In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JOHN ANTHONY GONZALES, MICHAEL SOLIZ,** **Defendants and Appellants.**	**CAPITAL CASE** Case No. S075616

Los Angeles County Superior Court Case No. KA033736
The Honorable Robert Armstrong, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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INTRODUCTION

With the permission of the Court, appellant Soliz filed a Supplemental Opening Brief (Supp. SAOB) addressing this Court's decision in *People v. Gay* (2008) 42 Cal.4th 1195 (*Gay*), as he argues it impacts Arguments XIII, XIV, XV, XVII and XXV in his Opening Brief.[1] Respondent hereby files the following Supplemental Respondent's Brief which disagrees with appellant Soliz.

In *Gay*, the trial court excluded a multitude of defense offered evidence showing the defendant's innocence including four witnesses who heard the codefendant make confessions taking sole responsibility for the murder, four eyewitnesses who would have identified the codefendant as being consistent with the murderer, an expert on eyewitness identification, and an expert of crime reconstruction and biomechanics. Specifically, had these witnesses been allowed to testify, the penalty phase jury in *Gay* would have heard and been permitted to consider "the four statements in which [another person] claimed to be the sole shooter, the testimony of the four defense eyewitnesses excluding defendant as the shooter, and the testimony that defendant nonetheless was the man who came out of the car to retrieve a weapon from the ground (thus offering an explanation why the prosecution eyewitnesses had been able to recognize him)." (*Gay*, *supra*, 42 Cal.4th at p. 1227.)

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[1] Respondent filed a Respondent's Brief which addressed the joint and separate arguments raised by appellants Gonzales and Soliz. As a result, the Respondent's Brief addressed appellant Soliz's arguments under different argument headings than those used in Appellant Soliz's Opening Brief so as to better and more clearly address the contentions raised. Respondent maintains herein the argument headings as they were initially identified in Respondent's Brief.

> The trial court excluded the witnesses and evidence because it was under the impression that a defendant at a penalty retrial could not present evidence that was inconsistent with the verdict reached in the guilt phase. In light of the jury's finding that defendant here personally used a firearm in the commission of the murder, the court reasoned that the jury necessarily found that defendant was the shooter. Accordingly, the court concluded that any evidence to the contrary was irrelevant and inadmissible at this penalty retrial.

(42 Cal.4th at p. 1218.)

The defense thereafter made an opening statement that referred to several witnesses who were going to testify as to the murder at issue in the guilt phase, and concluded with the contention that "we believe the evidence in this case will clearly show that Kenny Gay could not have and did not shoot Officer Verna." (42 Cal.4th at pp. 1224-1225.) After an objection by the prosecution as to this argument, the trial court returned after a recess and

> told the jury that it was taking judicial notice of the verdict form in the prior trial-meaning that "it's conclusively proven" and is "a fact that cannot be disputed"-and read the verdict form. Over defense objection, the court then instructed the jury as follows: "Now, further, any statement by the defense that you just heard in the opening statement to the effect that Kenneth Earl Gay did not personally shoot Officer Verna, you will disregard it. [¶] It's been conclusively proved by the jury in the first case that this defendant did, in fact, shoot and kill Officer Verna. [¶] So you will disregard any statements they made in opening statement, and you will not be hearing any evidence to the contrary during the trial."

(*Gay*, *supra*, 42 Cal.4th at 1215.)

Following closing argument, the jury was instructed on lingering doubt as follows:

> It is appropriate for a juror to consider in mitigation any lingering doubt he or she may have concerning defendant's guilt. Lingering or residual doubt is defined as that state of mind

> between beyond a reasonable doubt and beyond all possible doubt.

(42 Cal.4th at p. 1217.)

After the penalty phase retrial, the defendant in *Gay* was again sentenced by the jury to death, and this Court on automatic appeal reversed, citing *People v. Terry* (1964) 61 Cal.2d 137, as the "controlling authority," and noting that Penal Code section 190.3 "authorizes the admission of evidence 'as to any matter relevant to ... mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense' (Pen. Code, § 190.3), and a defendant may rely on such evidence to 'urge his possible innocence to the jury as a factor in mitigation.'" (*Gay*, *supra*, 42 Cal.4th at p. 1219.) The Court noted that the error in *Gay* was prejudicial as "the identity of the shooter was the heart of defendant's penalty phase defense" and the trial court's rulings had "surely crippled" the defendant from advancing this defense, and that this error was "compounded by the trial court's instruction to the jury, following opening statement, that defendant's responsibility for the shooting had been conclusively proven and that there would be no evidence presented in this case to the contrary." (*Id.* at pp. 1223, 1225.)

