IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,)
)
Plaintiff and Respondent,)
)
vs.)
)
JOHN ANTHONY GONZALES,)
MICHAEL SOLIZ,)
)
Defendants and Appellants.)
)

No. SO75616

Los Angeles County
Superior Court
No. KA033736

Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles

The Honorable Robert W. Armstrong, Judge

APPELLANT'S REPLY BRIEF

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PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	**No. SO75616**
Plaintiff and Respondent,	)	
	)	
vs.	)	**Los Angeles County**
	)	**Superior Court**
	)	**No. KA033736**
JOHN ANTHONY GONZALES, MICHAEL SOLIZ,	)	
	)	
	)	
	)	
Defendants and Appellants.	)	
	)	

INTRODUCTION

In this brief, appellant addresses specific contentions made by respondent, but does not reply to arguments which are adequately addressed in appellant's opening brief.[1] The failure to address any particular argument, sub-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), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

In Argument XVI of the AOB, appellant joined in the arguments of co-appellant Gonzales "to the extent those arguments inure to the benefit of

---

[1] The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief ("AOB").

Mr. Soliz." (AOB 308.) Because the Gonzales AOB was filed simultaneously with the filing of appellant's AOB, appellant could not state more specifically the arguments he joined in. Although some of the arguments by co-appellant Gonzales clearly do not inure to the benefit of appellant, respondent has incorrectly identified appellant as joining in some arguments which relate solely to co-appellant. For example, respondent asserts that appellant joins in co-appellant's argument that the trial court erred in failing to suppress statements by Gonzales. (RB 154, Gonzales AOB Arg. II). Clearly, this argument does not involve the rights or interests of appellant. In order to eliminate respondent's confusion, and clarify for this Court the joinder intended, appellant Soliz specifies the arguments by co-appellant Gonzales which are joined in Argument XVI of this reply brief.

* * * * *

I.

THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION TO SEVER COUNTS RESULTED IN PREJUDICIAL ERROR

A. Introduction

Prior to trial, appellant moved to sever counts 4 and 5 (the Skyles/Price shootings) from counts 1-3 (the Hillgrove Market crimes) (2 CT 476-484). Appellant Gonzalez also moved to sever the two groups of charges (2 CT 398-404). The court denied the motion following opposition from the prosecution (2 CT 508-518) and a hearing. (1 RT 33.)

Denial of appellant's motion to sever the charges, compounded with the prosecutor's improper argument urging the jury to consider evidence of one crime (the market robbery) when considering complicity in the other (the Skyles/Price shootings) resulted in an unfair trial which denied appellant his right to due process of law and reliable guilt and penalty determinations guaranteed by the United States and California Constitutions. Reversal is required.

B. Standard of Review

Penal Code section 954 allows consolidation for trial of two or more offenses which are of the same class of crimes. In appellant's case, the Eaton Crimes (counts 1-3) and the Skyles/Price crimes (counts 4 and 5) were of the same class and accordingly joinder was permissible.

Even where joinder is permissible, however, if the defendant can make a clear showing of prejudice, severance is required. (*People v. Jenkins* (2000) 22 Cal. 4th 900, 947; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 447.) "Severance may nevertheless be constitutionally required if joinder of the offenses would be so prejudicial that it would deny a defendant a fair trial." (*People v. Musselwhite* (1998) 17 Cal.4th 1216,

1243.) The propriety of the trial court's ruling on a motion to sever counts is judged by the information available to the trial judge at the time the motion was heard. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1285.)

However, "[e]ven if a trial court's severance or joinder ruling is correct at the time it was made, a reviewing court must reverse the judgment if the 'defendant shows that the joinder actually resulted in "gross unfairness" amounting to a denial of due process.'" (*People v. Mendoza* (2000) 24 Cal.4th 130, 162.) Reversal is required where the, "joinder substantially prejudiced defendant and denied him a fair trial." *(People v. Grant* (2003) 113 Cal.App.4th 579, 583; *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1083; *People v. Johnson* (1988) 47 Cal.3d 576, 590.)

In the instant case, joinder of the Eaton crimes with the Skyles/Price shootings denied appellant his right to due process of law and resulted in a "gross unfairness" by tainting the jury's consideration of appellant's guilt.

C. The Trial Court by Denying Severance

In determining whether joinder of charges actually prejudices a defendant, a trial court is required to consider whether, "(1) the evidence of the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case." (*People v. Caitlin* (2001) 26 Cal.4th 81, 110, quoting *People v. Bradford*, 15 Cal.4th at p. 1315.)

The trial court improperly weighed these factors when it ruled against appellant's motion to sever the charges. Properly considered, each of the factors gravitates against consolidation of the two sets of crimes and the court committed prejudicial error when it denied appellant's severance motion.

1. Cross-admissibility

The first factor for a court evaluating a severance motion to consider is the cross-admissibility of evidence relating to the separate charges.

In appellant's trial, the only cross-admissible physical evidence was the ballistics evidence which consisted of a single live round found in the getaway vehicle used in the Eaton crime that matched the type of ammunition used in the Skyles/Price shooting. Additionally, the prosecution gang expert's opinion testimony was cross-admissible in regards to both offenses. Aside from these two isolated pieces of evidence, the two cases involved crimes that had nothing to do with each other and were established by entirely separate evidence.

Respondent maintains that the charges were properly joined on the theory that "the interplay of evidence between the two occurrences," favored joinder. (RB 137, quoting *People v. Johnson* (188) 47 Cal.3d 576, 589-590.) However, given the very limited amount of evidence that was cross-admissible (the bullet and the gang expert), it is apparent that the real reason for joinder was to enable the prosecution to bolster each case by introducing character evidence which encouraged the jury to infer that both defendants were criminally disposed.

Respondent's reliance on *People v. Carpenter* (1997) 15 Cal 4th 312 is misplaced. In that case, the same gun had been used in multiple shootings and substantial evidence connected defendant to the firearm. (*Id.*

at pp. 348-349). By contrast, the ballistics evidence in appellant's case connected one live round found in the Eaton getaway van, which had only Gonzales's fingerprints, with the gun used in the killing of Skyles and Price. All eyewitnesses agreed that there was only one shooter in the Skyles/Price shootings. The prosecution used the joint trial, however, to argue that appellant's alleged cooperation in the Eaton killing meant that they acted together in the Skyles and Price killings as well. The prosecutor argued:

> If you look at this crime in isolation just as one situation, you might be able to say how would they know what the other was going to do.
>
> But, ladies and gentlemen, you're talking about people who robbed a market together. You're talking about people who walked into the Hillgrove Market with guns and pointed them in the faces of two people who owned that market. You're talking about two people who killed a 67 year old man because he had the audacity to stand up to the people who came into the store...
>
> So you're talking about two people who are not only members of the same gang, but they're people who at the time of the Skyles/Price murder had already committed another murder together: the Hillgrove Market robbery murder. They knew what each was about. They knew what each was going to do.

(17 RT 2308-2309.)

Without the joinder of the two groups of charges, the prosecution faced the problem of how to convict both appellants of the Skyles/Price killings, when Gonzalez had admitted to acting alone and all eyewitnesses saw only one shooter. Although there was some evidence that two people were present at the Skyles/Price killings, presence alone is not enough to constitute 'aiding and abetting' in California. (*In re Michael T.* (1978) 84

Cal. App.3d 907, 911.) Thus, the joinder of the crimes was needed by the prosecution to argue that because appellants allegedly acted together in one crime, they had done so in the other, despite the lack of evidence to support such a determination.

2. Joinder of Weak and Strong Cases

Joining a case which contains weak evidence of a defendant's guilt with a stronger case carries the risk that the jury will assume the "criminal disposition" of the defendant and infer guilt in the weaker crime. (*United States v. Burkley* (D.C. Cir. 1978) 591 F.2d 903, 919.) In cases where the crimes are of the same type, the prejudice is the most pronounced, because of "the human tendency to draw a conclusion which is impermissible in law: because he did it before, he must have done it again." (*United States v. Bagley* (9th Cir. 1985) 772 F.2d 482, 488.)

In the instant case, there was no separate analysis by the trial court as to the impact of the joinder on each defendant. The trial court's entire consideration of appellant's severance motion on the record was, "Oh, the counts are related and appropriately together. That motion is denied." (1 RT 33.) The court's superficial analysis failed to analyze the effect of the joinder on each defendant individually. Considering the effects of the joinder on appellant Soliz and appellant Gonzales separately exposes the disparate risk of prejudice to each defendant. The trial court's failure to consider this factor properly resulted in prejudice and denied appellant's right to a fair trial.

At the time of the severance hearing, the evidence connecting appellant with the Skyles/Price shootings was conflicted and weak. There were two eyewitnesses who identified appellant as the shooter. (2 CT 517.) Those identifications, however, were made in the middle of the night, under

poor lighting conditions, from a moving vehicle in the space of a few seconds. Further, the eyewitness testimony conflicted with the recorded statement of co-appellant Gonzalez in which he admitted to being the shooter (2 CT 501.)

Joining the two offenses resulted in prejudice because it allowed the prosecutor to argue, and the jury to infer, appellant's guilt in the Skyles/Price shooting on the theory that Soliz and Gonzales were a team when the evidence presented did not support that conclusion. The evidentiary gap in the Skyles/Price shooting was disguised by the prosecutor's improper argument to the jury that because Gonzales and Soliz allegedly acted together in the Hillgrove Market robbery, they acted together in the gas station shooting (17 RT 2308-2309.) The prosecutor's argument urging the jury to consider complicity in one crime as establishing complicity in the other, shows that the cases were joined not for, "the conservation of judicial resources" as respondent contends (RB 134), but rather to bolster the prosecutor's theory that Gonzales and Soliz acted together in the Skyles/Price shooting, a theory unsupported by any eyewitness testimony and contradicted by Gonzales's recorded admission. The prosecutor needed the joinder in order to have a theory of the Skyles/Price shootings under which both Soliz and Gonzales could be found guilty. That theory would have been insupportable without the joinder.

The key to understanding the prejudice which resulted from the joinder is to analyze the evidence presented that the two sets of crimes were committed cooperatively by the defendants. In the Hillgrove Market robbery, there was strong evidence of a cooperative endeavor between the defendants. Mrs. Eaton saw two men with guns enter the market and each played a complimentary role in the crime (9 RT 954-957). Another witness

heard appellants talking about pulling a "jale" together shortly before the robbery (10 RT 1071).

In contrast, the evidence presented on the Skyles/Price shootings tended to show that they were the work of one person. A single gun was used in the shootings. (12 RT 1386.) All eyewitnesses saw only one shooter. (12 RT 1460, 1462; 13 RT 1571-1572, 1578; 14 RT 1810-1811.) One eyewitness saw another person, standing behind a car in the parking lot, but according to the witness this person was not a participant in the shootings. (12 RT 1493.) Appellant Gonzales confessed to killing both victims by himself. Thus, there was no direct evidence that the Skyles/Price shootings were committed cooperatively whereas the evidence in the Hillgrove robbery strongly pointed to a planned cooperative endeavor.

The joinder of the crimes was particularly important for the prosecution with respect to appellant because the evidence of him being the shooter was very weak in both cases. In the Hillgrove Market robbery, the eyewitness identified the heavier of the two defendants (Gonzales) as the shooter (9 RT 967). In the Skyles/Price shooting, Gonzales admitted (in his surreptitiously recorded statement) to shooting both of the victims himself. (People's Exh. 58.)

Respondent argues that there was no joinder of strong and weak cases because evidence of guilt in each group of offenses was "overwhelming" and "there were multiple witnesses identifying both appellants as to both groups of offenses." (RB 150, 152.) But respondent's claim that there were multiple witnesses who identified both appellants as to each group of offenses is not supported by the record.

In the Skyles/Price shooting, although Judith Mejorado identified both appellants at the preliminary hearing, she later testified that her

testimony at that hearing was coerced by detectives. (14 RT 1776-1778.) Carol Mateo was the only witness to positively identify both appellants in the Skyles/Price shootings at the trial. Her identification was based on brief observation and at the trial she admitted that she may have testified at the preliminary hearing that she had not seen a second person outside the car (13 RT 1554-1555.)

Betty Eaton was the only witness to the Hillgrove Market robbery who saw both perpetrators commit the crimes, although other witnesses testified to circumstantial evidence linking appellants with the robbery. Mrs. Eaton testified that she would not recognize either of the robbers if she saw them again. (27 RT 3364.)

3. Inflammatory Nature of Offenses

Respondent argues that neither set of crimes was more egregious than the other, classifying the Hillgrove Market incident as, "the brutal, unprovoked, 'pistol-whipping and murder of a defenseless, elderly shopkeeper, shot repeatedly in the head while kneeling on the ground," and the Skyles/Price shootings as, "'the cold-blooded execution of two teenagers.'" (RB 140, quoting 3 CT 9.) This analysis overlooks how the crimes were presented to and perceived by the jury. The Skyles/Price shootings, cast by the prosecution as a gangland hit, were significantly more inflammatory in context than the Eaton murder, more properly characterized as a robbery gone wrong. The evidence presented showed that the murder committed in the Hillgrove Market robbery was unplanned and incidental to the robbery; by contrast, the prosecution gang expert theorized that the Skyles/Price shootings were done in deliberate retaliation for an earlier gang-related slaying.

When evaluating whether a severance motion should have been granted, the court must consider whether "certain of the charges are unusually likely to inflame the jury against the defendant." (*People v. Manriquez* (2005) 37 Cal.4th 547, 573.) In *People v. Balderas* (1985) 41 Cal.3d 144, 174, the Court stated that a charge or evidence particularly calculated to inflame or prejudice a jury would include "child molestation charges" or evidence of "gang warfare." While the prosecution's gang expert opined that both sets of crimes were gang-related, only the Skyles/Price shootings are properly considered charges of "gang warfare." The prosecution's theory of the Skyles/Price double murder, that it was done deliberately in retaliation for the slaying of gang member Billy Gallegos, places it beyond the pale of the robbery/murder charged in the Hillgrove Market crimes.

Taken in its totality, the evidence showed the Hillgrove Market robbery was a crime with the object of robbery and the crime was botched. Although the circumstances of Lester Eaton's murder were tragic, there was no evidence presented that appellant had any prior connection with Mr. Eaton or that the killing had a gang element beyond obtaining funds for the gang. Mr. Eaton himself was armed at the time of the robbery.

In contrast, prosecution evidence of the Skyles/Price shooting cast it as a premeditated double murder revenge killing, taken in retaliation for the murder of a fellow gang member, and planned and executed to add to the reputation of the Puente street gang. Unlike Mr. Eaton, Skyles and Price were unarmed at the time of the crime. Both victims were minors. Taken as the prosecution cast them, the Skyles/Price shootings were nothing if not "gang warfare." The killing of two unarmed teenagers, presented as a

revenge killing, was significantly more likely to inflame the jury against appellant than the Hillgrove market crimes.

4. Joinder in Capital Cases

Both the Hillgrove Market crimes and the Skyles/Price shootings were capital offenses. Where one of the charged offenses is a capital offense, "the court must analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a noncapital case." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 454.) While the joinder itself did not transform this into a capital case, the trial court should have considered the potential death sentences as a factor in favor of severance. (*People v. Bradford, supra,* 15 Cal.4th at p. 1315.) The failure to do so constituted error.

D. Joinder Resulted in an Unfair Trial

"[E]ven if a trial court's severance or joinder ruling is correct at the time it was made, a reviewing court must reverse the judgment if the 'defendant shows that the joinder actually resulted in "gross unfairness" amounting to a denial of due process.'" (*People v. Mendoza* (2000) 24 Cal.4th 130, 162.) Reversal is required where the, "joinder substantially prejudiced defendant and denied him a fair trial." (*People v. Grant* (2003) 113 Cal.App.4th 579, 583; *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1083; *People v. Johnson* (1988) 47 Cal.3d 576, 590.)

Bean v. Calderon contains an illustrative discussion of the prejudices that attend a misjoinder. In that case, the court overturned the appellant's conviction because the joinder of two murder charges denied him his right to a fair trial under the Fifth Amendment:

> We have previously acknowledged that there is "a high risk of undue prejudice whenever ... joinder of counts allows evidence of other crimes to be introduced in a trial of charges

> with respect to which the evidence would otherwise be inadmissible." *United States v. Lewis,* 787 F.2d 1318, 1322 (9th Cir.1986) (citation omitted). In *Lewis,* we explained this risk by observing that "[i]t is much more difficult for jurors to compartmentalize damaging information about one defendant derived from joined counts, than it is to compartmentalize evidence against separate defendants joined for trial," and by recognizing studies establishing "that joinder of counts tends to prejudice jurors' perceptions of the defendant and of the strength of the evidence on both sides of the case." *Id.* at 1322. These concerns resonate with particular force here: not only did the trial court join counts for which the evidence was not cross-admissible, but the State repeatedly encouraged the jury to consider the two sets of charges in concert, as reflecting the modus operandi characteristic of Bean's criminal activities. Thus, the jury could not "reasonably [have been] expected to 'compartmentalize the evidence' so that evidence of one crime [did] not taint the jury's consideration of another crime," *United States v. Johnson,* 820 F.2d 1065, 1071 (9th Cir.1987), when the State's closing argument and the import of several of the instructions it heard urged it to do just the opposite.

