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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. **DANIEL NUNEZ** and WILLIAM TUPUA SATELE, Defendants and Appellant's.	Supreme Court No. S091915 Los Angeles Superior Court No. NA039358

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

SUPPLEMENTAL REPLYBRIEF

on behalf of

DANIEL NUNEZ

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Appellant DANIEL NUNEZ

DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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SUPPLEMENTAL REPLY BRIEF

on behalf of

DANIEL NUNEZ

INTRODUCTION

In this brief, appellant does not reply to arguments by respondent that are adequately addressed in his opening brief. The failure to address any particular argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a

concession, abandonment, or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995 fn. 3, cert. den. (1993) 510 U.S. 963), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

A. The Recent Recognition in the Case Law That the Aider-Abettor's Mens Rea Is Independent of the Perpetrator's Renders Appellant's Claim "New" for Purposes of This Appeal and Establishes That Appellant Did Not Forfeit His Right to Appeal by Inaction Below

The Attorney General questions in the Introduction, though not in the Argument, of its brief whether appellant has raised a "new" claim in his supplemental brief with regard to Argument XX, which contends that the trial court incorrectly instructed the jury that principals to a crime are "equally guilty" in the language of CALJIC No. 3.00. (SuppRB 1-2.)

In formulating the argument that the "equally guilty" language of CALJIC No. 3.00 incorrectly stated the law and consequently misdirected the jury and lessened the prosecution's burden of proof, appellant principally relied upon *People v. McCoy* (2001) 25 Cal.4th 1111; *People v. Samaniego* (2009) 172 Cal.App.4th 1148; *People v. Concha* (2009) 47 Cal.4th 653; and *People v. Nero* (2010) 181 Cal.App.4th 504. (Nunez SuppBrief 3-27.) The gist of respondent's contention on this point appears to be that the instructional issue is not "new" because the 2001 decision in *People v. McCoy* predated the filing of the opening brief, which cited it, in 2007 and that although *Samaniego*, *Concha*, and *Nero* were decided after appellant filed his opening brief, those cases either echoed

arguments and concepts raised in earlier case law or in the opening brief. (SuppRB 1-2.)

As appellant explained in the Supplemental Brief, *Samaniego* and *Nero* respectively recognized that the legal principles regarding aider and abettor liability set forth in *McCoy* compelled the conclusion that the "equally guilty" language of CALCRIM No. 400 and CALJIC No. 3.00 regarding the liability of aiders and abettors was an incorrect statement of the law. (SuppBrief 10-14.) The decisions in *Samaniego* and *Nero*, however, were not issued until 2009 and 2010, respectively, well after appellant filed his opening brief.

Moreover, *McCoy*, *Concha*, *Samaniego*, and *Nero*, taken together as they were presented and discussed in the Supplemental Brief, present a body of work from the intermediate appellate courts and this Court that establishes as it has not been so clearly established before that while the determination of an aider and abettor's guilt for the substantive crime of murder and for the degree of murder is based on evidence of the combined acts of the principals, the mental state requirement of the aider-abettor's guilt determination is limited to evidence of the aider and abettor's own mental state. (SuppBrief 7-21.) This led directly to appellant's identification of this new issue and its presentation to this Court. The development of this body of law following appellant's trial also establishes why appellant did not forfeit his claim by inaction below, as appellant explains below.

However, even if this Court were to determine that this is not a new issue, it should still reach the merits. Doing so would serve appellant's Sixth and Fourteenth Amendment rights to appellate review and

the competent assistance of appellate counsel; serve the orderly administration of justice by allowing the issue to be addressed in conjunction with the other record-based issues, and obviate the need for a *habeas* claim of ineffective assistance of appellate counsel for failure to raise the issue. It would also serve substantive justice because the argument has substantial merit and should be considered by this Court in ruling on this appeal.

ARGUMENT

ARGUMENT XX.

