In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JAMES DAVID BECK and GERALD DEAN CRUZ,** **Defendants and Appellants.**	**CAPITAL CASE** Case No. S029843

Alameda County Superior Court Case No. 110467
The Honorable Edward M. Lacy, Jr., Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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ARGUMENT

I. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT APPELLANTS COULD BE LIABLE AS CONSPIRATORS FOR THE FOUR MURDERS; HOWEVER, IT COMMITTED HARMLESS ERROR WHEN IT INSTRUCTED THE JURY THAT CONSPIRACY COULD BE PREDICATED ON IMPLIED MALICE AND ON THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE

Respondent previously conceded that the trial court erroneously instructed the jury that conspiracy to commit murder (count five) could be predicated on either implied or express malice. In fact, only express malice was sufficient. (RB 254–257 [Argument VII]; see *People v. Swain* (1996) 12 Cal.4th 593, 599–607 (*Swain*) [Conspiracy to commit murder requires an intent to kill; therefore, the jury must be instructed that only express malice is sufficient to support the charge.].) However, respondent argued that the error was harmless beyond a reasonable doubt. (RB 257–269.)

In his Supplemental Opening Brief (CSOB), Cruz argues that the same "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." (CSOB 3.) Respondent disagrees. For the same reasons that the error was harmless as to count five (conspiracy to commit murder), it was harmless as to the four counts of murder.

Cruz also contends that the trial court improperly instructed the jury that it could convict him of first degree premeditated murder in counts one through four based "upon the 'natural and probable consequences' doctrine as a co-conspirator." (CSOB 3, citing *People v. Chiu* (2014) 59 Cal.4th 155, 167 (*Chiu*).) Respondent agrees that the instruction was erroneous—but not because it misled the jury. Rather, it had no application to the facts or the prosecutor's theory because the conspirators' target crime was always murder. Thus, there was no reason for the jury to use the natural and probable consequences doctrine to extend liability from the target

crime to the crime charged because they were both premeditated murder. As such, the superfluous instruction was harmless.

A. The Trial Court Erroneously Instructed the Jury That the Four Murder Charges Could Be Predicated on an Implied Malice Conspiracy Theory, But the Error Was Harmless

The trial court instructed the jury on the principles of conspiracy as a theory of liability for the four murder charges (counts one through four) as well as for the charge of conspiracy to commit murder (count five). (36 RT 6498–6502.) It instructed the jury that malice was required to find appellants guilty of first degree murder, however, it should have instructed the jury that the mental state required was *express* malice. (See *Swain*, *supra*, 12 Cal.4th at pp. 599–607.)

Respondent agrees that the error applied to the four murder charges just as it applied to charge of conspiracy to commit murder. However, for the same reasons the error was harmless as to the charge of conspiracy to commit murder, it was also harmless as to the four murder charges. Respondent incorporates by reference its harmless error analysis from the Respondent's Brief. (See RB 257–270.)

Cruz argues, "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." (CSOB 10.) He is mistaken. This Court can find the error harmless when there is no doubt that error in the "invalid theory" did not affect the verdicts: "When the prosecution presents its case to the jury on alternate theories, one of which is legally correct and the other legally incorrect, 'we must reverse the conviction unless it is beyond a reasonable doubt that the error did not contribute to the jury's verdict. [Citations.] Such a reasonable doubt arises where, although the jury was instructed on alternate theories, there is no basis in the record for concluding that the verdict was based on a valid

ground. [Citations.]' [Citation.]" (*People v. Calderon* (2005) 129 Cal.App.4th 1301, 1306–1307; *People v. Guiton* (1993) 4 Cal.4th 1116, 1122, 1130–1131 ["'[W]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand.'"].) "'An instructional error presenting the jury with a legally invalid theory of guilt does not require reversal, however, if other parts of the verdict demonstrate that the jury necessarily found the defendant guilty on a proper theory.'" (*People v. Calderon*, *supra*, at p. 1307; *People v. Guiton*, *supra*, at pp. 1130–1131; *People v. Hughes* (2002) 27 Cal.4th 287, 368; *People v. Pulido* (1997) 15 Cal.4th 713, 727.)