(*Bean v. Calderon, supra,* 163 F.3d at p. 1084.) All of the factors the court discussed in *Bean* apply to appellant. Multiple defendants were tried for the same charges when evidence conflicted as to each individual's involvement. Counts were joined in which the only a single piece of evidence was cross-admissible. And most importantly, a case in which evidence of appellant's guilt was weak was joined with a stronger case so that the prosecution could, "encourage[] the jury to consider the two sets of charges in concert, as reflecting the modus operandi..." The danger that the jury would not compartmentalize the evidence was exacerbated by the deliberate strategy of the prosecution to argue that cooperation in the Eaton crimes was indicative of cooperation in the Skyles/Price shootings.

Thus, even if joinder was proper at the time the severance motion was denied, the subsequent argument of the prosecution, which urged the jury to consider evidence of how one crime was perpetrated when considering cooperative guilt in the other, resulted in a fundamentally unfair trial for appellant. No eyewitness evidence established or even could be inferred to suggest what the prosecution argued, that the appellants collaborated on the Skyles/Price shootings. Thus, the actual prejudice which resulted from the joinder amounted to a "gross unfairness" to appellant. Under the *Bean* rule, reversal is required.

E. Conclusion

From a single bullet found in the getaway van used in the Hillgrove market robbery, the prosecutor was able to join two sets of charges which, aside from the identity of the defendants, had nothing to link them. By arguing that appellants Soliz and Gonzales acted together in the Skyles/Price shootings, where none of the evidence presented suggested that was the case, the prosecutor impermissibly prejudiced appellant's right to a fair trial and reliable determination of guilt beyond a reasonable doubt. The improper joinder was error and this case must be reversed.

* * * * *

II.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY MISTAKENLY TELLING THE JURY THAT APPELLANT HAD BEEN CHARGED WITH RACIALLY MOTIVATED MURDERS

A. Introduction

The trial court committed prejudicial error by improperly telling a panel of prospective jurors that the Skyles/Price charges included a special circumstance allegation that those crimes were racially motivated. This inflammatory allegation had actually been dismissed following the preliminary hearing due to insufficient evidence.

Respondent contends the error was harmless because it has not been shown that any actual juror sat on the misinformed panel. (RB 175.) Respondent additionally contends that no harm resulted because the jurors were subsequently informed of the correct charges and no references to racial motivation occurred in the trial.

The record does establish that eventual jurors sat on the first panel exposed to the inflammatory statement. The record also shows that the prosecutor used a racial motive to establish guilt. Under these circumstances, the trial court's improper reference that the murders included a charge of a racial motive resulted in prejudice.

B. Actual Jurors Were Exposed to the Inflammatory Remark

Respondent asserts this argument is without merit because there has been no demonstration that "any sitting juror or alternate was among the initial panel of prospective jurors that heard the incorrect allegation." (RB 177.) The record does establish that eventual jurors sat on the panel exposed to the incorrect allegation.

The trial judge told the first panel of prospective jurors that the charges included an allegation of a racial motivation for the Skyles and Price shootings. (2 RT 126.) Comparison of the clerk's "Jury Panel Sheet" showing the jurors eventually seated for trial with the clerk's "Case Info Sheet" showing the prospective jurors summoned for the first panel on January 22, 1998, shows that a number of the eventual jurors were on this first panel exposed to the inflammatory allegation. (34 CT 8802-8806.) For example, actual jurors 5994 (34 CT 8802, 8804), 4179 (34 CT 8802, 8803), 8134 (34 CT 8802, 8803), 0529 (34 CT 8802, 8805), 3151 (34 CT 8802, 8805), 8009 (34 CT 8002, 8803), and 1071 (34 CT 8802, 8806) all sat on the incorrectly charged panel. At least half of the eventual jurors sat on the panel exposed to the inflammatory and incorrect allegation.

C. The Inflammatory Remark Resulted in Prejudice

Respondent asserts that no harm resulted because "no evidence, argument, instructions or verdict forms" referred to the incorrect racial motive allegation. (RB 177.) The record undercuts respondent's contention.

As established in the opening brief (AOB 58), the prosecution presented evidence that Skyles and Price, who were black, were killed because of their race. (16 RT 2093-2094.) Respondent disputes this showing but the record is clear that the prosecution used the dismissed racial motive to show guilt. Detective Lusk testified as a gang expert that the Skyles and Price shooting constituted retaliation by the Puente 13 gang for the murder of one of their gang members (Billy Gallegos) by a "*black* street gangs known as the Neighborhood Crips." (16 RT 2903, emphasis added.) In essence, Detective Lusk testified that Skyles and Price were killed despite having no involvement in the Gallegos killing and even

though Skyles and Price were not members of the Neighborhood Crips but simply because they were black. As Detective Lusk stated, "if an individual or individuals are found within the general area of that gang and they meet *the right race*; the right age; possibly the right style of dress, they're gonna be targeted." (16 RT 2093.)

As further pointed out in the opening brief (AOB 58), the prosecutor also emphasized the racial motive in his closing argument to the jury. The prosecutor stated, "Mr. Price and Mr. Skyles happened to be Black." (17 RT 2235.) Respondent complains that defense counsel failed to object to this statement so any claim of prosecutorial misconduct is waived. (RB 178.) Respondent misunderstands the point of this reference.[2] It is not offered as a claim of prosecutorial misconduct but instead to show that the prosecutor exacerbated the error which occurred when the trial judge wrongly told the jury that the charges included a racial motive allegation.

Respondent repeatedly refers to the crimes as gang retaliation but it cannot be ignored that the prosecution presented evidence and argument capitalizing on the incorrect racial motive allegation heard by at least half of the eventual jurors. It is fundamentally unfair for a jury to be misled that there is a racial motive component to the charges when evidence of such an allegation has been dismissed already for insufficient evidence.

It is federal constitutional error to allow evidence of racism having no relevance to the proceedings in a capital case. (*Dawson v. Delaware* (1992) 503 U.S. 159, 165 [admission of evidence of membership in a racist

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[2] Appellant expressly noted in the opening brief the failure to object to the improper race motive evidence and correctly acknowledged that any claims flowing from the failure to object are more appropriately raised in a habeas petition. (AOB 58, fn. 7.)

prison gang required reversal].) The United States Supreme Court has further recognized that presentation of racist allegations would violate the Eighth Amendment where consideration of such allegations is "wholly arbitrary." (*Barclay v. Florida* (1983) 463 U.S. 939, 951.)

Remarks that infect a trial with unfairness make the resulting conviction a denial of due process as well. (*Donnelly v. De Christoforo* (1974) 416 U.S. 637, 643.) The inflammatory but unfounded allegations here posed a substantial likelihood of causing the jurors to be biased againt appellant. This error cannot be considered harmless. Appellant is entitled to reversal of his convictions, at least on counts 4 and 5.

* * * * *

III.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE MURDER IN VIOLATION OF PENAL CODE SECTION 187

Appellant's conviction should be reversed because the information did not charge him properly with first degree murder. (AOB 60-68.) Respondent answers this claim by relying on this Court's previous decisions without substantial further analysis. Appellant has already addressed why those prior cases should be reconsidered. Accordingly, no reply is necessary.

* * * * *

IV.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ADMITTING EVIDENCE OF THREATS AGAINST WITNESSES DESPITE THE LACK OF EVIDENCE TYING THE DEFENDANTS TO THE THREATS

A. Introduction

Appellant has shown that the trial court erred by admitting evidence of threats against prosecution witnesses despite a complete lack of evidence tying those threats to the defendants. (AOB 69-73). This improperly admitted evidence resulted in prejudice because it implied that defendants were dangerous and that the threats emanated from a consciousness of guilt.

Respondent asserts that appellant failed to object adequately to fully preserve the issue, that the trial court properly admitted the evidence, and that even if admitted improperly the error was harmless. Respondent's contentions are without merit.

B. The Objections Below Preserved the Issue for Appellate Review

In the guilt phase, the trial court overruled relevance objections to questions used to establish that Judith Mejorado and Salvador Berber had been threatened prior to their testimony. (14 RT 1830, 15 RT 1920.) In the penalty phase, the trial court overruled an unspecified objection to similar questioning of Salvador Berber. (31 RT 4019.)

Respondent contends that the objections failed to preserve federal and state constitutional grounds for review. (RB 191.) This Court, however, has refused to impose such formalistic requirements limiting the scope of review. In *People v. Partida* (2005) 37 Cal.4th 428, this Court held that an issue is preserved for appeal if it "entails no unfairness to the parties" who

had a full opportunity at trial to litigate whether the court should overrule or sustain the objection. (*Id.* at p. 436, quoting *People v. Yeoman* (2003) 31 Cal.4th 93, 118.) The Court in *Partida* also held that an appellant's federal constitutional claims are adequately preserved for appeal when appellant's present constitutional objections to the court's exclusion of this evidence rest upon the same factual and legal issues as defense counsel's objections to exclusion. (*People v. Partida, supra*, 37 Cal.4th at pp. 433-439; *People v. Yeoman, supra*, 31 Cal.4th at pp. 117-118.) In this case, appellant's claims of violations of his federal constitutional rights to due process and a fair trial are the legal consequences of the trial court's erroneous overruling of the relevance objection. These federal constitutional claims are properly before this Court.

Respondent also asserts that the unspecified objection in the penalty phase to Berber's testimony about feeling threatened precludes appellate review. (RB 191.) It has long been established however that an objection preserves an issue for appellate review despite inadequate phrasing if the record shows that trial court understood the issue present. (*People v. Scott* (1978) 21 Cal.3d 284, 290.) In this case, the trial court had previously overruled relevance objections to this line of questioning in the guilt phase. (14 RT 1830, 15 RT 1920.) Under the circumstances, the trial court would have understood the later objection as another one of relevance. Appellate review of appellant's claims is proper based on these objections.

C. The Testimony of Threats Against Witnesses Should Have Been Excluded

Appellant has established that evidence of threats against prosecution witnesses is inadmissible absent a showing that the perceived threats are connected to the defendant. (AOB 70-71; *Dudley v. Duckworth*

(7th Cir. 1988) 854 F.2d 967, 969-972; *People v. Williams* (1997) 16 Cal.4th 153, 200.) Respondent does not contend that any evidence established such a connection. Instead, respondent asserts that the evidence of fear of retaliation was relevant to the credibility of the witnesses. (RB 187-190.)

While there is case law supporting respondent's position that evidence of fear of retaliation may be admissible for credibility purposes, that case law is inapplicable here. For example, respondent relies on *People v. Burgener* (2003) 29 Cal.4th 833 on this point. In *Burgener*, the Court held that "[i]t is not necessarily the source of the threat – but is existence – that is relevant to the witness's credibility." (*Id.* at p. 870.) In appellant's case, however, the prosecution focused not on credibility concerns, but on the supposed source of the threats. Deputy Castillo testified that Mejorado was concerned for her brother's safety because of "the people involved in the incident." (14 RT 1830.) Berber testified that if he returned to La Puente, "they'd kill me." (31 RT 4019.) In *Burgener*, the "jury was promptly and correctly instructed as to the limited [credibility] purpose of the evidence." (*People v. Burgener, supra*, 29 Cal.4th at p. 870.) That was not done in appellant's case because the evidence was instead used for the improper purpose of implying that appellant had threatened the witnesses. In *Burgener*, the trial court also instructed the jury to disregard the evidence of the threats. (*Ibid.*) No such instruction was given in appellant's case leaving the jury free to use the evidence for the improper purpose of establishing appellant's dangerousness and consciousness of guilt.

Respondent's reliance on *People v. Olquin* (1994) 31 Cal.App.4th 1335 is also misplaced. (RB 188-189.) In *Olquin*, the court noted that "California law prohibits proving consciousness of guilt by establishing

attempts to suppress evidence unless those attempts can be connected to a defendant." (*Id.* at p. 1368, citing *People v. Hannon* (1977) 19 Cal.3d 588, 596-600; *People v. Weiss* (1958) 50 Cal.2d 535, 551-554.) But in *Olquin*, the evidence was not used for such a purpose. "There was never an argument, never even a suggestion, that this evidence reflected consciousness of guilt. It was strictly limited to establishing the witness's state of mind. For this purpose it was highly relevant." (*People v. Olquin, supra*, 31 Cal.App.4th at p. 1368.)

In contrast, in appellant's case, the testimony focused on the supposed source of the threats – that being the appellants – rather than simply the witness's fear as would be expected if limiting the evidence to credibility concerns. For example, Detective Castillo testified that Judith Mejorado expressed concern for her brother's safety because of "the people involved in this incident." (14 RT 1830.) Similarly, in the penalty phase, Salvador Berber testified that if he returned to La Puente, "they'd kill me," an obvious inference to appellant's gang associates. (31 RT 4019.) In closing argument, the prosecutor told the jury that Mejorado feared retaliation not only against her, but against her brother as well because of his gang membership. (17 RT 2229.) This reference had nothing to do with the credibility of the witness but instead implied a threat from the defendants. If the evidence had been presented only for credibility purposes, it would have been properly limited to establishing the witness's fear; the implication that appellants somehow were responsible for the threat crossed the line and rendered the evidence inadmissible.

In appellant's case, unlike the cases relied on by respondent, the prosecution presented testimony of purported threats against the witnesses with insinuations that the appellants were responsible for the threats, though

absolutely no evidence of such a connection was shown. Nor did appellant's case involve the limiting instruction given in *Burgerner* which directed the jury to consider the evidence only for credibility purposes. The trial court erred in admitting the improper evidence.

D. The Erroneous Admission of this Evidence Resulted in Prejudice

Respondent asserts that any error was harmless because it is not reasonably probable that a different verdict would have resulted absent the error. (RB 194.) That is not the correct standard for assessing the prejudice which resulted.

As established in appellant's opening brief, the erroneous admission of this evidence resulted in fundamental unfairness. (AOB 71-72.) Improper admission of threats to witnesses without any showing connecting the threats to a defendant amounts to an "evidential harpoon." (*Dudley v. Duckworth, supra,* 854 F.2d at p. 970, quoting *Keyser v. State* (Ind. 1981) 160 Ind. App.566, 312 N.E.2d 922, 924.) Such evidence is "highly prejudicial" because it improperly implies a consciousness of guilt by the defendants causing them to resort to threats against witnesses. (*Dudley v. Duckworth, supra*, 854 F.2d at p. 970.) Such fundamentally unfair evidence constitutes federal constitutional error subject to the *Chapman* standard that the error cannot be considered harmless unless the prosecution shows that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Respondent has made no such showing.

Not only has respondent failed to apply the correct standard of prejudice, but respondent has also engaged in distorted prejudice analysis. That is, respondent asserts harmless error because of the "overwhelming

evidence" of guilt. (RB 194.) The evidence of supposed threats against Mejorado and Berber went to counts 4 and 5, however, and the evidence of guilt on those counts was disputed. Although witnesses identified appellant as the shooter, those eyewitness identifications had many flaws. The questionable identification evidence was countered by Gonzales's admission that he committed those crimes alone.

The improper evidence of threats implying that both appellants were responsible for the threats made both appellants appear dangerous and guilty. Under these circumstances, the error cannot be considered harmless.

The error especially cannot be considered harmless as to the penalty determination. Respondent fails to recognize that error in the penalty phase is assessed by examining whether there is a "reasonable possibility" of a more favorable result absent the error. (See AOB 73; *People v. Hernandez* (2003) 30 Cal.4th 835, 877; *People v. Brown* (1988) 46 Cal.3d 432, 448.) The penalty determination was a closely decided issue with the original penalty phase ending in a hung jury. Berber's improper testimony that "they'd kill him" if he returned to the area skewed that close penalty determination.

The guilt and penalty determinations should be reversed.

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V.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY EXCLUDING EXPERT TESTIMONY ON EYEWITNESS IDENTIFICATION PROCEDURES

A. Introduction

Eyewitness identifications played a critical role in appellant's conviction for the murders in counts 4 and 5. In an attempt to show the unreliability of the eyewitness identifications, appellant's trial counsel sought to call a homicide detective to testify of his expertise in the proper procedures for conducting photographic line-ups. The trial court improperly upheld the prosecutor's objection to the expert's testimony resulting in federal constitutional error by depriving appellant of a fair opportunity to present his defense.

Respondent asserts that the trial court ruled properly because the defense failed to demonstrate the expertise of the witness and the defense proffer indicated that the witness would testify to the propriety of the procedures used in this case, rather than as to general procedures. Respondent also claims, purely in conclusory terms, that the "eyewitness identifications were substantially corroborated." (RB 195, 198.) Finally, respondent asserts that any error was harmless. (RB 195.)

Respondent's contentions are erroneous. Appellant should have been permitted to establish the expertise of the witness based on his experience as a homicide detective. Respondent has adopted the same erroneous assumption of the trial court in claiming that the detective's testimony would have invaded the province of the court. And respondent has presented no details to support the claim that the "eyewitness identifications were substantially corroborated" and has completely ignored the countervailing evidence that Gonzales conceded that he, rather than appellant, was the

shooter. Given the crucial role of the eyewitness identification evidence, the error in excluding the important evidence which would have allowed the jury to properly assess the identifications cannot be considered harmless.

