IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JAMES DAVID BECK and GERALD DEAN CRUZ, Defendants and Appellants.	No. S029843 (Alameda County Sup. Ct. No. 110467)

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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

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INTRODUCTION

In Appellant Cruz's Supplemental Brief (ASB[1]) three claims of reversible error are raised. The first is that an instructional error raised in Appellant Cruz's Opening Brief (AOB, Argument VII) and conceded by respondent (RB 260-262; SRB 1), requires reversal of not only Count V (conspiracy), but also of each of Counts I-IV (first-degree murder) as well as of the only special circumstance in this case (multiple murder). (ASB 9-14.)

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[1] Prior briefing in this appeal is cited to herein by the following initials:

AOB: Cruz's Opening Brief
ARB: Cruz's Reply Brief
ASB: Cruz's Supplemental Brief
RB: Respondent's Brief
SRB: Supplemental Respondent's Brief

A second, related claim is that instructional error concerning vicarious liability for crimes committed by a co-conspirator which were the natural and probable consequences of the conspiracy, similarly requires reversal of Counts I-IV and the special circumstance, as set forth in *People v. Chiu* (2014) 59 Cal.4th 155.

The third claim is that the prosecutor committed reversible misconduct in argument to the jury at Appellant Cruz's penalty phase by substantial and improper invocations of the Judeo-Christian Bible as relevant to the jurors' penalty decision. (ASB 19-29.)

Respondent concedes the instructional errors for the most part, although with a peculiar and fallacious twist as to *Chiu* error, and relies solely upon argument that the errors were harmless. (SRB 1-12.) As to the claim of misconduct at the penalty phase, respondent relies primarily on forfeiture and harmless error arguments which are adequately addressed in Appellant's Supplemental Brief. Appellant considers the issues on that claim joined and no further briefing on the point is necessary.

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VII.[2]

INSTRUCTIONAL ERRORS REGARDING CONSPIRACY AND COCONSPIRATOR LIABILITY REQUIRE REVERSAL OF ALL FOUR CONVICTIONS OF FIRST DEGREE *MURDER*

A. By Allowing the First Degree Murder Verdicts to Be Based upon a Flawed Conspiracy Finding Due to *Swain* Error, the Instructions Allowed the Verdicts in Counts I-IV to Be Based upon a Legally Invalid Theory.

Cruz has demonstrated, and respondent has conceded, that instructional error allowed the jury in this case to find a conspiracy to commit murder (Count V) without finding express malice, an element of that crime. (AOB Arg. VII.B.; RB 261-262; ARB 122; SRB 1-2.) Cruz has established, and respondent has conceded, that the prosecutor relied substantially on co-conspirator liability on the four homicide counts, Counts I-IV. (AOB 262; ARB 128-129, 144-145; ASB 13; RB 160.) Cruz has established, and respondent has conceded that the instructional error as to Count V applies as well to Counts I-IV. (ASB Arg. VII.C.1.; SRB 2.)

Nevertheless, respondent argues that the instructional error as to Count V does not require reversal of that count, and therefore does not require reversal of Counts I-IV. (RB 261-262; SRB 1-2.) Respondent does not present any arguments or authority to suggest that the convictions on Counts I-IV can survive the reversal of Count V. Respondent thus concedes sub silentio that if instructional error on Count V requires reversal of that count, it also requires reversal of Counts I-IV.

The issue to be resolved, therefore, is whether Count V must be reversed. As demonstrated in Cruz's prior briefing:

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[2] The numbering of the Arguments in this Supplemental Reply Brief track the numbering of the arguments in Appellant's Supplemental Brief, rather than the numbering in Respondent's Supplement Brief.

1) The jury returned general verdicts, as in *People v. Swain* (1996) 12 Cal.4th 593, 607. In the jury's verdict of conspiracy to commit murder in Count V, the degree of murder is unspecified. (9 CT 2284.) In the jury's verdicts of first degree murder in Counts I-IV, there is no specification of who the jurors found to have been an actual killer of each victim and who was held liable only under the vicarious liability of a co-conspirator, or even what theory of vicarious liability was relied upon by the jurors. (9 CT 2279-2282; see ARB 126-128, 132);

2) The evidence at trial was conflicting as to the intents of the various participants in going to the Elm Street house, and there is substantial evidence that appellant had no intent to kill anyone (see AOB 15-16, 30, 33-36, 42; ARB 132-133; ASB 4-6);

3) The evidence at trial was conflicting as to who the actual killer of each victim was, and there is substantial evidence that appellant personally killed no one, nor intended that anyone be killed (see AOB 7-9, 30-44; ARB 128-129, 131; ASB 4-6);

4) the evidence at trial is consistent with a finding by the jury of conspiracy to commit implied malice murder, without intent to kill, as in *People v. Swain*, *supra*, and *People v. Alexander* (1983) 140 Cal.App.3d 647[3] [4] (see ARB 124-125, 134; see pp. 8-9, 16, 18).

Thus, on contested issues at trial, the jury was presented with instructions which allowed the jury to convict on conspiracy to commit murder in Count V based upon an invalid legal theory, and to then impute

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[3] *Swain* and *Alexander* are discussed further below, as well as in Cruz's Reply Brief, at pp. 124-125, 134.)

[4] The citation to *Alexander* in Cruz's Reply Brief inadvertently identified the volume as 140 Cal.App., rather than 140 Cal.App.3d. *Alexander* is accurately cited in *Swain*. (See 12 Cal.4th at p. 602.)

the mental states of each actual killer to Cruz in Counts I-IV based upon that invalid finding of conspiracy. The jury was also presented with evidence that was consistent with findings based on that invalid legal theory. The jury then returned general verdicts on all five counts consistent with the jurors having relied upon that invalid legal theory. Nothing in the general verdicts, or elsewhere on the record in this case precludes that conclusion. Under the controlling federal and state authorities (see ASB 10-12), reversal is required.

As stated above, respondent concedes error in the instructions allowing a conviction of conspiracy based upon a finding of implied malice, but argues there is no basis for a belief the conspiracy verdict in Count V was predicated on such a theory, and thus any error was harmless as to the first degree murder convictions in Counts I-IV. (SRB 2-3 [also incorporating harmless error argument from RB 257-270].)

As in the initial Respondent's Brief, respondent here relies primarily on different forms of a fundamentally flawed and overly simplistic characterization of the verdicts in this case and the legal framework governing the instructions and verdicts. At the same time, respondent fails, or refuses, to acknowledge or meaningfully address the legal and factual demonstrations made in appellant's briefing of the prejudicial effect of the conceded instructional error.

