No. S058019

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA



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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>GEORGE LOPEZ CONTRERAS,<br><br>Defendant and Appellant. | (Tulare County Superior Court No. 37619) |

# APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Tulare

HONORABLE PATRICK J. O'HARA, JUDGE

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DEATH PENALTY

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**APPELLANT'S REPLY BRIEF**

## INTRODUCTION

The Attorney General has struggled to preserve this conviction by ignoring pertinent facts and avoiding significant legal issues. Her efforts, however, cannot conceal the fact that grievous error occurred in this case, and the conviction and death judgment must be reversed.[1]

[1] Appellant finds it unnecessary to reply to all the arguments in the response because respondent raises very little that is not fully addressed in the opening brief. Appellant has only addressed respondent's contentions that require further discussion for the proper determination of the issues raised on appeal. Appellant specifically adopts the arguments presented in his opening brief on each and every issue, whether or not discussed individually below. Appellant intends no waiver of any issue by not expressly reiterating it herein.

## LEGAL ARGUMENTS

### I.

### THE TRIAL COURT CONDUCTED INADEQUATE VOIR DIRE TO ENSURE APPELLANT A FAIR TRIAL, DUE PROCESS, AN IMPARTIAL JURY, AND A RELIABLE DEATH VERDICT.

The trial court's failure to conduct a general voir dire on basic legal tenets such as burden of proof, presumption of innocence and reasonable doubt denied appellant his rights to a fair trial, a fair and impartial jury, due process of law, equal protection, effective assistance of counsel and reliable guilt and penalty determinations under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, section 16 of the California Constitution. The trial court's failure to conduct group voir dire on general legal principles also violated Code of Civil Procedure section 223. (AOB Argument I, 26-42.)

Respondent first argues that this Court should not entertain appellant's challenge of the voir dire process because appellant failed to object or suggest modifications to the questionnaire. (RB 41.) Respondent apparently misunderstands appellant's argument. Appellant objects to the trial court's failure to conduct an adequate voir dire regarding essential legal principles necessary to insure the selection of a fair and impartial jury. After individual voir dire, and prior to calling 12 prospective jurors to the juror box for peremptory challenges, defense counsel expressed his concern that no general voir dire had been conducted asking prospective jurors whether they understood and had any problems with reasonable doubt, presumption of innocence and the burden of proof. (4 RT 1223-1224.) He suggested that the trial court conduct a general group voir dire, "like we've always done." (4 RT 1224.) He elaborated, "[w]e never had a question that

really has to do with just jurors[`] understanding and acceptance of the burden of proof, the presumption of innocence. Some of the general stuff that we always do." (*Ibid.*) There was nothing remarkable or exceptional about counsel's request. Code of Civil Procedure section 223 provides that voir dire "shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases." And the "general stuff" counsel requested was voir dire on general principles, the very questions the California Standards of Judicial Administration suggest should be asked by all trial judges during voir dire (Cal. Stds. Jud. Admin., §8.5(b)) and whose "language and formulae" trial court judges should "closely follow." (*People v. Holt* (1997) 15 Cal.4th 619, 661.)

Respondent also argues that this Court should not entertain appellant's challenge of the voir dire process because appellant failed to challenge the jurors for cause or with a peremptory. (RB 41, 44.) This claim is also without merit. In *People v. Bolden* (2002) 29 Cal.4th 515, this Court stated:

> When voir dire is inadequate, the defense is denied information upon which to intelligently exercise both its challenges for cause and its peremptory challenges. *Because the exercise of peremptory challenges cannot remedy the harm caused by inadequate voir dire, we have never required, and do not now require, that counsel use all peremptory challenges to preserve for appeal issues regarding the adequacy of voir dire.*

(*Id.* at pp. 537-538; italics added.)

Similarly, in *People v. Taylor* (2010) 48 Cal.4th 574, the defendant contended the trial court violated his constitutional rights by refusing to conduct individual, sequestered voir dire. This Court stated, "we disagree with respondent's assertion that defendant has forfeited his claim because

he did not challenge any juror for cause or exercise all of his peremptory challenges at trial." "[A] defendant who has made a timely objection to group voir dire and proposed that the trial court question prospective jurors individually has done all that is necessary." (*Id.* at pp. 605-606;[2] accord, *People v. Hoyos* (2007) 41 Cal.4th 872. 905. See also *People v. Cash* (2002) 28 Cal.4th 703, 723 [defendant entitled to a reversal of the death judgment without having to identify a particular biased juror because the trial court's error made it impossible to determine from the record whether any of the seated jurors held a disqualifying view about the death penalty]; *Turner v. Murray* (1986) 476 U.S. 28, 36-37 [reversal for failure to voir dire on racial bias; no showing of bias as to specific jurors found].) Similarly, a defendant who has made an objection to failure to conduct group voir dire in accordance with the sort required by Code of Civil Procedure section 223, to ensure that the prospective jurors understand the basic legal principles and can abide by them in this case, has done all that is necessary. Accordingly, the Court should reject respondent's claim that appellant has waived the issue of the inadequacy of the voir dire process in his case.

Respondent argues that even on the merits, this claim must fail, but her reasoning misses the mark. Respondent points to several instances where prospective jurors were questioned about fundamental legal concepts (see RB 37-38 [questioning of 23 prospective juror who did not sit on the jury regarding standard of proof and reasonable doubt]; 38-39 [questioning

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[2] The appellant in *Taylor* also complained that during voir dire the trial court conducted no inquiry into the racial views of any juror who served on the first jury. (48 Cal.4th at p. 607.) This Court concluded the appellant had forfeited *this* claim of error because counsel "failed to suggest followup questions ... or otherwise complain about the adequacy of the trial court's voir dire." (*Id.* at p. 608.)

of one juror and two alternates regarding standard of proof, reasonable doubt and presumption of innocence]; 39 [questioning of 11 prospective jurors and one juror regarding ability to follow the court's instructions]), but the examples she cites only underscore the problems with the voir dire conducted in this case. The voir dire questions asked of the specified prospective jurors would be meaningful had the trial court conducted group voir dire and instructed prospective jurors with former Section 8.5(b) of the California Standards of Judicial Administration, in effect at the time of appellant's trial and advising the entire juror panel to pay close attention to the questions asked of those seated in the jury box and to make "note of the answers they would give if these questions were put to you personally." (Cal. Stds. Jud. Admin., S8.5(b) (1).) But the court did not do so. And the fact that it individually questioned a number of prospective jurors who did not sit on appellant's jury does not cure the court's failure to so question the individuals who *did* sit in judgment of appellant.