> Although the trial court instructed the jury at the close of evidence that "[i]t is appropriate for a juror to consider in mitigation any lingering doubt he or she may have concerning defendant's guilt" and then defined lingering doubt, the court refused to withdraw its earlier, inconsistent instruction on the issue. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." (*Francis v. Franklin* (1985) 471 U.S. 307, 322, 105 S.Ct. 1965, 85 L.Ed.2d 344.) Nor does anything in the record suggest that the jury understood how to weigh the evidence that was admitted. The People in closing argument repeatedly relied on the earlier erroneous instruction, which was printed on a poster displayed to the jury and made part of the People's plea for the penalty of death. The prosecutor even quoted the offending portion in his summation.

(42 Cal.4th at p. 1225.)

Finally, the Court in *Gay* found that the trial court further compounded these errors when it inadequately responded to the jury's request for an explanation of the lingering doubt instruction by merely referring "to each of the contradictory instructions." (42 Cal.4th at p. 1226.)

> The combination of the evidentiary and instructional errors presents an intolerable risk that the jury did not consider all or a substantial portion of the penalty phase defense, which was lingering doubt. The defense could have had particular potency in this case, given the absence of physical evidence linking defendant to the shooting and the inconsistent physical and clothing descriptions given by the prosecution eyewitnesses.

(*Ibid.*)

As set forth below, the trial court in the instant case did not commit the combination of prejudicial evidentiary and instructional errors identified by the Court in *Gay*. As a result, respondent submits this Court's decision in *Gay* did not significantly alter the responses already put forward in the initial Respondent's Brief, which are incorporated herein by reference, nor does it dictate the reversal of the penalty phase retrial.

XVIII.[2] THE COURT DID NOT MISLEAD COUNSEL ON THE SCOPE OF VOIR DIRE FOR THE SECOND PENALTY PHASE

Appellant Soliz contended in his Opening Brief that the trial court erred "by expressly prohibiting appellant's counsel from conducting any voir dire [for the second penalty phase] on the concept of lingering doubt." (SAOB 138-141.) Respondent argued in the Respondent's Brief that there was no authority dictating that prospective jurors for a penalty phase retrial be subjected to additional voir dire concerning lingering doubt, that

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[2] As stated above, for ease of reference respondent maintains the argument headings herein as initially identified in Respondent's Brief.

lingering doubt was a subject of argument, not one requiring instruction or voir dire, and that even assuming any error, appellant Soliz failed to demonstrate prejudice. (RB 285, 287, 369-370.)

In his Supplemental Brief, appellant Soliz repeats his argument that the court erred when it denied voir dire on the prospective jurors willingness to apply the concept of lingering doubt, and adds that "the juror questionnaire and repeated directives from the trial court in voir dire that guilt had been determined" created a confusion such that the jurors may have felt they were precluded from considering such a defense, a "confusion" similar to that for which this Court reversed the penalty in *Gay*. (Supp. SAOB 4-7.) Respondent disagrees and submits that nothing this Court announced in *Gay* dictates a reversal of the second penalty phase in the instant case.

None of the multiple prejudicial errors at issue and identified by the Court in *Gay* occurred in the instant case. As set forth above, this Court in *Gay* reversed the penalty based upon the prejudice resulting from (1) an erroneous exclusion of a multitude of defense proffered testimony and evidence from eye witnesses and experts purporting to show the defendant's innocence; (2) erroneous instructions to the jury during defense counsel's opening statement that it was to disregard any statement made by counsel that the defendant did not shoot the victim, and that this fact had already been conclusively proven by the prior jury, and that the jury would "not be hearing any evidence to the contrary during the trial"; and (3) an inadequate response to the jury's request for an explanation of the lingering doubt instruction by merely referring to prior contradictory instructions.

The trial court in the instant case did not exclude any defense proffered evidence or testimony relevant to establishing a lingering doubt defense, did not instruct the jurors to disregard any opening statement or

argument from counsel concerning a lingering doubt defense, and did not erroneously reply to any juror question concerning lingering doubt.

Moreover, the Court in *Gay* nowhere addressed, let alone held, that a trial court was required to conduct or permit additional voir dire of prospective jurors at a penalty phase retrial "on their willingness to apply the concept of lingering doubt." (Supp. AOB 4.) Obviously, cases do not stand for propositions not considered. (*People v. Avila* (2006) 38 Cal.4th 491, 566; *People v. Dickey* (2005) 35 Cal.4th 884, 905; *People v. Barker* (2004) 34 Cal.4th 345, 354; *People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10; *People v. Casper* (2004) 33 Cal.4th 38, 43; *People v. Alvarez* (2002) 27 Cal.4th 1161, 1176; *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 65-66; *People v. Harris* (1989) 47 Cal.3d 1047, 1071.)