In reply, Cruz incorporates herein the same portions of his Opening and Reply Briefs as were incorporated in Argument VII of his Supplemental Brief.[5] The arguments and authorities presented by Cruz in his Reply Brief demonstrated the flaws in respondent's analysis, and

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[5] In Cruz's Supplemental Brief, Argument VII, he incorporated the AOB and ARB, specifically including Arguments I, II, VII and VIII, the Statement of Case and the Statement of Facts. (ASB p. 2-3.)

demonstrated explicitly that on this record, it cannot be determined that the erroneous instructions did not contribute to the conspiracy verdict. The same analysis demonstrates that it cannot be determined that the erroneous instructions did not contribute to the verdicts of first degree murder in Counts I-IV.

1. The instructions erroneously allowed the jury to find a conspiracy to commit implied-malice second-degree murder without a finding of an essential element, intent to kill.

The instructional error at issue is that the jury was instructed that murder, as the target crime of the conspiracy, included not only premeditated and deliberate murder, but also second degree murder with either express *or implied* malice. The jury was thus erroneously told that it could find appellant guilt of conspiracy to commit murder on Count V based on a finding that the conspiracy was to commit implied-malice second degree murder without finding an essential element, intent to kill. *People v. Swain* (1996) 12 Cal.4th 593, which came down after the trial in this case, held that such instructions constituted reversible error where it cannot be determined that the erroneous implied malice murder instructions did not contribute to the convictions on the conspiracy count. (12 Cal.4th at p. 607.) As in *Swain*, based on the general verdicts returned here, it cannot be determined that the jury necessarily found conspiracy to commit murder with express malice or intent to kill under other properly-given instructions. (*Ibid.*)

As this Court explained in *Swain*, "[t]he conceptual difficulty arises when the target offense of murder is founded on a theory of implied malice, which requires no intent to kill." (12 Cal.4th at p. 602.) None of respondent's theories about how the jury must have found an intent to kill resolve that conceptual difficulty here, or cure the error in the instructions.

Referring to the findings of "murder" without acknowledging that those findings could be based upon the very instructional error at issue here, i.e., upon implied rather than express malice, without finding the essential element of intent to kill, simply ignores the error without adding anything real to the analysis of prejudice.

Swain itself acknowledged that "under the instructions given [in *Swain*] the jury could have based its verdicts finding defendant guilty of conspiracy to commit murder in the second degree on a theory of implied malice murder." (*Swain*, *supra*, 12 Cal.4th at p. 602.) Respondent does not, and cannot, identify or explain any distinction between the instructions, the verdicts or the evidence in *Swain*, and the instructions, the verdicts or the evidence in this case. Thus, as in *Swain*, the erroneous instructions here require reversal of the conspiracy conviction in Count V. (12 Cal.4th at 607.) As demonstrated in the Supplemental Brief and not apparently contested by respondent, the reversal of Count V further requires reversal of Counts I-IV.

2. The evidence regarding Cruz's intent as to the conspiracy and as to the homicides was conflicting and supported jury findings based upon invalid legal theory.

As demonstrated in Cruz's prior briefing, not only were the instructions and verdicts consistent with an invalid jury finding of conspiracy to commit implied-malice murder without an intent to kill, but the evidence in this case was consistent with such a finding. (See, e.g., ARB 124-125, 128-136; ASB 4-6, 12-14.) Nevertheless, respondent fails to discuss, or even acknowledge Cruz's demonstration to that effect.

Instead, astonishingly, respondent goes so far as to deny that Cruz made any such showing: "... Cruz never explains how the jury could find that appellants premeditated and deliberated the murders [...], participates

[sic] in the five overt acts [...] and personally used deadly weapons [...], but did not have the intent to kill." (SRB 7.) This is demonstrably untrue. Cruz demonstrated with both legal and evidentiary support how the jury could reach such a conclusion. (ARB Arg. VII.A; ASB VII.A, B, C.1.)

There was ample evidence at appellant's trial which could have led a rational juror – instructed as they were – to conclude that appellant conspired without any intent to kill, but "with wanton disregard of the probability that deaths would occur as a result" of their actions. (*People v. Alexander*, *supra*, 140 Cal.App.3d at pp. 665-666[6]; ARB 125, 128-129.) Indeed, appellant denied any intent to kill, and the other testifying coconspirators (including prosecution witness Michelle Evans) denied any intent to kill. (ARB 128, 131; see AOB 7-9, 15-16, 30, 33-36, 42.)

Cruz demonstrated in his Reply Brief that a reasonable jury could find that the conspiracy was to commit implied malice murder, without an intent to kill. (ARB 123-124.) A similar conclusion is demonstrated quite clearly in both *Swain* (12 Cal.4th at p. 607) and *People v. Alexander*, *supra*, 140 Cal.App.3d 647, 665-666.

Alexander recognized how a jury instructed that a conviction for conspiracy to commit murder could be based on a finding of implied malice could reach a verdict on that basis. Under the evidence in that case, the court explained:

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[6] As noted in Cruz's Reply Brief, *Swain* rejected *Alexander's* legal conclusion that a crime of conspiracy to commit murder can be based upon implied malice murder. (12 Cal.4th at p. 605; ARB 125, fn. 40) However, even though *Alexander* is no longer good law as to that legal conclusion, the opinion still serves as a demonstration of the reasoning by which an erroneously instructed jury could reasonably return a verdict of conspiracy to commit murder based upon implied malice murder, as does *Swain* itself.

> In other words, [the jury] could have determined the participants conspired to launch a vicious attack upon white and Mexican inmates and that they acted with wanton disregard of the probability that deaths would occur as the result of the initial attacks themselves or of the racial riot which they would inevitably spark.

(140 Cal.App.3d at pp. 665-666.) Similarly, the jury here, under the instructions given and the evidence presented, could have determined that the defendants "conspired to launch a vicious attack" on Raper and his cohorts "with wanton disregard of the probability that deaths would occur as a result of the initial attacks themselves or of [the melee that attack] would inevitably spark." Respondent offers no explanation of how the instructions preclude such a finding, or how the verdicts are inconsistent with such a finding. Nor does respondent acknowledge, distinguish or otherwise respond to appellant's citations to *Swain* and *Alexander* in this regard. What amounts to a mere bald assertion by respondent is insufficient to overcome that showing.

Similarly, respondent argues, as in the initial respondent's brief, that the method of the killings established intent to kill at the time of the formation of the conspiracy. (SRB 6.) As shown below and in the Reply Brief, the method of the killings, which occurred after the formation of the conspiracy, does not establish the prior state of mind at the time of the formation of the conspiracy (pp. 12-17, *post*; ARB 130-133). Again, respondent does not address or refute the showing made in the Reply Brief.