B. The Court Erred by Excluding the Expert Testimony

Detective Lusk of the Los Angeles County Sheriff's Department testified for the prosecution as a gang expert. (16 RT 2064-2095.) During cross-examination of Detective Lusk, appellant's trial counsel sought to question the witness about proper photographic line-up procedures. The prosecutor objected to this line of questioning as "beyond the scope of direct" and the trial court sustained the objection as going beyond the testimony on gang expertise. Appellant's trial counsel then requested permission to call the detective as a defense witness to which the court responded, "You may at a later time but not at this juncture of the trial." (16 RT 2136-2137.)

After the prosecution rested, however, and the defense sought to call Detective Lusk as a defense witness, the prosecutor requested an offer of proof. (16 RT 2150-2151.) Defense counsel proffered that he would examine Detective Lusk about "investigatory procedures with mug show ups." (16 RT 2151.) The prosecutor then stated, "What's the relevance of that? There's been cross-examination of the detective. This is a homicide detective who has no contact with this homicide investigation." (16 RT 2151.) This exchange shows clearly that the prosecutor objected only on the ground of relevance, not on the ground now claimed by respondent that the homicide detective was not qualified as an expert. Nor did the trial court exclude the proffered testimony on the lack of expertise basis that respondent now asserts. As respondent well knows, and explicitly states in

their brief in this case, "[a]ppellate review is not available for questions relating to the admissibility of evidence without a specific and timely objection in the trial court on the ground urged on appeal." (RB 191, citing Evid. Code, §353, subd. (a); *People v. Rowland* (1992) 4 Cal.4th 238, 275; *People v. Raley* (1992) 2 Cal.4th 870, 892; *People v. Szeto* (1981) 29 Cal.3d 20, 32.) Since the prosecutor never raised the expertise ground at the time of the objection, and the trial court ruled instead on other grounds, defense counsel had neither the incentive nor the opportunity to establish the detective's expertise. Such a showing seemingly would have been relatively simple. Detective Lusk was an experienced homicide detective with training and experience in eyewitness identification procedures beyond the common understanding of most jurors. (See Evid. Code, §§ 720, 801.) Under these circumstances, the trial court's ruling cannot properly be upheld on a ground not litigated below.

Respondent's assertion that the trial court ruled correctly because Detective Lusk's testimony would have challenged the identification procedures used "in the instant case" is also mistaken. (RB 198.) The trial court similarly misunderstood defense counsel's proffer and relied on this erroneous assumption as well, concluding invalidly that the testimony would invade the province of the jury. (16 RT 2152.) It is clear, however, both from defense counsel's earlier attempt to cross-examine Detective Lusk on this issue and the subsequent attempt to call Detective Lusk as a defense witness, that the defense sought to establish general investigatory procedures for proper identifications.

During the cross-examination, defense counsel asked Detective Lusk, "When you prepare a mug show up, do you try to get the – do you try to place in the mug show up people who look generally like the person

described who was the perpetrator? (16 RT 2136.) Although the prosecutor's objection that the question exceeded the scope of direct, sustained by the trial court, precluded a response, defense counsel obviously sought to establish general procedures for proper photographic line ups, not to have the expert testify to the unreliability of the procedure used in this particular case. Similarly, in the subsequent proffer of proof, defense counsel clearly stated that he sought to show "general investigatory procedures." (16 RT 2151.) As defense counsel further explained, "He's a homicide investigator. He's an expert that I'm entitled to call as my witness and ask what policies and procedures he follows in preparing –." (16 RT 2151.) Although the trial court prematurely cut off defense counsel's proffer, this passage again shows clearly that the defense sought to establish proper policies and procedures in general, rather than to seek Detective Lusk's opinion on the procedures used in this specific case.

The trial court's confusion on this issue, now shared by respondent, stems from the trial court's poorly stated question to defense counsel which followed this proffer. The court asked, "What's the objective." Defense counsel responded, "The objective is to show that the mug show ups in this case were not prepared properly." (16 RT 2151.) The trial court misunderstood this response to mean that Detective Lusk would so testify. At no time did defense counsel give any indication that he sought any such testimony by Detective Lusk. Instead, defense counsel repeatedly made clear that he would use Detective Lusk to establish proper procedures and policies in general. That is, Detective Lusk's testimony about proper identification procedures and policies in general would be the means to meet the ultimate objective that defense counsel could argue that the procedures used in this case were improper and unreliable. Detective Lusk's testimony

would have established the general policy as to the proper procedure to be used for identifications by photographic lineups and defense counsel could then have used that testimony in closing argument to raise doubt about the propriety of the procedure used in appellant's case.

Respondent is mistaken in asserting that Detective Lusk's testimony would have invaded the province of the jury. (RB 199-200.) Instead, Detective Lusk's testimony would have provided the evidentiary foundation on an issue beyond the common experience of the jury for defense counsel's argument that the identifications in this case were unreliable. The trial court's incorrect ruling excluding the expert testimony deprived the defense of this important evidence.

Respondent asserts alternatively that the testimony could have been excluded because of sufficient corroboration of the eyewitness testimony. (RB 201-202.) But nowhere does respondent specifically identify the alleged corroborating evidence. A substantial dispute existed at trial as to whether appellant or Gonzales committed the shootings charged in counts 4 and 5. Gonzales confessed to being the shooter. The only substantial evidence supporting the prosecution's theory of appellant being the shooter was the eyewitness identifications.

The cases relied on by respondent on this point all involved corroboration beyond the disputed eyewitness identifications. (RB 201-202.) Respondent cites *People v. Sanders* (1995) 11 Cal.4th 475 which held that exclusion of proffered testimony as to eyewitness identification did not constitute error where the identification testimony "was corroborated by other independent evidence of the crime and the conspiracy leading to it." (*Id.* at p. 509.) But as this Court recognized in *People v. Jones* (2003) 30 Cal.4th 1084, also relied on by respondent, "[e]xclusion of the expert

testimony is justified only if there is other evidence that substantially corroborates the eyewitness identification and gives it independent reliability." (*Id.* at p. 1112.)

Aside from conclusionary claims, without citations to facts in the record, that the eyewitness identifications in this case were "substantially and fully corroborated" (RB 202), respondent cannot show any such independent corroboration rendering the expert testimony excludable. Appellant's convictions on counts 4 and 5 depended on the eyewitness identifications. The only other evidence having any tendency to connect appellant with those shootings was the attenuated evidence that appellant had previously possessed a 9 mm weapon, the type used in the shooting. (12 RT 1362, 15 RT 1914.) That evidence, however, was further attenuated by Gonzales's admission that he used the 9 mm in the shootings underlying counts 4 and 5. (15 RT 1899.) Thus, appellant's convictions on those counts depended on the eyewitness identification. Unlike in *Sanders*, and as required in *Jones*, no substantial evidence corroborated the eyewitness evidence.

Given the importance of the eyewitness identification evidence in this case, and the reliance of the defense in attempting to show the unreliability of that evidence through the use of the proffered expert, the court erred in excluding the expert testimony.

C. Prejudice Resulted from the Improper Exclusion of the Testimony

Respondent contends that it is not reasonably probable that the excluded testimony would have raised a reasonable doubt of appellant's guilt. (RB 203.) This is an incorrect standard in assessing prejudice on this issue.

As established in the opening brief (AOB 78-80), the error infringed on appellant's federal constitutional rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Such error is not assessed under the reasonable probability test but instead under the *Chapman* standard which requires reversal unless the State can establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) Respondent has not even attempted to make such a showing.

Nor could such a showing be made given the critical importance of the eyewitness identification evidence. The excluded testimony could have raised a reasonable doubt as to the reliability of the evidence. Appellant's convictions on counts 4 and 5 should be reversed.

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VI.

THE COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL, RELIABLE GUILT AND PENALTY DETERMINATIONS AND DUE PROCESS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN IT REFUSED TO GRANT A CONTINUANCE TO ENHANCE THE TAPES OF GONZALES' ADMISSIONS TO BERBER

The trial court committed prejudicial error when it refused to grant the defense a continuance during trial to enhance a critical tape after a prosecution witness provided surprise testimony that had not been provided in discovery and was inconsistent with the tape. (AOB 81-89.) Respondent contends the trial court did not abuse its discretion. (RB 204-216.) This argument has been presented sufficiently in the opening brief and no reply is necessary.

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VII.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING THE MISTRIAL MOTION FOLLOWING THE IMPROPER TESTIMONY OF A KEY PROSECUTION WITNESS

The trial court erred by failing to grant a mistrial after improper and prejudicial testimony by a prosecution witness which requires reversal because the court's tardy admonition did not cure the error. (AOB 90-95.) Respondent claims that the trial court did not abuse its discretion. (RB 217-218.) This argument has been presented sufficiently in the opening brief and no reply is necessary.

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VIII.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY LIMITING THE CROSS-EXAMINATION OF THE GANG EXPERT

The trial court improperly restricted cross-examination of the prosecution's gang expert on whether appellant had ever claimed involvement in the shootings. (AOB 96-103.) Respondent claims no improper restriction occurred and any error was harmless. (RB 219-219-230.) This argument has been presented sufficiently in the opening brief and no reply is necessary.

* * * * *

IX.

THE FIRST DEGREE MURDER CONVICTIONS ON COUNTS 4 AND 5 MUST BE REVERSED DUE TO INSUFFICIENCY OF THE EVIDENCE

Appellant's convictions on counts 4 and 5 should be reversed due to the insufficiency of the evidence. (AOB 106-109.) Respondent contends the convictions are supported by sufficient evidence. (RB 231-242.) This argument has been presented sufficiently in the opening brief and no reply is necessary.

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X.

REVERSAL IS REQUIRED DUE TO THE TRIAL COURT'S FAILURE TO INSTRUCT ON THE LESSER-INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER

A. Introduction

The trial court erred in failing to instruct sua sponte on the lesser-included offense of voluntary manslaughter on counts 4 and 5. (See AOB 110-116.) Respondent claims that no lesser-included instruction was required because of insufficient evidence of provocation. (RB 252-254.) Respondent's contention rests on an erroneous interpretation of the evidence and a misunderstanding of appellant's position.

B. The trial court erred in failing to instruct on voluntary manslaughter

It is undisputed that the court is required to instruct on voluntary manslaughter as lesser-included offense if there is substantial evidence that the defendant acted in a sudden quarrel or heat of passion. (RB 252-253; *People v. Benavides* (2005) 35 Cal.4th 69, 102.)

Respondent disputes, however, that any objective evidence of provocation existed. As respondent states, "Appellants sole evidence of 'provocation' is the murder of Billy Gallegos – which had occurred weeks before – and appellants' 'belief that Sklyes and Price had been involved in the murder.'" (RB 254.)

Respondent is mistaken. Appellant Soliz has cited other evidence in the trial record showing a quarrel or heat of passion sufficient to justify instruction on voluntary manslaughter. That is, Judith Mejorado either testified or provided statements to the investigating officers admitted to impeach her testimony that appellants Soliz and Gonzales exited the car and

engaged in a heated argument with Skyles and Price then she heard shots. (14 RT 1708-1714, 1794, 1800.) Mejorado also stated that no discussion took place between the occupants of the car indicating a plan to shoot anyone. (14 RT 1812.) No evidence showed that appellants were looking for Skyles and Price or that they had a plan to retaliate for the Billy Gallegos shooting.

These circumstances demonstrate that the evidence of premeditation and deliberation was hardly overwhelming. Rather than the revenge or retaliation theory advanced by the prosecution, the evidence of a heated argument leading to the shootings could have supported a finding of voluntary manslaughter based on heat of passion or sudden quarrel. It has long been established in California that a verbal argument may arouse a heat of passion sufficient to justify instruction on voluntary manslaughter. (*People v. Valentine* (1946) 28 Cal.2d 121, 143-144.) Any doubt concerning the sufficiency of this evidence should have been resolved in favor of the defendants. (*People v. Ratliff* (1986) 41 Cal.3d 675, 694; *People v. Sears* (1970) 2 Cal.3d 180.) The failure to instruct on voluntary manslaughter constituted error.

C. The error resulted in prejudice

Respondent does not even address appellant's argument that the error resulted in prejudice requiring reversal. The lack of a response to appellant's argument effectively concedes the issue. (See *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 529; *People v. Bouzas* (1991) 53 Cal.3d 467, 480.)

In the opening brief, appellant has established that the failure to instruct on a lesser-included offense in a capital case constitutes federal constitutional error subject to the *Chapman* standard of review on prejudice.

(AOB 114-115; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) Such error requires reversal unless the prosecution shows beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Since respondent did not brief the issue of prejudice, it has been conceded.

Also for the reasons elaborated on in the opening brief, it is clear that this error cannot be considered harmless. (AOB 115-116.) Reversal is required.

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XI.

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S NEW TRIAL MOTION BASED ON NEWLY DISCOVERED EVIDENCE

Appellant is entitled to a new trial because newly discovered evidence, consisting of the testimony of co-appellant Gonzales which was not available during the guilt phase trial, would have reinforced appellant's defense that he was not the shooter of Skyles and Price. (AOB 117-126.) Respondent contends the trial court did not abuse its discretion in denying the new trial motion. (RB 343-351.) This argument is presented sufficiently in the opening brief and no reply is necessary.

* * * * *

XII.

APPELLANT'S RETRIAL AFTER THE ORIGINAL JURY FAILED TO REACH A PENALTY VERDICT VIOLATED HIS FEDERAL CONSTITUTIONAL RIGHTS

A. Introduction

Allowing a penalty retrial after the original penalty phase juror had hung in favor of life sentences constituted federal constitutional error. (*Trop v. Dulles* (1958) 356 U.S. 86, 100-101.) The vast majority of states and the federal death penalty statute prohibit the death penalty altogether or prohibit penalty retrials after a hung jury. (AOB 129-130.) These prohibitions demonstrate the unfairness[3] and inequality of the California procedure and show the "the evolving standards of decency that mark the progress of a maturing society. (*Trop v. Dulles, supra,* 356 U.S. at p. 101.)

Respondent contends that the failure to raise this issue in the trial court constitutes a waiver. Respondent also contends the standards of decency have not evolved to the point where such penalty retrials should be prohibited.

As shown in the opening brief, this issue has not been waived because this Court has consistently considered constitutional challenges raising questions of pure law without objection below. (See AOB 128, fn. 33.) In arguing that the penalty retrial procedure does not violate the evolving standards of decency, respondent has relied on faulty statistics and inapplicable case law. Appellant's death sentences should be reversed due

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[3] In addition to the stress and drain on resources stemming from a retrial, such retrials also enhance the possibility of a death sentence when a life sentence is appropriate. (See *Green v. United States* (1957) 355 U.S. 184, 188.)

to this violation of appellant's rights to due process, equal protection and under the prohibition against cruel and unusual punishment.

B. Lack of Waiver

Citing no case law, respondent contends that appellant has waived the issue for appellate review by not presenting this claim in the trial court. (RB 380.) As established in the opening brief, however, this Court has consistently considered "as applied" challenges to the constitutionality of various aspects of California's death penalty scheme on the merits without requiring an objection below. (*People v. Hernandez* (2003) 30 Cal.4th 835, 863; *People v. Seaton* (2001) 26 Cal.4th 598,, 691.) A reviewing court also may consider a claim raising a pure question of law on undisputed facts when raised for the first time on appeal. (*People v. Yeoman* (2003) 31 Cal.4th 93, 118; *People v. Hines* (1997) 15 Cal.4th 997, 1061.) This constitutional issue based on undisputed facts has not been waived.

C. The Evolving Standard of Decency

Respondent asserts that 25% of the states permit a permit a penalty retrial following a hung jury so no "national consensus" has evolved making such penalty retrials unconstitutional. (RB 380.) Respondent is relying on faulty statistics.

Twelve states, the District of Columbia and Puerto Rico prohibit the death penalty altogether. (See AOB 129, fn. 34.) The death penalty is currently authorized under federal law and in 38 state jurisdictions. In the vast majority of those jurisdictions, however, if the jury is unable to agree unanimously on a penalty phase verdict, no penalty retrial is permitted and the defendant is instead sentenced to life imprisonment or life imprisonment without possibility of parole. (See AOB 129, fn. 35.) Of those jurisdictions that rely on jury determinations of the penalty in a capital case, California

stands with only six states that permit penalty retrials following a hung jury. (See AOB 130-131.) Thus, of the 53 jurisdictions (50 states, federal government, District of Columbia and Puerto Rico), only seven permit penalty retrials following a hung jury. This amounts to 13% of the jurisdictions, not 25% as asserted by respondent.[4] Even excluding the federal government, the District of Columbia and Puerto Rico, death penalty retrials are barred in 43 states, a number far larger than the 30 states found to mark a "national consensus" in *Atkins* and *Roper*. (*Roper v. Simmons, supra,* 543 U.S. at p. 564.) This demonstrates an emerging national consensus prohibiting penalty retrials following a hung jury, or the death penalty altogether.

Respondent contends that this Court has consistently upheld penalty phase retrials as constitutional, citing *People v. Gurule* (2002) 28 Cal.4th 557, 645; *People v. Hawkins* (1995) 10 Cal.4th 920, 966; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1240; and *People v. Davenport* (1995) 11 Cal.4th 1171, 1192-1194.) None of these cases, however, involved this issue. "It is axiomatic that cases are not authority for propositions not considered."

