable than that of the actual perpetrator, that person's guilt may be greater than that of the actual perpetrator. Similarly, the aider and abettor's guilt may be less than the perpetrator's, if the aider and abettor has a less culpable mental state.]" The accompanying use note discusses the holdings in *McCoy*, *Samaniego*, and *Nero* and directs that, when appropriate, the alternative bracketed material be used in place of the "equally guilty" language.

jury convicted two of the assailants of first degree murder for the death of their accomplice. This Court held that the trial court correctly allowed the jury to consider returning a verdict of first degree murder against the defendants for the death of their accomplice under the provocative act doctrine, but, in reliance upon *McCoy*, *supra*, reversed the convictions for first degree murder because the instructions given the jury "failed to require that the jury resolve whether each defendant acted willfully, deliberately, and with premeditation," i.e., with the mens rea required by Penal Code section 189 to elevate the degree of murder from second to first degree. (*People v. Concha*, *supra*, 47 Cal.4th at p. 666.) *Concha* observed, " . . . it appears that the trial court did err when instructing on first degree murder . . . by not providing an instruction that explained that for a defendant to be found guilty of *first degree murder*, he *personally* had to have acted willfully, deliberately, and with premeditation when he committed the attempted murder. (*McCoy*, *supra*, 25 Cal.4th at p. 1118.)" (*People v. Concha*, *supra*, 47 Cal.4th at p. 666.)

Concha explained that murder requires that a defendant or an accomplice proximately cause an unlawful death and that the defendant personally act with the mens rea of malice. The Court found that the defendants were guilty of murder (i.e., murder of the second degree by operation of law) as to any killing either of them proximately caused while acting together pursuant to their intent to kill (the mental state of malice) because although they did not intend to kill their accomplice, they had the intent to kill *a* person when they attacked the intended victim. (*Id.*, at pp. 661, 663.) However, the question regarding the degree of murder liability still remained to be determined.

"Once liability for murder is established in a . . . murder case, the degree of murder liability is determined by examining the defendant's personal mens rea and applying *section 189.* Where the individual defendant personally intends to kill and acts with that intent willfully, deliberately, and with premeditation, the defendant may be liable for first degree murder for each unlawful killing proximately caused by his or her acts. . . . Where malice is implied from the defendant's conduct or where the defendant did not personally act willfully, deliberately, and with premeditation, the defendant cannot be held liable for first degree murder." (*People v. Concha, supra*, 47 Cal.4th at pp. 663-664.)

Accordingly, "[o]nce liability for murder 'is otherwise established, section 189 may be invoked to determine its degree.' ([*People v.*] *Gilbert*, [(1965)], 63 Cal.2d [690], 705; see also [*People v. Caldwell* (1984)], 36 Cal.3d [210], 217, fn. 2, quoting *Gilbert* with approval; *People v. Cervantes* [(2001)] 26 Cal.4th [860], 872–873, fn. 15 ['If proximate causation is established, the defendant's level of culpability for the homicide in turn will vary in accordance with his criminal intent.'].) Section 189 states that if an unlawful killing is 'willful, deliberate, and premeditated,' or is perpetrated by means of 'poison, lying in wait, torture . . . , discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death,' using specific types of weapons, destructive devices, explosives, or ammunition, or in the perpetration of certain enumerated felonies, it is murder of the first degree. ([Pen. Code,] § 189.) 'All other kinds of murders are of the second degree.' (*Ibid.*) Therefore, 'assuming legal causation, a person maliciously intending to kill is guilty of the murder of all persons actually killed. If the

intent is premeditated, the murder or murders are first degree.' ([*People v.*] *Bland* [(2002)], 28 Cal.4th [313], 323-324, fn. omitted.) While joint participants involved in proximately causing a murder '"are tied to a 'single and common *actus reus*,' 'the individual *mentes reae* or levels of guilt of the joint participants are permitted to float free and are not tied to each other in any way. If their *mentes reae* are different, their independent levels of guilt . . . will necessarily be different as well.'"' (Dressler, Understanding Criminal Law (2d ed. 1995) § 30.06[C], p. 450, fns. omitted, as quoted with approval in *McCoy, supra*, 25 Cal.4th at pp. 1118-1119.)" (*People v. Concha, supra*, 47 Cal. 4th at pp. 661-662.)