Pursuant to section 223, the trial court has primary responsibility for questioning prospective jurors. (*People v. Box* (2000) 23 Cal.4th 1153, 1178-1179; see also *People v. Wilborn* (1999) 70 Cal.App.4th 339, 347.) "With this heightened authority of the trial court in the conduct of voir dire, mandated under [section 223], goes an increased responsibility to assure that the process is meaningful and sufficient to its purpose of ferreting out bias and prejudice on the part of prospective jurors." (*People v. Taylor* (1992) 5 Cal.App.4th 1299, 1314.) The trial court failed in this regard.

Respondent states that the court started "almost every" sequestered voir dire session with an advisement on the burden of proof and requirement that the jury find appellant guilty beyond a reasonable doubt. (RB, p. 36.) First, "almost every" is an insufficient endorsement to support

appellant's right to "a fair trial by a panel of impartial, 'indifferent' jurors." (*Irvin v. Dowd* (1961) 366 U.S. 717, 722.) Indeed, one of the jurors who sat on appellant's jury, juror No. 4 was not so advised. Moreover, as pointed out in appellant's opening brief, the prejudice from failure to conduct sufficient voir dire cannot be cured by instruction on the law. (AOB, 42, citing *People v. Chapman* (1993) 15 Cal.App.4th 136, 142, a case in which Justices Chin and Werdegar concurred in reversing a conviction because the trial court abused its discretion by barring any questions concerning possible prejudice or bias toward the defendant due to his prior felony conviction ].)

Respondent also argues that defense counsel and the deputy district attorney had ample opportunity to question the jurors on the standard of proof and reasonable doubt, and she lists the 18 prospective jurors defense counsel questioned and the 5 the prosecutor questioned on these topics, three of whom were excused for cause. (RB 37.) Again, the fact that 23 individuals who did not sit on appellant's jury were properly questioned has little bearing on the adequacy of the voir dire conducted on the 12 individuals who did sit on the jury. Moreover, while counsel could have posed questions about all fundamental legal concepts, it is clear from the record that he did not believe it necessary to do so individually, with each and every prospective juror because counsel understandably had an expectation that the court would conduct a group voir dire covering the basic legal concepts expected of a juror. (4 RT 1223-1224.) Additionally, trial counsel expected the court to conduct an adequate voir dire to permit him to exercise challenges competently, as the court had apparently done so in prior trials. As trial counsel observed, "I think the last time you allowed us a few minutes to do like we've always done, where we have the jurors in

the box and just a general voir dire as a last precaution." (4 RT 1224.)

Trial counsel's expectation of additional general voir dire on basic legal principles is also suggested by the court's own actions and comments. Initially, the court advised counsel that voir dire of each prospective juror would be approximately 10 minutes. (1 RT 146, 191 [5 prospective jurors an hour].) Ten minutes is scant time to allow for death qualification of prospective jurors, let alone follow-up on questionnaire answers and voir dire regarding all applicable legal concepts by both defense counsel and the prosecutor.

The limited nature of the sequestered voir dire is also suggested by the court's statement to each prospective juror – and thus repeated statements to trial counsel – that it was conducting sequestered voir dire to inquire about their views regarding the death penalty. (2 RT 408 ["[Juror Number 1], the reason I've asked the perspective [sic] jurors to come individually, of course, is because I need to talk about your views of the death penalty"]; 4 RT 1068 [Juror Number 2]; RT 206 [Juror Number 3]; 4 RT 1036 [Juror Number 4]; RT 309 [Juror Number 5]; RT 1975 [Juror Number 6]; 3 RT 749-750 [Juror Number 7]; 3 RT 622 [Juror Number 8]; 2 RT 462 [Juror Number 9]; 4 RT 946-947 [Juror Number 10]; 4 RT 893 [Juror Number 11]; and 4 RT 1114 [Juror Number 12].)

The court also signaled the limited nature of the voir dire early on in the process when, after questioning Juror No. 3 about the death penalty, it stated to defense counsel, "Mr. Hamilton, *based upon the questionnaire*, what other questions do you have of [Juror No. 3]?" (1 RT 207, italics added.) Given the brief amount of time allotted for voir dire of each prospective juror, the court's statements that it was conducting the sequestered voir dire to inquire about death penalty views, and its directive

to counsel to limit voir dire to the questionnaire responses, it was imminently reasonable for counsel to believe that the court would conduct a group voir dire asking the questions recommended by the California Standards of Judicial Administration, and thus he need not ask those questions himself of every prospective juror questioned. The fact that counsel *did* question some prospective juror regarding fundamental legal concepts and that three prospective jurors D. Kelly, B. Cosart and D. Kennedy were excused for cause (RB 37-38) does not suggest otherwise. All three gave answers in their questionnaires that called for follow-up. D. Kennedy stated she believed that a defendant must testify before being found not guilty (III CT [Amended Juror questionnaires] 879); B. Cosart stated she would like to hear from the defendant and believed that a defendant should have to prove he is not guilty, though she recognized that was not the law (II CT [Amended Juror questionnaires] 529); and D. Kelly believed that a defendant should prove he is not guilty (III CT 865 [Amended Juror questionnaires] ).

Respondent acknowledges that trial judges are advised to follow closely the language and formulae recommended by the Judicial Counsel to ensure that all appropriate areas of inquiry are covered in the appropriate manner. (RB 42.) She does not explain, however, why she believes it was acceptable for the trial court to have failed to do so in this case. She asserts, without explanation, that group voir dire may be deemed impracticable when it results in actual rather than potential bias (RB 43), but that appears to have nothing to do with the facts of this case. Respondent cites *People v. Vieira* (2005) 35 Cal.4th 264, 288, for this proposition, but there the defense was arguing that the trial court's group voir dire prejudicially influenced prospective jurors. This Court concluded that group voir dire

was not impracticable in that case. Likewise, in this case, not only would group voir dire not have been impracticable, it also was necessary to ensure that all of the jurors who sat in judgment of appellant would be fair and impartial in *this* case. It is fatuous to suggest that recommended group voir dire with questions spelled out by the Judicial Counsel would have resulted in actual bias at appellant's trial.