Moreover, respondent mischaracterizes the evidence of the method of the killing in an attempt to attribute the intent of each actual perpetrator at the time of each killing to the earlier agreement to conspire: "the evidence showed that after beating and stabbing each victim numerous

time, the *assailants* cut the throat of every victim[7] virtually from ear to ear and down to the vertebra." (SRB 6 (emphasis added).) The evidence does not compel the conclusion that all coconspirators committed each of those acts or that all coconspirators premeditated and deliberated each of the four homicides. There is no evidence that Cruz was the actual killer of Paris or Colwell, the evidence is conflicting as to who the actual killer(s) of Raper and Ritchey were, and appellant testified that he did not kill anyone, had no intent to kill anyone when they went to Elm Street and had no intent that anyone be killed once they arrived there. (See AOB 30-32; ARB 128-133.) While respondent's view of jointly-held intent to kill/premeditation-and-deliberation is one possible view of the evidence, it is not compelled by the evidence. Other views, such as that the evidence showed a conspiracy to commit implied-malice murder without an intent to kill, followed by premeditated and deliberate murders committed thereafter by individual coconspirators, and attributed to all coconspirators by application of vicarious liability under the natural and probable consequences doctrine, is also supported by the evidence and the instructions in this case. It is that interpretation of the evidence, instructions and verdict, not refuted by respondent, that require reversal of Count V and, consequently, of Counts I-IV.

3. Respondent mischaracterizes the instructions as requiring the jury to find premeditation and deliberation for conspiracy to commit murder.

Respondent also claims that the trial court instructed the jury "it could not find appellants guilty of ... conspiracy to commit murder unless it found (in addition to malice) that appellants harbored the mental states of

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[7] The evidence is that Raper's throat was not cut in that manner. (See 18 RT 3087-3097, 3110-3112, 3138-3144; AOB 24.)

premeditation and deliberation," citing 36 RT 6507-6508. (SRB 3.) This is demonstrably untrue. As noted in the Opening Brief (AOB 257-259) and the Supplemental Brief (ASB 6-7), the instruction quoted by respondent, in respondent's footnote 1, requires malice aforethought, premeditation and deliberation for "conspiracy to commit *first-degree murder*." (36 RT 6508 (emphasis added).) The instruction did not require premeditation for conspiracy to commit second degree murder. Moreover, the trial court also instructed the jury it could find conspiracy to commit second-degree murder without premeditation and deliberation, and without express malice. (See AOB 258-259; ASB 6-7; 8 CT 1896, 1938; 36 RT 6492-6493, 6507-6508.) That the instructions allow a finding of conspiracy to commit second-degree murder based on implied malice, i.e., without intent to kill, is *Swain* error, the very error which respondent has conceded occurred in this case.

4. The general verdicts returned by the jury are consistent with the jurors having relied upon an invalid legal theory regarding the conspiracy, and thus of the application of coconspirator liability in the four homicide counts.

As shown in Cruz's previous briefing, the verdict on Count V found appellant guilty of "conspiracy to commit murder" without specification of the degree of the target crime, murder. (9 CT 2293; see AOB 261-263; ASB 8-9.) On its face, that verdict is thus wholly consistent with a finding by the jurors, or some of them, that the conspiracy was to commit implied-malice murder without an intent to kill. The verdict alone, on its face, does not establish a finding of conspiracy to commit premeditated-and-deliberate murder, or even express-malice murder. Nowhere does respondent acknowledge this crucial fact. Instead, respondent repeatedly refers to the verdict as if it was explicitly based on a finding of express malice murder. This flaw in respondent's argument, repeated throughout the relevant

portion of the initial Respondent's Brief, was highlighted in Cruz's Reply Brief (see e.g., ARB 122-135.) Nevertheless, without addressing the flaw identified in the Reply Brief, or even acknowledging that the Reply Brief addressed the argument at all, respondent repeats it here, in almost as many guises as in the initial Respondent's Brief.

Respondent relies on various versions of an analysis which relies upon one basic point – respondent repeatedly contends that "murder" in the Count V verdict of conspiracy to commit murder means murder with express malice, i.e., intent to kill. Having conceded the instructional error that defined murder for the jury as including implied-malice second degree murder, respondent analyzes the verdict as if that instructional error had not occurred. Respondent does not even attempt to assess the actual effect of the error on the jurors and their verdict. As a result, respondent's analysis of the verdict in this case is fundamentally flawed and without merit.

Respondent apparently makes an unwarranted assumption that the conspiracy verdict was for express malice murder because the four murder counts (Counts I-IV) themselves required findings of premeditation and deliberation. (SRB 7.) However, respondent is thus repeating a flawed assumption first made in the initial Respondent's Brief (RB 264) and fully rebutted in Cruz's Reply Brief. (ARB 127-128.) Respondent's assumption fails to acknowledge, the substantial material differences in the relevant time frames for the required intents for (1) the conspiracy and (2) the homicides themselves. As demonstrated in Cruz's Reply Brief, the relevant time at which the intent for the conspiracy was to have been formed was at the formation of the conspiracy, not at the culmination. (See *Swain*, *supra*,

12 Cal.4th at p. 600[8].) The intent at the time each of the homicides was thereafter committed (by whoever committed them), may have been *relevant* to a determination of what conspiracy was originally entered into, but was not *determinative* on that question. (ARB 130-133.) Respondent nowhere directly disputes this point, or even mentions it.

According to the prosecution theory at trial, the conspiracy was entered into, and thus the relevant intent to conspire must have been formed, at the Camp, before traveling to the house at Elm Street, and before the melee resulting in the four homicides. Based upon the evidence and the overt acts found by the jury, e.g., driving to Elm Street., the conspiracy as found by the jury was formed before the coconspirators drove to Elm Street, where the homicides occurred. In contrast, the relevant intents for each of the four homicides could have been established as late as immediately prior to the commission of each of those homicides. Nothing in the instructions, the verdicts, the evidence or the law required a finding that the intent at the time of the formation of the conspiracy was the same as the intent at the time of each of the homicides. Respondent cites no factual or legal support for a conclusion to the contrary.

Moreover, the instructions given to the jury in this case allowed the intent of actual killers in committing those offenses to be imputed to non-actual killers by virtue of the natural and probable consequences doctrine. As a result, the general verdicts of first degree murder on each homicide cannot be read as findings of actual premeditation and

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[8] "'As an inchoate crime, conspiracy fixes the point of legal intervention at [the time of] agreement to commit a crime'" (*Swain*, 12 Cal.4th at p. 600 [quoting Model Pen. Code & Commentaries (1985) com. 1 to § 5.03, pp. 387-388]).

deliberation as to any specific coconspirator in connection to the killing of any specific homicide victim, let alone establish an actual state of mind shared by all of the coconspirators. The very problem with the conspiracy instructions was that they erroneously allowed that imputation to coconspirators of intents and mental states formed by some coconspirators after the formation of the conspiracy, based upon an invalid legal theory of conspiracy to commit implied-malice murder. (*Swain*, *supra*, 12 Cal.4th at p. 607.)