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[4] This method of calculation, which includes those jurisdictions that prohibit the death penalty altogether, rather than only those states that allow the death penalty as used by respondent is consistent with the method employed by the United States Supreme Court. (See *Roper v. Simmons* (2005) 543 U.S. 551, 564.) In *Roper*, the Supreme Court held the executions of juveniles unconstitutional based on figures showing that 30 states prohibit such executions, including the 12 states that prohibit the death penalty in any circumstances. (*Ibid.*) The Court also noted that it had similarly prohibited the execution of mental retarded individuals in *Atkins v. Virginia* (2002) 536 U.S. 304 based on similar figures of 30 states prohibiting the execution of the mentally retarded, including the 12 states that prohibit the death penalty. (*Roper v. Simmons, supra,* 543 U.S. at p. 564.)

(*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10; *People v. Avila* (2006) 38 Cal.4th 491, 566; *Hart v. Burnett* (1860) 15 Cal. 530, 598.) Similarly, respondent cites to *Sattazahn v. Pennsylvania* (2003) 537 U.S. 537 U.S. 101 where the Court rejected a double jeopardy challenge to a penalty retrial after a hung jury. Again, that case did not involve the cruel and unusual punishment and due process issue raised here and has no bearing on this issue.

Appellant has demonstrated that there is a national consensus prohibiting penalty retrials after a hung jury. His death sentences should be reversed.

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XIII.

THE TRIAL COURT'S RESTRICTIONS ON VOIR DIRE IN THE PENALTY PHASE INTERFERED WITH APPELLANT'S RIGHT TO AN IMPARTIAL JURY

A. Introduction

The trial court denied appellant's right to an adequate voir dire by refusing to question prospective jurors on the issues of racial bias and whether they would be willing to give consideration to lingering doubt as a mitigating factor. These errors require reversal of the death sentences.

On the racial bias voir dire issue, respondent contends the issue has been waived by a lack of timely objection, that the court did not abuse its discretion in failing to inquire into racial bias, and that any error was harmless. (RB 272.) On the lingering doubt voir dire issue, respondent claims there is no right to instruction on lingering doubt and no prejudice resulted. (RB 287.)

No waiver occurred. The record is clear that objection was made in a sufficient manner to preserve the issue for appellate review. Respondent's claim no abuse of discretion occurred is simply specious. This case involves two Mexican-American men charged with killing a white man in one crime, and two black men in the other crime. The latter crime particularly had racial overtones as the prosecution advanced a theory that appellants, members of a Mexican-American gang, killed Skyles and Price because of their race to retaliate for a killing of one of their gang members by a black gang. Given the interracial crimes, Appellant had a federal constitutional right to have the jury questioned on racial bias. Respondent's claim that any error was harmless is wrong because such error is reversible per se.

On respondent's lingering doubt claims, the issue was not waived because the trial court made clear that restrictions on voir dire would not allow questioning beyond the death-qualification process, even after trial counsel complained of the restrictive voir dire. The trial court denied defense counsel's explicit request for voir dire on whether prospective jurors would consider lingering doubt. This issue was clearly preserved for appellate review.

Respondent's claim that no abuse of discretion occurred because jury instruction on lingering doubt is not required misses the point. The issue here is not entitlement to a jury instruction, but to a fair and adequate voir dire. In this case, where appellant's penalty defense largely hinged on lingering doubt, it was imperative that counsel be allowed to ascertain from prospective jurors that such a defense would be fairly considered.

The trial court erred by failing to conduct a fair and adequate voir dire in the penalty retrial. Appellant's death sentences should be reversed.

B. No Waiver Occurred

In the penalty retrial, the trial court restricted the jury voir dire to questioning to determine whether prospective jurors were "death qualified." Appellant's trial counsel sought to expand the questioning to general voir dire beyond the death qualification questions. (24 RT 3023.) Defense counsel pointed out that questions beyond the death qualification process had been allowed in the original trial. (24 RT 3023.) The trial court refused to allow further questions beyond the narrow focus of death qualification

and pointed out that the prospective jurors had also responded to a questionnaire.[5]

It is clear from the record that defense counsel for both defendants were caught off guard by the trial court's restrictive voir dire and that they had expected the opportunity to conduct voir dire beyond the death qualification questions.[6] When trial counsel complained that other questions needed to be asked, the trial court stated unequivocally that no question beyond the *Hovey*[7] death qualifications would be allowed. (24 RT 3024-3025.) Under these circumstances, where the trial court adamantly refused to question prospective jurors beyond the death qualification questions, and trial counsel sought to expand the voir dire but to no avail, the issue of the adequacy of the voir dire is sufficiently preserved for appellate review.

Appellant's counsel specifically sought to question the prospective jurors on the issue of lingering doubt and whether jurors would consider that concept. (24 RT 3027-3028.) After a debate on whether an instruction on lingering doubt would be given in the penalty retrial, with the trial court initially indicating that no such instruction would be proper, but then reversing itself and indicating that such an instruction would be appropriate, the trial court still refused trial counsel's request for voir dire on this issue.[8]

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[5] The jury questionnaire used in the penalty retrial did not contain any questions concerning racial bias. (See, e.g., 13 CT 3290-3314.)

[6] In the first trial, which resulted in a hung jury on the penalty determinations, the court permitted questioning on racial bias. (See AOB 134, fn. 44.)

[7] See *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80.

[8] Ultimately, in the jury instruction conference at the conclusion of the penalty retrial, the trial court reversed direction again on entitlement to

(24 RT 3027-3031.) Under these circumstances, it is specious for respondent to claim waiver on the inadequacy of the voir dire on the lingering doubt issue.

Following selection of the jury, trial counsel for Gonzales objected that the trial court had limited the attorneys from questioning prospective jurors on certain issues. In particular, defense counsel complained that he would have wanted to explore potential racial bias issues but had been precluded from doing so by the trial court's ruling that voir dire would be limited to death qualification questions. (26 RT 3180-3181.) When the trial court indicated that it was a little late to bring this up as the jury had already been sworn, defense counsel pointed out that the trial court had made clear on the record that the questioning would be limited. (26 RT 3181.) After the court reiterated that it was too late, counsel for Gonzales, joined by appellant's counsel, moved for a mistrial which the court denied. (26 RT 3182-3183.)

As stated above, the trial court's unequivocal statements during the jury selection process that voir dire would be limited to death qualification questions, despite the complaints of both trial counsel of the inadequacy of this restrictive voir dire, makes clear that no waiver occurred. But even assuming that more specific objection was needed, the explicit objection that the court had failed to voir dire on potential racial bias preserved the issue sufficiently for appellate review. This is not a situation where trial counsel expressed or implied satisfaction with the jury selection process, proceeded to trial without voicing any objection or complaint and gambled on an

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instruction on lingering doubt and refused to so instruct. This instructional error is raised separately in Argument XII.

acquittal, but after conviction claims for the first time on appeal that the panel was tainted. (See *People v. Cleveland* (2004) 32 Cal.4th 704, 736.) Defense counsel brought the error to the trial court's attention before opening arguments or presentation of any evidence.

Even though the jury had been sworn, the error still could have been rectified. That is, rather than going through with an entire penalty retrial despite the failure to explore the important consideration of potential racial bias, the trial court could have either reopened jury selection or declared a mistrial. (*People v. Crowe* (1973) 8 Cal.3d 825, 832.) This is not a situation where trial counsel failed to bring the error to the attention of the trial court and now the issue is raised for the first time on appeal. The trial court learned of the error at a time when the error could have been corrected.

The rationale of the waiver rule is that the failure to object prevents the trial court from correcting the error. As this Court has stated:

> In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his obligations until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.

(*In re Seaton* (2004) 34 Cal.4th 193, 198.) When defense counsel here called the trial court's attention, it was not too late to cure the defect. The trial court could have either reopened jury selection to question the jurors on potential racial bias or declared a mistrial.

In *Crowe,* the trial court mistakenly limited the parties to an insufficient number of peremptory challenges. After the jury had been

sworn, the court realized the error and asked defense counsel if he wanted to exercise further peremptory challenges. After conferring with the defendant, defense counsel announced that they would make no further peremptory challenges. This Court noted that "the record thus indicated that defendant was satisfied with the jury selected and did not elect to exercise his remaining peremptory challenges." (*People v. Crowe, supra,* 8 Cal.3d at p. 831.)

The record in appellant's case indicates just the opposite. When defense counsel pointed out that the trial court had failed to voir on racial bias, defense counsel also made clear their dissatisfaction with the jury selection process. Indeed, defense counsel moved for a mistrial.

As this Court further stated in *Crowe*, "if defense counsel believed that the court had erred and by that error selected a jury unfair to defendant, he should have articulated those views at the time. The court might then have been able to fashion some means of remedying the error; if no workable remedy appeared the court could have declared a mistrial." (*Id.* at p. 832.)

A workable remedy here would have been to reopen jury selection for the limited purpose of a short voir dire on potential racial bias. If any juror indicated such bias, a challenge for cause could have been granted. Such a remedy would not have implicated double jeopardy concerns even though the jury had been sworn because the discharge for good cause of a juror after he or she has been sworn amounts to legal necessity overriding any subsequent claim of double jeopardy. (*People v. Hernandez* (2003) 30 Cal.4th 1, 5.)

This Court has recently held that reopening of jury selection is improper but did so only in the context of reopening to allow the exercise of

further peremptory challenges. (*People v. Cottle* (2006) 39 Cal.4th 246, 255.) As the Court recognized, a trial court still retains the power to discharge a sworn jury for good cause. (*Ibid.*) A juror's lack of impartiality due to racial bias would constitute such good cause.

The error here involved the fundamental federal constitutional right to a fair and impartial jury free from racial bias. (*Turner v. Murray* (1988) 476 U.S. 28, 36-37.) In holding the reopening of jury selection is improper to permit further exercise of peremptory challenges, this Court recognized that peremptory challenges "are not a right of direct constitutional magnitude." (*People v. Cottle, supra,* 39 Cal.4th at p. 258, quoting *People v. Webster* (1991) 54 Cal.3d 411, 438.) Implicit in this recognition is the principle that reopening of jury selection for potential further challenges for cause to protect a fundamental constitutional right is permissible.

Even if reopening of jury selection for this purpose is not permissible, the trial court should have precluded the trial from going forward (no evidence had yet been presented) with a possibly racially biased jury by declaring a mistrial as requested by defense counsel. *Crowe* makes clear that such a remedy was called for as a last resort. (*People v. Crowe, supra,* 8 Cal.3d at p. 832.) Instead, the trial court did the unacceptable; it ignored the federal constitutional problem and allowed the presentation of evidence and the trial to proceed despite the noted dissatisfaction with the jury selection process.

Under these circumstances, there has been no waiver and the issue is cognizable on appeal on the merits.

C. The Failure to Voir Dire on Racial Bias Constituted Error

The Sixth and Fourteenth Amendments to the United States Constitution require jury impartiality in a criminal case. (*Turner v. Louisiana* (1965) 379 U.S. 466, 472.) The Eighth Amendment requirement of reliability in a death sentence makes the right to an impartial jury especially deserving of protection. (*Morgan v. Illinois* (1992) 504 U.S. 719, 730.) The trial court violated those rights here by failing to conduct a voir dire adequate to explore potential racial bias.

The United States Supreme Court has repeatedly recognized that violent crimes perpetrated against members of other racial groups may raise a reasonable possibility that racial prejudice will influence the jury. (See, e.g., *Rosales-Lopez v. United States* 1981) 451 U.S. 182, 192; *Turner v. Murray, supra,* 476 U.S. at p. 36, fn. 8.) The present case involved allegations of interracial violence which, coupled with the capital charges, made inquiry on voir dire as to potential racial bias imperative. As stated in *Turner,* "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." (*Id.* at p. 35.) Based on these considerations, the Court in *Turner* held "that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." (*Id.* at pp. 36-37.)

While acknowledging this case law, respondent makes the vague and perplexing argument that somehow the voir dire in this case sufficed and the trial court did not abuse its discretion despite failing to inquire into potential racial bias. (RB 272.) Respondent provides summaries of various cases

involving voir dire issues but provides absolutely no analysis of how these cases support respondent's undeveloped position that the voir dire adequately covered racial bias. (RB 284-285.)

Respondent cites *People v. Stewart* (2004) 33 Cal.4th 425, 458 but fails to note that case did not involve potential racial bias due to interracial crime. In *Stewart*, the defendant and his victims were of the same race. (*Ibid.*) Unlike in the present case, in *Stewart*, the trial court "expressly invited follow-up voir dire examination by counsel for both parties." (*Ibid.*) No requests or questions were presented at the trial level for voir dire on possible racial bias. *Stewart* provides no guidance or authority on the issue presented in this case.

Respondent's citation to *People v. Cleveland, supra,* is also inapposite. *Cleveland* did not involve the racial bias voir dire issue presented here. And the very quote from *Cleveland* relied on by respondent (RB 285) acknowledges that "discretion is abused 'if the questioning is not reasonably sufficient to test the jury for bias or partiality.'" (*People v. Cleveland, supra,* 32 Cal.4th at p. 737, quoting *People v. Box* (2000) 23 Cal.4th 1153, 1179.)

Such an abuse of discretion occurred in appellant's case because the voir dire was not sufficient to test for racial bias. The other California case cited by respondent make this clear. In *People v. Holt* (1997) 15 Cal.4th 619, 660. this Court recognized once again that "adequate inquiry into possible racial bias is ... essential" in a capital case involving interracial violence. In *Holt*, the Court found the voir sufficient, but noted factual circumstances not present in appellant's case. As the Court stated:

> Here, unlike *Mu'Min,*[9] the inquiry was not conducted by the judge alone. Both sides were afforded unlimited opportunity to inquire further into the views of the prospective jurors and to probe for possible hidden bias and took advantage of that opportunity. The voir conducted in this case covered substantially all of the areas of inquiry in the Standards, and followed the completion by each prospective juror of a questionnaire that covered an even broader range of topics. Those inquiries were supplemented by additional questioning of the jurors by counsel. Unless the voir dire by a court is so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair, the manner in which voir dire is conducted is not a basis for reversal. (*Mu'Min v. Virginia, supra,* 500 U.S. at pp. 425-426 [111 S.Ct. at pp. 1905-1906].) A fortiori, the same standard of reversible error applies when both the court and counsel participate in the voir dire. After reviewing the entire voir dire of all prospective jurors, including those eventually seated, we are satisfied that the inquiry into possible racial bias was adequate to meet the demands of the Sixth and Fourteenth Amendments to the United States Constitution.

(*People v. Holt, supra,* 15 Cal.4th at p. 661.)

In appellant's case, the court conducted the entire penalty retrial voir dire and expressly excluded questioning outside the death qualification process. The voir dire did not cover the "broad range of topics" in *Holt* and, most importantly, did not include any inquiry into possible racial bias. The inadequate voir dire violated appellant's federal constitutional rights.

D. The Failure to Voir Dire on Lingering Doubt

Defense counsel explicitly requested to supplement the voir dire by questioning prospective jurors on their willingness to apply the concept of lingering doubt, but the trial court refused that request. (24 RT 3027-3031.)

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[9] *Mu'Min v. Virginia* (1991) 500 U.S. 415

The debate over this issue made clear that the defense would rely on lingering doubt to attempt to persuade the jury to vote for life.

Respondent contends no abuse of discretion occurred because no jury instruction is required on lingering doubt. (RB 287.) Whether or not a defendant is entitled to such a jury instruction has no bearing on the issue of the adequacy of the voir dire.

Respondent also asserts that appellant has cited no authority holding that prospective penalty phase jurors should be subjected to voir dire concerning lingering doubt. (RB 287). Respondent ignores, however, that in his opening brief appellant cited analogous case law from this Court holding that a defendant in a capital case is allowed to question prospective jurors about their willingness to apply a particular doctrine of law likely to be relevant at trial. (AOB 141-142.) As this Court recognized, for example, in *People v. Williams* (1981) 29 Cal.3d 392, 410, general inquiry into whether jurors will "follow the law" is insufficient and "a reasonable question about the potential juror's willingness to apply a particular doctrine of law should be permitted when from the nature of the case the judge is satisfied that the doctrine is likely to be relevant at trial."

Having presided over the original penalty phase trial, where the taped confession by Gonzales that he shot Skyles and Price was used by appellant to argue for life, and having been told by defense counsel in the penalty retrial that lingering doubt would again be presented, the judge plainly knew that the legal doctrine of lingering doubt would be at issue. Indeed, the judge did not deny the request for voir dire on lingering doubt because of irrelevancy. Even after the judge agreed to instruct on lingering doubt (although the judge subsequently changed his position on this in the jury instruction conference), the judge simply refused to voir dire on this subject.

This refusal constituted an abuse of discretion and deprived appellant of his state and federal constitutional rights to an adequate voir dire to insure a fair and impartial jury. It is well established that a capital defendant has the right to have penalty phase jurors consider any residual or lingering doubt. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1238.) As stated by the United States Supreme Court, the defense of "'residual doubt has been recognized as an extremely effective argument for defendants in capital cases.'" (*Lockhart v. McCree* (1986) 476 U.S. 162, 181, quoting *Grigsby v. Mabry* (8th Cir. 1985) (en banc) 758 F.2d 226, 248 (dis. opn. of Gibson, J.).)