Here, there is no basis to find that the jury believed the conspiracy was predicated upon an improper implied malice theory. First, the trial court instructed the jury that it could not find appellants guilty of the first degree murders or conspiracy to commit murder unless it found (in addition to malice) that appellants harbored the mental states of premeditation and deliberation.[1] (36 RT 6507–6508.) It is inconceivable that the jury believed appellants premeditated and deliberated about the murders, but did

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[1] The trial court instructed the jury: "In each of the crimes charged in the information, namely, murder and conspiracy to commit murder, there must exist a certain mental state in the mind of the perpetrator. Unless such mental state exists, the crime to which it relates is not committed. In the crimes of first degree murder and conspiracy to commit first degree murder, the necessary mental states are malice aforethought, premeditation, and deliberation." (36 RT 6507–6508.) To the extent respondent previously failed to emphasize the fact that the instruction required the jury to find premeditation and deliberation before it could find appellant guilty of conspiracy to commit murder, respondent incorporates the current argument into its harmless error analysis in Argument VII-E in the Respondent's Brief. (RB 257–270.)

not intend to commit murder, i.e., did not harbor express malice. (See *People v. Cortez* (1998) 18 Cal.4th 1223, 1237 ["all conspiracy to commit murder is necessarily conspiracy to commit premeditated and deliberated first degree murder"]; *German v. Superior Court* (2001) 91 Cal.App.4th 58, 63 ["the specific intent required to conspire to commit 'intent to kill' murder is the functional equivalent of premeditation and deliberation . . . ."]; *People v. Collie* (1981) 30 Cal.3d 43, 62 [deliberation and premeditation "entail a specific intent to kill"]; *People v. Koontz* (2002) 27 Cal.4th 1041, 1080 [a verdict of deliberate and premeditated attempted "murder requires *more* than a showing of intent to kill." Italics added.].)

Likewise, the trial court instructed the jury, "A conspiracy is an agreement entered into between two or more persons with the specific intent to agree to commit the public offense of murder . . . ." (36 RT 6499; 8 CT 1914.) The jury could not have complied with the instructions and found that appellants had the specific intent to *agree* to commit murder without also finding an intent to *actually* commit murder. (*People v. Jurado* (2006) 38 Cal.4th 72, 123 ["For a conspiracy to commit murder, intent to commit the target offense means an intent to kill."].) Further, it is common sense that one cannot plan to commit murder without intending to kill.

In addition, the trial court's instructions and verdict form required that the jury find that appellants were part of the conspiracy when at least one of five enumerated overt acts was committed. (36 RT 6499.) The jury found that appellants were part of the conspiracy when *all five* of the overt acts were committed: the defendants armed themselves; they drove to the scene of the murders; they put on a mask to conceal their identities; they entered the Elm Street house; and they killed the four victims. (9 CT 2293–2294, 2300–2301.) The jury also specifically found for each murder charge and the conspiracy charge that appellants personally used a dangerous weapon. (9 CT 2288–2291, 2296–2299.)

No reasonable jury could find that appellants participated in all the stages of the conspiracy to commit murder, but did not intend to kill the victims. (See *People v. Jurado*, *supra*, 38 Cal.4th at p. 123 ["defendant does not identify any evidence in the record that could lead a rational juror to conclude that [the coconspirators] agreed to kill [the victim] with the specific intent to agree to do so, but without a specific intent to actually kill her."]; *People v. Cortez*, *supra*, 18 Cal.4th at p. 1232 ["where two or more persons conspire to commit murder–i.e., intend to agree or conspire, further intend to commit the target offense of murder, and perform one or more overt acts in furtherance of the planned murder–each has acted with a state of mind "functionally indistinguishable from the mental state of premeditating the target offense of murder."].)

Furthermore, the jury's determination that appellants drove to the murder scene and donned masks before personally using deadly weapons demonstrated the jury's conclusion that appellants conspired to commit murder and must have harbored an intent to kill. If appellants planned to go to the Elm Street house to kill Raper and his associates, they had to have had the intent to kill. Therefore, since the jury specifically found that the overt acts of the conspiracy were true, it had to also believe that appellants' intent was to commit first degree murder. (See *People v. Cortez*, *supra*, 18 Cal.4th at p. 1232.)