Respondent's references to the trial court's unique position to assess demeanor, tone and credibility are also inapposite. (RB 43.) This is not a case about assessing responses given by particular jurors, but about the trial court's failure to ask essential questions to test the jury for bias or partiality.

The sum of the situation here is that the trial court failed to discharge its "serious duty to determine the question of actual bias" and disobeyed the Supreme Court's oft-stated command that "the trial court must be zealous to protect the rights of an accused." (*Dennis v. United States* (1950) 339 U.S. 162, 168.)

Respondent repeatedly refers to fact that the trial court may limit voir dire in its discretion and that voir dire is not a constitutional right. (See RB 41-42, 43-44, 46.) While this is true, it is also true that "[v]oir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored, as without adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." (*People v. Earp* (1999) 20 Cal.4th 826, 852.) Thus, due process and the essential demands of fairness define the outer boundary of a trial court's discretion. (*Morgan v. Illinois* (1992) 504 U.S. 719, 729–730 ["the exercise of [the trial court's] discretion, and the restriction upon inquiries at the request of counsel [are] subject to the

essential demands of fairness"] internal citations and quotations omitted.)

Discretion is not properly exercised if the questions are not reasonably sufficient to test the jury for bias or partiality. (*United States v. Baldwin* (9th Cir. 1979) 607 F.2d 1295.) As the panel explained in *Baldwin*, "The sole purpose of voir dire is not to tell potential jurors that they are to be fair and then ask them if they think they can be impartial." (*Id.* at p. 1298, quoting *United States v. Martin* (7th Cir. 1974) 507 F.2d 428, 432-433.)

Code of Civil Procedure former section 223 was adapted from federal practice. (*People v. Taylor*, *supra*, 5 Cal.App.4th at p. 1309.) Accordingly, federal court decisions are persuasive in this area, and a number of them have found constitutional reversible error where the trial court failed to voir dire on essential legal concepts. In *United States v. Blount* (6th Cir. 1973) 479 F.2d 650, a panel reversed the defendant's conviction because the trial court refused the defendant's request to ask the prospective jurors if they could accept the proposition of law that a defendant is presumed innocent, has no burden to establish his innocence and is clothed throughout the trial with this presumption. (*Id.* at pp. 651-652.) "The primary purpose of the voir dire of jurors is to make possible the empanelling of an impartial jury through questions that permit the intelligent exercise of challenges by counsel." (*Id.* at p. 651, citing Wright, 2 *Federal Practice and Procedure,* ¶ 382 (1969).) The Court stated that the trial court's concern to expedite the trial was commendable, "but expedition should not be pursued at the cost of the quality of justice." (*Id.* at p. 652.) It concluded that since the trial court's failure to honor defense counsel's request may have resulted in the denial of an impartial jury, the error could not be dismissed as harmless. (*Ibid.*, citing *Brown v. United States* (D.C.

Cir. 1964) 338 F.2d 543 (Burger, J.).)

Similarly, in *United States v. Hill* (6th Cir. 1984) 738 F.2d 152, 153, the panel stated that "[j]ury instructions concerning the presumption of innocence and proof beyond reasonable doubt are fundamental rights possessed by every citizen charged with a crime in these United States," and ruled that a fairly phrased question concerning whether or not a juror could accord such rights to a defendant in a criminal trial must, if requested, be submitted by the trial court as a fundamental part of voir dire. (*Ibid.*)

Respondent concludes by reiterating that the general legal principles were covered by the court's general advisements, the jury questionnaire and the voir dire interviews. (RB 46-47.) As stated in appellant's opening brief and again in this reply, none of these partial measures covered the critical legal principles that were necessary to ensure that each juror understood the law, would abide by the law regardless of whether he or she approved of it, or felt he or she could be a fair and impartial juror, for any reason, in this case. Moreover, if a juror has a prejudice against basic guarantees such as presumption of innocence and proof beyond a reasonable doubt, an instruction given before or at the end of trial will have little curative effect. As one court has stated, "admonitions and instructions are no substitute for interrogation." (*People v. Starks* (1988 Ill.) 523 N.E.2d 983, 988.)

In failing to conduct a group voir dire on general legal principles, the trial court infringed on appellant's right to "ferret out the possible biases or prejudices of individual jurors." (*People v. Chapman*, *supra*, 15 Cal.App.4th at pp. 142-143.) Appellant's conviction and death judgment must be reversed.

## II.

## 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 asserts that because the information in his case charged him with only second degree murder in violation of Penal Code section 187, the trial court lacked jurisdiction to try him for first degree murder. (AOB 43-50.)

Respondent argues that malice murder and felony murder are not two different crimes but rather merely two theories of the same crime with different elements. This position, however, embodies a fundamental misunderstanding of how, for the purpose of constitutional adjudication, the courts determine if they are dealing with one crime or two. Comparison of the act committed by the defendant with the elements of a crime defined by statute is the way our system of law determines if a crime has been committed and, if so, what crime that is. "A person commits a crime when his or her conduct violates the essential parts of the defined offense, which we refer to as its elements." (*Jones v. United States* (1999) 526 U.S. 227, 255 (dis. opn. of Kennedy, J.).)

Moreover, comparison of the elements of two statutory provisions is the traditional method used by the United States Supreme Court to determine if the crimes at issue are different crimes or the same crime. The question first arose as an issue of statutory construction in *Blockberger v. United States* (1932) 284 U.S. 299, when the appellant asked the Court to determine if two sections of the Harrison Narcotic Act created one offense

or two. The Court concluded that the two sections did describe different crimes, and explained its holding as follows:

> Each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

(*Id.* at p. 304, citing *Gavieres v. United States* (1911) 220 U.S. 338, 342.)

Later, the "elements" test announced in *Blockberger* was elevated to a rule of constitutional dimension. It is now the test used to determine what constitutes the "same offense" for purposes of the Double Jeopardy Clause of the Fifth Amendment. (*United States v. Dixon* (1993) 509 U.S. 688, 696-697.)