The same reasoning undercuts respondent's contention that because the target offense of the conspiracy was found to be murder, and the jury returned verdicts of first degree murder as to the homicides, the conspiracy must therefore have been to commit first degree murder. (SRB 6.) Nothing compels such a conclusion. Respondent cites no authority which suggests, much less holds, that the target offense of the conspiracy needs be identical to the ultimate offenses committed by each perpetrator. Nor does respondent cite any authority that holds that the intent to conspire and the mental state of the target offense are necessarily identical to the intent of the perpetrators of the ultimate offense at the time the ultimate offense is committed by each perpetrator. As above, the instructions given to the jury in this case allowed the intent of actual killers in committing those offenses to be imputed to non-actual-killers by virtue of the natural and probable consequences doctrine. A difference between the target crime agreed upon at the inception of a conspiracy and a different crime subsequently committed by a coconspirator is at the base of the natural and probable consequence doctrine which allows vicarious attribution of the intent of the perpetrators of an offense other than the target crime to each

co-conspirator,[9] as it did here. If the ultimate crime committed by a coconspirator could retroactively transform the original conspiratorial intent, there would be little use for the natural and probable consequences doctrine.

Respondent also argues that the jury found that appellants were part of the conspiracy when all five overt acts were committed (SRB 4), and that "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." (SRB 5.) For this argument, respondent cites and relies upon *People v. Jurado* (2006) 38 Cal.4th 72, and *People v. Cortez* (1998) 18 Cal.4th 1223. As shown in Cruz's Reply Brief and below, *Jurado* and *Cortez* postdate *Swain,* did not involve *Swain* error, and did not address the effect of *Swain* error. They do not support respondent's argument in this case. (ARB 133-134; see pp. 17-20, *post.*)

In a similar manner, respondent argues that the overt acts themselves "demonstrated the jury's conclusion that appellants conspired to commit murder and must have harbored an intent to kill." (SRB 5.) Again, this argument was refuted in Cruz's reply brief. (ARB 130-131.) If the conspiracy to commit murder was based upon implied malice theory without an intent to kill, which the instructions erroneously allowed, then Cruz's participation in the conspiracy when all five overt acts were committed adds nothing to the analysis of whether or not appellant had express malice or an intent to kill *at the time the conspiracy was formed*, or

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[9] But see *People v. Chiu*, *supra*, 59 Cal.4th 155, which holds that the mental states of premeditation and deliberation cannot be attributed vicariously to a coconspirator through the natural and probable consequences doctrine, a separate error in the instructions here. (See ASB Arg. VII.C.2.; Arg. VII.B., *post.*)

at any other time.

For a finding of conspiracy to commit murder based upon express malice/intent to kill, that express malice/intent to kill had to exist at the time the conspiracy was formed (*Swain*, *supra*, 12 Ca1.4th at pp. 599-600), not at the time overt acts undertaken *after* the formation of conspiracy occurred. None of the overt acts is inconsistent with implied malice. Respondent cites no authority to support such a concept. Moreover, as noted the evidence is substantially conflicting as to who committed which homicide, and there is substantial evidence that appellant committed none of them. (See, e.g., AOB 129-130, 266, 403-407; ARB 131, fn. 44.)

In a similar vein, respondent claims "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." (SRB 5.) Again, respondent ignores the demonstrations made in Cruz's Reply Brief which undercut respondent's point. If the co-conspirators went to the Elm Street house *not* with an intent to kill, but *with* wanton disregard of the probability that deaths would occur as a result of the initial attacks on the Elm Street house or of the melee that attack would inevitably spark, the jury, under the instructions and the evidence, could find a conspiracy to commit implied malice murder without intent to kill. (See ARB 125, 134; *Alexander*, *supra*, 140 Cal.App.3d at pp. 665-666.)

As in the initial Respondent's Brief, respondent also relies upon the continuing nature of a conspiracy to argue that membership in the conspiracy when each of the homicides occurred somehow establishes that the conspiracy was entered into with the intent to kill. (SRB 5-6; see RB 268.) This argument is refuted in Cruz's Reply Brief:

> Whether or not the eventual killings were done with express malice does not establish whether *at the time the alleged conspiracy was entered into* appellant or any other defendant or co-conspirator acted with express or implied malice.

> Respondent continues to confuse the state of mind at the time of the commission of the homicides with the state of mind at the time of the formation of the conspiracy. It is the latter point in time which is at issue in the flawed conspiracy instructions. *(Swain, supra,* 12 Cal.4th at p. 600.) The continuing nature of conspiracy is central to coconspirator liability for the natural and probable consequences of the conspiracy, but is irrelevant in determining what the jury in this case actually decided concerning whether appellant had express malice or an intent to kill at the time he entered into any conspiracy.

ARB 133.) Respondent does not acknowledge or otherwise address this point, and does nothing to refute it.

Respondent also attempts to argue the instructional error was harmless because the prosecution never suggested the conspiracy charge could be predicated on anything less than intent to commit murder. (SRB 6.) However, respondent provides no authority for concluding that the prosecution's theory of the case is determinative here, where the existence and details of any conspiracy, including the relevant mental states, were contested by the defendants.

As in the initial Respondent's Brief, respondent relies upon *People v. Jurado* (2006) 38 Cal.4th 72, 123, to conclude that conspiracy to commit murder must necessarily involve an intent to kill, and that therefore the instructions on conspiracy required specific intent to agree to commit the offense of murder with an intent to kill. (SRB 4.)

Jurado is of no help to respondent's position. As demonstrated in the Cruz's Reply Brief, *Jurado* is a post-*Swain* opinion which did not involve, or discuss *Swain* error. (ARB 133-134.) *Jurado* thus defines conspiracy to commit murder as involving an intent to kill *in the absence of erroneous instructions to the contrary.* Since the instructions in this case were erroneous under *Swain*, they were equally erroneous under *Jurado*.

The instructions at issue in *Jurado* simply did not allow for conspiracy to commit implied malice murder, as the instructions in appellant's case did. It is the *Swain* error in this case which makes *Jurado* inapposite and requires reversal of the conspiracy verdicts as well as of all four murder counts and the special circumstance finding. (See ARB 133-134.)