Furthermore, "Conspiracy 'is the classic example of a continuing offense because by its nature it lasts until the final overt act is complete. [Citations.]' [Citation.] 'The general rule is that a "conspiracy usually comes to an end when the substantive crime for which the coconspirators are being tried is either attained or defeated."'" (*People v. Quiroz* (2007) 155 Cal.App.4th 1420, 1429, quoting *People v. Hardy* (1992) 2 Cal.4th 86, 143.) Here, the jury specifically found that appellants were actively participating in the conspiracy when the overt act of killing the four victims

was committed. (9 CT 2285, 2301.) The evidence showed that after beating and stabbing each victim numerous times, the assailants cut the throat of every victim virtually from ear to ear and down to the vertebra. Since the conspiracy was still in effect at that point, and no reasonable jury could have doubted that the method used to kill the victims indicated that the conspirators intended to kill their victims, there is no doubt that the conspiracy was committed with an intent to kill. Indeed, the jury specifically found that "The defendants killed Franklin Raper, Richard Ritchey, Emmie Darlene Paris, and Dennis Colwell *in furtherance of the conspiracy.*" (36 RT 6491, italics added; 7 CT 1820; 9 CT 2270–2287.)

Similarly, no jury could believe appellants drove to the crime scene in the middle of the night with knives and bats; donned masks; and killed four people in furtherance of the conspiracy; but did not actually have the intent to kill. Thus, it is unavoidable that, in finding that appellants participated in a conspiracy to commit murder, the jury necessarily found that appellants intended to commit murder.

Furthermore, as previously discussed and incorporated by reference (RB 266–269), several categories of evidence established that appellants had a premeditated and deliberate intent to kill, including (1) facts about appellants' behavior before the incident that showed planning; (2) facts about appellants' prior relationship or conduct with the victims from which the jury could infer motive; and (3) facts about the manner of the killing from which the jury could infer appellants intended to kill the victim according to a preconceived plan. (*People v. Welch* (1999) 20 Cal.4th 701, 758.)

In addition, the target crime was expressly identified in the instructions as murder and the prosecutor never suggested that the conspiracy charge could be predicated on anything less than an intent to commit murder. (15 RT 2692; 36 RT 6498 [defendants charged with

"willfully, unlawfully, and feloniously conspir[ing], combin[ing] and agree[ing] together and with other persons to commit the crime of murder]; 36 RT 6499 ["A conspiracy is an agreement entered into between two or more persons with the specific intent to agree to commit the public offense of murder and with the further specific intent to commit such offense followed by an overt act . . . ."]; 36 RT 6527–6533; see also 36 RT 6487.)

Lastly, Cruz never explains how the jury could find that appellants premeditated and deliberated the murders (36 RT 6507–6508), participates in the five overt acts (9 CT 2293–2294, 2300–2301), and personally used deadly weapons (9 CT 2288–2291, 2296–2299), but did not have the intent to kill.

In conclusion, when the jury found appellants guilty of conspiring to commit murder, there is no possibility it based that verdict on any mental state other than intent to kill. Likewise, if the jury based the individual murder convictions on a conspiracy theory, it is inconceivable that the jury did not believe the conspiracy was predicated on an express intent to kill. In short, the jury's various findings, the overwhelming evidence, and the prosecutor's argument all demonstrate beyond a reasonable doubt that the jury found that appellants harbored the intent to kill. Moreover, simple logic dictates that the jury could not have found that appellants conspired to commit murder without intending to kill. Accordingly, the erroneous instruction was harmless.[2] (See *Chapman v. California* (1968) 386 U.S. 18, 24 (*Chapman*); *Neder v. United States* (1999) 527 U.S. 1, 7–10.)

[2] Respondent previously addressed appellants' claim that the trial court erroneously instructed the jury on the special circumstance allegation. (RB 269–281; see CSOB 9, fn. 5.)