In *Concha*, then, the Court found that each of the defendants shared an intent to kill a person when they attacked the intended victim. Thus, each defendant was liable for the combined attack and each had the requisite mens rea (malice) to be held liable for murder.

However, because Penal Code section 189 states that all murders are of the second degree unless they are one of the murders enumerated in that section, and because the trial court in *Concha* failed to require that the jury resolve whether each defendant acted willfully, deliberately, and with premeditation, the Court reversed the judgment of conviction. (*People v. Concha, supra*, 47 Cal.4th at p. 666.)

The identical instructional error in this case compels reversal of appellant's convictions for the murders of Robinson and Fuller. The jury was incorrectly instructed that all principals are *equally guilty* as to the degree of murder liability.

As Penal Code section 189 provides and *Concha* and *McCoy* establish, a person who maliciously intends to kill is guilty of first degree

murder only when he or she *personally* acts willfully, deliberately, and with premeditation or with any other mental state within the contemplation of section 189.

Here, the prosecution contended that Robinson and Fuller were intentionally killed willfully, deliberately, and with premeditation and that Satele said he had gone out that night "looking for niggers." Accordingly, the trial court instructed on murder perpetrated by means of a willful, deliberate, and premeditated killing with express malice. (CALJIC No. 8.20; 37CT 10766-10767; 14RT 3186-3187.) The jury was additionally instructed, however, on other alternate theories of liability for first degree murder –murder perpetrated by means of discharging a firearm from a motor vehicle where the perpetrator specifically intended to inflict death and murder committed with armor-piercing bullets. (CALJIC Nos. 8.22, 8.25.1; 37CT 10768, 10769; 14RT 3188.) Appellant was entitled to have his jury correctly instructed regarding whether he personally had the requisite mens rea for first degree murder before returning first degree murder verdicts.

For the first degree murders identified in section 189, other than murder committed with premeditation and deliberation, the prosecution need not prove premeditation and deliberation (*People v. Ruiz* (1988) 44 Cal.3d 589, 614 [murder by lying in wait does not require independent proof of premeditation, deliberation, or intent to kill]; *People v. Laws* (1993) 12 Cal.App.4th 786, 792-793 [prosecution need not prove intent to kill for first degree murder based on lying in wait]), but the prosecution must show that the defendant had a specific intent to do the

underlying act that resulted in the killing (*People v. Steger* (1976) 16 Cal.3d 539, 546 [intent to inflict pain required for murder by torture]).

Steger is instructive. In *Steger*, our Supreme Court pointed out that because Penal Code section 189 defines certain specific types of unlawful killing as first degree murder and designates most other types of unlawful killing as second degree murder, "the prosecution is required to prove not only the elements of murder, but also the aggravating elements of first degree murder." (*People v. Steger, supra*, 16 Cal.3d at p. 545.) *Steger* reasoned: "In this perspective the phrasing of section 189 becomes clearer: 'All murder which is perpetrated by means of . . . torture, or *by any other kind* of willful, deliberate, and premeditated killing . . . is murder of the first degree . . . .' In labeling torture as a 'kind' of premeditated killing, the Legislature requires the same proof of deliberation and premeditation for first degree torture murder that it does for other types of first degree murder." (*Id.*, at pp. 545-546.)

The Court explained: "The element of calculated deliberation is required for a torture murder conviction for the same reasons that it is required for most other kinds of first degree murder. It is not the amount of pain inflicted which distinguishes a torturer from another murderer, as most killings involve significant pain. [Citation.] Rather, it is the *state of mind* of the torturer – the cold-blooded intent to inflict pain for personal gain or satisfaction – which society condemns. Such a crime is more susceptible to the deterrence of first degree murder sanctions and comparatively more deplorable than lesser categories of murder. [¶] Accordingly, we hold that murder by means of torture under section 189 is murder committed with a

willful, deliberate, and premeditated intent to inflict extreme and prolonged pain." (*Id.*, at p. 546; italics added.)