Jurado is further distinguishable from the situation in this case, as pointed out in Cruz's Reply Brief. (ARB 134.) In that case, the trial court's instructions defining the charged offense of conspiracy erroneously omitted part of the specific intent element of that crime. This Court found the error harmless in that case because the defendant in that case conceded that the jury's verdict in that case that he was guilty of the first degree murder necessarily included a finding that he himself had a specific intent to kill the victim. (*People v. Jurado*, *supra*, 38 Ca1.4th at p. 123.) Moreover, the defendant was unable to point to any evidence in the record showing that his coconspirators agreed to kill the victim without the specific intent to do so. (*Ibid.*)

Here, by contrast, there was ample evidence at appellant's trial which could have led a rational juror – instructed as they were – to conclude that appellant conspired without any intent to kill, but "with wanton disregard of the probability that deaths would occur as a result" of their actions. (*People v. Alexander*, *supra*, 140 Cal.App.3d at pp. 665-666; ARB 125, 128-129.) Indeed, appellant denied any intent to kill, and the other testifying coconspirators (including prosecution witness Michelle Evans) denied any intent to kill. (See, e.g., 24 RT 4211-4212, 4338-4339; 29 RT 5008-5009.) Thus, unlike *Jurado*, the issue of intent was contested in appellant's trial, and *Jurado* is simply inapposite. Nor, as demonstrated above, do the general verdicts on Counts I-IV reflect a jury finding that Cruz had an intent to kill. Again, however, respondent ignored the showing

made in the reply brief and simply repeats here the analytical error made in the initial Respondent's Brief.

Respondent also relies on *People v. Cortez, supra,* 18 Cal.4th at p. 1232, for the proposition that

> 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."

(SRB 5.) That proposition is true if, and only if, proper instructions are given and no *Swain* error occurs. *Cortez,* while following *Swain*, was *not* addressing the prejudicial effect of *Swain* error, for no *Swain* error occurred in *Cortez:*

> The necessary instructions were given in this case. The jury was instructed that murder is "the unlawful killing of a human being . . . with malice aforethought," and *malice aforethought was further specifically defined as intent to kill.* These instructions were sufficient to define the elements of the target offense of murder *simpliciter* in connection with the charged conspiracy.

(18 Cal.4th at p. 1239 (emphasis added).) Because *Swain* error *did* occur in appellant's trial, as respondent concedes, *Cortez* is simply inapposite. This point was made in Cruz's Reply Brief. (ARB 134-135.) Again, however, respondent has ignored the showing made in the reply brief and repeats here the analytical error made in the initial Respondent's Brief.

By citing to *Jurado* and *Cortez*, respondent appears to suggest that, after *Swain*, it is now clear that conspiracy to commit "murder" means conspiracy to commit "first degree murder" and that, therefore, appellant's jury's verdict of conspiracy to commit murder must mean that they found appellant guilty of conspiracy to commit first degree murder. This makes

no sense. Appellant's trial preceded *Swain* by four years, and the verdicts in this case must be interpreted in light of the instructions upon which they were based. Those instructions, as those given in *Swain*, were erroneous because conspiracy to commit murder *required* a jury finding of express malice/intent to kill. (12 Cal.4th at p. 599.) The instruction given to Cruz's jury did not require a finding of express malice/intent to kill. And because an instructional error allowing conviction on a legally invalid theory requires reversal if the record does not clearly establish the conviction was based on a valid ground (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1130), reversal of appellant's conviction on Count V is required, as it was in *Swain* (12 Cal.4th at p. 607).

To similar effect, respondent argues "[i]t is inconceivable that the jury believed appellants[[10]] premeditated and deliberated about the murders, but did not intend to commit murder, i.e., did not harbor express malice." (SRB 3-4.) In support respondent cites *Cortez*, *German v. Superior Court* (2001) 91 Cal.App.4th 58, *People v. Collie* (1981) 30 Cal.3d 43, and *People v. Koontz* (2002) 27 Cal.4th 1041. However, nowhere does respondent cite any authority which interprets *Swain* error in the peculiar manner respondent proposes. None of the cases cited does so.

As demonstrated above, *Cortez* is a post-*Swain* decision which does not involve *Swain* error. Its analysis is inapposite here, where *Swain* error did occur. *German v. Superior Court, supra,* 91 Cal.App.4th 58 held that when a verdict of conspiracy to commit second degree murder was overturned on appeal due to *Cortez*, the defendant could not be retried for a conspiracy to commit first degree murder. (91 Cal.App.4th at p. 64.) That

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[10] Again, the general verdicts here do not reflect that the jury found that Cruz personally premeditated and deliberated any of the homicides.

holding does not support respondent's position. The relevant point in *German's* analysis for the analysis here is that *Cortez*, which held that there is no crime of conspiracy to commit second degree murder (18 Ca1.4th at pp. 1237-1240) did not thereby retroactively transform a verdict of conspiracy to commit second degree murder into a conspiracy to commit first degree murder as respondent tries to do here where the verdict for conspiracy to commit murder left the degree of murder unspecified. Rather, the erroneous verdict of conspiracy to commit second degree murder in *German* resulted in an implied acquittal of conspiracy to commit first degree murder, precluding retrial on *either* theory. (91 Cal.App.4th at pp. 64-65.)

Respondent cites *People v. Collie, supra,* 30 Cal.3d at p. 62, as holding that "deliberation and premeditation 'entail a specific intent to kill.'" (SRB 4.) That quote, however, ignores the context in which it appears – the reversal of a conviction for attempted second degree murder due to an erroneous instruction allowing the conviction to be based on implied malice without an intent to kill, similar to the situation here:

> [T]he trial court erred in instructing the jury that it need not find a specific intent to kill in order to convict of attempted murder. [] The instructional error was harmless regarding the conviction for the attempted first degree murder of Mrs. Collie, because the jury was properly instructed that the verdict required findings of premeditation and deliberation, which entail a specific intent to kill. *But the verdict of guilt on the attempted second degree murder charge was not insulated from error.* Although the jury was properly instructed that a specific intent to kill would satisfy the intent requirement of an attempted second degree murder charge, it is impossible to determine whether the verdict rested on that ground, for which there was little evidence, or on the impermissible basis of defendant's wanton conduct, which was more clearly supported by the record. Because we cannot know on which instruction the jury relied, the conviction for attempted second

degree murder of defendant's daughter must be reversed. (*People v. Collie, supra*, 30 Cal.3d at p. 62.) Thus, insofar as it is relevant to this case, rather than supporting respondent's position, *Collie* supports appellant's contention that the error in the conspiracy instructions in this case requires reversal of Count V, and of the resulting murder convictions and special circumstance.