B. The Trial Court Erroneously Instructed the Jury on the Natural and Probable Consequences Theory, But It Was Harmless

The trial court instructed the jury: "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." (8 CT 1916–1917; 36 RT 6500.)

Cruz argues, "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 [p.] 167; *People v. Rivera* (2015) 234 Cal.App.4th 1350, 1356–1357 (*Rivera*) [applying *Chiu* holding to co-conspirator liability].)" (CSOB 15, fn. omitted.)

Cruz is correct that the jury could not have properly found appellants guilty of the murder charges under the natural and probable consequences doctrine. But instructing the jury on that doctrine was necessarily harmless because there was no basis for the jury to rely on that theory.

The trial court instructed the jury that the target offense was murder. (8 CT 1914.) The instruction on aiding and abetting did not identify the target crime (36 RT 6485), but it was never suggested in the instructions, or argued by the prosecutor, that appellants ever intended to commit any crime other than murder. Nor does Cruz suggest that the jury had any reason to believe there was any target crime other than murder. Thus, there was no need for the jury to use the natural and probable consequence doctrine to extend liability from the target offense to the offenses charged. Put another way, the jury did not need to be instructed that murder was the natural and probable consequences of a conspiracy to commit murder. Accordingly, it was error to give the instruction on natural and probable consequences because it had no application to the facts of the case. (See *People v. Guiton*, *supra*, 4 Cal.4th at p. 1129 ["It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case"].) But, as discussed below, the error was harmless because the instruction could not have had any effect on the jury's deliberations.

In *Chiu*, the defendant was convicted of first degree murder "on the theory that either he directly aided and abetted the murder or he aided and abetted the 'target offense' of assault or of disturbing the peace, the natural and probable consequence of which was murder." (See *Chiu*, *supra*, 59 Cal.4th at p. 158.) In *People v. Rivera*, *supra*, 234 Cal.App.4th 1350, one theory of liability was that the defendant was an aider and abettor based on the theory that the murder was the natural and probable consequences of the uncharged conspiracy. (*Rivera*, *supra*, 234 Cal.App.4th at pp. 1354–1355.) *Rivera* opined, "[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." (*Id.* at p. 1356.)

Chiu and *Rivera* are distinguishable from the current matter because, there, the juries could have used the natural and probable consequences doctrine to impose liability for crimes other than the target offense. Here, on the other hand, the crimes charged *were* the target offenses. Therefore, it is difficult to see how the natural and probable consequences doctrine came into play, let alone affected the verdicts.

Cruz does not contend that the jury might have relied on the theory that appellants were aiders and abettors. Rather, he argues that "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." (CSOB 16–17.) Assuming the jury relied on the conspiracy theory for the murder charges, however, there was no reason for the jury to consider the natural and probable consequences doctrine. Since the target offense was murder, the jury did not need to consider what further crime was a probable consequence. Therefore, instructing the jury on that theory was harmless because it was inapplicable, and also for all of the same reasons discussed above, i.e., the intent to join and further a conspiracy to commit murder necessarily included intent to kill.

Again, the jury could not have believed that appellants engaged in a conspiracy to commit murder, but did not harbor the intent to kill. The jury was expressly instructed that the target offense was murder, so there was no need to rely on the natural and probable consequences doctrine to bootstrap an additional crime to the target offense. (See *Chiu, supra*, 59 Cal.4th at p. 161 ["A nontarget offense is a "natural and probable consequence" of the target offense if, judged objectively, the additional offense was reasonably foreseeable."].) This was not a case where appellants intended to assault Raper, but should have foreseen that a murder might occur. Appellants

conspired to kill Raper and everyone who was with him. Therefore, the natural and probable consequences doctrine had no application.

Curiously, Cruz argues that "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." (CSOB 17.) That is far from the case. The undisputed evidence showed that Cruz organized the group that went to the Raper's house. He supplied the weapons. He drove them there. Evans testified that Cruz asked her to draw the map of the house; Cruz planned every detail of the assault; Cruz assigned tasks to the coconspirators; and he expressly stated the goal was to kill everyone in the house. On the other hand, Cruz's testimony that the six conspirators armed themselves and went to the victim's house in the middle of the night to retrieve some clothes was patently ridiculous. Most importantly, Cruz ignores the fact that, in order to find there was a conspiracy, the jury had to find appellants acted with premeditation and deliberation. (36 RT 6507–6508.) Obviously, there was no need for the jury to rely on the natural and probable consequences doctrine when it found that appellants premeditated and deliberated the target offense of murder.