This Court has several times rejected arguments concerning the necessity of a lingering doubt instruction at penalty phase retrials. Most recently, in *People v. Hamilton* (2009) 45 Cal.4th 863, the trial court at the penalty phase retrial instructed the jury with a modified lingering doubt instruction, and the defendant argued in his automatic appeal that the trial court erred in failing to instruct the jurors as he had specifically requested that lingering doubt may be considered a factor in mitigation. (*Id.* at pp. 948-949.) This Court found no error, noting the Court had previously held that "[t]here is no constitutional entitlement to instructions on lingering doubt," and repeating that "[i]nstructions to consider the circumstances of the crime (§ 190.3, factor (a)) and any other circumstance extenuating the gravity of the crime (*id.*, factor (k)), together with defense argument highlighting the question of lingering or residual doubt, suffice to properly put the question before the penalty jury." (*Id.* at p. 948, citing *People v. Demetrulias* (2006) 39 Cal.4th 1, 42, internal quotation marks omitted.)

> The court here instructed the jury to consider the circumstances of the crime and any other circumstances extenuating the gravity

> of the crime. Defense counsel gave a lengthy argument about lingering doubt, in which he directly stated "lingering doubt [is] ... an aspect of mitigation." Defendant fails to convince us that the jury was not adequately informed that they could consider lingering doubt as a factor in mitigation.

(*Id.* at pp. 948-949, citations omitted.)

In *People v. Bonilla* (2007) 41 Cal.4th 313, the trial court at the penalty phase retrial refused the defendant's request for a lingering doubt instruction, and this Court again refused to "disregard settled precedent" and held that even at such a proceeding where the defendant argues lingering doubt he had no right to such an instruction. (*Id.* at pp. 357-358.)

In *People v. Robinson* (2005) 37 Cal.4th 592, the defendant complained on appeal that the court erred in refusing to instruct the jury at the retrial of a penalty phase concerning lingering doubt, and this Court rejected the claim, noting it had "repeatedly rejected claims that, under either state or federal law, a trial court must instruct concerning lingering doubt, whether on the court's own motion or in response to a specific request," that it could "perceive of no reason to reconsider those determinations here," and observing that "consistent with defense counsel's closing arguments, the jury was allowed under the factor (k) instruction to consider in mitigation any lingering doubt it may have had." (*Id.* at p. 635.)

In *People v. Harrison* (2005) 35 Cal.4th 208, when addressing the adequacy of the lingering doubt instruction given at that defendant's penalty phase retrial, this Court again declared: "A trial court is not required as a matter of state or federal law, however, to instruct a penalty jury to consider lingering doubt as a factor in mitigation." (*Id.* at p. 260.)

In *People v. Slaughter* (2002) 27 Cal.4th 1187, the defendant claimed that the court erred in refusing to instruct the jury as to lingering doubt at his second penalty phase, and this Court rejected the claim, holding: "As to the second penalty phase, we repeatedly have held that although it is proper

for the jury to consider lingering doubt, there is no requirement that the court specifically instruct the jury that it may do so." (*Id.* at p. 1219; see also *Id.* at p. 1222 ["Defendant asserts that trial counsel was ineffective in failing to request that the second penalty phase jury be instructed on lingering doubt. As we have observed ... , defendant has no state or federal constitutional right to such an instruction, and trial counsel reasonably may have concluded that such a request would be futile."].)

And finally, in *People v. Raley* (1992) 2 Cal.4th 870, this Court again addressed and rejected a defendant's contention that the failure to instruct the jury at a penalty phase retrial as to lingering doubt violated his federal and state constitutional rights, holding it was "settled" that such an instruction was not required as matter of state or federal law, and finding no error as the standard instructions given "permitted the jury to consider any lingering doubt they may have had regarding defendant's culpability, and defense counsel thoroughly explored the issue in her closing argument." (Id. at p. 918.)

These holdings as to penalty phase retrials are not unique, as this Court has repeatedly held, including in cases decided after *Gay*, that even in cases where a defendant presents evidence of and argues lingering doubt, there is no state or federal constitutional requirement that a lingering doubt instruction be given because the instructions that the jury may consider the circumstances of the crime and any other extenuating circumstances (CALJIC No. 8.85; § 190.3, factors (a), (k)) adequately inform the jury that it may consider any lingering doubts. (See *People v. Lewis* (2009) 46 Cal.4th 1255, __ [96 Cal.Rptr.3d 512, 567]; *People v. Rogers* (2009) 46 Cal.4th 1136, 1176; *People v. Davis* (2009) 46 Cal.4th 539, 623; *People v. Page* (2008) 44 Cal.4th 1, 54-55; *People v. Watson* (2008) 43 Cal.4th 652, 697; *People v. Zamudio* (2008) 43 Cal.4th 327, 370.)

Appellant Soliz nevertheless cites in his Supplemental Brief this Court's opinion in *People v. Cash* (2002) 28 Cal.4th 703, 721, in which the trial court was found to have prejudicially erred when it prohibited voir dire on whether the prospective penalty phase jurors would automatically vote for the death penalty if the defendant had committed a prior murder. (SAOB 7.) In *Cash*, the trial court's error was "precluding mention of *any* general fact or circumstance not expressly pleaded in the information." (*Id.* at p. 722, emphasis added.) Specifically, the defendant in *Cash* was prohibited from asking "whether prospective jurors could return a verdict of life without parole for a defendant who had killed more than one person, without revealing that defendant had killed his grandparents." (*Id.* at p. 719.)