Thus, in order to prove appellant culpable of first degree murder committed either with premeditation and deliberation or by means of armor-piercing ammunition, or by discharging a firearm from a motor vehicle when the perpetrator specifically intended to inflict death, the prosecution was required to prove both that appellant's mens rea satisfied the mens rea element to hold him liable for murder and that appellant had the requisite mental state for first degree murder, i.e., premeditation and deliberation, a specific intent to commit murder by use of armor-piercing ammunition, or a specific intent to inflict death by shooting from a motor vehicle.

Murder committed by a drive-by shooting is first degree murder for which the prosecution need not prove premeditation and deliberation if it is perpetrated by means of (1) discharging a firearm from a motor vehicle; (2) intentionally at another person outside of the vehicle; (3) with the intent to inflict death. (Pen. Code, § 189.) As noted, murder committed by drive-by shooting requires a specific intent to kill. If the intent is to inflict only great bodily injury, rather than death, the crime is not statutory first degree murder but could be second degree murder based on an implied malice theory. (See *People v. Chun* (2009) 45 Cal.4th 1172 [underlying felony merges with felony murder so as to preclude application of second degree felony murder rule, but evidence showed implied malice from willful shooting with conscious disregard for human life].)

Murder committed by means of armor-piercing ammunition is first degree murder if it is perpetrated by means of the "knowing use of

ammunition designed primarily to penetrate metal or armor." (Pen. Code, § 189.)

Accordingly, in order to convict appellant of first degree murder committed willfully, deliberately, and with premeditation, or by drive-by shooting, or by means of armor-piercing ammunition, the prosecution was required by *McCoy* and *Concha* to prove appellant had the personal mens rea for guilt based on one of these theories of culpability. Appellant was entitled to have the jury correctly instructed that his liability for first degree murder rested on his personal mens rea. The instruction given to appellant's jury stated the contrary when it instructed that an aider and abettor was necessarily guilty of whatever crime the direct perpetrator committed.

E. A Trial Court Is Obligated to Correctly Instruct the Jury on the Applicable Law

As appellant has indicated above, defense counsel did not object to the incorrect instruction. Counsel's failure to specify the error claimed here does not, however, act as a bar to appellant's claim.

A trial court has an independent duty to correctly instruct the jury regarding applicable legal principles. The law is settled that a trial court has a duty to instruct the jury sua sponte on general principles which are closely and openly connected with the facts before the court. (Pen. Code, § 1259; *People v. Gutierrez* (2009) 45 Cal.4th 789, 824; see *People v. Breverman* (1998) 19 Cal.4th 142, 154.)

Moreover, Penal Code section 1259 authorizes this Court to "review any instruction given . . . even though no objection was made

thereto in the lower court, if the substantial rights of the defendant were affected thereby."

Penal Code section 1259 provides:

> Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.

In *People v. Graham* (1969) 71 Cal.2d 303, the trial court erred in failing to instruct on involuntary manslaughter due to diminished capacity. Not only was no defense request for such instruction made, but all three defense counsel acquiesced in the court's statement that "'"everyone agrees that there is no evidence from which involuntary manslaughter could be found; the only type of manslaughter that could be found here would be voluntary.'" (*Id.*, at p. 317.) Despite this, this Court concluded in *Graham* that there is placed upon the trial court an "affirmative duty to instruct the jury on its own motion on the general principles of law relevant to the issues of the case [which] can [not] be nullified by waiver of defense counsel." (*Id.*, at pp. 317-318.) An exception exists where "defense counsel deliberately and expressly, as a matter of trial tactics, objected to the rendition of a [correct] instruction." (*Id.*, at p. 318; *People v. Wickersham* (1982) 32 Cal.3d 307, 331.) In all

other cases, instructions which misstate the elements of a crime or theory of criminal liability may be reviewed on appeal without an objection having been made in the trial court.