For such lingering doubt argument to be effective, however, the defense is entitled to probe prospective jurors to ascertain that they will fairly apply the concept. The trial court's refusal here to permit such questioning constituted error.

E. Reversal is Required

Again with no analysis, respondent asserts that any errors in the adequacy of the voir dire were harmless. Respondent has failed to recognize that error in failing to voir dire on racial bias in a capital case involving interracial violence is reversible per se. (*Morgan v. Illinois, supra,* 504 U.S. at p. 739; *Turner v. Murray, supra,* 476 U.S. at pp. 36-37.)

On the lingering doubt issue, respondent has also ignored case law cited in the opening brief that prejudice analysis is inappropriate where the trial court errs by failing to conduct an adequate voir dire. (AOB 142; *Knox v. Collins* (5th Cir. 1991) 928 F.2d 657, 661.)

But even if the lingering doubt error is not considered reversible per se, reversal is still required. Lingering doubt formed the core concept of the defense in seeking to avoid the death sentences on the Skyles and Price killings. Because this was a penalty retrial, there was a real possibility that

jurors would feel bound by the prior jury's finding of guilt and would not fairly be able to consider the concept of lingering doubt. Under these circumstances, there is a reasonable possibility that the jury would have rendered a different result absent the error. (*People v. Brown, supra,* 46 Cal.3d at p. 448.) Alternatively, the State has not shown beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Reversal is required.

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XIV.

THE TRIAL JUDGE'S IMPROPER TESTIMONY AS AN EXPERT WITNESS VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS AND REQUIRES REVERSAL

A. Introduction

In his opening brief, appellant established that the trial judge's taking judicial notice of the "physical impossibility" of facts asserted during the lead defense witness's testimony constituted reversible error. (AOB 144-155.) On cross-examination, co-appellant Gonzales, taking responsibility for the double murders, was explaining the multiple gunshot wounds to the victims, Skyles and Price. (32 RT 4304-4305.) Gonzales attributed the multiple shots to the handgun, which he stated had been converted from semi-automatic to fully automatic by removing the spring from behind the trigger. (32 RT 4305.) At this point, the trial judge interrupted Gonzales's testimony to take judicial notice of the physical impossibility of "render[ing] a semi-automatic fully automatic by any manipulation with the spring behind the trigger," which he knew from his "own experience." (32 RT 4305.) The judge did not admonish the jury of their right to disregard his statement. As a result, the jury likely took the judge's statement, which was highly damaging to Gonzales's credibility, as an established fact. The judge's infringement on the jury's fact-finding ability and undue, highly prejudicial statements violated appellant's state and federal constitutional rights.

Respondent contends that there are no constitutional issues because (1) appellant failed to timely object to the judge's statements, thus waiving any claim of impropriety, and (2) even if appellant's objection was preserved, the judge's statements were proper. Respondent further contends

that any error the trial court may have committed was harmless because Gonzales's credibility had already been irreparably damaged.

As discussed in detail below, appellant did object to the judge's improper statement immediately after Gonzales's testimony concluded, and this objection preserved the issue for appeal. A more immediate objection to the constitutional violations and an admonition to disregard the highly prejudicial statements would have been futile, because the judge initially denied any wrongdoing. Furthermore, the judge's statements were not an appropriate matter for judicial notice because they did not constitute a matter of common knowledge and effectively rendered the judge an unsworn, un-cross-examined expert witness for the prosecution. This abuse of discretion amounted to reversible error, as the trial judge destroyed Gonzales's credibility, which was of focal importance in this case.

B. This Issue is Cognizable on Appeal

Respondent argues that a timely objection and request for admonition would have been sufficient to cure any harm resulting from the judge's statements, and by failing to do so, appellant waived the judicial notice issue. Repondent, however, fails to acknowledge defense counsel's objection, which defense counsel made immediately following Gonzales's testimony. (32 RT 4308.) Evidence Code section 353, subdivision (a) does not indicate a specific time-frame for an objection. Nor does this section "specify the form in which an objection must be made." (See Assem. Comm. On Judiciary, Comment to Evid. Code, § 353, subd.(a).) Instead, any objection must be meaningful, specific, and provide the court with notice and an opportunity to rectify the error. (*Ibid.*) This Court has held an objection "will be deemed sufficient so long as it 'fairly apprises the trial court of the

issue it is being called on to decide.'" (*People v. Scott* (1978) 21 Cal.3d 284, 290.)

In this case, the defense counsel fulfilled the criteria for a timely objection. Immediately following Gonzales's testimony, defense counsel requested to approach the bench to object specifically to the judge's statements. (32 RT 4308.) At this point, the trial judge denied any wrongdoing, thereby overruling the objection. (*Ibid.*) Because defense counsel objected during the course of the trial within minutes of the testimony in controversy and specifically stated the grounds for objecting, his objection was timely and preserved on appeal.

To support the waiver contention, respondent cites *People v. Hines* (1997) 15 Cal.4th 997, 1041 (RB 336), in which the trial judge demonstrated a pro-prosecution bias by independently objecting to defense counsel's questions and characterizing the prosecution in favorable terms. This Court held in that case that the defendant had waived the issue of judicial bias on appeal by failing to object. The current case is distinguishable. Counsel for appellant objected to the trial judge's commentary after examination of Gonzales had concluded. (32 RT 4303-4306.) Conversely, in *Hines*, the defense counsel failed to object at all.

Similarly, respondent refers to *People v. Fudge* (1994) 7 Cal.4th 1075, 1107. (RB 336-337.) In that case, Fudge alleged the trial judge repeatedly disparaged defense counsel, which violated his constitutional rights, and this Court denied relief. Defense counsel in *Fudge* never objected to any of the alleged misconduct; whereas in the present case, defense counsel did object following Gonzales's testimony. (32 RT 4303-4306.) This objection was sufficient to preserve this issue on appellate review.

Even assuming defense counsel failed to timely object, this Court has repeatedly held "[t]he duty to object will be excused when an 'objection or request for admonition would have been futile or would not have cured the [alleged] harm . . . .'" (See, e.g., *People v. McDermott* (2002) 28 Cal.4th 946, 1001; *People v. Terry* (1970) 2 Cal.3d 362, 368, disapproved on another ground in *People v. Carpenter* (1997) 15 Cal.4th 312, 387.) Because of the authoritative nature of the trial judge's position, the jury attributed great weight to his statements. As such, an objection by defense counsel followed by an admonition to the jury by the judge would have done little to resurrect Gonzales's credibility. Furthermore, the trial judge completely disregarded defense counsel's objection, indicating that an instant objection would have fared no better. Given that the trial judge *considered his remarks proper*, no further objection or request for an admonition would have cured the harm which flowed from this error. Appellant cannot be faulted for failing to request an admonition that would not have been forthcoming as the judge did not consider his statement to be error. This issue is cognizable on appeal.

C. The Judge's Comments Violated Appellant's Statutory and Constitutional Rights

This Court recognized in *People v. Mahoney* (1927) 201 Cal. 618, 626-627 that "jurors rely with great confidence on the fairness of judges and upon the correctness of their views expressed during trials." Similarly, the United States Supreme Court stated, "'The influence of the trial judge on the jury is necessarily and properly of great weight,'. . . and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's word is apt to be the decisive word." (*Bollenbach v. United States* (1946) 326 U.S. 607, 612.) Federal circuit courts have also echoed this

sentiment, finding that "some comments may be so highly prejudicial that even a strong admonition by the trial judge to the jury, that they are not bound by the judge's views, will not cure the error." (*United States v. Stephens* (9th Cir. 1973) 486 F.2d 915, 916, quoting *Bursten v. United States* (5th Cir. 1968) 395 F.2d 976, 983.)

In this case, appellant's penalty phase defense relied on Gonzales's testimony that Gonzales was responsible for killing Skyles and Price. Thus, Gonzales's credibility was a critical factor in appellant's lingering doubt defense that appellant had not been involved in these killings.

Respondent cites *People v. Monterroso* (2004) 34 Cal.4th 743, 759-760 in support of the judge's statements. (RB 336.) In that case, however, the trial judge had simply noted during death qualification voir dire that a few capital cases were pending at the time. Unlike in the present case, the trial judge's remark in *Monterroso* did not involve any fact-finding or prejudice the jury against a witness's credibility. In that case, the trial judge correctly emphasized the importance of the jury's role; whereas in this case, the judge sua sponte usurped the jury's role.

1. The Trial Court's Statements Consisted of Matters Improper for Judicial Notice

Respondent argues that the trial court's taking judicial notice constituted an appropriate exercise of discretion. Respondent fails, however, to address the strict limitations on judicial notice. (*People v. Cook* (1983) 33 Cal.3d 400, 407, overruled on other grounds by *People v. Rodriguez* (1986) 42 Cal.3d 730; *People v. Brock* (1967) 66 Cal.2d 645, 650.) Evidence Code section 451, subdivision (f) provides judicial notice shall be taken of "Facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute." The manner in which

a gun is converted from semi-automatic to fully automatic is not generally known and is subject to reasonable dispute. This matter was also not "capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subd. (h); *People v. Barnett* (1998) 17 Cal.4th 1044, 1122.) As counsel for both appellant and Gonzales pointed out, neither one of them had any knowledge of the process for converting a gun from semi-automatic to fully automatic. (32 RT 4308.) The trial judge's personal opinion and experience on this matter could not simply be taken as stipulated fact. Instead, any controversy surrounding Gonzales's statements should have been submitted to an expert witness. (Evid. Code, § 801, subd. (a).)

By improperly taking judicial notice of this matter, the judge effectively converted himself into an unsworn, un-cross-examined expert witness for the prosecution, as he later explicitly acknowledged. (35 RT 4539-4540.) The judge thus abused his discretion and violated appellant's constitutional right to confrontation. The judge's actions constitute reversible error. (*Koon v. United States* (1996) 518 U.S. 81, 100 ("A district court abuses its discretion when it makes an error of law".)

2. The Judge Failed to Act Impartially

Respondent cites *People v. Mayfield* (1997) 14 Cal.4th 142, which held that trial judges need not "remain passive at the trial while the attorneys are presenting the evidence." Although a judge need not remain impassive, he must remain impartial. This Court has held that a judge's remarks must remain "accurate, temperate, and scrupulously fair" and must not invade the province of the jury. (*People v. Melton* (1988) 44 Cal.3d 713, 735.) Additionally, the United States Supreme Court held in *Quercia v. United States* (1933) 289 U.S. 466, 470 that a judge is permitted to comment on the

evidence, as long as he does not "distort it or add to it." By asserting the "physical impossibility" of rendering a semi-automatic weapon fully automatic via removing the spring from behind the trigger, the trial judge in this case clearly added to Gonzales's testimony. And the trial judge assisted the prosecution by presented "evidence" refuting the testimony of the key defense witness. As this Court stated recently: "The [trial] court may not ... assume the role of either the prosecution or of the defense." (*People v. Cook* (2006) 39 Cal.4th 566, 597.)

By challenging the testimony of Gonzales and providing assistance to the prosecution, the trial judge abandoned his role as an impartial arbiter. A court's remarks "must be "'temperate, nonargumentative, and scrupulously fair.'" (*Id.* quoting *People v. Hawkins* (1995) 10 Cal.4th 920, 948.) "[A]nd it must not convey to the jury the court's opinion of the witness's credibility." (*People v. Cook, supra,* 39 Cal.4th at p. 241.) The trial judge here violated that rule in the strongest way – by taking judicial notice of the falsity of Gonzales's testimony.

By independently asserting a fact, he also invaded the province of the jury, denying appellant his Sixth Amendment right to a trial by jury. The jury likely took the judge's statement as undisputed truth because the judge failed to advise the jury of their ability to disregard his statements. Along with the other instructional error which occurred in the penalty phase (see Arg. XIX), the trial court failed to instruct the jury with CALJIC No. 17.30 which would have informed the jury to disregard his statements regarding finding any facts or whether he disbelieved a witness.[10] (33 RT 4491-4502.)

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[10] CALJIC No. 17.30 provides: "I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be

The statement heavily biased the jury against appellant by interfering substantially with his penalty phase defense, violating appellant's Fourteenth Amendment right to due process and a fair trial. (See, e.g., *People v. Patubo* (1937) 9 Cal.2d 537; *People v. Gosden* (1936) 6 Cal.2d 14.) This improper, prejudicial statement requires reversal.

D. The Trial Court's Statements Were Prejudicial

Respondent contends that any error resulting from the trial court's improper statements was harmless because the statements were not mentioned again and Gonzales's credibility had been destroyed prior to the statements. (RT 331.) The judge's statements, however, violated appellant's federal constitutional rights under the Sixth and Fourteenth Amendments. In order for such federal constitutional errors to be harmless, the prosecution must show beyond a reasonable doubt that the error did not contribute to the jury's verdict. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Respondent cannot meet that burden in this case because Gonzales's testimony played such a critical role in the penalty retrial. The outcome of the penalty phase depended largely on the identity of the shooter. The defense relied on Gonzales's credibility, because if the jury believed – or at least had a lingering doubt – that Gonzales killed Skyles and Price without appellant's aid, appellant would not have been sentenced to death. The judge attacked Gonzales's credibility by serving as an expert witness for the prosecution and conveying to the jury that Gonzales had testified falsely.

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the facts, or that I believe or disbelieve any witness. [¶] If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion."

Respondent cites *People v. Fudge, supra,* 7 Cal.4th at p. 1107 to support the contention that harmful error only results if there is frequent improper judicial conduct. (RB 336-337.) Although the judge in this case commented once, the jury heard the statement again during the read-back of Gonzales's testimony, which exacerbated the prejudice. (34 RT 451.) The read-back request also shows that the jury considered Gonzales's testimony important, a significant factor in recognizing the prejudicial effect from the judge's highly improper interference with that testimony. The reference also involved a critical issue in the penalty determination, Gonzales's credibility. As this Court admonished in *People v. Sturm* (2006) 37 Cal.4th 1218, 1238, where the Court reversed a death sentence due to judicial misconduct: "[T]his court has repeatedly stated that a trial court must avoid comments that convey to the jury the message that the judge does not believe the testimony of the witness."

Respondent quotes *People v. Harris* (2005) 37 Cal.4th 310, 347, in which this Court noted:

> The role of a reviewing court "is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect trial. (*United States v. Pisani* (2d Cir. 1985) 773 F.2d 397, 402)" [Citation.] In deciding whether a trial court has manifested bias in the presentation of evidence, we have said that such a violation occurs only where the judge "'officiously and unnecessarily usurp[ed] the duties of the prosecutor . . . and in doing so create[d] the impression that he [was] allying himself with the prosecution.'"

Harris support's appellant's position that reversible error occurred here. In this case, the judge's statements made a significant impression on

the jury, both that he was aligned with the prosecution and by usurping the jury's role in determining Gonzales's credibility. Prior to the judge's statements, Gonzales's credibility was still intact. Respondent bases the claim of Gonzales's already diminished credibility on the contradictory testimony of several eyewitnesses. As discussed in detail in Argument XV of this brief, however, the alleged eyewitness testimonies themselves are severely suspect. Furthermore, as mentioned *ante*, these unnecessary, prejudicial comments, by the judge's own admission, converted him into an unsworn, un-cross-examined expert witness for the prosecution. (35 RT 4539-4540.) This impropriety seriously damaged appellant's defense. The trial judge thereby deprived appellant of his constitutional right to a fair trial. (See *Quercia v. United States*, *supra*, 289 U.S. at p. 470.)

Even if no federal constitutional error occurred, reversal is required because there is a reasonable possibility that the jury would have rendered a different verdict had the error not occurred. (*People v. Brown, supra,* 46 Cal.3d at p. 448.) For these reasons, the death sentences for appellant must be reversed.

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XV.

REVERSAL IS REQUIRED FOR THE PROSECUTOR'S REPEATED MISCONDUCT DURING THE PENALTY RETRIAL

A. Introduction

During the penalty retrial[11], the prosecutor asked co-appellant Gonzales "were they lying" questions at least 19 times in relation to the testimony of seven witnesses whose testimony differed from that of Gonzales. These witnesses included the wife of one victim, a law enforcement officer, three eyewitnesses to the shooting at the gas station, a woman allegedly in the car with Gonzales at the gas station, and a woman who allegedly saw Gonzales before the market robbery. This improper pattern of questioning violated appellant's federal constitutional rights under the Eighth and Fourteenth Amendments to a reliable penalty determination and a fair trial with due process.[12]

Respondent asserts the usual trilogy of waiver, no error, and harmless error in claiming that reversal is not required. (RB 317.) As shown in the opening brief (AOB 162-163), and as further established below, no waiver occurred under the circumstances of this case. By engaging in a pattern of

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[11] Gonzales did not testify in the guilt phase or the original penalty phase, but did testify at the penalty retrial.