In sum, there was no need for the jury to use the instruction about the natural and probable consequences doctrine because the target offense was the same as the crimes charged. Therefore, it is not reasonably probable appellants would have obtained a more favorable result if the instruction had been omitted. (See *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Guiton*, *supra*, 4 Cal.4th at p. 1129 [giving a jury an instruction with no application to the facts is state law error]; *People v. Rollo* (1977) 20 Cal.3d 109, 122–123, superseded by statute as stated in *People v. Castro* (1985) 38 Cal.3d 301, 324 ["such an error is usually harmless, having little or no effect 'other than to add to the bulk of the charge'"].)

Moreover, even if the instructional error somehow violated the federal Constitution, it was harmless beyond a reasonable doubt for all of the reasons discussed above and in the previous subsection. In particular, it is certain that, if the jury based the murder convictions on a conspiracy theory, it did so with the understanding that appellants harbored express malice. The jury would have undoubtedly reached the same result even if the trial court had not instructed it on the natural and probable consequences doctrine. (See *Chapman*, *supra*, 386 U.S. at p. 24; *Neder v. United States*, *supra*, 527 U.S. at pp. 7–10.)

II. CRUZ FORFEITED HIS CLAIM THAT THE PROSECUTOR IMPROPERLY DISCUSSED THE BIBLE AT HIS PENALTY TRIAL; AND ANY PROSECUTORIAL ERROR WAS HARMLESS

The prosecutor discussed the Bible during his closing arguments at both appellants' penalty trials. Beck claimed in his Opening Brief that the prosecutor erred. (BOB 289–305.) Respondent argued that Beck forfeited the claim by failing to object and that any error was harmless. (RB 578–593.) Even though Cruz joined many of Beck's arguments, and presumably made a conscious decision not to join or match Beck's argument regarding the Bible, Cruz now contends that the prosecutor's discussion of the Bible violated a litany of Fourteenth Amendment rights.[3] (SCOB 19.) However, when this Court previously addressed similar prosecutorial errors, it found (1) the prosecutor committed only state law error; (2) the issue was forfeited when trial counsel failed to make a contemporaneous objection; and (3) the error was harmless.

The same result should apply here. First, the prosecutor's argument did not violate the federal Constitution. Contrary to Cruz's argument, the prosecutor did not tell the jury that it should follow the Bible's endorsement

[3] Respondent incorporates by reference its Argument XXX from the Respondent's Brief.

of the death penalty. The prosecutor argued only that jurors need not be concerned that voting for the death penalty violated Biblical rules or principles. In other words, the prosecutor asked the jurors to follow California law and disregard any conflicting ideas from the Bible. Therefore, any error was minor and violated only the state constitution.

Second, Cruz's defense attorney did not object to the prosecutor's comments about the Bible. So he forfeited Cruz's claim on appeal. Moreover, there was not ineffective assistance of counsel because counsel could have had a tactical reason for not objecting and there was also no prejudice. And third, because the error was minor, and there was overwhelming evidence that Cruz conceived, planned, led, and participated in the brutal murders of four people, the error was harmless.

A. Standard of Review

"A prosecutor's conduct violates the federal Constitution only when it is '"'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' [Citations.] A prosecutor's conduct that does not rise to the level of a constitutional violation will constitute misconduct under state law only if it involves 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' [Citation.] A prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence." (*People v. Hill* (1998) 17 Cal.4th 800, 819; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

"'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least

damaging meaning from the prosecutor's statements. [Citation.]' [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 553–554.)

"A defendant's conviction will not be reversed for prosecutorial misconduct, however, unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct." (*People v. Crew* (2003) 31 Cal.4th 822, 839.) Prosecutorial error that violates the federal Constitution is reviewed to see if it is harmless beyond a reasonable doubt pursuant to *Chapman*. (*People v. Sandoval* (1992) 4 Cal.4th 155, 194.)