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

A. Respondent's Contention That Appellant Forfeited Review Is without Merit

In the Supplemental Brief, appellant noted that trial counsel did not object to CALJIC No. 3.00 as it was given to the jury, and that the lack of objection did not bar appellant's claim of instructional error. It is settled law that a trial court has a duty to instruct the jury sua sponte on general principles which are closely and openly connected with the facts before the court. (Pen. Code, §§ 1259, 1469; *People v. Gutierrez* (2009) 45 Cal.4th 789, 824; see *People v. Breverman* (1998) 19 Cal.4th 142, 154.)

Furthermore, Penal Code section 1259 authorizes this Court to "review any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (See SuppBrief 21-23.) Penal Code section 1469 authorizes review under similar circumstances.

McCoy, *Samaniego*, *Nero*, and *Concha*, i.e., those cases that

comprise the core body of case authority explicitly establishing that mental state evidence critically differentiates an individual aider-abettor's liability from that of other principals, were decided after appellant's trial.

Yet, even if defense counsel had or should have known that the "equally guilty" language of CALJIC No. 3.00 was an incorrect statement of the law and failed to act to correct the instructional error, this Court would nevertheless still have authority to review it. (Pen. Code, §§ 1259, 1469.) "Claims of instructional error are reviewable when such error could only have resulted from counsel's neglect or mistake in requesting the instruction. . . ." (*People v. Beardslee* (1991) 53 Cal.3d 68, 88-89; no forfeiture of right to appeal instruction requested by trial counsel that lessened prosecution burden of proving mental state.)

Respondent points out that *Samaniego* found that the "equally guilty" language was a generally accurate statement of law and that its defendant had forfeited his right to appeal the instructional error by failing to request either modification or clarification below (*People v. Samaniego*, *supra*, 172 Cal.App.4th at pp. 1163-1165) and notes further that *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118-1119, and *People v. Lee* (2011) 51 Cal.4th 620, 638 held similarly. Appellant has explained above that *McCoy*, *Samaniego*, *Nero*, and *Concha*, and their recognition that an aider-abettor's mens rea "floats free" of the perpetrator's, were decided much after his trial. *People v. Lopez*, *supra*, which, like *Samaniego*, concluded the defendant had forfeited his right to appeal error in the "equally guilty" language by failing to request a modification below, references *Samaniego* and *Nero* and so was decided after decisions in those cases signaled error in CALJIC No. 3.00 and CALCRIM No. 400. In contrast, when appellant's

case was tried no reviewing court had given notice that the "equally guilty" language was erroneous. For that reason, respondent's claim that appellant has forfeited review on this ground is unavailing. More to the point, *McCoy*, in which this Court articulated the controlling principles in resolving the question of whether an aider and abettor of first degree murder is always equally as guilty as the direct perpetrator, was decided *after* appellant's case was tried. On the other hand, *Samaniego*, which held the defendant had forfeited his claim by failing to have the instruction modified below, came after the decision in *McCoy*, and thus supports a conclusion that the defendant had notice of this Court's articulation in *McCoy*. Nor does this Court's decision in *Lee* help respondent. In *Lee*, the defendant alleged the trial court had improperly instructed the jury on the definition of consent in an attempted forcible rape trial. This Court noted that with only minor exceptions, the challenged instruction tracked the language of the relevant statute and thus was an accurate statement of the law at the time of the defendant's trial, thus obligating him to seek clarification. (*People v. Lee*, *supra*, 51 Cal.4th at p. 638.) Because the instruction tracked the statutory language, the defendant in *Lee* had prior notice that it was charged with seeking any clarification the defense wanted. In contrast, as noted, this Court had not yet decided *McCoy* and articulated those controlling principles regarding the determination of aider-abettor liability vis-à-vis that of the direct perpetrator.

Thus, under the circumstances present here, respondent's argument that appellant has forfeited review because trial counsel did not ask that CALJIC No. 3.00 be either modified or clarified at appellant's trial in 2000 (SuppRB 5-11) is meritless.