*People v. Dillon* (1983) 34 Cal.3d 441, the controlling interpretation of the felony murder rule at the time of appellant's trial, properly applied the *Blockberger* test for determining the "same offense" when it declared that "in this state the two kinds of murder are not the 'same' crimes." (*Id.* at p. 476, fn. 23.) Malice murder and felony murder are two crimes defined by separate statutes, for "each provision requires proof of an additional fact which the other does not." (See *Blockberger v. United States*, *supra*, 284 U.S. at p. 304.) Malice murder requires proof of malice (Pen. Code, § 187), and, if the crime is to be elevated to murder of the first degree, proof of premeditation and deliberation; felony murder does not. Felony murder requires the commission or attempt to commit a felony listed in Penal Code section 189 and the specific intent to commit that felony; malice murder does not.

Therefore, it is incongruous to say, as this Court did in *People v. Silva* (2001) 25 Cal.4th 345, that the language in *People v. Dillon*, *supra*, 34 Cal.3d 441, on which appellant relies meant "only that the *elements* of the two kinds of murder differ; there is but a single statutory offense of murder." (*People v. Silva*, *supra*, 25 Cal.4th at p. 367, emphasis added.) If the *elements* of malice murder and felony murder are different, as *Silva* acknowledges they are, then malice murder and felony murder are different crimes. (See *United States v. Dixon*, *supra*, 509 U.S. at p. 696.)

"Calling a particular kind of fact an 'element' carries certain legal consequences. [Citation.]" (*Richardson v. United States* (1999) 526 U.S. 813, 817.) One consequence "is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." (*Ibid.*) The same consequence follows in a California criminal case; the right to a unanimous verdict arises from the state Constitution and state statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163, 1164) and is protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488).

In addition, "elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt. [Citations.]" (*Jones* v. *United States*, *supra*, 526 U.S. at p. 232.) In this case, where appellant was charged with one crime, but the jury was instructed that it could convict him of another, that rule was breached as well, violating appellant's rights to due process, a jury determination of each element of the charged crime, adequate notice of the charges, and a fair and reliable capital guilt trial.

Respondent dismisses in a two-sentence paragraph appellant's argument that the failure of the information to allege all the facts necessary to justify the death penalty make it defective under *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476. (RB 52.) Respondent asserts the claim is unmeritorious because the information included a special circumstance allegation that supported the penalty verdict, but appellant's point is that the special circumstance should not even have been alleged because appellant could was charged with only second degree murder. The jury shall determine the truth of all special circumstances only "[i]f the trier of facts finds the defendant guilty of first degree murder." (Pen. Code, § 190.1 (a).)

This Court has offered support for appellant's position. In *People v. Seel* (2004) 34 Cal.4th 535, the defendant was convicted of attempted premeditated murder (Pen. Code, § 644, subd. (a) and § 187, subd. (a)). The Court of Appeal reversed the finding of premeditation and deliberation due to insufficient evidence and remanded for retrial on that allegation. In holding that double jeopardy barred retrial on the premeditation allegation under *Apprendi*, this Court endorsed the view that "'[t]he defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense "element."'" (*Seel, supra*, 34 Cal.4th at p. 549, citing *Apprendi v. New Jersey, supra*, 530 U.S. at p. 493.) Intent, of course, in an element that makes malice murder a different crime from felony murder.

In addition, in *Burris v. Superior Court* (2005) 34 Cal.4th 1012, this Court held that under Penal Code section 1387, the dismissal of a misdemeanor prosecution does not bar a subsequent felony prosecution based on the same criminal act when new evidence comes to light that suggests a crime originally charged as a misdemeanor is, in fact, graver and should be charged as a felony. (*Id.* at p. 1020.) In reaching this conclusion,

the Court compared the elements of the offenses at issue. "When two crimes have the same elements, they are the same offense for purposes of Penal Code section 1387." (*Id.* at p. 1016, fn. 3, citing *Dunn v. Superior Court* (1984) 159 Cal.App.3d 1110, 1118 [applying "same elements" test to determine whether new charge is same offense as previously dismissed one for purposes of section 1387]. See also *People v. Traylor* (2009) 46 Cal.4th 1205, 1208.) The negative implication is obvious: when two crimes have different elements, they are *not* the same offense.

*Seel* and *Burris* reaffirm the principle that because premeditated (malice) murder and felony murder have different elements under California statutory law, they are different crimes, not merely two theories of the same crime. Accordingly, appellant's conviction and judgment for first degree murder must be reversed.

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## III.

## THE RESTRICTION OF IMPEACHMENT OF A KEY PROSECUTION WITNESS'S CREDIBILITY VIOLATED APPELLANT'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

At trial, Lupe Valencia testified that he was scared and bothered by Hassan's killing. He had trouble concentrating when he returned to school, and this was reflected in his poor grades. (5 RT 1340-1341.) Over time, he felt better and his grades improved, and after he talked to the police about what had happened, he was relieved and did even better at school. (5 RT 1341-1343.) When defense counsel attempted to impeach Lupe with school report cards showing that this testimony was false, the prosecutor objected and the trial court excluded this powerful, contemporaneously created impeaching evidence.

Appellant has argued that the trial court abused its discretion when it excluded evidence that a pivotal immunized prosecution witness lied under oath regarding his school performance in order to bolster the prosecution's theory of the case. Further, the exclusion of this evidence violated appellant's federal constitutional rights to confront and cross examine witnesses, compulsory process, due process and reliable guilt and penalty determinations under the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB Argument III, 51-63.)

Respondent initially argues that appellant waived his constitutional challenges to the ruling because he did not make a sufficient objection that the ruling violated appellant's federal constitutional rights. (RB 56.) Respondent cites *People v. Gordon* (1990) 50 Cal.3d 1223, but fails to mention the more recent case, *People v. Partida* (2005) 37 Cal.4th 428, where this Court ruled that while specific objections are required so that

trial judges may rule on the particular legal principal proposed, a defendant need not cite the constitutional base along with the objection in order to preserve constitutional issues, as long as the constitutional error argued on appeal stems from the error to which defendant objected. (*Id.* at pp. 434-439 [defendant may make due process argument stemming from 352 objection without citing due process as base for objection].)

This Court explained that although the requirement of a specific objection serves important purposes,

> the requirement must be interpreted reasonably, not formalistically. "Evidence Code section 353 does not exalt form over substance." [Citation.] The statute does not require any particular form of objection. Rather, "the objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility." [Citation.] What is important is that the objection fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling. If the court overrules the objection, the objecting party may argue on appeal that the evidence should have been excluded for the reason asserted at trial, but it may not argue on appeal that the court should have excluded the evidence for a reason different from the one stated at trial. A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct.