People v. Koontz, supra, 27 Cal.4th 1041, also cited by respondent, does indeed note that "deliberate and premeditated first degree murder requires more than a showing of intent to kill." (*Id.* at p. 1080.) However, that case was not examining *Swain* instructional error, but the issue of sufficiency of the evidence. It is thus wholly inapposite to the analysis of the *Swain* error on the verdicts in this case. (Cf. *People v. Mil* (2012) 53 Cal.4th 400, 418; see ARB 135-136.)

5. The erroneous instructions require reversal of all five counts and the special circumstance finding.

The instructions here specifically told the jury that "[i]n the crime of . . . conspiracy to commit second degree murder, the necessary mental state is malice aforethought" (8 CT 1938), and that malice could be "either express or implied. (8 CT 1896.) The instructional error was not simply an ambiguity in the instructions which the jurors might misinterpret. The instructions clearly set forth for the jury a legally incorrect theory of guilt regarding the conspiracy which did not require a jury finding of a necessary element, i.e., intent to kill. Thus, the instructions erroneously, but clearly, informed the jury that they could return a conviction of conspiracy to commit murder based upon a theory of conspiracy to commit second degree murder based on implied malice, without finding an intent to kill. Respondent's refusal to acknowledge the possibility that the jury returned

its verdict on Count V based upon that legally incorrect theory cannot be squared with the instructions and the verdicts themselves.

The prosecutor's argument or understanding of the instructions given to the jury doesn't define the jury's options or its verdict, despite respondent's assertion to the contrary. (SRB 6.) Nor does respondent cite any authority for such a concept. The jury's verdicts are bound by the instructions and the evidence, which here combine to demonstrate that the jury's general verdict of conspiracy to commit murder may have been based upon an invalid theory of implied malice, without a finding of an intent to kill. To be sure, that verdict may instead have been based on a valid theory. That *possibility*, however, is not determinative, and respondent cites no authority which suggests, much less holds, that it is determinative. The issue instead is whether it can be determined that the verdict *was* based on a valid theory. (See ASB 10-12.) In this case, that determination cannot be made, and as in *Swain*, the conviction on Count V must be reversed. Respondent has presented no basis for preserving the convictions on Counts I-IV upon reversal of Count V, nor is there any such basis. As a result, the entire guilt judgment, including the special circumstance, must be reversed.

Respondent argues "several categories of evidence established that appellants had a premeditated and deliberate intent to kill," citing *People v. Welch* (1999) 20 Cal.4th 701, 758. (SRB 6.) The citation to *Welch*, however, refers to a section of that opinion addressing review of the sufficiency of the evidence to support a conviction, not instructional error. It does not hold that evidence which is sufficient to sustain a verdict is determinative of the effect of instructional error upon the ultimate jury verdict. *Welch* is thus wholly inapposite. (See *People v. Mil*, *supra*, 53 Cal.4th at p.418; see ARB 135-136.) The "several categories of evidence" relied upon by respondent are relevant to sufficiency of the evidence, but do

not compel a finding that the *Swain* error was harmless. Nor has respondent cited any case actually supporting this argument. As this Court stated in *Mil*:

> Although we agree that this evidence would be sufficient to sustain a finding of [the omitted element] on appellate review, under which we would view the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of any facts the jury might reasonably infer from the evidence [], our task in analyzing the prejudice from the instructional error is whether any rational factfinder could have come to the opposite conclusion.

(*Mil*, 53 Cal. 4th at p. 418.) This point was made in the Reply Brief. (ARB 135-136.) Again, respondent does not acknowledge or refute this point made in the Reply Brief.

Moreover, under *Neder v. United States* (1999) 527 U.S. 1,19 , this Court must

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

(emphasis added); *Mil*, 53 Cal. 4th at p. 417.)

As in *Mil*, cited and quoted in Cruz's Reply Brief, appellant personally contested whether he personally killed anyone, or had any intent to kill anyone. The question of whether appellant had any intent to kill at any time was contested, and there was sufficient evidence for the jurors to have returned the verdicts they did without finding that appellant had an intent to kill in the formation of the conspiracy. The verdicts and findings do not demonstrate that the jury necessarily determined that he had such intent in the formation of the conspiracy or as to any specific homicide.

Respondent has not and cannot carry the state's burden of proving the jury verdict would have been the same absent the error. (*Neder*, *supra*, 527 U.S. at p. 19.) The instructional error allowed appellant to be convicted on a legally invalid theory, mandating reversal in this case. (*People v. Guiton*, *supra*, 4 Cal.4th at pp. 1128-1130; *Swain*, supra, 12 Cal.4th at p.607; *People v. Chiu*, *supra*, 59 Cal.4th at p. 167.)

6. Conclusion

Respondent's arguments to preserve the conviction in Count V, and to thereby preserve the convictions in Counts I-IV, essentially come down to a bald assertion, untethered to controlling case law or the instructions given in this case, and repeated under various guises, that "... simple logic dictates that the jury could not have found that appellants conspired to commit murder without intending to kill." (SRB 7.)

However, review of the controlling law, the evidence in the case and the instructions actually given to Cruz's jury provide the bounds of the only logic relevant to the determination of the effect of the instructional error upon the judgment in this case. The logic of the instructions, in the light of all of the evidence and the controlling law, dictates that jury could have based its general verdict of conspiracy to commit murder on a finding that the coconspirators could have conspired to commit implied malice second degree murder, i.e., murder without an intent to kill. That logic is supported by *Swain* and *Alexander*, and overcomes respondent's simplistic "logic."

Respondent makes no argument that the convictions on Counts I-IV can survive reversal of Count V. Thus, respondent concedes, sub silentio, that if Count V is reversed, Counts I-IV must also be reversed. Appellant's Reply Brief, Argument VII.A., addressed and refuted all of respondent's arguments to preserve the conviction in Count V. Respondent repeats those arguments here, but makes no attempt to acknowledge, much less rebut or

refute the arguments and authorities presented in the Reply Brief. Nor does respondent cite any controlling authority supporting the peculiar approach respondent has taken to assessing the effect of *Swain* error on the verdicts in this case.

For the foregoing reasons, the error in the conspiracy instructions, which respondent concedes, cannot be found harmless beyond a reasonable doubt on this record. The conviction on all five counts must therefore be reversed.

B. By Allowing the First Degree Murder Verdicts in Counts I-IV to Be Based upon the "Natural and Probable Consequences" Doctrine, the Instructions Allowed Those Verdicts to Be Based on a Legally Invalid Theory.

In the Supplemental Brief, Cruz argued that, pursuant to *People v. Chiu* (2014) 59 Cal. 4th 155 (*Chiu*), the instructions which allowed Cruz's convictions for first-degree murder in Counts I-IV based upon the natural and probable consequences doctrine as a coconspirator were erroneous. Because it cannot be determined whether the convictions on those counts were based on a valid theory, the convictions on all four homicide counts, as well as the special circumstance, must be reversed. (ASB Arg. VII. C. 2.; *Chiu*, 59 Cal.4th at p. 167.)