Respondent's argument that the instructional error did not impact appellant's substantial rights so as to make his claim of instructional error reviewable under Penal Code sections 1259 and 1469 (SuppRB 9-11) is similarly meritless.

In *People v. Graham* (1969) 71 Cal.2d 303, this Court noted that "An instruction relating to the various degrees of criminal homicide certainly affects the substantial rights of the defendant." (*Ibid.*) In *People v. Beardslee*, *supra*, this Court concluded that the mental state requirement of CALJIC No. 3.00 did affect the substantial rights of the defendant because it lessened the prosecutorial burden of proving the necessary mental state and, as such, the instructional error was reviewable under Penal Code section 1259. (*People v. Beardslee*, *supra*, 53 Cal.3d at p. 89.)

The "equally guilty" language of CALJIC No. 3.00, as given to appellant's jury, affected the substantial rights of appellant, lessening the prosecutorial burden of proving appellant's mental state. As such, the instructional error is reviewable under the authorities herein cited.

B. Respondent's Contention That Appellant's Claim of Instructional Error Lacks Merit Itself Lacks Merit

Respondent contends that the instructional error complained of was cured by a host of other instructions given the jury. (SuppRB 11-20.)

Respondent first points to CALJIC No. 17.00, which instructs that the jury must "decide separately whether each of the defendants is guilty or not guilty." Respondent argues that under the quoted language the jury knows it must separately decide "the level or degree of homicide responsibility" of each defendant. (SuppRB 14.) The fallacy inherent in

this contention is that in order to determine appellant's individual liability for the charged homicide the jury must necessarily refer to and follow the instruction dealing with the liability of principals, viz., CALJIC No. 3.00, where the jury was incorrectly informed that persons who commit a crime, *viz.*, principals, are "equally guilty" under the law. Here, the jury was instructed in unequivocal terms that "[p]ersons who are involved in committing a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation[,] is equally guilty." (CALJIC No. 3.00; 37CT 10754; 14RT 3177.)

Respondent additionally argues that the jury was instructed under CALJIC No. 17.31 that it could disregard the "equally guilty" language of CALJIC No. 3.00 if it found the language did not apply and that it should consider the instruction in the context of all other instructions (CALJIC No. 1.01) and that the jury was further instructed if it found the defendant culpable of murder it must determine the degree of the murder (CALJIC No. 8.70). (SuppRB 14.) Respondent points to these instructions and others as curing the instructional misdirection in the language of CALJIC No. 3.00 that "each principal, regardless of the extent or manner of participation, is equally guilty." (See SuppRB 14-16.) But, none of these instructions cited by respondent informs the jury, either individually or in the aggregate, that each principal, regardless of the extent or manner of participation, is *not* equally guilty absent proof beyond a reasonable doubt that the principal personally and individually had the requisite mental state contemporaneously with the required conduct.

Significantly, beyond a general claim that these other instructions either correct or compensate for the instructional error,

respondent merely lists and describes the instructions without discussion of how these instructions individually or in the aggregate remedy the mistake in law provided by the incorrect instruction. (See SuppRB 14-16.)

In addition, most of the instructions cited by respondent, e.g., CALJIC Nos. 17.31, 1.01, 1.11, 8.70, are general instructions. (See SuppRB 14-16.) The law is settled that when two instructions are inconsistent, the more specific charge to the jury controls. (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 878; *Cummings v. County of Los Angeles* (1961) 56 Cal.2d 258, 267.) Thus, respondent's claim that the trial court's error in instructing that each principal is equally guilty was corrected by other instructions lacks merit.