B. Cruz Forfeited this Claim

At Cruz's penalty trial, the prosecutor argued:

> 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 Paul, who is speaking, says, "The ruler bears not the sword in vain for he is the 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[s] 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.

(41 RT 7530–7531.) Cruz's trial counsel did not object. (*Ibid.*)

As argued below regarding harmless error, the prosecutor's intent was to allay jurors' fears that imposing the death penalty would run afoul of the Bible. He acknowledged that passages from the Bible could be used to both support and oppose capital punishment. Taken together in context, the prosecutor did not argue that the Bible required the death penalty; just that it did not preclude it. Nevertheless, the prosecutor's argument that "the most important concepts . . . are that capital punishment for murder is necessary in order to preserve the sanctity of human life" was probably error. (See *People v. Slaughter* (2002) 27 Cal.4th 1187, 1209, abrogated on another ground in *People v. Diaz* (2015) 60 Cal.4th 1176, 1189; *People v. Vieira* (2005) 35 Cal.4th 264, 297; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1168–1169, disapproved on another ground in *People v. Doolin*

(2009) 45 Cal.4th 390, 421, fn. 22; *People v. Ayala* (2000) 23 Cal.4th 225, 284 ["when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion."].)

However, assuming that the prosecutor erred, that error could have been corrected at trial if Cruz had made a timely objection. Cruz could not reasonably expect to remain silent at the time the error could have been corrected, and then raise the issue for the first time almost 24 years later. Cruz's failure to make an assignment of misconduct at trial, and his failure to request that the jury be admonished to disregard the impropriety, forfeited the claim on appeal. (See *People v. Samayoa* (1997) 15 Cal.4th 795, 841; see also *People v. Hill*, *supra*, 17 Cal.4th at p. 820 [A timely objection was not necessary if it would have been futile, and the failure to request that the jury be admonished did not forfeit the issue for appeal if an admonition would not have cured the harm caused by the misconduct.]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1030 ["To determine whether an admonition would have been effective, [the reviewing court] consider[s] the statements in context."]; *People v. Adanandus* (2007) 157 Cal.App.4th 496, 512 [burden is on the defendant to prove that an admonition would have been ineffective].)

Here, Cruz concedes that he did not object or request an admonition. (CSOB 25.) Nevertheless, he claims "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* [1994] 8 Cal.4th [450,] 516; *People v. Wash* [1993] 6 Cal.4th [215,] 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.)." (SCOB 25.) Cruz's reliance on those cases is peculiar since

this Court squarely held in both instances that the defendants *did* forfeit their claims of prosecutorial error. (*People v. Freeman* (1994) 8 Cal.4th 450, 516; *People v. Wash* (1993) 6 Cal.4th 215, 259–260.) The fact that those cases held that there were prosecutorial errors, and those errors were harmless, does not change the fact that the claims were forfeited. (See *People v. Freeman*, at p. 516; *People v. Wash*, at p. 261; see also *People v. Zambrano*, *supra*, 41 Cal.4th at p. 1169.) Therefore, those cases do not help Cruz.

Likewise, Cruz contends that this Court should address the merits because the prosecutor committed "'plain error.'" (CSOB 25, citing *People v. Wash*, *supra*, 6 Cal.4th at pp. 276–279, conc. & dis. opn. of Mosk, J.).) However, Cruz's own citation explains that reviewing courts should only exercise their discretion to reach forfeited claims when the error affects the defendant's substantial rights. (*People v. Wash*, at p. 277 ["'Plain errors or defects *affecting substantial rights* may be noticed although they were not brought to the attention of the court.'" Italics added.]; see Pen. Code, § 1259; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7.) It cannot be said that the prosecutor's error affected Cruz's substantial rights because, as discussed below, there was no prejudice. (See *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249 [ascertaining whether error affected defendant's substantial rights necessarily requires an examination of whether the error resulted in prejudice].)