Respondent concedes that the instructions on the natural and probable consequences doctrine were error. However, respondent contends the error was not based upon *Chiu*. Rather, respondent argues there was no basis for the jury to rely on the natural and probable consequences doctrine to convict appellant of premeditated and deliberate murder on Counts I-IV, and that the instructions on natural and probable consequences had no basis in the evidence. (SRB 8.)

Other than cases which apply the *Watson*[11] standard to state law errors involving instructions which have no application to the case (SRB 11), respondent cites no case, statutory or other authority applying such an analysis to even a remotely analogous factual or legal scenario. Instead, the basis for respondent's argument is essentially the same flawed analysis upon which respondent based his argument that the *Swain* error as to Count V is harmless. In other words, respondent argues that because the target crime of the conspiracy was "murder," there was no need for the jury to use the natural and probable consequences doctrine to extend liability from the target offense to the offenses charged. (SRB 9.)

However, respondent nowhere acknowledges that, as demonstrated in Cruz's prior briefing and in section A. of this argument, the verdict returned by the jury, in light of the erroneous instructions given, does not compel the conclusion that the target crime was *express-malice* murder, much less premeditated and deliberate murder. (See ARB VII.A.; section A., *ante*.)

Respondent again ignores the demonstration set forth in appellant's prior briefing that establishes that the evidence in this case, considered in light of the erroneous instructions given, supported a conclusion by the jurors that the target crime of the conspiracy was implied-malice second degree murder, and that the jury's verdict on Count V for conspiracy to commit murder, without specification of degree, is wholly consistent with such a result. (AOB VII.B.; ARB VII.A.; ASB VII.C.1.[12])

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[11] *People v. Watson* (1956) 46 Cal.2d 818.

[12] The cited portions of Cruz's Opening and Reply Brief were specifically incorporated into this argument in Cruz's Supplemental Brief. (ASB 2-3 ["Appellant incorporates herein by this reference his Opening and Reply Briefs, including Arguments I, II, VII and VIII, the Statement of

Respondent argues that "Assuming the jury relied on the conspiracy theory for the murder charges..., 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." (SRB 10) This argument is simply wrong. If the target offense found by the jurors was invalid implied-malice second-degree murder as the flawed conspiracy instructions allowed, no express malice, no intent to kill, and no premeditation and deliberation were part of the target crime the jurors found. In the absence of such findings, application of the natural and probable consequences doctrine would have been necessary to impute premeditation and deliberation as to the homicide of any particular victim onto any coconspirator who was not the actual killer of that particular victim.

If the jury's verdict of conspiracy to commit murder was based on the erroneous implied-malice theory, the only ways the jurors could have found Cruz guilty of premeditated and deliberate murder of all four victims was either as the actual killer (which is not supported by substantial evidence as to Paris or Colwell, and supported only by conflicting and contested evidence as to Raper and Ritchie) or by attribution of the state of mind of the actual killers to Cruz through the natural and probable consequences doctrine as a coconspirator. The latter theory, however, allows only the vicarious attribution of an intent to kill to a conconspirator, not the mental state of premeditation and deliberation. (*Chiu, supra,* 59 Cal.4th at pp. 166-167.) If the findings of premeditation and deliberation were based upon the natural and probable consequences doctrine, therefore, those findings are invalid and must be reversed.

Case and the Statement of Facts."].)

As demonstrated in section A, above, the general verdicts on Counts I-IV did not specify which coconspirator was determined by the jury to have been the actual killer of any particular victim. Nor did the general verdicts on those counts specify whether Cruz had been found to have been found to have personally premeditated and deliberated or whether that state of mind was imputed to him as a coconspirator. If the latter, the general verdicts do not specify whether the jury relied on direct coconspirator liability or liability based upon the natural and probable consequences doctrine. As a result, it cannot be determined from the general verdicts returned by the jury whether the jury relied upon a valid theory or not. As in *Chiu* and *Rivera*, the convictions of first degree premeditated and deliberate murder cannot stand. (*Chiu, supra,* 59 Cal.4th at p. 167; *Rivera*, 234 Cal.App.4th at pp. 1357-1358; see ASB 16-18.))

Respondent attempts to distinguish *Chiu* and *People v. Rivera* (2015) 234 Cal.App.4th 1350 (*Rivera*) on the basis that those cases involve the use of the natural and probable consequences doctrine to impose liability for crimes other than the charged offenses, whereas the crimes charged here, according to respondent, were the target offenses. (SRB 10.) Even assuming arguendo that such a distinction might matter in another case, it does not preserve the convictions in this case. Respondent fails to acknowledge that while first-degree murders were charged in Counts I-IV, the target crime charged on the conspiracy was defined not as first degree murder but only as murder, which in turn was defined in the instructions to include implied- and express-malice second-degree murder. While respondent conceded the error of such instructions, nowhere in respondent's briefing is the actual effect of the error acknowledged.

Nor does respondent acknowledge that, as demonstrated in Cruz's previous briefing and above in this brief, the jury's general verdict of

"conspiracy to commit murder" without specification of degree does not differentiate between any of those theories, and cannot be read to have necessarily found conspiracy to commit express-malice, intentional murder, let alone premeditated and deliberate murder. (See section A., *ante.*)

Respondent also claims "Nor does Cruz suggest that the jury had any reason to believe there was any target crime other than murder." (SRB 9.) As explained in the previous section, this is inaccurate. Cruz demonstrated in his previous briefing, and in section A. above, that the instructions given to the jury allowed for the jury to find the target crime of murder under an implied malice second-degree murder theory, with no finding of intent to kill on the part of Cruz. Cruz also demonstrated that the verdict on Count V was a general verdict of conspiracy to commit murder without specification of the degree of the target crime. The instructions allowed for each *perpetrator* of each homicide to be found directly guilty of premeditated and deliberate murder for the homicide that perpetrator committed. However, the instructions allowed for non-perpetrator coconspirators to be vicariously liable for that more culpable state of mind without having personally harbored premeditation and deliberation, let alone intent to kill. The mechanism for that, as set out in the instructions, was the natural and probable consequences doctrine.

As explained in the previous briefing, and in section A. above, the evidence of appellant's intent in entering into a conspiracy, and whether he was the actual perpetrator of any of the killings was conflicting, and those issues were contested by appellant at trial. The record cannot be reasonably read to compel findings of actual premeditation and deliberation against appellant. Nor can the general verdicts be read to compel the conclusion that appellant entered into the conspiracy with an intent to kill, or that he was the actual killer of any of the four victims.