(*People v. Partida, supra*, 37 Cal.4th at p. 435.) The Court explained, "No purpose would be served by requiring the objecting party to inform the court that it believes error in overruling the actual objection would violate due process." (*Id.* at p. 437.) Earlier cases where this Court found waiver "should be read to hold only that the constitutional argument is forfeited to

the extent the defendant argued on appeal that the constitutional provisions required the trial court to exclude the evidence for a reason not included in the actual trial objection. They did not consider whether, and do not preclude us from holding that, defendant may argue an additional legal consequence of the asserted error in overruling the Evidence Code section 352 objection is a violation of due process." (*Partida, supra*, at p. 437.)

Numerous other Supreme Court cases provide that a reviewing court may address a constitutional argument where, as here, the argument does not invoke facts or legal standards different from those which the trial court was asked to apply. In *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17, this Court observed,

> With respect to this and virtually every other claim raised on appeal, defendant urges that the error or misconduct he is asserting infringed various of his constitutional rights to a fair and reliable trial. In most instances, insofar as defendant raised the issue at all in the trial court, he failed explicitly to make some or all of the constitutional arguments he now advances. In each instance, unless otherwise indicated, it appears that either (1) the appellate claim is of a kind (e.g., failure to instruct sua sponte; erroneous instruction affecting defendant's substantial rights) that required no trial court action by the defendant to preserve it, or (2) *the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional legal consequence of violating the Constitution. To that extent, defendant's new constitutional arguments are not forfeited on appeal.*

(Italics added. Accord, *People v. Bacon* (2010) 50 Cal.4th 1082, 1101, fn. 3 [federalizing on appeal claim that court erred in excluding corroborating evidence]; *People v. Cowan* (2010) 50 Cal.4th 401, 464 and fn. 20 [arguing

on appeal that admission of hearsay statements violated defendants's right to confront witnesses and due process]; *People v. Verdugo* (2010) 50 Cal.4th 263, 277, fn. 5 [federalizing claim that trial court erred by refusing to appoint *Keenan* counsel]; see also *People v. Yeoman* (2003) 31 Cal.4th 93, 133 [defendant argued for first time on appeal that admission of evidence rendered the death sentence arbitrary and unreliable: "Defendant's new claim . . . merely invites us to draw an alternative legal conclusion (i.e., that the death sentence is arbitrary and unreliable) from the same information he presented to the trial court (i.e., that the evidence [presented at trial] was untested and, thus, could not be presented to the jury without causing unfair prejudice). We may therefore properly consider the claim on appeal"]; *People v. Jeha* (2010) 187 Cal.App.4th 1063, 1078 ["When a challenge to the constitutional validity of a statute is raised for the first time on appeal, we will generally exercise our discretion to consider the argument if it represents an important issue of public concern (or case of first impression) and involves only the application of legal principles to undisputed facts for which the People have not been deprived of a fair opportunity to develop facts to the contrary"]; *People v. Delacy* (2011) 192 Cal.App.4th 1481, 1493 [equal protection challenge considered even though it was not raised below as issue is one of law presented by undisputed facts].)

Here, appellant's constitutional claims stem from the court's restriction of cross examination. No facts on this point are disputed. Appellant argued that the excluded report cards were relevant to impeach the prosecution witness and to expose his bias. As such, the confrontation and due process arguments do not invoke facts or legal standards different from those the trial court was asked to apply. Therefore, no specific

constitutional objection was required to preserve his confrontation and due process claims.

On the merits, respondent argues that the trial court did not abuse its discretion in excluding the evidence as irrelevant because "[w]hether Lupe's grades went up or down after the shooting is not a fact of consequence in appellant's murder trial and it had no bearing on any contested issue in the case." (RB 57.) She states that appellant's argument that Lupe's grades got better after the shooting because he was not involved and declined after he allegedly lied to the police, "is entirely speculative." (RB 58.) She also states that whether or why Lupe got better grades in one semester or the other "was of no consequence to the determination of appellant's guilt for murder." (*Ibid.*) Respondent either misunderstands or misstates appellant's argument. The issue is not simply whether Lupe's grades went up or down. The issue is whether Lupe lied, and did so in a manner solely designed to help the prosecution's case.[3] The school records, created contemporaneously to the time about which Lupe testified, directly contradicted his testimony.

Lupe testified that he was so affected by the crime he claimed to have witnessed that it had a negative impact on his school performance. The documentary evidence, however, proved the exact contrary. The only

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[3] Under respondent's reasoning, a witness's prior felony conviction would be "of no consequence" in determining a defendant's guilt. In fact, however, it is "of consequence" – and admissible – for impeachment purposes to help a jury assess the credibility of that witness. (See Evid. Code, § 788.) Similarly, as Professor Witkin has stated, "a person lacking in veracity is an untrustworthy witness and may be impeached by proof of this bad character trait." (Witkin, California Evidence, 4th ed., Vol. 3, § 280, p. 353.)

explanation is that Lupe, who was given immunity for his testimony, testified as he did to bolster the prosecution's case. The jurors were entitled to learn the truth about Lupe's questionable credibility, and the school records, which fully contradicted his testimony, had a tendency in reason to dispute the material fact of Lupe's credibility.

Respondent also asserts that appellant was not prejudiced because defense counsel was able to cross examine Lupe regarding his grades; other factors may have affected Lupe's grades; and alternative interpretations might suggest that the grades Lupe actually received, rather than testified to, were equally supportive of the prosecution's theory of the case, thereby confirming that defense counsel's theory was merely "pop psychology." (RB 58-59.) Again, respondent misses the point, and rather pointedly fails to address appellant's argument that excluded records were not collateral to Lupe's testimony but proper impeachment demonstrating falsity and bias. (See AOB 53-55.) Relevant evidence includes evidence "relevant to the credibility of a witness. . . ." (Evid.Code, § 210.) And "[t]here is no specific limitation in the Evidence Code on the use of impeaching evidence on the ground that it is 'collateral.'" (Evid. Code, § 780, Law Review Commission Comment. See AOB 54.) Respondent states simply that trial counsel had discretion to exclude the evidence and did not abuse it because Lupe's grades were irrelevant. (RB 57.) This is a circular analysis that avoids the arguments appellant has made.