Respondent also relies upon the closing arguments of the parties in assessing the impact of the instructional error upon the jury. (SuppRB 17-19.) Respondent points out that appellant presented an alibi defense and that trial counsel urged the jury to acquit on that basis (SuppRB 18), but does not even begin to explain how counsel's argument or the arguments made by the other parties affects the circumstance that exists here – that is, where the jury rejects the alibi defense and must then determine appellant's liability for the substantive crime and the degree of the crime in the face of a jury instruction that expressly and wrongly informs them that they may make these determinations of appellant's liability based on their determination of the conduct and mental state of other principals – "Person who are involved in committing a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation, is equally guilty."

In the Supplemental Brief, appellant explained that *McCoy*,

Samaniego, *Nero*, and *Concha* taken together establish that the "equally guilty" language of CALJIC No. 3.00 misdirected the jury in determining appellant's liability for murder and the degree of appellant's murder liability. The determination that the defendant has the required mens rea is essential to finding a defendant liable for murder and in determining the degree of murder. (SuppBrief 7-21.) Respondent's arguments regarding the other instructions given the jury or the parties' closing arguments fail to demonstrate how they obviated the misdirection in CALJIC No. 3.00's imperative that each principal, regardless of the extent or manner of participation, is equally guilty.

C. Respondent's Contention That the Instructional Error Was Harmless Lacks Merit

Respondent argues that any instructional error was harmless because (1) the jurors were instructed to consider all instructions as a whole (SuppRB 20); (2) appellant was a member of a gang whose main activity was the commission of murders and the jury found the gang enhancement to be true (SuppRB 20-21); (3) the jury found appellant guilty of premeditated murder (SuppRB 21); (4) the jury found a special circumstance to be true (SuppRB 21). In addition, respondent argues that the prosecution proved beyond a reasonable doubt that each appellant shot and killed as reflected in the jury's weapons use findings and, as such, both appellants are equally liable for murder. (SuppRB 23.)

Appellant addresses each of these specific contentions in seriatim.

Respondent earlier raised the contention that the instructional misdirection in the "equally guilty" language of CALJIC No. 3.00 was

corrected or rendered superfluous by other instructions given the jury in his "Analysis" of the instruction. (See SuppRB 12-17.) Appellant discussed why this particular contention is unavailing in the section preceding the present one and respectfully refers the Court to that discussion, *supra*.

In addition, respondent's reliance on the jury's findings pertaining to gang-related evidence to prove that any misdirection in CALJIC No. 3.00 regarding the mens rea requirement for accomplice liability was harmless is misplaced. (SuppRB 20-21.) It is misplaced because the jury's findings the murders were committed for the benefit of a gang are the product of an incorrect instruction on the elements required for the gang enhancement. The court erroneously instructed the jury on the elements of the substantive offense of participation in a criminal street gang (Pen. Code, § 186.22, subd. (a)) rather than on the elements of the sentence enhancement (Pen. Code, §186.22, subd. (b)). The verdicts are therefore suspect and fail to support respondent's contention because membership in a criminal street gang does not prove a person possessed the necessary mens rea to prove his culpability for a specific crime. (See Nunez AOB, Arg. IV, p. 126; *People v. Ramon* (2009) 175 Cal.App.4th 843, 853 (two gang members in possession of illegal property in gang territory alone does not allow expert to construct opinion about defendant's specific intent).)

Respondent's reliance on the jury's findings the murders were premeditated is misplaced as such verdicts are the product of the very instructional misdirection complained of. (SuppRB 21.) The verdicts are suspect and fail to prove beyond a reasonable doubt that appellant possessed the required mental state because the verdicts were achieved

under the erroneous instruction that each principal, regardless of the extent or manner of participation, is equally guilty.

Respondent's reliance on the fact that the jury found the multiple murder special circumstance to be true as indicative that the jury necessarily found that appellant possessed the requisite mental state is misplaced and disingenuous because, once again, the trial court incorrectly instructed the jury on the mental state required for accomplice liability when a special circumstance is charged. Respondent tracks the analysis applied by the court in *Samaniego* in making this argument. (SuppRB 21.) But, respondent's reliance is misplaced because, in appellant's case, the jury did not have to first find the accomplice had an intent to kill in order to find the multiple murder special circumstance to be true. The trial court's instruction allowed the jury to find the special circumstance to be true as to a principal other than the actual killer if he were a major principal who acted with reckless indifference to human life. Respondent's reliance on the special circumstance verdict is misplaced because, under this misinstruction, the true finding fails to show that each appellant possessed the mental state required for an aider and abettor such that would prove the "equally guilty" language of CALJIC No. 3.00 harmless as respondent claims. (See Nunez AOB, Arg. V, p. 139.)