Here, however, there was no such error, and the voir dire conducted before the penalty phase retrial was more than sufficient to allow defense counsel to challenge any prospective juror who would automatically vote for death just because of the prior guilt verdict. The prospective jurors were required to complete questionnaires which told them that if selected, the jury would be required to decide the appropriate punishment "based upon evidence related to the murders themselves and upon additional evidence relating to the penalty decision," and, "This additional evidence may include the circumstances relating to the crimes[.]" (See, e.g., 14CT 3441.) The prospective jurors were also required to respond to a series of questions in the juror questionnaire concerning their level of disagreement or agreement with whether they would "automatically and regardless of the evidence" return a sentence of death or life imprisonment without the possibility of parole. (See, e.g., 14CT 3444.)

Further, the prospective jurors were repeatedly questioned by the court and counsel as to their responses in the questionnaire and specifically as to whether they would automatically vote for death merely because the

defendants had already been found guilty. (See, e.g., 24RT 2925, 2928-2933, 2939, 2948, 2950-2954, 2957-2958, 2962-2963, 2983-2984, 3044-3045, 3059-3064.) Under such circumstances, additional voir dire concerning lingering doubt was not required because a juror who would not automatically vote for death based on a guilt verdict necessarily would not automatically vote for death merely because there was no additional or specific voir dire on lingering doubt. In other words, once the jurors said that they could consider all of the evidence in determining penalty, not just the fact that there was a prior guilty verdict, appellant Soliz's fair trial and impartial jury concerns disappear because the guilt phase is proper Penal Code section 190.3, subdivision (a), evidence.

Additionally, the trial court's instructions to the prospective jurors that guilt was not to be redetermined (see Supp. SAOB 4, fn.1) were correct, and accurately informed the prospective jurors that their task if chosen was solely to determine punishment, not to redecide guilt. (See, e.g, *Gay*, *supra*, 42 Cal.4th at p. 1223 ["a defendant may not 'relitigate' the guilt verdict,'" or "'contest 'the legality of the prior adjudication.'"].)

Thus, unlike *People v. Cash*, *supra*, 28 Cal.4th 703, "the court's procedures in this case were adequate to ascertain the prospective jurors' attitudes on case-specific factors that might disqualify them to participate in a capital trial." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1288; see also *People v. Butler* (2009) 46 Cal.4th 847, 860-861.)

Also, the trial court's instructions to both the jurors and prospective jurors in the instant case, unlike the instructions given to the penalty phase jurors in the retrial at issue in *Gay*, nowhere stated that appellant Soliz's guilt was a fact that had been "conclusively proven," that it could not be disputed and was a fact of which the court took judicial notice, or that the jury would not hear any evidence to the contrary.

Indeed, the trial court here, unlike the court in *Gay*, did not exclude any relevant evidence or testimony proffered by appellant Soliz that would have arguably supported a lingering doubt defense, nor did the trial court ever instruct the jury that there would be no such evidence or testimony offered to support it.

Moreover, during his opening statement at the penalty phase retrial, appellant Soliz without objection specifically pointed the jury to the evidence they could consider "under a concept of what we call in the law lingering doubt." (27RT 3241.) He emphasized that the jury would "be able to examine, under the law, whether the first jury may have, in fact, made a mistake as to the conviction of Mr. Soliz," and he asked the jury not to return with a death sentence because the evidence he would present would show that appellant Soliz "never killed anyone," "did not personally killed Mr. Eaton," and "did not kill, by Mr. Gonzales' own words, Mr. Price or Mr. Skyles." (27RT 3242.) This is in stark contrast to what occurred in *Gay*, where the court sustained an objection to counsel's opening statement and instructed the jury at that retrial that the jury was to disregard any statement counsel made that the defendant did not personally kill the victim, that this was a fact conclusively proven at the first trial, and that the jury would hear no evidence to the contrary at trial. (*Gay, supra*, 42 Cal.4th at p. 1215.)

Further, the prosecuting attorney in the instant case specifically noted in his argument that the jury was required to look at the conduct of the defendants during the crimes and to consider it "in a qualitative fashion and balance it against the other factors presented by the defense," and that it was also to consider any "extenuating circumstance that in some way mitigates the conduct of the defendants. (33RT 4391, 4407.) Thus, "although the prosecutor argued the jury should have no doubt concerning [the] verdict, he did not tell the jurors they could not consider lingering

doubt as a mitigating factor." (*People v. Lewis*, *supra*, 46 Cal.4th at p. __ [96 Cal.Rptr.3d at p. 568].)