Respondent also fails to respond to appellant's argument that the prosecutor failed to make a relevance objection to any of the cross examination regarding Lupe's school performance after the shooting, until defense counsel was about to impeach Lupe with his school records. (AOB 55.) Regardless of whether the initial cross examination was proper, once

Lupe testified without objection, defense counsel was entitled to impeach him with records showing that Lupe had not testified truthfully *and* had done so to support the prosecution's theory.

Respondent claims that because the report cards were not relevant, the trial court properly declined to engage in a balancing analysis under Evidence Code section 352. (RB 59.) However, "[w]hen a section 352 objection is raised, 'the record must affirmatively show that the trial judge did in fact weigh prejudice against probative value.' [Citations.]" (*People v. Leonard* (1983) 34 Cal.3d 183, 187-188.) The trial court erred when it affirmatively declined to engage in any balancing analysis in this case.

Respondent next states that had the court conducted a balancing analysis, it would have excluded the evidence, but she undermines her conclusion when she concedes that "it is questionable whether this evidence would have presented any serious prejudice to the People's case." (RB 60.) Given the absence of prejudice, and the impeachment relevance that respondent fails to address or recognize, as well as the little time it would take to introduce the records, it would have been error to exclude the school records under Evidence Code section 352 had the trial court engaged in the analysis to which appellant was due.

Respondent also contends there was no confrontation violation because appellant "was allowed to examine Lupe's credibility extensively at trial." (RB 60.) Again, respondent wrongly assumes that the only purpose of the examination regarding Lupe's grades was the actual grades Lupe received. Respondent also suggests that cross examination was sufficient without introduction of the documentary impeachment evidence because defense counsel was able to ask Lupe whether or not it was true that he was not really bothered immediately after the shooting because he was not really

involved, and whether he was distressed after speaking to the police because he lied about his involvement. "These questions demonstrated to the jury the defense's argument that Lupe's grades indicated whether he was lying about being at the Casa Blanca." (RB 60.) Again, this misses the point. The report cards reveal that Lupe was not telling the truth about his grades, which suggests he may not be telling the truth about other matters. According, contrary to respondent's assertion ( RB 61), the court limited relevant impeachment testimony of a key prosecution witness.

Respondent's final argument is that even assuming error, it was harmless because the report cards were not relevant and defense counsel was able to present his argument that Lupe's grades "indicated he was not at the Casa Blanca shooting." (RB 61.)[4] First, evidence of Lupe's actual performance, as evidenced by the grade report, was relevant impeachment. Second, Lupe testified that defense counsel's theory based on his grades was not true. Counsel may have been able to *argue* anything, but the grades themselves supported the defense theory *and proved* that Lupe was not honest in his testimony. As it was, Lupe testified in a manner that bolstered the prosecution's theory of the case and then could not be impeached with evidence showing such testimony was not true.

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[4] Respondent asserts that appellant claims the standard of review is "harmless beyond a reasonable doubt" under *Chapman v. California* (1967) 386 U.S. 18, 24, and suggests that appellant failed to mention the "reasonable probability" standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (RB 61, fn. 39.) In fact, appellant states immediately after the reference to *Chapman*, that under *Watson* "an error is harmless if it does not appear reasonably probably that the verdict was affected." (AOB 60.) Appellant has argued that the error was prejudicial under either standard. (*Ibid.*)

Respondent disputes that this was a close case and attempts to minimize the importance of Lupe's testimony at trial. The facts remain, however, that there was no physical evidence linking appellant to the offense, eyewitnesses and an informant for the prosecution disputed Lupe's account of who and how many were involved in the robbery and killing, the jurors asked for significant read-backs of Lupe's testimony, and the jurors deliberated for nearly 8 hours. (See AOB 61-63.)

Lupe was an important prosecution witness who appellant was not able to adequately cross examine about his credibility and bias. The trial court's ruling excluding Lupe's school records was not harmless beyond a reasonable doubt *and* it appears reasonably probably that the verdict was affected by that ruling. The convictions, special circumstance finding and death judgment should be reversed.

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## IV.

## APPELLANT'S DEATH SENTENCE, IMPOSED FOR FELONY MURDER *SIMPLICITER*, IS A DISPROPORTIONATE PENALTY UNDER THE EIGHTH AMENDMENT AND VIOLATES INTERNATIONAL LAW.

Appellant's death sentence, based on the commission of a felony murder *simpliciter*, is unconstitutional. The lack of any requirement that the prosecution prove that he had a culpable state of mind with regard to the killing violates the proportionality requirement of the Eighth Amendment as well as international human rights law governing use of the death penalty. (AOB 64-79.)

Respondent answers that this Court has repeatedly rejected similar claims and contends that appellant fails to demonstrate a need for this Court to revisit the issue. (RB 64.) Respondent is wrong. Appellant provided argument and authority demonstrating that the Eighth Amendment requires that a culpable mental state with regard to the murder must be proved before a death sentence may be imposed. Respondent, however, does not address appellant's arguments or even acknowledge recent decisions of the United States Supreme Court on proportionality. (RB 64-69.) Respondent relies on *Tison v. Arizona* (1987) 481 U.S. 137, without even mentioning, let alone refuting or discussing, appellant's reliance on *Hopkins v. Reeves* (1998) 524 U.S. 88 (AOB 70-72), or that the United States Supreme Court in that case assumed that the requirement of a culpable mental state enunciated in *Tison* and *Enmund v. Florida* (1982) 458 U.S. 782, applies to the actual killer in a felony murder. (See RB 66, discussing *Tison v. Arizona*.)

Respondent similarly avoids appellant's argument that even if the United States Supreme Court's decisions do not already require a finding of

intent to kill or reckless indifference to human life in order to impose the death penalty on defendant who actually kills, the Eighth Amendment's proportionality principle would dictate the same requirement. (See AOB 72-79.) In light of appellant's showing on both points, respondent has presented no reason why this Court should not reconsider its prior rulings on this issue and no justification for holding appellant's death sentence for felony murder *simpliciter* constitutional under the Eighth and Fourteenth Amendments and international law.