Respondent's reliance on the jury's findings that each appellant personally and intentionally fired a gun that proximately caused death is also misplaced because here, again, the weapon use verdicts were the product of an instruction that was flawed. (SuppRB 23.) The instruction given appellant's jury was fatally flawed because it failed to instruct the jury that in order to find the enhancement true it was first

required to find that a particular principal must have intentionally discharged the firearm. Thus, the instruction given appellant's jury omitted to define what the jury was required to find, i.e., that a particular principal personally and intentionally shot and killed. Moreover, the verdict forms provided to the jury were also flawed because they made no provision for finding any defendant liable for the enhancement as an accomplice. Thus, respondent's reliance on the weapon use verdicts to prove each appellant had the requisite mental state despite the "equally guilty" language of CALJIC No. 3.00 given the jury is misplaced. (See Nunez AOB, Arg. I, p. 40.)

Finally, respondent argues that appellants are equally culpable for murder because each was a shooter, i.e., that both appellants fired the same weapon. (SuppRB 22-24.) This assertion is both contrary to the evidence and contrary to the prosecution's own theory of the case at trial in which the trial prosecutor told the jury, "I will be the first to admit that I have not proven which of the two defendants was the actual shooter." (13RT 3048-3049; see discussion Nunez AOB 46-51, "Substantial Evidence Established Only One Shooter Shot and Killed Robinson and Fuller.") To support its two-shooter/equivalent-culpability theory, respondent points to appellant's rejected alibi defense; to evidence appellants purchased the firearm; to evidence appellants were in the car where the firearm was found on the day after the shooting; to statements attributed to appellants by others; and to evidence of appellants' gang membership. (SuppRB 22-24.) But, respondent fails to explain how a rejected alibi defense or evidence of a firearm purchase or evidence of gang membership or evidence appellants were in a car with the firearm at a time

other than when the charged offenses occurred proves that both defendants were actual shooters. Accordingly, respondent's contentions that both appellants are actual killers who are equally culpable so as to render the principal liability instructional error harmless are specious and lack merit.

Appellant here respectfully refers the Court to the additional harmless error analysis in the Supplemental Brief. (SuppBrief 23-27.) For these reasons, appellant respectfully submits that respondent's arguments lack merit and that the error was not harmless beyond a reasonable doubt at both the guilt and penalty phases.

ARGUMENT XII

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

In *People v. Pearson* (2012) 53 Cal.4th 306, this Court found that the trial court had rested its ruling on an erroneous view of the law when it excused for cause a prospective juror who, the court concluded, held "equivocal" views of the death penalty. *Pearson* found that the trial court had misread *People v. Guzman* (1988) 45 Cal.3d 915 and acted in reliance upon that mistaken understanding of the relevant law.

In the Supplemental Brief, appellant noted that the trial court in this case was the trial court in *Pearson* and argued that in excusing Juror No. 2066 the trial court had relied on the same erroneous reading of *Guzman* that compelled a reversal of the penalty phase verdict in *Pearson*. (SuppBrief 28-32.)

Respondent now contends that the trial court did not excuse Juror No. 2066 under an erroneous view of the law or an erroneous reading of *Guzman*, essentially arguing that the juror was properly excused for cause. (SuppRB 29.) Respondent supports its contention with questionnaire and voir dire responses by Juror No. 2066 that, in respondent's view, demonstrate Juror No. 2066's adherence to personal and

religious views that rendered the juror unable to follow her juror's oath and the law. (See SuppRB 26-34.)