With nothing but a bald assertion, respondent claims, "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." (SRB 10-11.) On the contrary, as appellant has demonstrated throughout his briefing, the evidence and the instructions were unquestionably subject to interpretation by the jury that what was intended at the inception of the conspiracy was a non-homicidal attack on whoever might be at the Elm Street house, albeit "with wanton disregard of the probability that deaths would occur as a result" of their actions. (*People v. Alexander*, *supra*, 140 Cal.App.3rd at pp 665-666; see ARB 125, 134; section A, *ante*.)

It may have been the prosecution's theory that the conspiracy was expressly to kill Raper and everyone who was with him. Unfortunately for respondent's position, the prosecution's theory does not govern the jury's verdicts, or this Court's analysis of the verdicts in light of all of the evidence in the record and the instructional errors. The evidence, under the instructions, was subject to different interpretations, especially given that no one but Michelle Evans, whose credibility was in substantial and serious question, testified to such a conspiracy as the prosecution saw it. Even she didn't think anyone was going to get killed. (24 RT 4211-4212, 4338-4339.)

Respondent also misstates and mischaracterizes the state of the evidence as "undisputed" (SRB 11) on various points. Contrary to respondent's mischaracterization, the evidence *was* disputed as to whether "Cruz organized the group that went to the [sic] Raper's house." (*Ibid.*) It *was* disputed whether "[he supplied the weapons." (*Ibid.*) It *was* disputed whether "Cruz asked [Evans] to draw the map of the house." (*Ibid.*) It *was*

disputed whether "Cruz planned every detail of the assault." (*Ibid.*) It *was* disputed whether "Cruz assigned tasks to the co-conspirators." (*Ibid.*) It *was* disputed whether "he expressly stated the goal was to kill everyone in the house." (*Ibid.*) Disputes in the evidence are more thoroughly discussed in Cruz's Opening Brief and Reply Brief (see, e.g., AOB VII.B.; ARB VII.A.), and those discussions are expressly incorporated into Argument VII of Cruz's Supplemental Brief. (ASB 2-3.) There is no explanation, or reasonable justification, for respondent's reckless mischaracterizations of the evidence at this stage of the appellate proceedings. Suffice it to say that respondent's reliance on the false assertions that the evidence was not in dispute renders respondent's analysis of the effect of the instructional errors as fundamentally, and irreparably, flawed.

To the same effect, respondent claims, falsely, that "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.)" (SRB 11.) This claim, and the citation to the record, essentially mirror the claim erroneously made in the prior section of Supplemental Respondent's Brief, at page 3, including footnote. 1. As is pointed out above (pp. 10-11, ante), the actual language of the instruction upon which respondent relies, quoted in respondent's footnote 1, does not support respondent's claim. The instruction quoted therein requires malice aforethought, premeditation and deliberation for "conspiracy to commit *first-degree* murder." (Emphasis added.) The jury's verdict on Count V did not find Cruz guilty of conspiracy to commit first-degree murder. Rather, the verdict found Cruz guilty of conspiracy to commit murder, with the degree of that murder unspecified. The instructions given to the jury also allowed them to find conspiracy to commit implied-malice or express-malice second-degree murder. The verdict is consistent with any of those alternatives, and as

explained throughout Cruz's briefing, does not compel the conclusion that the jury found the conspiracy was entered into with an intent to kill, let alone with premeditation and deliberation.

Respondent's attempt to recharacterize the error as merely an instruction with no application to the facts seems to be an attempt to avoid the constitutional implications by recasting the error as merely state law error. (See SRB 11.) Since that characterization of the error is without any basis in the record and dependent upon mischaracterizations or misunderstandings of the record, respondent's discussion of the *Watson* standard for review of state law error is beside the point and inapplicable to analysis the effect of the error here.

However, respondent claims in the alternative that the error would be harmless beyond a reasonable doubt for all the reasons stated in the previous section. (SRB 12.) Respondent claims "in particular, it is certain that, if the jury based the murder convictions on the 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." (SRB 12.) As demonstrated in section A above, and in Cruz's Reply Brief, there is no basis for concluding with any certainty that the jury based its conspiracy verdict or the murder convictions upon an understanding, or finding, that appellant harbored express malice. (ARB Arg. VII.A.; section A., *ante*.)

Other than respondent's flawed attempt to recharacterize the general verdicts in this case without regard to the *Swain* error and the *Chiu* error contained in the instructions, there is no basis for this Court to conclude with any certainty that either Count V or Counts I-IV were based on valid legal theories. As stated in *Chiu*, the verdicts on Counts I-IV must be

reversed. (59 Cal.4th at pp 167-168; see also *Swain, supra*, 12 Cal.4th at p. 607.)

Respondent makes no argument that, if the verdicts are compatible with a jury finding of conspiracy to commit implied malice murder, without an intent to kill, that nevertheless the instructions concerning natural and probable consequences had no applicability to the convictions of Counts I-IV. Thus, respondent concedes sub silentio that, in that case, *Chiu* would mandate reversal of those four counts.

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XVII

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

In his Supplemental Brief, appellant demonstrated that in his argument to the jury during penalty phase, the prosecutor made substantial and improper invocations of the Judeo-Christian Bible as relevant to the jurors' penalty decision. (ASB 19-29.) Respondent contends that "(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." (SRB 12.) The arguments made by respondent for rejecting this claim of error are addressed in Cruz's Supplemental Brief, so the issues are joined and no further reply herein is necessary.

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CONCLUSION

For all the reasons stated above and in Cruz's Opening, Reply and Supplemental Briefs, the guilt and penalty verdicts must be reversed in their entirety.

DATED: October 12, 2016

Respectfully submitted,

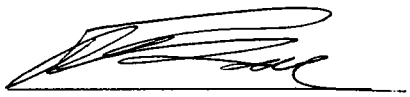
WILLIAM T. LOWE

Attorney for Appellant
GERALD DEAN CRUZ

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

I, William Lowe, am the Attorney assigned to represent appellant Gerald Dean Cruz in this automatic appeal. I conducted a word count of this brief using my office computer software. On the basis of that computer generated word count I certify that this brief is 9,932 words in length.

DATED: October 12, 2016



WILLIAM LOWE
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

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

I, the undersigned, declare as follows:

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

On October 12, 2016, I served the attached

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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

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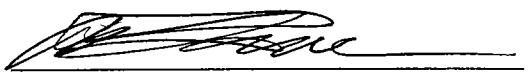
I declare under penalty of perjury that the foregoing is true and correct. Executed on October 12, 2016, at El Cerrito, California.



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