And appellant Soliz was permitted to and did argue to the penalty phase jurors as to any lingering doubt they may have had as to his guilt and responsibility for and involvement in the crimes.[3] (33RT 4468-4491.) In this regard, appellant Soliz specifically argued: he was "wrongly convicted" based upon "erroneous eye witness testimony" (33RT 4468); he "did not get out of the car and he did not kill Mr. Price and Skyles, and, therefore, if you were to vote the death penalty for Mr. Soliz, you would be imposing the death penalty on a man who never killed anyone personally" (33RT 44710); that "if the eye-witness identification is wrong, which it so often is, you would be imposing the death penalty on someone who never pulled a trigger on anyone" (33RT 4471-4472); that appellant Gonzales had made statements and had testified that appellant Soliz never got out of the car, and had said that "it was just me – the only one that got out" (33RT 4475-4476); that appellant Gonzales's testimony at trial (that he was responsible

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[3] Appellant Soliz in a footnote suggests that "the court was emphatic that the jury not be told they could consider lingering doubt about appellant's guilt as a mitigating factor, and that if counsel were to argue anything that conflicted with the court's admonition to the jurors during voir dire that the issue of guilt was behind them, it would admonish the jury to follow the court's instruction." (Supp. SAOB 15-16, n. 3, citing 32 RT 4191.) Of course, the trial court specifically told appellant Soliz that he was "able to argue this as to his perceived lack of involvement and so on." (32RT 4191.) Moreover, appellant Soliz's assertion is belied by the proceedings that actually took place, which show that appellant Soliz was permitted to and did specifically refer -- without objection or contradiction by the court -- to the concept of lingering doubt in his opening statement, and that he was also permitted to and did emphasize in both his opening statement and closing argument -- again, without objection or contradiction by the court -- that the penalty phase jury could and should consider such lingering doubt evidence to show that he was "wrongly convicted" and that he did not kill victims Price and Skyles. (27RT 3242; 32RT 4468-4491.)

for the murders) was consistent in important respects with appellant Gonzales's pretrial statements (33RT 4476-4482); that the mental health expert's conclusions concerning appellant Soliz were inconsistent with having committed the crimes (33RT 4482-4484); and that there were inconsistencies in the eye witness testimony (33RT 4488-4489). Further, appellant Soliz argued that "If the first jury was wrong, based upon the eye-witness identification, the jury that never heard Mr. Gonzales testify, if they were wrong and you vote for the death penalty for Mr. Soliz, where does that put our system? ... That's what your job is in this case is to act as a judge of the facts and to prevent further error made in our judicial system, if any error may have been made." (33RT 4488.)

Finally, had there been relevant evidence to support it, the jury in the instant case could have considered any lingering doubt it may have had under Penal Code section 190.3, with which it was properly instructed to "consider, take into account and be guided by" various factors, including "the circumstances of the first-degree murders of which each defendant was previously convicted and the existence of any special circumstances previously found to be true," "whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor," and "[a]ny other circumstance that extenuates the gravity of the crime, even though it's not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for sentence less than death, whether or not related to the offense for which he is on trial." (33RT 4493-4496.)

As a result of all of the above, it surely cannot be said that the trial court here "crippled" appellant Soliz from advancing a lingering doubt defense, which was at the heart of this Court's ruling in *Gay*. (*Id.* at p. 1223, 1225.) Thus, appellant Soliz's argument here can be fairly

characterized as a challenge to the manner with which the trial court conducted voir dire. However, as noted by this Court, the decisions of the United States Supreme Court "have made clear that 'the conduct of voir dire is an art, not a science,' so '[t]here is no single way to voir dire a juror.'" (*People v. Cleveland* (2004) 32 Cal.4th 704, 737.)

> "The Constitution ... does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury." (*Morgan v. Illinois* (1992) 504 U.S. 719, 729, 112 S.Ct. 2222, 119 L.Ed.2d 492, quoted in *People v. Box* [(2000)] 23 Cal.4th [1153,] 1179, 99 Cal.Rptr.2d 69, 5 P.3d 130.) The high court has "stressed the wide discretion granted to the trial court in conducting voir dire in the area of pretrial publicity and in other areas of inquiry that might tend to show juror bias." (*Mu'Min v. Virginia* [(1991)] 500 U.S. [415,] 427, 111 S.Ct. 1899 [trial court is not required to ask content-based questions regarding pretrial publicity]; see also *People v. Taylor*, *supra*, 5 Cal.App.4th at p. 1313, 7 Cal.Rptr.2d 676.) Accordingly, "the trial court retains great latitude in deciding what questions should be asked on voir dire," and "'content' questions," even ones that might be helpful, are not constitutionally required. (*Mu'Min v. Virginia*, *supra*, at pp. 424, 425, 111 S.Ct. 1899.) To be an abuse of discretion, the trial court's failure to ask questions "must render the defendant's trial fundamentally unfair." (*Id.* at pp. 425-426, 111 S.Ct. 1899.) "Such discretion is abused 'if the questioning is not reasonably sufficient to test the jury for bias or partiality.'" (*People v. Box*, *supra*, at p. 1179, 99 Cal.Rptr.2d 69, 5 P.3d 130.)