Inasmuch as there is no evidence here that defense counsel invited the jury to be misdirected as a matter of trial tactics, the erroneous instruction regarding accomplice liability may be reviewed on appeal without need for an objection in the trial court.

F. THE FAILURE TO INSTRUCT CORRECTLY ON THE ELEMENTS OF AIDING AND ABETTING WAS NOT HARMLESS BEYOND A REASONABLE DOUBT AT BOTH THE GUILT AND PENALTY PHASES

As appellant noted in the Introduction, *supra*, the trial court instructed the jury in the language of CALJIC No. 3.00 at both the guilt and penalty phases of appellant's trial that those who aid and abet a crime and those who directly perpetrate the crime are principals and *equally guilty* of that crime. (37CT 10754; 38CT 11081; 14RT 3177; 18RT 4418.)

The failure to instruct correctly on the elements of aiding and abetting is assessed under the harmless beyond a reasonable doubt standard. (*People v. Hardy* (1992) 2 Cal.4th 86, 185-186; *People v. Dyer* (1988) 45 Cal.3d 26, 64.) Misinstruction on elements of a crime is federal constitutional error. (*Neder v. United States* (1999) 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.)

The misinstruction was prejudicial at both the guilt and penalty phases of the trial. Here, no percipient witness identified appellant as either participating in, or even being present during the murders of

Robinson and Fuller. Instead, the prosecution presented evidence of appellant's presence in the car with codefendant Satele through the manifestly unreliable testimonies of Ernie Vasquez and Joshua Contreras.

Vasquez, who happened upon the bodies of Robinson and Fuller immediately after the shooting, was himself taken into custody on unrelated outstanding warrants following a traffic stop. Vasquez had never met either Satele or appellant. While he was in custody, however, Vasquez contacted detectives and told them that he had had a conversation with Satele in a jail holding tank and that Satele had confessed to shooting Robinson and Fuller by saying either , "I AK'd them," or "We AK'd them." (6RT 1210.) Vasquez was then moved to the separate jail facility where appellant was being held where, according to Vasquez, appellant approached him and said: "Did you hear about those niggers that got killed in your neighborhood." Appellant continued, "I did that shit." (6RT 1223-1225.) The record shows that Vasquez received multiple benefits for this information, including financial help and the favorable resolution of his cases. It is worth noting that the trial prosecutor himself chose not to rely on this seemingly inculpatory evidence, but instead told the jury that the prosecution had failed to prove who the actual shooter was.

The evidence produced during multiple interviews of Joshua Contreras, who was just 15-years-old at the time of the shootings, by detectives and by the trial prosecutor and his investigator was equally unreliable in that Contreras claimed at trial that he made the statements while being harassed and threatened. During these interviews, Contreras said that late on the night of the shooting he was at the neighborhood park among a group that included appellant and Satele. Contreras overheard

Satele, who was in conversation with a man called Puppet, say, "We were out looking for niggers." Contreras then heard either appellant or Satele say, "I think we got one of them." (7RT 1597, 1599-1600, 8RT 1629-1630.) Contreras also said that on the day after the shooting, Satele said in a conversation with a man called G-Boy that he had shot "a black guy and a black girl" in Harbor City. (7RT 1618-1622.) Again, it is worth noting that the trial prosecutor himself chose not to rely on this evidence, but instead told the jury that he had failed to prove who the actual shooter was.

While such evidence may serve as circumstantial evidence of appellant's mental state at the time of the shootings, appellant was entitled to have the jury consider such evidence in the context of the presence or absence of other evidence of his mental state at the times the crimes were committed in determining his culpability. Penal Code section 20 requires a joint operation of actus reus and mens rea at the time of the commission of the crime. (*People v. Concha*, *supra*, 47 Cal.4th at p. 660.) The instruction stating that principals in the commission of the crime are *equally guilty* manifestly directs the jury away from an evaluation of appellant's individual mens rea.