[12] In the opening brief, this issue was characterized as prosecutorial misconduct. In a decision issued subsequent to that briefing, this Court addressed the propriety of this line of questioning for the first time and stated that whether the issue is labeled as misconduct or the erroneous admission of evidence "does not greatly matter" for the argument is "essentially identical under either characterization." (*People v. Chatman* (2006) 38 Cal.4th 344, 380.)

eliciting inadmissible evidence, error clearly occurred. This error cannot be considered harmless because it improperly tainted testimony crucial to appellant's penalty determination. Penalty reversal is required.

B. Lack of Waiver

Respondent asserts that this issue has been waived, claiming that appellant failed to make a timely objection or seek an admonition. (RB 324.) Appellant's trial counsel, however, did object to the form of the question when the prosecutor asked Gonzales whether "Carol Mateo was lying she testified here in court that this man [appellant] was the man she saw? (32 RT 4275.) Appellant's trial counsel responded: "Your Honor, that's an incorrect statement. I'd object. He said she was wrong, not that she was lying." The trial judge stated: "Before he said two or three times that she was lying. So in cross–examination I think counsel is entitled to pick up that portion of it."[13] (32 RT 4275.)

This exchange makes clear that the trial court found the prosecutor's "were they lying" questions acceptable in cross-examination. If the trial court believed it was proper to ask Gonzales whether Carol Mateo had lied, "then it must have believed that the prosecutor's entire line of 'were they lying' questions . . . were also proper." (*People v. Zambrano* (2004) 124 Cal.App.4th 228, 237.) As pointed out in our opening brief, and not addressed by respondent, in *Zambrano*, the appellate court found that defense counsel had failed to object on proper grounds but in the context of

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[13] The trial judge must actually have been referring to the immediately preceding cross-examination of Gonzales relating to Judith Mejorado (where the prosecutor asked twice whether Mejorado had been lying) because at that point, Gonzales had not testified that Mateo was lying. (See 32 RT 4272-4275.)

the trial court's ruling it is clear that the questioning would have been permitted anyway even with a specific, proper objection. (*Ibid;* AOB 163.) The same is true in this case. A defendant is excused from either a timely objection or seeking an admonition if either would be futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Under the circumstances indicating that the trial court deemed the cross-examination questions proper, and would have overruled any further objection, the futility exception applies and this issue is cognizable on appeal. (*People v. Zambrano, supra,* 124 Cal.4th at p. 237.)

Another variation of the futility exception also makes this issue cognizable on appeal. Appellate courts do not insist upon an objection in the lower court where it would have been futile at the time of trial. (*People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6.) This Court has a long established rule excusing a failure to object where requiring defense counsel to do so "would place an unreasonable burden on defendant's to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where defendants might hope that an established rule of evidence would be changed on appeal." (*People v. Kitchens* (1956) 46 Cal.2d 260, 263; see also *People v. Turner* (1990) 50 Cal.3d 668, 703; *In re Gladys R.* (1970) 1 Cal.3d 855, 861 [failure to object excused where at time of trial the law was so unsettled that reasonable minds could differ as to the appropriateness of an objection].)

As acknowledged by respondent, at the time of the penalty retrial, "no California court had yet determined the propriety of such questions." (RB 329, fn. 67.) In *People v. Chatman, supra,* 38 Cal.4th at p. 381, this Court recognized that *People v. Zambrano, supra,* 124 Cal.App.4th 228 "was the first California case to determine the propriety of such questions . . .." As the Court noted, "the applicable law was unsettled at the time of trial."

(*People v. Chatman, supra,* 38 Cal.4th at p. 380.)

Under these circumstances, there has been no waiver. The trial court indicated this line of questioning was proper so further objection or request for an admonition would have been futile. The failure to object is also excused because the lack of settled law in this area would have made further objection futile. This issue is cognizable on appeal.

C. The Impropriety of the Questioning

In claiming that the "were they lying" questions constituted proper inquiry, respondent relies exclusively on this Court's recent decision in *Chatman*, an opinion issued after the filing of the opening brief. Respondent has read *Chatman* too broadly and failed to recognize the limits on this line of questioning recognized by this Court in that case. Respondent errs by attempting to characterize the questioning of Gonzales in this case as the same as the questioning which occurred in *Chatman*. The cases are very different.

Chatman does not hold that "were they lying" questions are always proper; it merely finds under the circumstances of that case, with one exception, that such questioning was proper. Critical to the finding in *Chatman* is the issue of whether the defendant knew the other witnesses so that he may have a basis for knowing why those witnesses lied. (*People v. Chatman, supra,* 38 Cal.4th at p. 382 ["When, as here, the defendant knows the other witnesses well, he might know of reasons those witnesses lie".]) Respondent quotes extensively from *Chatman* but fails to offer any analysis or cite anything in the record showing that the critical aspect of personal knowledge of the witnesses was met here. Respondent probably ignores this crucial determination because no such showing can be made in this case. Other than Judith Mejorado, Gonzales did not know any of the witnesses

whom he was forced through the improper cross-examination to label as liars.

As recognized in *Chatman*, "[t]here is a difference between asking a a witness whether, in his opinion, another is lying and asking that witness whether he knows of a reason why another would be motivated to lie. (*Id.* at p. 381.) A proper reading of *Chatman* clarifies that the latter type of questioning is permissible when the defendant has personal knowledge of the other witnesses and therefore some basis to possibly know why their testimony is contradictory. This point is repeated in various forms in *Chatman*. "Defendant was not asked to opine on whether other witnesses should be believed. He was asked to clarify his own position and whether he had any information about whether other witnesses had a bias, interest, or motive to be untruthful." (*Id.* at p. 383.) "Defendant had personal knowledge of the conversations had with the other witnesses, and they were all friends or relatives." (*Ibid.*) "At least when, as here, the defendant knows the witnesses well, we think questions regarding any basis for bias on the part of a key witness are clearly proper." (*Ibid.*) This Court also noted that "the were they lying questions were brief and generally percusors to follow-up questions as to whether defendant knew of any reason the witnesses had to lie." (*Ibid.*).

The instant case stands in marked contrast to *Chatman*. The "were they lying" questions in this case were pervasive and without any follow-up based on the possibility that Gonzales had any reason to know the basis for the contradictory testimony by the other witnesses. Other than Judith Mejorado, none of the witnesses were friends or relatives, or even people that Gonzales had ever met. Gonzales had no prior relationship with these witnesses and therefore no basis to testify as to the motivation for their

testimony. Unlike in *Chatman*, the only purpose served by the prosecutor's improper questions was to force Gonzales to label them as liars.

This line of questioning is the same as that disapproved of in *Zambrano*. Respondent relying exclusively on *Chatman* ignores *Zambrano*. But *Chatman* explicitly cites *Zambrano* as an "example of improper were they lying questions." (*People v. Chatman, supra,* 38 Cal.4th at p. 381.)

Zambrano had been arrested for allegedly selling cocaine to two undercover officers who both testified to the circumstances of the transaction. Zambrano testified and denied involvement in any drug transaction. On cross-examination, the prosecutor repeatedly asked Zambrano if the officers were lying and whether "'everybody is lying except you?'" (*People v. Zambrano, supra,* 124 Cal.App.4th at p. 235.)

This Court in *Chatman* agreed with the *Zambrano* court that such questioning is improper:

> As the *Zambrano* court held, the district attorney's questions called for irrelevant and speculative testimony. It was clear that the defendant was testifying to a diametrically different set of circumstances from that recounted by the officers. The differences could not have been attributed to mistake or faulty recall. Defendant, a stranger to the officers, had no basis for insight into their bias, interest, or motive to be untruthful. Had the prosecutor asked why they might lie, which she did not, it would have been apparent that any answer would have been speculative. Under these circumstances, the questions did not develop facts regarding defendant's own testimony. They "'merely forced defendant to opine without foundation, that the officers were liars.'"

(*People v. Chatman, supra,* 38 Cal.4th at p. 381, quoting *People v. Zambrano, supra,* 124 Cal.App.4th at p. 241.)

Similarly, in the present case, the prosecutor repeatedly forced Gonzales to opine that the other witnesses, all of whom were strangers to him except Mejorado, were liars. This testimony was inadmissible.

D. The Improper Cross-Examination was Prejudicial

Respondent contends that any error was harmless because Gonzales lacked credibility in any event. (RB 330.) But respondent's superficial analysis on this point does not establish that there is no reasonable possibility that the jury would have reached a different verdict absent the error or that the error has been shown to be harmless beyond a reasonable doubt. (*People v. Brown, supra,* 46 Cal.3d at pp. 447-448; *Chapman v. California, supra,* 386 U.S. at p. 24.)

For example, respondent claims that Gonzales's credibility was "severely impeached ... by his taped statement to Mr. Berber." (RB 330.) Respondent fails to explain this reference, and it makes no sense. The taped statement to Mr. Berber, presented by the prosecution, consisted of Gonzales confessing to being the shooter in the Skyles and Price killings (as well as the shooter in the killing of Lester Eaton). The taped statement and Gonzales's subsequent testimony in the penalty retrial are consistent for the most part, so respondent's claim that the taped statement impeached the Gonzales trial testimony is simply wrong.

Respondent also claims that Gonzales was impeached "by the testimony of the eyewitnesses about whom he was questioned." (RB 330.) First, this point largely begs the question at issue because the improper cross-examination interfered with a fair and proper consideration of the contradictions between the Gonzales testimony and the eyewitness testimony. Second, the eyewitness identification testimony was hardly

overwhelming. Although the eyewitnesses picked appellant from a photographic line-up, that process did not include photographs of Gonzales. (13 RT 1652-1658.) The absence of Gonzales from the line-up throws into doubt the reliability of the process because the trial judge described appellant and Gonzales as looking "like twins." (1 RT 29.) The identifications also occurred under circumstances rendering them largely unreliable. Carol Mateo and her brother, Jeremy Robinson, made their identifications from a distance of about 50 feet, late at night, from a moving car after seeing the suspect for only three to five seconds. (12 RT 1456-1467; 13 RT 1513, 1569-1570.) Jeremy Robinson was unable to identify appellant in court as the shooter. (13 RT 1575.) Alejandro Mora, the gas station attendant, acknowledged that he only saw the shooter from the side and never saw his face. (13 RT 1624, 1628-1629.)

Respondent's claim that the jury ignored Gonzales's testimony is also undercut by the circumstance that the penalty phase jury found his testimony significant enough to request a read-back. (34 RT 4510.) The jury's focus on this testimony is a noteworthy factor in assessing the prejudice from interference with that testimony. (*People v. Williams* (1971) 22 Cal.App.3d 34, 40.) Respondent also ignores the significant factor that the original penalty phase trial, without the improper line of questioning, favored verdicts of life.[14] (*People v. Sturm* (2006) 37 Cal.4th 1218, 1244 [judicial misconduct in penalty retrial constituted reversible where original penalty phase had ended in hung jury favoring life].) Absent the error complained of

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[14] Gonzales did not testify in the original penalty phase trial but in the guilt phase the jury heard the taped confession by Gonzales where he admitted being the shooter.

here, appellant's original penalty phase jury had split 11-1 in favor of life on count 1, and 7-5 in favor of life on counts 4 and 5. (19 RT 2769.)

Finally, respondent ignores the negative impact on the penalty determination caused by the improper line of questioning. The prosecutor asked Gonzales three times whether Deputy Sheriff Esquivel was lying when he testified in a contradictory manner. (32 RT 4260-4261.) Forcing a defendant to characterize a police officer as a liar is a particularly prejudicial tactic. (*State v. Casteneda-Perez* (Wash. 1991) 61 Wash.App. 354, 360, 810 P.2d 74, 77 ["The tactic of the prosecutor was apparently to place the issue before the jury in a posture where, in order to acquit the defendant, the jury would have to find the officer witnesses were deliberately giving false testimony. Since jurors would be reluctant to make such a harsh evaluation of police testimony, they would be inclined to find the defendant guilty"].) As noted in *Zambrano*, the prosecutor "used the questions to berate defendant before the jury and to force him to call the officers liars in an attempt to inflame the passions of the jury." (*People v. Zambrano, supra,* 124 Cal.App.4th at p. 242.) As with the testimony of Deputy Esquivel, the prosecutor similarly asked improper questions repeatedly as to whether other witnesses were lying, including each of the eyewitnesses. (32 RT 4209-4210 [Gonzales asked four times whether Carol Mateo lying when she identified appellant as the shooter]; 32 RT 4276 [Gonzales asked if Jeremy Robinson lying when he identified appellant as the shooter]; 32 RT 4209 [Gonzales asked if Alejandro Mota Garcia lying when he identified appellant as the shooter].) Such improper questions greatly skewed the proper evaluation of the lingering doubt defense presented by appellant because this line of questioning "precludes the possibility that the witnesses's testimony

conflicts with that of the defendant for a reason other than deceit." (*State v. Singh* (Conn. 2002) 259 Conn. 693, 793 A.2d 226, 238.)

Appellant relied on the Gonzales testimony to create lingering doubt that he shot Skyles and Price. The improper cross-examination skewed the evaluation of this critical testimony and distorted the penalty determination by creating a false aura that the jury would have to find that all of the prosecution witnesses lied. (*Id.* at pp. 237-238.) There is a reasonable possibility that this error affected the penalty determination. Appellant's death sentences should be reversed.

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XVI.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY IMPROPERLY ADMITTING EVIDENCE RELATING TO JAIL INCIDENTS AND IMPROPERLY INSTRUCTING THE JURY ON THIS "OTHER CRIMES" EVIDENCE

A. Introduction

The trial court erred by allowing the prosecution to present evidence in aggravation not tied to the violation of any particular penal statute and not shown to involve the threat or use of force or violence. Respondent mischaracterizes this issue by focusing on the trial court's failure to hold a hearing outside the presence of the jury on the admissibility of this evidence. (RB 339.) While the trial court should have conducted such a hearing, that is not the crux of the issue presented by appellant.

Respondent ignores the real issue here – the failure of the prosecution to tie any of the alleged aggravating incidents to any specific penal code violation. (See AOB 173-188.) Respondent also claims in the introduction to this issue, that any error was harmless in light of the overwhelming aggravating evidence, but provides absolutely no analysis on the issue of prejudice. Respondent has failed to address adequately the issues raised by appellant which establish that the trial court committed reversible error.

B. The Failure to Connect the Jail Incidents to Violation of any Penal Statute

Respondent asserts that no "formal hearing" was necessary before admitting evidence of "other crimes" allegedly committed by appellant while in jail. (RB 340.) At trial, appellant sought a hearing pursuant to Evidence Code section 402 to determine the admissibility of this evidence. (26 RT 3188; see *People v. Phillips* (1985) 41 Cal.3d 29, 72.) In his opening brief,

appellant showed that such a hearing should have been conducted to determine the admissibility of the challenged evidence. (AOB 174.) But respondent misses the point by focusing exclusively on the lack of such a hearing and claiming that no hearing was necessary. As addressed in appellant's opening brief, the lack of a *Phillips* hearing is only a subpart of the larger issue which respondent completely ignores – the inadmissibility of the jail incidents evidence because none of the incidents were tied to a violation of a specific penal statute. The failure of respondent to brief this overriding issue constitutes a concession of appellant's position. (See *People v. Bouzas* (1991) 53 Cal.3d 467, 480 [respondent's failure to engage arguments operates as concession]; *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 529; *California School Employees Assn. v. Santee School Dist.* (1982) 129 Cal.App.3d 785, 787 ["[T]he district apparently concedes by its failure to address this issue in its appellate brief . . ."].)

It is well established, as pointed out in appellant's opening brief, that factor (b) other crimes evidence is admissible only if the conduct violates a specific penal statute. (AOB 175-176; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1259; *People v. Phillips, supra,* 41 Cal.3d at p. 72; *People v. Grant* (1988) 45 Cal.3d 829, 850.) A *Phillips* hearing should have been held because that would have forced the prosecution and trial court to recognize that admissibility of the other crimes evidence depended on a showing by substantial evidence of every element of some specific penal violation. (*People v. Phillips, supra,* 41 Cal.3d at p. 72, fn. 25.) The failure here to connect the alleged jail incidents with any specific penal violation rendered the evidence inadmissible. As further elaborated on in the opening brief, the failure to tie appellant's alleged conduct to any specific penal violation also

rendered the reasonable doubt standard meaningless, as the prosecution and trial court failed to provide the jury with any elements which must be met. (See AOB 176; *People v. Robinson* (1982) 33 Cal.3d 21, 53, 55, fn. 19.)

Respondent has failed to address these issues, and well established law supports appellant's position. The trial court erred by admitting the other crimes evidence.

C. Lack of Implied Threat of Use of Force or Violence

The other crimes evidence relating to possession of razor blades also suffers from another deficiency – the mere possession of razor blades in jail does not establish proof beyond a reasonable doubt of an implied threat of use of force or violence as required under factor (b). Respondent contends that this Court has held to the contrary. (RB 341.)