Furthermore, Cruz has made no showing that an objection would have been overruled or otherwise futile. (See *People v. Hill*, *supra*, 17 Cal.4th at p. 820.) On the contrary, a timely objection could have kept the vast majority of the Biblical references from the jury. Indeed, Cruz suggests that defense counsel was on notice from the prosecutor's prior closing arguments, including at Vieira's penalty trial, and could have even raised the issue before Cruz's penalty trial. (CSOB 26–27; see *People v. Slaughter*,

supra, 27 Cal.4th at p. 1209 ["Defendant had reason to anticipate that the prosecutor would refer to the Bible during his argument to the second penalty phase jury, because the prosecutor had made similar biblical references during his argument to the first penalty phase jury."].)

Cruz has also not shown that a request for an admonition, after a timely and successful objection, would have been incapable of curing the purported harm. (*People v. Adanandus*, *supra*, 157 Cal.App.4th at p. 512 [defendant carries burden of proving admonition would have been futile].) Surely, the trial court could have admonished the jury to follow the instructions and not any particular interpretation of the Bible.

Finally, Cruz contends that defense counsel's failure to object constituted ineffective assistance. (CSOB 25–27.) However, trial counsel may have made a tactical decision not to object. (See *People v. Slaughter*, *supra*, 27 Cal.4th at p. 1210.) For example, as the prosecutor acknowledged, there were passages in the Bible that clearly condemned capital punishment, such as "Thou shall not kill" and "Vengeance is mine." Obviously, the New Testament also has many exhortations to avoid retributive justice, such as "turn the other cheek." Since the jury instructions required the jury to apply the death penalty, defense counsel may have decided there was little to lose from allowing the prosecutor to reference another authority that might inspire juror nullification. (See *ibid.*)

Likewise, there was no prejudice. As Cruz, himself, points out, the same prosecutor made the same argument in other capital cases. And this Court has not found that references to the Bible were prejudicial. (See, e.g., *id.* at p. 1209; *People v. Vieira*, *supra*, 35 Cal.4th at p. 297; *People v. Zambrano*, *supra*, 41 Cal.4th at pp. 1168–1169.) Thus, for the reasons discussed in similar cases (see *ibid.*), as well as the reasons discussed below pertaining to harmless error, there was not prejudice and, therefore, there was not ineffective assistance of counsel. (See *Strickland v. Washington*

(1984) 466 U.S. 668, 697 ["If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."].)

C. Any Prosecutorial Error Was Harmless

This Court has addressed prosecutors' similar references to the Bible and found them harmless state law error. (See, e.g., *People v. Slaughter*, *supra*, 27 Cal.4th at pp. 1210–1211; *People v. Sandoval*, *supra*, 4 Cal.4th at p. 194 ["no reasonable possibility that the jury would have reached more favorable verdicts had the misconduct not occurred"]; *People v. Vieira*, *supra*, 35 Cal.4th at p. 298; but see *ibid.*, fn. 11 [court opined that a prosecutor's use of Biblical references in conscious disregard of the court's condemnation of the practice might "constitute[] a more serious form of prosecutorial misconduct"].)

Nevertheless, Cruz contends that the error not only violated various federal constitutional rights, it was the type of error that was reversible per se. (CSOB 28.) Not so. Appellant's reliance on *Com. v. Chambers* (1991) 528 Pa. 558, 587 [599 A.2d 630, 644] is misplaced. That court reversed the defendant's death sentence because it violated the Pennsylvania death penalty *statute*, not because it found a constitutional violation. (See *ibid.*, citing 42 Pa.C.S. § 9711(h)(4).) More importantly, as noted above, this Court has repeatedly found references to the Bible to be harmless state law error.