Proof that a first degree murder was committed with express malice, premeditation, and deliberation, or by means of armor-piercing ammunition, or by shooting from a motor vehicle with the intent to kill should and must be distinguished from the determination of appellant's own culpability in this case in which the evidence did not identify appellant as the actual killer. Implicit in this Court's recognition in *McCoy* and *Contra* that an aider and abettor's mens rea "floats free" of the direct perpetrator's is the notion that, as to any aider and abettor, there is an

inherent reasonable doubt as to the personal mens rea of that individual because the aider and abettor's mens rea is independent of the direct perpetrator's.

Without proof that appellant possessed the requisite mens rea, it is not possible to state beyond a reasonable doubt that absent the misinstruction, the jury verdict would have been the same – that appellant would have been found guilty of the first degree murders of Robinson and Fuller. (*Chapman v. California* (1967) 386 U.S. 18, 24.) For these reasons, the error was not harmless beyond a reasonable doubt and reversal of both first degree murder convictions is warranted.

Moreover, just as the *equally guilty* language of the misinstruction manifestly directed the jury away from an evaluation of appellant's individual mens rea at the guilt phase, there is a reasonable possibility that the jury would not have returned a death sentence for appellant had it not been instructed at both guilt and penalty phases that appellant and Satele were equally guilty. (*People v. Brown* (1988) 46 Cal.3d 432, 337 (prejudicial effect of state law errors at penalty phase of capital trial is whether there is a "reasonable possibility" such an error affected the verdict). Although the trial court instructed the jury that it "may consider as a mitigating factor any lingering or residual doubt that [it] may have as to the guilt of the defendant," and then defined lingering doubt (38CT 110879; 18RT 4423), it also instructed the jurors that the principals were "equally guilty." The "equally guilty" language contrarily directed the jurors to determine the appropriate penalty for appellant based not only on evidence of appellant's conduct and mens rea but on Satele's conduct and mens rea as well. In *People v. Gay* (2008) 42 Cal.4th 1195, 1225-

1227, this Court acknowledged that lingering doubt has "particular potency" in a case where physical evidence linking the defendant to the shooting is lacking and eyewitness testimony is inconsistent. In appellant's case, no physical evidence or eyewitness testimony linked appellant to the murders. The "equally guilty" instruction effectively told the jurors that the defendants should be given the same sentence. Because there is a reasonable possibility that in the absence of the misdirection, the jurors' penalty verdicts would have been different, appellant's death sentences must be reversed.

SUPPLEMENTAL BRIEF re ARGUMENT XII

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

Over defense objection (3RT 629:1-12), the trial court excused for cause Prospective Juror No. 2066 who expressed reservations about imposing the death penalty, but who also explained that she "would be able to vote for death, knowing there is a possibility that [she] could choose life without possibility of parole," "if the evidence on the aggravation and mitigation warrants that the imposition of the death penalty should be imposed." (3RT 623:17-22.) Juror 2066 also said, "I'll do my best, yes," when asked if, after hearing all of the evidence, she would "follow the instructions on the law and do what the law requires [her] to do." (3RT 622:15-19.) (See voir dire in entirety at 3RT 618-630.)

Appellant raised this error in argument XII of his opening and reply briefs and incorporates by reference all arguments and contentions made therein.

In stating its reasons for excusing Juror 2066, the court said: "This court has examined the juror's state of mind, particularly the demeanor in this case, and the reluctance of the responses, and the

equivocal responses that the juror has had, and the conflicting responses that the juror has had. And this court makes the determination as to the juror's state of mind, and she is incapable of imposing the death penalty. And the reason ask [sic] because of her reluctance to be able to do that when asked her the leading question as to whether or not she could impose it under certain circumstances she said, yes; but when asked if there's another choice, life imprisonment, what she would do, she, without reluctance and without equivocation, chose life imprisonment if there's a choice. [¶] Given that is the case, and given her responses in the questionnaire, her demeanor in the court and her state of mind as observed by this court, with multiple inferences that are given, the court infers based upon her responses that she is not death qualified and excuses her for cause." (3RT 629:18-630:7.)