(*Ibid.* See also *People v. Friend* (2009) __ Cal.4th __, __ [97 Cal.Rptr.3d 1, 52]; *People v. Tafoya* (2007) 42 Cal.4th 147, 179; *People v. Avila*, *supra*, 38 Cal.4th. at p. 536.)

Thus, "'[u]nless 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.'" (*People v. Carter* (2005) 36 Cal.4th 1215, 1250, citing *People v. Holt* (1997) 15 Cal.4th 619, 661; see also *People v. Rogers*, *supra*, 46 Cal.4th at pp. 1149-1150.)

Appellant Soliz has not demonstrated that the trial court abused its discretion when it failed to specifically and additionally voir dire the prospective jurors as to lingering doubt, and this Court's decision in *Gay* does not dictate a different result.

XXIII. THE TRIAL JUDGE'S REMARKS DID NOT VIOLATE APPELLANT'S FEDERAL OR STATE CONSTITUTIONAL RIGHTS

Appellant Soliz initially argued in his Opening Brief that the trial judge's comment during the cross-examination of appellant Gonzales -- taking notice of the physical impossibility of a firearm conversion described by appellant Gonzales -- violated Evidence Code sections concerning judicial notice, and appellant Soliz's right to a fair trial, due process and confrontation. (SAOB 144-155.) Respondent argued that even assuming this issue had been properly preserved for appellate review, the comment was not necessarily improper, and in any event it was clearly harmless. (RB 331-338.)

Appellant Soliz now argues in his Supplemental Opening Brief that this Court's opinion in *Gay* "solidifies appellant's position that these errors resulted in prejudice" because the court's comment had a "devastating effect" on the defense evidence of lingering doubt. (Supp. SAOB 9.)

Again, however, the Court in *Gay* addressed a penalty phase retrial in which the court erroneously excluded a multitude of defense offered testimony and evidence designed to show that the defendant did not shoot the victim, erroneously directed the jury to disregard any statement from counsel that the defendant did not shoot the victim because this fact had already been conclusively proven to the prior jury, and erroneously and inadequately responded to the jury's request for an explanation of lingering doubt. As stated above, the trial court in the instant case made no such errors, and "[i]t is axiomatic that cases are not authority for propositions not considered." (*People v. Ault*, *supra*, 33 Cal.4th at p. 1268, fn. 10.)

Moreover, as stated in Respondent's Brief, the trial court's brief comment, even presuming error, was never repeated by the court or referred to by counsel, and the examination and cross-examination of appellant Gonzales repeatedly showed him to be evasive and deceitful, and, specifically as to appellant Soliz's involvement in the murders of victims Skyles and Price, his testimony was thoroughly contradicted by eyewitnesses. The effect, if any, of the court's brief comment on appellant Soliz's defense or the jury's verdict was clearly not "devastating." And specifically, this Court's opinion in *Gay* does not alter the prejudice analysis assuming any error in the court's comment since the jury was never precluded from considering lingering doubt.

XXII. THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING CROSS-EXAMINATION OF APPELLANT GONZALES AT THE SECOND PENALTY PHASE

In his Opening Brief, appellant Soliz initially argued that the prosecutor committed misconduct at the second penalty phase when he repeatedly asked appellant Gonzales whether prosecution witnesses had lied during their testimony. (SAOB 156-169.) Respondent submitted in the Respondent's Brief that this issue was waived by the failure to timely object and request an admonition below, and that in any event, such questioning was neither improper nor misconduct, and even if it were, it was clearly harmless. (RB 317-338.)

Appellant Soliz now argues in his Supplemental Opening Brief that "*Gay* clarifies that prejudice resulted from the prosecutor's improper cross-examination of [appellant] Gonzales" because it "forced [appellant] Gonzales to label other witnesses, including the wife of a victim, and a police officer as liars although [appellant] Gonzales had no foundation to opine on their motives, severely damag[ing] his credibility." (Supp. SAOB 12.)

Once again, however, *Gay* did not purport to speak to or address the issue of the "were they lying" type questions, and as such it cannot stand for the proposition for which it has been offered. (See *People v. Avila*, *supra*, 38 Cal.4th at p. 566; *People v. Dickey*, *supra*, 35 Cal.4th at p. 905.)

In any event, as stated in Respondent's Brief, having made no timely objection to those particular questions and having sought no curative admonition, appellant Soliz has forfeited the claim on appeal. (See, e.g., *People v. Hawthorne* (2009) 46 Cal.4th 67, 97.) Moreover, the prosecuting attorney's questions were not misconduct. "Here, by choosing to testify, [appellant Gonzales] put his own veracity in issue." (*People v. Tafoya, supra,* 42 Cal.4th at p. 179; see also *People v. Chatman* (2006) 38 Cal.4th 344, 382) Further, there is "[n]othing in the record [which] suggests the prosecutor sought to present evidence [he] knew was inadmissible." (*People v. Hawthorne*, *supra*, 46 Cal.4th at p. 98.) Indeed, as noted in Respondent's Brief, at the time the prosecuting attorney cross-examined appellant Gonzales, "the applicable law was unsettled" as no California Court had yet determined the propriety of such questions. (RB 329, n. 67, citing *People v. Chatman, supra*, 38 Cal.4th at p. 382.)