Rather than repeat here the voir dire and questionnaire responses by Juror No. 2066 that establish the juror's willingness to perform her duty, appellant respectfully refers the Court, as he did in the Supplemental Brief (SuppBrief 31), to the discussion of Juror No. 2066's responses that may be found in his appellant's opening brief at pages 246-249.)

Respondent urges this Court to find that the trial court properly dismissed Juror No. 2066 for cause despite the clear showing in the record, through the medium of the court's own words, that the court misread *Guzman* and acted under a mistaken view of the law when it found Juror No. 2066 was "not death qualified" because the juror's position and responses to questions regarding imposition of the death penalty were "equivocal."

That this trial court labored under a mistaken understanding of the law is clear from the court's own words. During a colloquy with defense counsel regarding Juror No. 2066 at a point in the selection process when defense counsel had refused the court's invitation to excuse the juror by stipulation on the ground the juror had indicated a willingness to follow the law (3RT 547:1-26), the trial court referred specifically to *Guzman* and made clear that it was indeed relying upon a mistaken understanding of the law:

> [U]nder *People versus Guzman*, the trial court may excuse prospective jurors due to their views of capital punishment with statements such as 'I believe' prec[]eded by statements such as 'I believe' or 'I think.' This causes me

> great concern that you need and [sic] unequivocal statement before you would --. (3RT 547:27-548:7.)

That the trial court excused Juror No. 2066 under compulsion of its own misreading of *Guzman* and mistaken understanding of the relevant law is again made manifest in the record by the court's own words:

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

In the context of these clear expressions that the trial court has misapprehended the law in its reading of *Guzman* and had excused Juror No. 2066 in reliance upon that mistaken understanding, respondent's efforts to re-characterize the trial court's words and actions as having been properly made are unavailing. Respondent points out that the trial court did not refer to *Guzman* when it excused Juror No. 2066 (SuppRB 30), but fails to address the court's view of the juror's qualifications as that view was

revealed in the court's earlier pointed reference to *Guzman* in colloquy with defense counsel and in its efforts to have Juror No. 2066 excused for cause by stipulation. The court's comments regarding the juror's state of mind, demeanor, conflicting, reluctant, and equivocal responses are but facets of the same concern – that the juror's state of mind about the death penalty was equivocal.

For the reasons set forth in this and earlier briefs, appellant respectfully submits that the record does not support the trial court's excusal of Prospective Juror No. 2066 for cause under the governing legal standard and that this error requires reversal of appellant's death sentence without inquiry into prejudice.

ARGUMENT XVIII

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

In view of respondent's summary contention that the arguments raised in the supplemental briefing do not affect the cumulative prejudice arguments previously made (SuppRB 34), appellant respectfully refers the Court to the discussion set forth in the previous briefing on this issue (AOB 329-337; SuppBrief 33-34).

CONCLUSION

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

DATED: July 16, 2012

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Rule 8.630, subdivision (b)(1), California Rules of Court, and in reliance upon Microsoft Office Word 2010, which was used to prepare this document, I certify that, with the exception of the tables, the certificate of word count required by the rule, and any attachment permitted under Rule 8.204, subdivision (d), that the word count of this brief is 4595 words.

DATED: July 16, 2012

Respectfully submitted,

____

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DANIEL NUNEZ

PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to the within entitled action and that my business address is 321 Richmond Street, El Segundo, California 90245.

On **July 18, 2012**, I served the **Supplemental Reply Brief on behalf of Appellant Daniel Nunez in People v. Daniel Nunez and William Satele (S091915; LASC NA039358)** on the interested parties in said action by placing true copies thereof, enclosed in sealed envelope(s) addressed as stated below with postage/delivery fee fully prepaid, at El Segundo, California, with United States Postal Service/United Parcel Service.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on July 18, 2012, at El Segundo, California.

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JANYCE K. BLAIR