Earlier in the selection process, the court had invited defense counsel to excuse Juror 2066 by stipulation. When counsel declined on grounds the juror had indicated a willingness to follow the law (3RT 547:1-26), the court said: "The other thing I'll share with you is that under the law, and I know [defense counsel] Mr. McCabe you have done a lot of these types of cases, that under *People versus Guzman*, the trial court may excuse prospective jurors due to their views of capital punishment with statements such as 'I believe' prec[]eded by statements such as 'I believe' or 'I think.' This causes me great concern that you need and [sic] unequivocal statement before you would --." (3RT 547:27-548:7.)

This Court recently found in *People v. Pearson* (2012) 53 Cal.4th 306, that this very same trial court had misread *People v. Guzman*

(1988) 45 Cal.3d 915, just as its articulation to defense counsel in this case shows it had misread *Guzman* here.

Pearson held this trial court committed reversible error by excusing a prospective juror who had "equivocal views on capital punishment." Rejecting such a reading of *Guzman*, this Court noted: "*Guzman* does not stand for the idea that a person is substantially impaired for jury service in a capital case because his or her ideas about the death penalty are indefinite, complicated or subject to qualifications, and we do not embrace such a rule. As the high court recently reminded us, 'a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause.' (*Uttecht v. Brown* [(2007)] 551 U.S. at [1], 9.) Personal opposition to the death penalty is not itself disqualifying, since '[a] prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law.' (*People v. Kaurish* (1990) 52 Cal.3d 648, 699.) It follows the mere absence of strong, definite views about the death penalty is not itself disqualifying, since a person without strong general views may also be capable of following his or her oath and the law." (*People v. Pearson, supra*, 53 Cal.4th at p. 331.) (See, *People v. Crittenden* (1994) 9 Cal.4th 83, 121 [a juror may be challenged for cause based upon his views only if those views would "prevent or substantially impair" the performance of the juror's duties; *People v. Kaurish* (1990) 52 Cal.3d 648, 699 [prospective juror may not be excluded for cause because his conscientious views would lead him to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for him ever

to impose the death penalty]; *People v. Stewart* (2004) 33 Cal.4th 425, 447, [juror's conscientious beliefs concerning the death penalty that make it very difficult for juror ever to impose the death penalty is not equivalent to a determination that such beliefs will 'substantially impair the performance of his duties as a juror].)

The juror in *Pearson*, like Juror No. 2066 in appellant's trial, stated she would not vote automatically for life in prison regardless of the evidence; neither would she find it impossible to vote for death in every case. (*People v. Pearson*, *supra*, 53 Cal. 4th at pp. 330-331; see AOB 246-249 for relevant voir dire and questionnaire responses by Juror No. 2066.) In excusing the juror in *Pearson*, the trial court focused particularly on the juror's response to Question No. 188, which read: "'Some people say they support the death penalty; yet could not personally vote to impose it. Do you feel the same way?' [The juror] checked 'no' and wrote in explanation: 'I'm not sure where I stand but if I strongly felt strong about something, I would stand behind it.'" (*Id.*, at p. 332.) *Pearson* found the trial court's concern that the juror would not stand behind something about which she did not feel strongly to be misplaced because the role of the juror is "to assess the evidence, weigh the aggravating and mitigating circumstances, deliberate with the other jurors, and choose the appropriate penalty," and the juror's responses were clear on her ability to perform her duty. (*People v. Pearson*, *supra*, 53 Cal. at p. 332.) Juror No. 2066's responses similarly establish a willingness to perform her duty.

By erroneously excusing Juror No. 2066 for cause, the trial court denied defendant the impartial jury to which he was entitled under the

Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. (*Uttecht v. Brown*, *supra*, 551 U.S. at pp. 6, 9.)