In addition, the prosecuting attorney's questions allowed appellant Gonzales "to clarify his position" and "to explain why ... [other witnesses] might have a reason to testify falsely." (*People v. Tafoya*, *supra*, 42 Cal.4th at p. 179.)

> The jury properly could consider any such reason defendant provided; if defendant had no explanation, the jury could consider that fact in determining whether to credit defendant's testimony. [Citation.] Thus, the prosecution's questions in this case "sought to elicit testimony that would properly assist the trier of fact in ascertaining whom to believe." [Citation.] There was no prosecutorial misconduct.

(*Ibid.*)

And finally, as set forth in Respondent's Brief, even assuming such questions were both improper and preserved for appellate review, appellant Gonzales's credibility was already severely impeached by the testimony of the eyewitnesses about whom he was questioned, by the facts and circumstances of the murders, by his taped statements to Salvador Berber, by his pretrial attempts to have witnesses change their testimony, and by his obviously evasive, false and contradictory testimony. (RB 330.) Specifically, this Court's opinion in *Gay* does not change the prejudice analysis in that appellant Soliz's jury was never precluded from considering lingering doubt.

XXVII. THE SECOND PENALTY PHASE JURY WAS PROPERLY INSTRUCTED

In his Opening Brief, appellant Soliz initially raised several instructional issues related to the penalty phase, including a complaint that the trial court erred when it refused to instruct the jury on lingering doubt. (SAOB 190-203, 204-209, 318.) Respondent filed a Respondent's Brief noting this identical claim had been consistently rejected by this Court, which has repeatedly found that there is no requirement under state or federal law requiring a trial court to instruct a jury as to lingering doubt. (RB 369-370.) The trial court in *Gay* in fact instructed the jury as to lingering doubt, but *Gay* did not purport to consider or resolve whether trial courts henceforth must give such an instruction in penalty phase retrials. It therefore cannot stand for that proposition. (*People v. Avila*, *supra*, 38 Cal.4th at p. 566; *People v. Dickey*, *supra*, 35 Cal.4th at p. 905.)

In *Franklin v. Lynaugh* (1988) 487 U.S. 164 [108 S.Ct. 2320, 101 L.Ed.2d 155] (*Franklin*), Justice White, writing for four Justices of the United States Supreme Court, first noted that "[t]his Court's prior decisions, as we understand them, fail to recognize a constitutional right to have [residual] doubts considered as a mitigating factor." The Court

thereafter held that even if the Eighth Amendment guaranteed such a right, mere denial of a jury instruction did not impair the right, because the "trial court placed no limitation whatsoever on [defendant]'s opportunity to press the 'residual doubts' question with the sentencing jury." (*Id.* at p. 174.) The Court also rejected the argument that jurors needed to be told they could consider residual doubt. Accordingly, "even if petitioner had some constitutional right to seek jury consideration of 'residual doubts' about his guilt during his sentencing hearing-a questionable proposition- *the rejection of petitioner's proffered jury instructions did not impair this 'right.'*" (*Id.* at p. 175, emphasis added.) Justice O'Connor, for herself and Justice Blackmun, went further and wrote in a concurring opinion that "the Eighth Amendment does not require [consideration of residual doubt by the sentencing body]." (*Id.* at p. 187; see also *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 250 [127 S.Ct. 1654, 167 L.Ed.2d 585] ["we have never held that capital defendants have an Eighth Amendment right to present 'residual doubt' evidence at sentencing"]; *Oregon v. Guzek* (2006) 546 U.S. 517, 525 [126 S.Ct. 1226, 163 L.Ed.2d 1112] ["[*Franklin*] makes clear ... that this Court's previous cases had not interpreted the Eighth Amendment as providing a capital defendant the right to introduce at sentencing evidence designed to cast 'residual doubt' on his guilt of the basic crime of conviction."]; *Penry v. Lynaugh* (1989) 492 U.S. 302, 320 [109 S.Ct. 2934, 106 L.Ed.2d 256] [(characterizing *Franklin* as a case in which a majority "agreed that 'residual doubt' as to Franklin's guilt was not a constitutionally mandated mitigating factor" (brackets omitted)].)