Some cases such as *People v. Tuilaepa* (1992) 4 Cal.4th 569, 589, have found simple possession of razor blades in a jail facility sufficient, but that finding is not supported by the cases relied on and *Tuilaepa* should be reconsidered. (See AOB 177-180.) That is, cases like *Tuilaepa* made an unwarranted expansion from cases where possession of materials such as razor blades was accompanied by other evidence indicating an implied or express threat of use of force. Other than *Tuilaepa,* the cases relied on by respondent either did not resolve this issue (*People v. Lucero* (2000) 23 Cal.4th 692, 727-728 [defendant in possession of shank and issue concerned whether he knowingly possessed shank, not whether an implied threat of use of force existed]; *People v. Hines* (1997) 15 Cal.4th 997, 1056-1057 [defendant in possession of plastic inmate made knife and issue concerned whether he knowingly possessed knife, not whether implied threat of use of force existed]), involved evidence of possession of a shank or other item for

which there is no legitimate purpose, unlike razor blades (*People v. Martinez* (2003) 31 Cal.4th 673, 693, 694 [defendant possessed metal shank that had no legitimate purpose unlike razor blades]; *People v. Nakahara* (20030 30 Cal.4th 705, 719-720 [defendant possessed metal shank]; *People v. Hughes* (2002) 27 Cal.4th 287, 383-384 [defendant in possession of four-inch sharpened pin]; *People v. Smithey* (1999) 20 Cal.4th 936, 1002, 1003 [defendant in possession of shank]; *People v. Williams* (1997) 16 Cal.4th 153, 237-238 [defendant in possession of shank]; *People v. Ramos* (1997) 15 Cal.4th 1133, 1173-1174 [defendant in possession of five shanks over two month period]), or involved other evidence of an implied of express threat of use of force (*People v. Jurado* (2006) 38 Cal.4th 72, 138-139 [defendant involved in jail riot and using steel poles to make stabbing motions toward other inmates]; *People v. Combs* (2006) 34 Cal.4th 821, 858, 860 [defendant engaged in three separate incidents using razor blades and other items to make jabbing motions at guards and threatening to fight guards]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153 [defendant's possession of razor blades accompanied by evidence that he would attack a guard]).

In *People v. Roberts* (1992) 2 Cal.4th 271, 332, where the defendant possessed an unsharpened piece of metal hidden in his cell and even admitted the metal was for a weapon, this Court stated, "[t]here may be doubt whether the crime involved conduct making its commission admissible under the statute." That doubt is even more apparent in appellant's case. This Court should reconsider the holding in *Tuilaepa* on this issue and find that mere possession of razor blades is insufficient to establish an implied threat of use of force or violence.

D. Allowing Use of the Jail Incidents as Factor (b) Evidence Would Render the Aggravating Factor Unconstitutionally Overbroad

In the opening brief, appellant established that use of the jail incidents in appellant's case as aggravation would constitute an overbroad and invalid application of other crimes evidence under factor (b). (AOB 180-182.) Respondent has not addressed this issue. Respondent's failure to brief this issue constitutes a concession. (*People v. Bouzas, supra,* 53 Cal.3d at p., 480 [respondent's failure to engage arguments operates as concession]; *Westside Center Associates v. Safeway Stores 23, Inc., supra,* 42 Cal.App.4th at p.529; *California School Employees Assn. v. Santee School Dist., supra,* 129 Cal.App.3d at p. 787 ["[T]he district apparently concedes by its failure to address this issue in its appellate brief . . ."].)

E. Admission of Evidence of Unadjudicated Criminal Activity at the Penalty Phase is Unconstitutional

In the opening brief, appellant established that admission of unadjudicated criminal activity in the penalty phase of a capital trial is unconstitutional. (AOB 182-183.) Respondent has not addressed this issue. Respondent's failure to brief this issue constitutes a concession. (*People v. Bouzas, supra,* 53 Cal.3d at p., 480 [respondent's failure to engage arguments operates as concession]; *Westside Center Associates v. Safeway Stores 23, Inc., supra,* 42 Cal.App.4th at p.529; *California School Employees Assn. v. Santee School Dist., supra,* 129 Cal.App.3d at p. 787 ["[T]he district apparently concedes by its failure to address this issue in its appellate brief . . ."].)

F. The Trial Court Incorrectly Instructed on the Other Crimes Evidence

In the opening brief, appellant established instructional error due to the failures of the trial court and prosecutor to specify any applicable criminal statutes making application of the reasonable doubt standard meaningless. (AOB 183-188.) Respondent has not addressed this issue. Respondent's failure to brief this issue constitutes a concession. (*People v. Bouzas, supra,* 53 Cal.3d at p., 480 [respondent's failure to engage arguments operates as concession]; *Westside Center Associates v. Safeway Stores 23, Inc., supra,* 42 Cal.App.4th at p. 529; *California School Employees Assn. v. Santee School Dist., supra,* 129 Cal.App.3d at p. 787 ["[T]he district apparently concedes by its failure to address this issue in its appellate brief . . ."].)

G. The Improper Use of Other Crimes Evidence Resulted in Prejudice

This was a closely decided case with the original penalty phase ending in a hung jury with the jurors favoring life verdicts. The improper admission and instructions on other crimes evidence is likely to have skewed the determination in the penalty retrial, especially since the other aggravation evidence was largely limited to the circumstances of the crime. (See AOB 188-189.)

There is a reasonable possibility that consideration of this improper aggravation affected the verdict, especially when considered in conjunction with other penalty phase errors. (*People v. Brown, supra,* 46 Cal.3d at p. 447; *Chapman v. California, supra,* 386 U.S. at p. 24.). Appellant's death sentences must be reversed.

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XVII.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN THE PENALTY RETRIAL BY REFUSING TO INSTRUCT THE JURY ON LINGERING DOUBT

A. Introduction

Appellant has established that the trial judge's refusal to instruct the jury on lingering doubt during the penalty retrial was erroneous and constituted harmful error. (AOB 190-203.) In the original penalty trial, the trial court instructed the jury on lingering doubt. (19 RT 2640) That trial ended in a hung jury favoring life sentences. During the penalty retrial, the same trial judge agreed to instruct the jury on lingering doubt again after defense counsel explained appellant's reliance on this instruction. (24 RT 3028.) Defense counsel proceeded to incorporate lingering doubt throughout the penalty retrial, presenting evidence that exonerated appellant of the murders of Skyles and Price. (27 RT 3241-3242.)

Shortly before the penalty retrial concluded, however, the trial judge announced his decision to disallow the jury instruction on lingering doubt. (32 RT 4190.) This unexpected, unreasonable decision left the jury with no mechanism for applying the exonerating evidence they heard defense counsel present throughout the trial. As a result, the jury made an unfair and unreliable determination to sentence appellant to death. This arbitrary decision violated appellant's federal constitutional rights. Had the judge properly instructed the jury on lingering doubt, appellant's death sentence would likely not have resulted.

Respondent contends that there are no constitutional violations because (1) the catchall provision of factor (k) in CALJIC No. 8.85 allowed

the jury sufficient means for evaluating the evidence, and (2) jury instructions on lingering doubt are not required. (RB 369-370.) Respondent further contends that any error the trial court may have committed was harmless because appellant's death sentence was a virtual certainty.

As discussed in detail below, factor (k) was insufficient to afford jurors the means to consider the exonerating evidence because factor (k) specifically excludes legal excuses. Gonzales's testimony that he, not appellant, was solely responsible for the Skyles/Price shootings constitutes a legal excuse for the crime, not merely mitigating evidence. Thus, factor (k) is inapplicable to this particular evidence. Furthermore, although instructions on lingering doubt are not required generally, this instruction became imperative in this case when the trial court agreed to allow it and defense counsel based his entire defense on it. The trial judge's unexpected decision to disallow this instruction late in the trial constituted reversible error due to the high probability that the jury would not have returned a death sentence had they been properly instructed on lingering doubt as happened in the original penalty trial.

B. CALJIC No. 8.85 (k) Was Insufficient To Allow Jurors The Means For Assessing Exonerating Evidence

Respondent argues factor (k) of CALJIC No. 8.85 afforded jurors the ability to consider any mitigating evidence presented in appellant's defense. Respondent's reliance on this instruction, however, is misplaced. Factor (k) exclusively pertains to mitigating evidence, not to legal excuses. (See CALJIC No. 8.85, subd. (k).) As the Supreme Court has distinguished, mitigating evidence involves characteristics of the defendant or the offense. (See, e.g., *Oregon v. Guzek* (2006) 546 U.S. 517, 519.) Legal excuses, in

contrast, absolve defendants from criminal responsibility altogether. (See, e.g., *Eddings v. Oklahoma* (1982) 455 U.S. 104, 113.)

In this case, Gonzales's testimony that he, not appellant, was solely responsible for the murders of Skyles and Price, constituted a legal excuse because it absolved appellant of any criminal liability for the crimes. Because factor (k) specifically excludes legal excuses, that instruction was not sufficient to allow the jury to consider the exonerating evidence. There is a reasonable likelihood that the jury interpreted factor (k) as not applying to lingering doubt. In this way, although the trial judge allowed defense counsel to present evidence relating to appellant's innocence, he effectively foreclosed the jury from considering this evidence. The trial judge thereby violated appellant's due process right to present a defense. (See *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1099.) The Supreme Court has held capital defendants have a constitutional right to jury consideration of any relevant mitigating factors, and courts must provide the jury with the vehicle to express their "reasoned moral response" to the evidence presented on defendants' behalf. (See *Penry v. Lynaugh* (1989) 492 U.S. 302, 328, overruled on another ground in *Atkins v. Virginia* (2002) 536 U.S. 304.) Echoing this Supreme Court precedent, the Ninth Circuit held in *Bradley v. Duncan*:

> [T]he state court's failure to correctly instruct the jury on the defense may deprive the defendant of his due process right to present a defense. This is so because the right to present a defense would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense. (*Bradley v. Duncan, supra,* 315 F.3d at p. 1099.)

In a series of recent capital cases, the United States Supreme Court overturned death sentences where the jury instructions left the juries with no meaningful basis to consider factors presented by the defense in favor of life sentences. (*Smith v. Texas* (2007) __ U.S. __, 127 S.Ct. 1686; *Brewer v. Quarterman* (2007) __ U.S. __, 127 S.Ct. 1707; *Abdul-Kabir v. Quarterman* (2007) __ U.S. __, 127 S.Ct. 1654.) The failure to instruct on lingering doubt in appellant's case resulted in the same deficiency. Although the jury heard evidence of lingering doubt, the penalty phase instructions left the jury with no meaningful basis to apply the facts to the law sufficient to lead to a fair and reliable penalty determination.

Additionally, the trial judge violated Penal Code section 1093, subdivision (f), which requires trial courts to charge the jury "on any points of law pertinent to the issue, if requested." (Pen. Code § 1093, subd. (f).) This prejudicial error requires reversal.

C. Lingering Doubt Instruction Was Required In This Case Due To Special Circumstances

Respondent argues that neither state nor federal law compels trial courts to instruct the jury on lingering doubt. Although courts generally need not instruct juries on lingering doubt, this Court has held the lingering doubt instruction proper in the context of capital penalty retrials, especially where the original trial resulted in a hung jury. (See *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.) The United States Supreme Court has not ruled on whether defendants have a federal constitutional right to the lingering doubt instruction.[15]

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[15] The Supreme Court issued a narrow opinion last term in *Oregon v. Guzek, supra,* 546 U.S.517 addressing the admissibility of mitigating evidence during penalty retrials. (517.) The Court explicitly declined to

The original penalty trial, which included the lingering doubt instruction, resulted in a hung jury. (19 RT 2769.) A post-trial inquiry of the jurors by the trial judge revealed that the jurors had split 11-1 in favor of a life sentence for appellant on count 1, and 7-5 in favor of life on counts 4 and 5. (19 RT 2769.) As a result, defense counsel focused the penalty retrial on lingering doubt, emphasizing the same self-incriminating statements that the jury heard Gonzales make during both the guilt and original penalty phases.[16] (27 RT 3241.) Defense counsel heavily relied on the trial judge's approval of the lingering doubt instruction throughout the entire penalty retrial. (RT 3241.) By agreeing that appellant was entitled to this instruction at the outset of the penalty retrial, the trial judge invited a reasonable, good faith reliance on the use of this jury instruction. Thus, the trial judge should have been foreclosed from recanting this instruction shortly before the penalty retrial's conclusion.

Even assuming that it is not error to fail to instruct on lingering doubt generally, the particular facts of this case required such an instruction. This Court has recognized that a trial court "may be required to give a properly formulated lingering doubt instruction when warranted by the evidence." (*People v. Cox* (1991) 53 Cal.3d 618, 678, fn. 20; *People v. Thompson* (1988) 45 Cal.3d 86, 134-135.) Under the circumstances of this particular case, the lingering doubt instruction was imperative, and the trial judge's

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rule on the lingering doubt issue, which it had left unresolved in *Franklin v. Lynaugh* (1988) 487 U.S. 164. Because the instant case does not involve the admissibility of new evidence that is inconsistent with that presented in the earlier trial, *Guzek* is inapplicable.

[16] In the original trial, Gonzales did not testify but the jury heard his taped statements where Gonzales admitted being the shooter in the Skyles and Prices shootings.

arbitrary decision to withhold it late in the retrial constituted harmful, reversible error.

D. The Trial Court's Unexpected, Arbitrary Decision Not To Instruct The Jury On Lingering Doubt Constituted Harmful Error

Respondent contends that any error resulting from the trial court's failure to instruct the jury properly was harmless because the outcome of the penalty retrial was a virtual certainty. (RB 378.) This supposed "mountain of aggravating evidence" against appellant, however, mainly consists of minor disciplinary infractions and one previous conviction for automobile theft. (33 RT 4496, 4498.) It is precisely the court's failure to instruct the jury on lingering doubt that made appellant's death sentence a virtual certainty. The trial judge's unfair, unreasonable decision to withhold the lingering doubt instruction heavily prejudiced the outcome of the penalty trial in the prosecution's favor. In this way, the trial judge violated appellant's due process rights.

This egregious violation of appellant's fundamental federal constitutional rights requires reversal due to its impact on the penalty retrial's outcome. (See, e.g., *United States v. Sotelo-Murillo* (9th Cir. 1989) 887 F.2d 176, 180 [a criminal defendant's right to an instruction on his theory of the case "implicates fundamental constitutional guarantee"]; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201 [criminal defendant's right to have the jury instructed on the theory of the case is "basic to a fair trial"].)

The trial judge's failure to instruct the jury properly on lingering doubt does not withstand harmful error analysis. In order for such federal constitutional error to be harmless, respondent must show beyond a

reasonable doubt that the error did not contribute to the jury's verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Respondent failed to meet the *Chapman* burden in this case because lingering doubt comprised the crux of appellant's penalty retrial defense. The trial judge allowed the lingering doubt instruction during the original penalty trial, which resulted in a hung jury. When the judge omitted this instruction in the penalty retrial, the jury returned a verdict of death. Therefore, it is reasonable to infer that this lingering doubt instruction was the determining factor of appellant's sentence. For this reason, the trial judge's arbitrary decision to omit this instruction during the retrial cannot be considered harmless.

Even if no federal constitutional error occurred, reversal is required because there is a reasonable possibility that the jury would have rendered a different verdict had the error not occurred. (*People v. Brown, supra*, 46 Cal.3d at p. 448.) For these reasons, the death sentences for appellant must be reversed.

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XVIII.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO INSTRUCT THE JURY THAT MERCY COULD BE CONSIDERED AS A BASIS FOR RETURNING A VERDICT OF LIFE WITHOUT POSSIBILITY OF PAROLE

The trial court erred by denying the defense request to instruct the jury that it could consider mercy as a basis for deciding for a life sentence. (AOB 204-209.) As pointed out in the opening brief, the standard instruction covers only sympathy, but not the separate concept of mercy. (AOB 204.) Respondent contends no instruction on mercy is required, relying on prior case law holding that instruction on sympathy is sufficient. This argument has been presented sufficiently in the opening brief and no further reply is necessary.

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XIX.

APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY IN THE PENALTY PHASE WITH CRITICAL GUIDELINES ON HOW THE JURY SHOULD EVALUATE THE EVIDENCE

A. Introduction

The trial court erred by failing to give critical instructions, including the presumption of innocence, allocation of the burden of proof, determining the credibility of witnesses, evaluating conflicting evidence and considering the sufficiency of the evidence, in the penalty phase. (See AOB 210-220.) These omissions left the jury without any legal guidance in making key determinations.

Respondent concedes that the trial court failed to give the instructions. (RB 376.) Respondent contends, however, that the trial court error was harmless. (RB 376-378.)

Respondent's position is wrong. Even respondent recognizes that the cases relied on for the position that this failure constitutes harmless error are not really applicable because the error in appellant's case occurred in a penalty retrial where the jury did not have the benefit of instruction in the guilt phase as in the cases relied on by respondent. Some of the omitted instructions, such as the presumption of innocence and allocation of the burden of proof, also are such basic protections for a fair trial that harmless error analysis is inappropriate. But even under harmless error analysis, it is likely that this error contributed to the penalty verdicts so that reversal is required.

Appellant is entitled to a penalty reversal due to the failure of the trial court to instruct on critical areas of the law.

B. The Error Was Prejudicial

Respondent contends that this Court has repeatedly found the failure to give penalty phase evidentiary instructions harmless citing *People v. Wharton* (1993) 53 Cal.3d 522, 600 and *People v. Daniels* (1991) 52 Cal.3d 815, 885. (RB 376.) Respondent recognizes, however, that unlike in *Wharton* and *Daniels*, where the same jury was involved in the guilt and penalty phase determinations and the instructions omitted in the penalty phase were given in the guilty phase, in appellant's case the penalty jury never received any instructions for evaluating the evidence because this case involves a penalty retrial. (RB 376.)