Witherspoon held that "a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death" and determined that the remedy was the reversal of the death sentence. (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 521-523, fn. omitted; see also *Gray v. Mississippi* (1987) 481 U.S. 648, 668; *Davis v. Georgia* (1976) 429 U.S. 122, 123.

This Court has similarly held that the automatic reversal of the death sentence is appropriate under such circumstances. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962; *People v. Heard* (2003) 31 Cal.4th 946, 966; *People v. Stewart*, *supra*, 33 Cal.4th at p. 454.) Accordingly, appellant respectfully submits that the record does not support the trial court's excusal of Prospective Juror No. 2066 for cause under the governing legal standard and that this error requires reversal of appellant's death sentence without inquiry into prejudice.

SUPPLEMENTAL BRIEF re ARGUMENT XVIII

THE CUMULATIVE EFFECT OF THE MULTIPLE ERRORS AT TRIAL RESULTED IN A TRIAL THAT WAS FUNDAMENTALLY UNFAIR; THE COLLECTIVE THRUST OF THE ERRORS, REINFORCED BY PROSECUTORIAL ARGUMENT AND DEFECTIVE VERDICT FORM LANGUAGE, OBSCURED THE JURY'S DUTY TO JUDGE APPELLANT ON HIS INDIVIDUAL CULPABILITY AND, IN PARTICULAR, WITH REGARD TO THE NECESSARY MENS REA DETERMINATIONS

In Section D within Argument XVIII, appellant contended that "The Trial Errors Were Related and They Cumulatively Obscured the Jury's Duty to Judge Appellant Based on His Individual Culpability." (AOB 331.) The supplemental contention enfolds within the cumulative prejudice argument the contention made in Argument XX, *supra*, that the trial court incorrectly instructed the jury that principals in the commission of a crime are "equally guilty." Appellant incorporates by reference all arguments and contentions made in Argument XVIII in Appellant's Opening and Reply Briefs.

Supplemental Contention

CALJIC No. 3.00, which was given appellant's jury at both guilt and penalty phases, incorrectly instructed the jury that principals in the commission of the charged crimes are "equally guilty." (See Argument XX, *supra*.) The jury, or some jurors, likely understood the directive in the "equally guilty" language to mean that they could decide appellant's guilt of the charged crimes without determining his individual culpability, that is, without resolving questions regarding his conduct and mental state.

Appellant maintains that this error alone requires reversal of the *guilt phase*. However, even if this Court were to determine that the error, standing alone, was harmless, taken together with the other guilt phase errors, in any combination, the prejudice is manifest and reversal is required.

Appellant further asserts that this error alone requires reversal of the *penalty phase*. However, even if this Court were to determine that the error, standing alone, was harmless, taken together with the other penalty phase errors, in any combination, the prejudice is manifest and reversal is required.

CONCLUSION

For the reasons set forth in the opening, reply, and supplemental briefs, it is respectfully submitted on behalf of defendant and appellant DANIEL NUNEZ that the judgment of conviction and sentence of death must be reversed.

DATED: February , 2012

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Rule 8.630, subdivision (b)(1), California Rules of Court, and in reliance upon Microsoft Office Word 2010, which was used to prepare this document, I certify that, with the exception of the tables, the certificate of word count required by the rule, and any attachment permitted under Rule 8.204, subdivision (d), that the word count of this brief is 8760 words.

DATED: February , 2012

Respectfully submitted,

____

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PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to the within entitled action. I am an employee of Bleckman & Blair, Attorneys at Law, and my business address is Suite 3 Ocean Plaza, 302 West Grand Avenue, El Segundo, California 90245.

On **February , 2012**, I served the **Supplemental Brief on behalf of Appellant Daniel Nunez in People v. Daniel Nunez and William Satele (S091915; NA039358)** on the interested parties in said action by placing true copies thereof, enclosed in sealed envelope(s) addressed as stated below with postage/delivery fee fully prepaid, at El Segundo, California, with United States Postal Service/United Parcel Service.

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on February , 2012, at El Segundo, California.

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JANYCE K. BLAIR