Contrary to Cruz's argument, the prosecutor's intent was not to convince the jury that, regardless of California law, the Bible required imposition of the death penalty for murder. On the contrary, the prosecutor repeated three times that the jury could not use his argument about the Bible as an aggravating factor. That meant the jury could not give the prosecutor's argument any weight in its deliberations over whether to impose the death penalty. The prosecutor's explicit purpose was to have

the jury follow the trial court's instructions and to not worry that the Bible was incompatible with that task. As the prosecutor argued, "The only reason I mention it is because maybe some of you that had a little problem with the subject of religion." (41 RT 7530.) Thus, even if the prosecutor's argument was inappropriate, and parts of it could be seen, in isolation, to suggest that the Bible endorsed capital punishment, that was not the point of the overall argument. Rather, the prosecutor meant only that the Bible could be interpreted in many ways, and proponents and opponents of capital punishment could find support for their positions. Therefore, the jurors should not think that the Bible categorically precluded capital punishment or contradicted California law.

Cruz argues that the prosecutor "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." (CSOB 28–29.) Again, the prosecutor explicitly raised the issue to allay jurors' concerns that the Bible precluded imposition of the death penalty. Certainly, the prosecutor never made any argument that the jury should follow the Bible *instead of* the jury instructions. And, again, the prosecutor repeatedly stated that his comments did not affect the jurors' deliberations on aggravation. That meant the jury could not base its decision on the Bible and, therefore, could not abdicate its responsibility for the decision.

Cruz also contends that the prosecutor devoted a "substantial amount of his argument . . . to biblical exhortations." (CSOB 29 & fn. 18.) However, as he acknowledges, the prosecutor used less than 2 pages of his 24-page argument to address that topic. (*Ibid.*) Thus, over 90 percent of the prosecutor's argument addressed other proper matters. This Court has previously held that erroneous discussions of the Bible are harmless even when they go beyond brief references: "Although the prosecutor's biblical

references in the present case certainly were not "brief" and "undeveloped" as in *People v. Wrest*, they similarly were part of a longer argument that properly focused upon the factors in aggravation and mitigation." (*People v. Slaughter*, *supra*, 27 Cal.4th at p. 1210.)

Furthermore, "This court has held that, in similar contexts, when improper biblical references '"were part of a longer argument that properly focused upon the factors in aggravation and mitigation"' such improper statements are harmless because 'there is no likelihood his biblical references diminished the jury's sense of responsibility or displaced the court's standard penalty instructions. [Citations.]' (*Zambrano*, *supra*, 41 Cal.4th at p. 1170.)" (*People v. Lucas* (2014) 60 Cal.4th 153, 312, disapproved on another ground in *People v. Romero* (2015) 62 Cal.4th 1, 53, fn. 19.)

Likewise, here, the prosecutor's overall focus was on the factors in aggravation and the appropriateness of the ultimate punishment. (41 RT 7509–7534; see *People v. Lucas*, *supra*, 60 Cal.4th at p. 312 ["The record shows the asserted biblical references were but a fraction of the prosecutor's overall argument when compared to his focus on the factors in aggravation and mitigation."].) In addition, as discussed in Argument XIII-G in the Respondent's Brief, and incorporated here by reference, the evidence against Cruz at the penalty trial was quite strong. (See RB 366–369.) Therefore, because the erroneous discussion of the Bible was only a small part of the prosecutor's otherwise proper argument; because the prosecutor told the jury three times not to use his discussion of the Bible for aggravation; because the trial court instructed the jury to follow only its instructions; and because of the weight of the evidence in aggravation, it is not reasonably probable Cruz would have received a more favorable result if the prosecutor had not discussed the Bible. (See *People v. Sandoval*, *supra*, 4 Cal.4th at p. 194.) Likewise, even if the error violated Cruz's

federal constitutional rights, it was harmless beyond a reasonable doubt. (See *Chapman, supra*, 386 U.S. at p. 24.)

CONCLUSION

Accordingly, respondent respectfully requests that this Court affirm the judgment.

Dated: April 15, 2016

Respectfully submitted,

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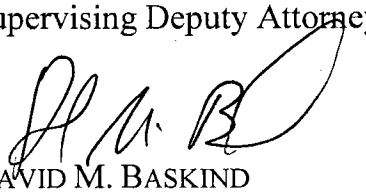

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CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 6,951 words.

Dated: April 15, 2016

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Beck and Cruz** (CAPITAL CASE) No.: **S029843**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On April 15, 2016, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 15, 2016, at San Francisco, California.

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