Respondent's fallback position is that *People v. Carter* (2003) 30 Cal.4th 1166 sanctions finding the error harmless in appellant's case. But *Carter* involved a different factual scenario than appellant's case, the chief difference being that in *Carter* the trial court *did instruct in the penalty phase on the presumption of innocence* and defined the burden of proof beyond a reasonable doubt. (*Id.* at p. 1219.) In appellant's case, the trial court gave an abbreviated reasonable doubt instruction, omitting the first paragraph of CALJIC No. 2.90 which sets out the presumption of innocence and specifies that the prosecution bears the burden of proof. (33 RT 4497.)

Respondent mischaracterizes this critical omission as only a "technical error in the reading of the reasonable doubt instruction." (RB 373.) Omission of instruction on the presumption of innocence is not a mere "technical error" so easily cast aside. It is well established that "[t]he presumption of innocence . . . is a basic component on a fair trial under our system of criminal justice." (*Estelle v. Williams* (1976) 425 U.S. 501, 503.) In *Taylor v. Kentucky* (1978) 436 U.S. 478, 490, the United States Supreme Court reversed a conviction where the trial court instructed on the

prosecution burden of proof beyond a reasonable doubt but failed to instruct on the presumption of innocence

In finding the error harmless in *Carter*, this Court held that the lack of evidentiary instructions did not constitute structural error because it did not deprive the defendant of "'basic protections' ... without which 'a criminal trial cannot reliably serve its function as vehicle for determination of guilt or innocence [or punishment] . . . and no criminal punishment may be regarded as fundamentally fair.'" (*People v. Carter, supra,* 30 Cal.4th at p. 1221, quoting *Neder v. United States* (1999) 527 U.S. 1, 8-9, quoting *Rose v. Clark* (1986) 478 U.S. 570, 577-578.) The error in *Carter* did not include the failure to instruct on the presumption of innocence or allocation of the burden of proof.

In appellant's case, the trial court failed to instruct on "basic protections" such as the presumption of innocence and allocation of the burden of proof. This error is structural. The failure to instruct on the presumption of innocence and allocation of the burden of proof is akin to the defective instruction on reasonable doubt found to constitute structural error in *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278. The error here "affected the framework in which the trial proceeds." (*Neder v. United States, supra,* 527 U.S. at p. 8, quoting *Arizona v. Fulminante* (1991) 499 U.S. 279, 310.)

In *People v. Phillips* (1997) 59 Cal.App.952, 953-954, the Second District Court of Appeal held that the trial court's failure to define reasonable doubt, instruct on the defendant's presumption of innocence, or instruct on the prosecution's burden to prove guilt beyond a reasonable doubt constituted structural error. Similarly, the failure to instruct on the presumption of innocence and on the prosecutions' burden of proof beyond a reasonable doubt was found to be structural error and reversible per se in

People v. Crawford (1997) 58 Cal.App.3d 815, 817.[17] The penalty determination should be reversed.

Even under a harmless error analysis, reversal is required. Respondent asserts that "it can be said with certainty that in this case the absence of evidentiary instructions at the penalty phase made absolutely no difference." (RB 378.) Respondent's certainty is misplaced.

Given the disputed nature of the other crimes evidence (see Arg. XVI), the failure to instruct on the presumption of innocence and allocation of the burden of proof is likely to have deprived appellant of proper guidance to the jury on a core principal of American criminal law. This Court has recognized that errors relating to the reasonable doubt instruction as to other crimes evidence in a capital case are "especially serious because that type of evidence 'may have a particularly damaging impact on the jury's determination whether the defendant should be executed.'" (*People v. Davenport* (1985) 41 Cal.3d 247,280-281, quoting *People v. Robertson* (1982) 33 Cal.3d 21, 54, quoting *People v. Polk* (1965) 63 Cal.2d 443, 450.) The error here deprived appellant of the presumption of innocence on

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[17] There is a split of authority in California appellate courts on whether this failure to instruct constitutes structural error or is reviewed under the harmless error standard of *Chapman.* But even in most of those cases applying harmless error analysis, reversal has still been required. (See, e.g., *People v. Flores* (2007) 147 Cal.App.4th 199, 202; *People v. Elguera* (1992) 8 Cal.App.4th 1214, 1222, 1224.) In *People v. Vann* (1974) 12 Cal.3d 220, 228, this Court reversed a conviction where the trial court failed to instruct sua sponte on the presumption of innocence and that the prosecution had the burden of proving the defendant's guilt beyond a reasonable doubt, finding that it could not conclude "the omission of the vital instruction was harmless beyond a reasonable doubt." *Vann* did not consider whether this error is reversible per se because it occurred years before *Fulminante* and *Sullivan* elucidated the structural error standard.

evidence he disputed, such as whether he possessed razor blades for innocent purposes. The State cannot show that this error did not contribute to the verdict. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

The likely prejudice from the instructional error also extended to the evaluation of other evidence. A critical issue in the penalty determination centered on the credibility of Gonzales when he confessed to being the shooter. The prosecution's gang expert testified that Gonzales had exaggerated his role in the Skyles and Price shootings. (31 RT 4069, 4072.) The expert also offered testimony that those shootings were in retaliation for a prior killing of a fellow gang member. (31 RT 4068.) The jury should have been instructed that they were not bound by such expert testimony. (See Pen. Code, § 1127b; CALJIC No. 2.80.) The failure to give the requisite instructions left the jury likely to accept the expert's testimony without giving it adequate evaluation leading to improper findings that appellant was the shooter and the shootings were premeditated rather than arising from a heat of passion.

In *Carter*, this Court found harmless error where "the jury expressed no confusion or uncertainty in this regard and never requested clarification." (*People v. Carter, supra,* 30 Cal.4th at p. 1221.) But this assumes too much. How are jurors to know that they should have been instructed further? "Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (*Carter v. Kentucky* (1981) 450 U.S. 288, 302.) Putting the onus on the jurors to recognize that they had been deprived of necessary instructions ignores that it is the judge who needs to recognize the judicial duty to give guidance. "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depend[s] on *discharge of the judge's responsibility* to give the required

guidance by a lucid statement of the relevant legal criteria." (*Bollenbach v. United States* (1946) 326 U.S. 607, 612, emphasis added.) Indeed, in appellant's case, the trial court instructed the penalty phase jurors : "You will now be instructed as to *all of the law* that applies to the penalty phase of this trial." (33 RT 4491, emphasis added; CALJIC No. 8.84.1.) Presuming as we must that the jurors followed this instruction (*Richardson v. Marsh* (1987) 481 U.S. 200, 211), it is illogical and unreasonable to expect that the jurors would have sought further instruction. "In net effect the jurors were given to understand that they had received a self-contained, complete statement of the law they were to follow." (*People v. Vann, supra,* 12 Cal.3d at p. 227, fn. 6.)[18]

But even under the standard set out in *People v. Carter,* there is indication in the record that the jury struggled with evaluation of critical evidence. For example, during deliberations the jury requested a read-back of the testimony of Gonzales. (34 RT 4510.) Appellant depended on the Gonzales testimony to show that appellant was not the shooter. The read-back request shows that the jury had questions about this crucial testimony. But due to the trial court error, the jury was left without guidance on how to evaluate this testimony. Due to the failure to instruct with CALJIC No. 2.01, relating to circumstantial evidence, the jurors were not told that if there are two reasonable interpretations of the evidence, one pointing to the defendant's innocence, that the jurors must adopt that interpretation. The

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[18] Although the trial court had a sua sponte duty to give the omitted instructions, it is also important to note that "[a]s the moving party in a criminal action, it is the People's obligation ... to tender adequate instructions ... so that a lawful determination can be made and sustained on appeal. (*People v. Phillips, supra,* 59 Cal.App.4th at p. 956, quoting *People v. Winslow* (1995) 40 Cal.App.4th 680, 683.)

Gonzales testimony conflicted with eyewitness testimony and the prosecution's expert testimony. Due to the failure to instruct with CALJIC No. 2.22, relating to weighing conflicting testimony, the jurors were not told that they are not required to decide any issue of fact because more witnesses had testified one way over the other. Due to the failure to instruct with CALJIC No. 2.80, relating to expert testimony, the jurors were not told that they were not bound by the testimony of the prosecution's expert. The testimony of Gonzales standing alone could have been a sufficient basis for rejecting a death verdict. Due to the failure to instruct on CALJIC No. 2.27, relating to the sufficiency of testimony of one witness, the jury is not likely to have understood this legal concept. The trial court had already considerably skewed the penalty determination by improperly insinuating himself into the case by providing "expert" opinion on the impossibility of Gonzales's testimony. (See Arg. XIV.) Due to the failure to instruct with CALJIC No. 2.20, relating to the believability of witnesses, the jury likely deferred to the judge, given the importance of his position and the respect afforded judges, not knowing that jurors are the exclusive judges of the credibility of witnesses.

Given the importance of the Gonzales testimony and the other crimes evidence to the penalty determination, it cannot be said that the failure to instruct on the presumption of innocence, the allocation of the burden of proof and the standards for evaluating the evidence did not contribute to the verdict. (*Chapman v. California, supra,* 386 U.S. at p 24.) Thus, even under harmless error analysis, reversal is required. (*People v. Vann, supra,* 12 Cal.3d at p. 228; *People v. Flores, supra,* 147 Cal.App.4th at p. 202.) Appellant's death sentences should be reversed.

* * * * *

XX.

THE INSTRUCTIONS ABOUT THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3, AND THE APPLICATION OF THESE SENTENCING FACTORS, RENDER APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

Appellant's death sentences should be reversed because of the unconstitutionality of the penalty instructions and application of the sentencing factors. (AOB 221-245.) Respondent contends the instructions are constitutional relying solely on prior case law of this Court. (RB 365-366.) Appellant has already addressed in the opening brief why that prior case law should be reconsidered so no further reply is necessary.

* * * * *

XXI.

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF

Appellant has established that his death sentences violated the federal Constitution because the prosecution was not required to prove beyond a reasonable doubt that aggravation outweighed mitigation and that death was appropriate. (AOB 247-260.) Respondent contends this claim is without merit because this Court has previously rejected such claims. (RB 335.)

Appellant has urged reconsideration of this argument because this Court's position in not tenable under the controlling authority of the United States Supreme Court in *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, and *Blakely v. Washington* (2004) 542 U.S. 296. Since the filing of the opening brief in this matter, the United States Supreme Court has also issued another decision applying the *Apprendi* principles which supports appellant's position. (*Cunningham v. California* (2007) __ U.S. __, 127 S.Ct. 856.) Indeed, *Cunningham* makes clear that this Court has misinterpreted *Apprendi* and its progeny.

In *Cunningham*, the United States Supreme Court rejected this Court's analysis in *People v. Black* (2005) 35 Cal.4th 1238 that *Apprendi* did not apply to imposition of the upper term by a judge under California's determinate sentencing law (DSL). *Black* held that the relevant statutory maximum under the DSL after a guilt verdict was the upper term and that the judge's selection of the upper term did not violate the defendant's Sixth Amendment right to a jury trial with proof beyond a reasonable doubt. Rejecting this analysis in *Cunningham*, the Supreme Court found that under

the DSL the jury's guilty verdict made the middle term the statutory maximum under *Apprendi*. The Court held that increasing a defendant's sentence to the upper term based upon a judicial finding of an aggravating fact violated the Constitution unless that aggravating fact was submitted to a jury and proven beyond a reasonable doubt. (*Cunningham v. California, supra,* 127 S.Ct. at pp. 868-871.)

This Court's error in the *Apprendi* analysis in *Black* has also occurred in the death penalty context. This Court's insistence in capital cases that the death penalty is the statutory maximum does not square with *Apprendi, Ring, Blakely,* and now *Cunningham*. Following a guilty verdict with a special circumstance, the death penalty cannot be imposed unless aggravating circumstances are found to outweigh mitigation and the death penalty is found to be appropriate. Because additional findings are necessary to impose the death penalty properly, *Apprendi* and it progeny establish that life without possibility of parole is the statutory maximum unless a jury makes the requisite findings beyond a reasonable doubt.

Respondent points to language by this Court that the sentencing function in capital cases is inherently "moral and normative, not functional," and therefore not susceptible to any burden of proof. (RB 356; see, e.g., *People v. Anderson* (2001) 25 Cal.4th 543, 601.) The "moral and normative" label, however, does not exempt the process from application of the Sixth Amendment. Whatever label is applied, all facts essential to the increased sentence must be made by the jury beyond a reasonable doubt. (*Ring v. Arizona, supra,* 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

Imposing the death sentences without requiring the jury to find proof beyond a reasonable doubt violated appellant's rights under the Sixth and Fourteenth Amendments to the United States Constitution. His death sentences should be reversed.

* * * * *

XXII.

THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

The penalty determination should be reversed because CALJIC No. 8.88, which formed the centerpiece of the trial court's instruction on the sentencing process, is constitutionally flawed. (AOB 280-292.) Respondent contends that no error occurred relying solely on prior case law of this Court. (RB 361-365.) Appellant has already addressed in the opening brief why that case law should be reconsidered so no further reply is necessary.

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XXIII.

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant's deaths sentences should be reversed because the failure of California courts to conduct intercase proportionality review in capital cases violates federal constitutional law. (AOB 293-296.) Relying solely on prior case law, respondent contends no constitutional violation occurred. (RB 357.) Appellant has already established in the opening brief why that prior case law should be reconsidered so further reply is necessary.

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XXIV.

CALIFORNIA'S USE OF THE DEATH PENALTY VIOLATES INTERNATIONAL LAW, THE EIGHTH AMENDMENT, AND LAGS BEHIND EVOLVING STANDARDS OF DECENCY

Appellant's death sentence should be reversed because application of the death sentence violates international law and evolving standards of decency. (AOB 297-302.) Respondent contends this claim should be rejected relying solely on prior case law of this Court. Appellant has already established in the opening brief why this case law should be reconsidered so no further reply is necessary.

* * * * *

XXV.

APPELLANT'S CONVICTIONS AND DEATH SENTENCES MUST BE REVERSED DUE TO CUMULATIVE ERRORS

Appellant's convictions and death sentences should be reversed due to the multiple errors that occurred in the guilt and penalty phases of his trial. (AOB 303-307.) Respondent contends in conclusory fashion that no errors, either individually or cumulatively, require reversal. (RB 382.) Appellant has shown, however, in his opening brief and this reply brief, that multiple errors occurred which rendered his trial fundamentally unfair. Appellant's convictions and death sentences should be reversed.

* * * * *

XVI.

APPELLANT JOINS IN THE ARGUMENTS SUBMITTED BY CO-APPELLANT JOHN GONZALES

In the opening brief, appellant Soliz joined in the arguments, submitted by co-appellant John Gonzales "to the extent those arguments inure to the benefit of Mr. Soliz" pursuant to California Rules of Court, rule 8.200(a)(5)). Respondent has misconstrued this joinder and incorrectly assumed that appellant Soliz has joined in all of co-appellant's arguments, even though some of the Gonzales arguments obviously do not inure to the benefit of appellant. (See, e.g., RB 167 [respondent asserts that appellant Soliz joins in Gonzales argument that the trial court erred when it denied appointment of second counsel for Gonzales].)

At the time of the filing of the opening brief, appellant could not be more specific because the Soliz and Gonzales briefs were filed simultaneously and appellant did not have the benefit of reviewing the Gonzales brief to be more precise. Now that the briefing is completed, and for the benefit of the Court and respondent, appellant specifies that he joins in only the following arguments submitted by appellant Gonzales (as numbered in co-appellant's brief): Arguments I, VII, VIII, XI, XII, XIV, XV, XVI, XVII, XIX, XX, XXI, XXII, XXIV.

* * * * *

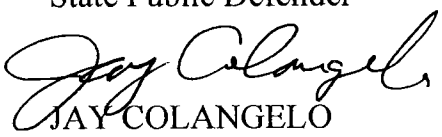
CONCLUSION

For the reasons stated above and as established in the opening brief, appellant's convictions and sentences should be reversed.

Dated: August 29, 2007

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



JAY COLANGELO
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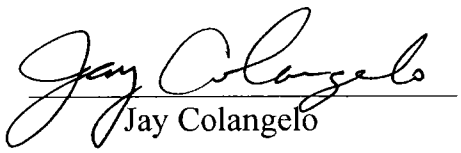
CERTIFICATION

I hereby certify that I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates, contains approximately 25,968 words.

Dated: August 29, 2007



Jay Colangelo

DECLARATION OF SERVICE

Case Name: People v. John Anthony Gonzales, Michael Soliz
Case No. S075616
Los Angeles Co. No. KA033736

I, Kristin Twining, declare that I am over 18 years of age, and not a party to the within cause; my business address is 801 K Street, Suite 1100, Sacramento, CA 95814. A true copy of the attached:

APPELLANT'S REPLY BRIEF

was served on each of the following, by placing same in envelopes addressed, respectively, as follows:

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Each said envelope was then, on August 29, 2007, sealed and deposited in the United States Postal Service mailbox at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on August 29, 2007, at Sacramento, California.

KRISTIN TWINING