As noted above, this Court has specifically held or noted as to penalty phase retrials that a trial court is not required to instruct as to lingering doubt. (See *People v. Hamilton, supra*, 45 Cal.4th at pp. 948-949; *People v. Bonilla, supra*, 41 Cal.4th at pp. 357-358; *People v. Robinson, supra*, 37 Cal.4th at p. 635; *People v. Harrison, supra,* 35 Cal.4th 208; *People v.*

Slaughter, *supra*, 27 Cal.4th at pp. 1219, 1222; *People v. Raley*, *supra*, 2 Cal.4th at p. 919.) And also as noted above, since *Gay* was decided this Court has repeatedly and consistently held that a trial court has no duty to instruct a penalty phase jury as to lingering doubt, even where the defendant has offered such evidence and argued it to the jury. (See *People v. Lewis*, *supra*, 46 Cal.4th at p. __ [96 Cal.Rptr.3d at p. 567]; *People v. Rogers*, *supra*, 46 Cal.4th at p. 1176; *People v. Davis*, *supra*, 46 Cal.4th at p. 623; *People v. Page*, *supra*, 44 Cal.4th at pp. 54-55; *People v. Watson*, *supra*, 43 Cal.4th at p. 697; *People v. Zamudio*, *supra*, 43 Cal.4th at p. 370.)[4]

Once again, nothing in *Gay* dictates or suggests that a trial court is required to instruct a jury at a penalty phase retrial as to lingering doubt.

XXIX. APPELLANTS RECEIVED A FAIR TRIAL

Appellant Soliz argued in his Opening Brief that the cumulative effect of the alleged guilt and penalty phase errors at his trial required reversal of the penalty phase. (SAOB 303-307.) Respondent submitted in the Respondent's Brief that many of appellant Soliz's claims were waived, that there were no errors to accumulate, and that in any event, appellant Soliz received a fair trial and any errors, considered individually or cumulatively, did not affect the outcome of the guilt or penalty phase. (RB 382.)

Appellant Soliz now cites to *Gay*, *supra*, 42 Cal. 4th at pages 1213, 1223, 1224 and 1226, and specifically alleges that there were three "errors" at his trial that combined to create an 'intolerable risk' that the penalty

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[4]See also *State v. Garner* (Ohio 1995) 656 N.E.2d 623, 632 ["The overwhelming weight of authority, even in jurisdictions that recognize a capital defendant's right to argue residual doubt, is that a defendant is not entitled to an instruction on residual doubt. [Citations.] We agree with this authority. Garner was not entitled to an instruction identifying residual doubt as a mitigating factor."].

phase jury did not consider appellant Soliz's defense of lingering doubt: "(1) the trial court's repeated admonitions to the jury that guilt had already been determined; (2) its refusal to allow appellant to voir dire prospective jurors to clarify that this did not preclude their consideration of lingering doubt as a mitigating factor; and (3) its refusal to instruct the jury that it could consider lingering doubt as a factor in mitigation." (Supp. SAOB 17-18.)

As stated above, there were no prejudicial guilt or penalty phase errors at appellant Soliz's trial, and certainly none that rose to the level of the combination of multiple prejudicial errors at issue in *Gay*, as the trial court below: (1) properly and accurately instructed the prospective and actual jurors as to their task at the penalty phase retrial; (2) was not required to additionally and specifically voir dire the prospective jurors as to lingering doubt; and (3) was not required to specifically instruct the jurors as to lingering doubt. As a result, there were no guilt or penalty phase errors to accumulate into the "combination of errors" as argued by appellant Soliz. And finally, even presuming the existence of any error, and that such error is preserved for appellate review, no prejudice resulted.

Accordingly, given the totality of the evidence presented on the question of penalty, and specifically considering appellant Gonzales's testimony that attempted to reduce appellant Soliz's moral culpability for the underlying crime, the cumulative nature of the errors alleged, if any, does not lead to the conclusion that appellant Soliz was denied a fair trial.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment of conviction and the penalty of death be affirmed in its entirety.

Dated: August 17, 2009

Respectfully submitted,
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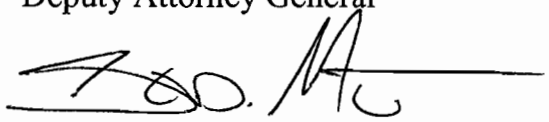

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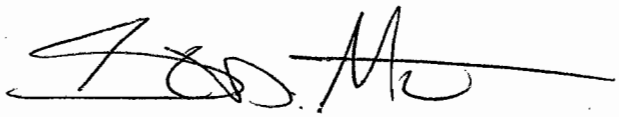
CERTIFICATE OF COMPLIANCE

I certify that the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 6,455 words.

Dated: August 17, 2009

EDMUND G. BROWN JR.
Attorney General of California



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DECLARATION OF SERVICE

Case Name: ***People v. John Anthony Gonzales & Michael Soliz***

No.: **S075616**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 17, 2009, I served the attached **Supplemental Respondent's Brief (Capital Case)** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

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On August 17, 2009, I caused thirteen (13) copies of the **Supplemental Respondent's Brief** in this case to be delivered to the California Supreme Court at 300 South Spring Street, Second Floor, Los Angeles, California by **Personal Delivery**.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 17, 2009, at Los Angeles, California.

M. O. Legaspi
Declarant

Signature

SDM:mol
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