A case decided by the United States Supreme Court after the filing of the opening brief further bolsters appellant's claim. *Kennedy v. Louisiana* (2008) 554 U.S. 407, not only underscores that California's outlier practice of imposing the death penalty for felony murder *simpliciter* is disproportionate under the Eighth and Fourteenth Amendments, but also calls into question whether *Tison* itself remains good law and instead strongly suggests that the death penalty is unconstitutional for any unintentional murder.

In *Kennedy*, the high court held that the Eighth and Fourteenth Amendments prohibit the death penalty for the rape of a child because the penalty is disproportionate to the crime. (*Kennedy v. Louisiana*, *supra*, 554 U.S. at pp. 413, 421.) Although *Kennedy* addressed the ultimate penalty for a person who committed a felony but did not kill, the Court's proportionality analysis applies with equal force here.

In *Kennedy*, the high court applied its two-part "evolving standards of decency" test to determine whether death is disproportionate to the crime of child rape. The Court first considered whether there is a national consensus about the challenged penalty by looking at penal statutes and the record of executions (*Kennedy v. Louisiana*, *supra*, 554 U.S. at pp.420-

434), and then brought its own judgment to bear on the question of the constitutionality of the penalty, i.e. whether either of the social purposes of the death penalty – retribution or deterrence – justifies capital punishment for the crime (*id.* at pp. 421, 434-446). The Court, however, prefaced its traditional analysis with a discussion of the cruel and unusual punishments clause and delineated essential principles that animate its proportionality jurisprudence.

The Court began with a reminder that the Eighth Amendment's prohibition of cruel and unusual punishments proscribes all excessive punishments and "flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense." (*Kennedy v. Louisiana*, *supra*, 554 U.S. at p. 419, quoting *Weems v. United States* (1910) 217 U.S. 349, 367.) The high court emphasized that the standards for determining whether the Eighth Amendment proportionality requirement is met are "the norms that 'currently prevail[,]" since the measure of excessiveness or extreme cruelty "necessarily embodies a moral judgment." (*Ibid.*) The Court also cautioned that retribution, as a justification for punishment, "most often can contradict the law's own ends," particularly in capital cases. The Court was blunt: "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." (*Id.* at p. 420.)

To guard against this danger, the Court admonished that capital punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (*Kennedy v. Louisiana*, *supra*, 554 at p. 420, quoting *Roper v. Simmons* (2005) 543 U.S. 551, 568, internal

quotation marks omitted.) The Court forthrightly acknowledged that the more crimes that are subject to capital punishment, the greater the risk that the penalty will be arbitrarily imposed. (*Id.* at pp. 436- 439.) Thus, under the Eighth Amendment, "the Court insists upon confining the instances in which the punishment can be imposed." (*Id.* at p. 420; see *id.* at p. 437 [repeating the point].) The Court's message is unmistakable: the use of capital punishment must be restricted. This mandate informs the Court's ensuing Eighth Amendment analysis.

The proportionality analysis in *Kennedy* confirms appellant's argument that imposing the death penalty for felony murder *simpliciter* is unconstitutional. The evidence regarding a national consensus against imposing the death penalty for child rape was nearly identical to that appellant presents about the national consensus against imposing death for felony murder *simpliciter*. Only six states authorized the death penalty for child rape, and 44 states did not. (*Kennedy v. Louisiana*, *supra*, 128 S.Ct. at p. 2651.) The Supreme Court repeatedly drew an analogy between this six-state showing and that in *Enmund v. Florida*, *supra*, 458 U.S. 752, where eight states imposed death on vicarious felony murderers, and 42 states did not. (*Kennedy v. Louisiana*, *supra*, 554 U.S. at pp. 425-426, 432-434.) In *Kennedy*, as in *Enmund*, the exceedingly lopsided tally established a national consensus against the death penalty for the crimes considered in those cases. (*Id.* at p. 425-426.)

As appellant has shown, the evidence of a national consensus against executing actual felony murderers when there has been no proof of a culpable mental state with regard to the killing is just as stark as that presented in *Kennedy*. At most six states, including California, permit the death penalty for such felony murders, and 44 states and the federal

government do not. (AOB 72-74 [reporting four states other than California]; see also Shatz, *The Eighth Amendment, The Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study* (2007) 59 Fla.L.Rev. 719, 761 [adding Idaho to the list of states that along with California, Florida, Georgia, Maryland, and Mississippi authorize death for felony murder *simpliciter*].) Under the analysis used in *Kennedy* and the high court's other recent proportionality cases, *Atkins v. Virginia* (2002) 536 U.S. 304 and *Roper v. Simmons*, *supra*, 543 U.S. 551, the death penalty for felony murder *simpliciter* is inconsistent with our society's national standards of decency and justice.

The Supreme Court's decision on the second part of the "evolving standards of decency" test further supports appellant's claim. In determining that, in its own independent judgment, the death penalty is excessive for the crime of child rape, the Court drew a clear distinction between "intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other." (*Kennedy v. Louisiana*, *supra*, 554 U.S. at p. 438.) The Court repeated this distinction between "intentional murder" and child rape in comparing the number of reported incidents of each crime. (*Id.* at pp. 438-439.) These references cannot be considered inadvertent or incidental. They build upon the Court's understanding in *Hopkins v. Reeves*, *supra*, 524 U.S. at p. 99, that there must be a finding that an actual killer had a culpable mental state with respect to the killing before the death penalty may be imposed for felony murder, and the Court's decision in *Tison v. v. Arizona*, *supra*, 481 U.S. at pp. 157-158, in which the Court drew no distinction between the mental state required to impose death on actual killers and accomplices for a felony murder. They also are consonant with the understanding of

individual justices about the limits of the death penalty for murder. (See AOB 71, fn. 103, citing *Graham v. Collins* (1993) 506 U.S. 461, 501 [conc. opn. of Stevens, J., stating that an accidental homicide, like the one in *Furman v. Georgia* (1972) 408 U.S. 238, may no longer support a death sentence]; see also *Lockett v. Ohio* (1978) 438 U.S. 586 621 [conc. & dis. opn. of White, J., stating that "the infliction of death upon those who had no intent to bring about the death of the victim is . . . grossly out of proportion to the severity of the crime"].) Just as the death penalty is excessive for child rape, it is excessive for felony murder *simpliciter*.

The decision in *Kennedy* not only supports appellant's challenge to felony murder *simpliciter*, but also signals that the death penalty is disproportionate for any unintentional murder. The high court's repeated references to intentional murder indicate another step toward "confining the instances in which the punishment can be imposed." (*Kennedy v. Louisiana, supra*, 554 U.S. at p.420.) As *Kennedy* reveals, the high court now considers intentional murder as the constitutional norm for capital punishment. The decision pointedly suggests that under the Eighth Amendment, *Tison*'s requirement of reckless disregard for human life is no longer sufficient. To impose a death sentence, there must be proof that the defendant, whether the actual killer or an accomplice, acted with an intent to kill.

Under the traditional Eighth Amendment analysis used in *Kennedy*, there is now a national consensus that the death penalty may not be applied to unintentional robbery felony murderers. As discussed above, at most six states, including California, make a defendant death-eligible for felony murder *simpliciter*. Only seven other jurisdictions – Arkansas, Delaware, Illinois, Kentucky, Louisiana, Tennessee, and the United States military –

authorize the death penalty for a robbery felony murderer who acts with a mental state less than intent to kill. (See Shatz, *supra*, at pp. 761-762.)[5] Thus, only 13 jurisdictions of a total 52 jurisdictions (the 50 states, the United States military, and the United States government) impose the death penalty without requiring proof of an intent to kill.[6] Of the remaining 39 jurisdictions, 16 jurisdictions do not use capital punishment at all.[7] The remaining 23 death penalty jurisdictions (1) do not make robbery murder or attempted robbery murder – appellant's crime – a capital crime,[8] do not make felony murder a death-eligibility circumstance,[9] or do not permit the prosecution to use the robbery to prove both the murder and death eligibility,[10] or (2) require proof of an intent to kill.[11] In this way, at least 39

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[5] See Shatz, *supra*, at p. 770, fn. 248, citing Ark. Code Ann. § 5-10-101(a)(1) (2006); Del. Code Ann. tit. 11, § 4209(e) (2007); 720 Ill. Comp. Stat. Ann. 5/9-1(6)(b) (West 2007); Ky. Rev. Stat. Ann. §§ 532.025, 507.020 (West 20067); La. Rev. Stat. Ann. § 14:30(A)(1) (20067); Tenn. Code Ann. §§ 39-13-202, 39-13-204(i)(7) (2007); Manual for Courts-Martial, United States, R.C.M. 1004(c) (2005).

[6] The District of Columbia, which does not have the death penalty, is excluded from this list.

[7] As of July 25, 2011, these states are Alaska, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia and Wisconsin. http://www.deathpenaltyinfo.org/FactSheet.pdf.

[8] See, Shatz, *supra*, at p. 770, fn. 249, citing Mo. Rev. Stat. § 565.020 (2007) as an example.

[9] See Shatz, *supra*, at p. 770, fn. 250, citing Ariz. Rev. Stat. Ann. § 13-703(F) (2006); S.D. Codified Laws § 23A-27A-1 (2006) as examples.

[10] See Shatz, *supra*, at p. 770, fn. 251, citing *McConnell v. State*

(continued...)

jurisdictions (38 states and the federal government) – three-quarters of all jurisdictions – do not follow California's practice of subjecting to execution a defendant who unintentionally kills during a robbery or attempted robbery. This showing reflects a substantially stronger "national consensus against the death penalty" than the high court found in striking down the death penalty as disproportionate for mentally retarded murderers in *Atkins v. Virginia*, *supra*, 536 U.S. at pp. 314-316 (30 states and the federal government) and for juvenile murderers in *Roper v. Simmons*, *supra*, 543 U.S. at p. 664 (30 states and the federal government). In short, the national consensus, as evidenced by state and federal legislation, establishes that the death penalty for an unintentional murder is a cruel and unusual punishment under the Eighth and Fourteenth Amendments.

In addition, exacting death for an unintentional murder is excessive to both the deterrence and retribution justifications for capital punishment. To be sure, in *Tison v. Arizona*, *supra*, 481 U.S. at pp. 156-157, the high court held that being a major participant and acting with reckless indifference to human life, rather than with an intent to kill, was enough to impose a death sentence on a felony murder accomplice. But more than 20 years have passed since *Tison*. As noted above, in *Kennedy* the high court

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[10] (...continued)
(Nev. 2004) 102 P.3d 606, 620-624; *State v. Gregory* (N.C. 1995) 459 S.E.2d 638, 665 as examples.

[11] See Shatz, *supra*, at p. 770, fn. 252, citing Ohio Rev. Code Ann. § 2903.01(D) (West 2007); Tex. Penal Code Ann. § 19.03(a)(2) (Vernon 2007) as examples.

appears to have raised the death-eligibility bar to intentional murder, which is wholly consistent with its emphasis on the need to restrain the reach of the ultimate penalty.

With regard to the deterrence rationale, common sense dictates that fear of execution will not deter a person from committing a murder he did not intend to commit. Precisely because of the unintentional nature of the murder, executing a felony murderer will not likely deter others from engaging in similar crimes. Indeed, in *Enmund*, the high court concluded that "it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation[.]'" (*Enmund v. Florida, supra,* 458 U.S. at 798-799, quoting *Fisher v. United States* (1946) 328 U.S. 463, 484 (dis. opn of Frankfurter, J.).)

In *Enmund*, the high court went further. It found the death penalty for felony murder had *no* deterrent value with regard to the underlying felony. The Court posited that the deterrent value of the death penalty might be different if the likelihood of a killing in the course of a robbery were substantial. (*Enmund v. Florida*, *supra*, 458 U.S. at p. 799.) But the empirical data refuted this hypothesis. Both historical data and then-recent data from 1980 "showed that only about one-half of one percent of robberies resulted in homicide." (*Id.* at pp. 799-800 & fns. 23 & 24.) As a result, the high court concluded "there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself." (*Id.* at p. 799.)[12]

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[12] In *Tison*, the Court glossed over the deterrence justification and minimized *Enmund*'s discussion of the deterrence data, including its

(continued...)

Moreover, as a general matter, the validity of the deterrence rationale is questionable. As Justice Stevens has observed, "[d]espite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders. In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment." (*Baze v. Rees* (2008) 553 U.S. 35, 79 (conc. opn. of Stevens, J.); see also Shatz, *supra*, at p. 767 & fn. 275 [noting the scholarly debate and empirical data on the deterrence question].) Even assuming that capital punishment may deter some murders, its deterrent value is lost when, as Justice White noted in *Furman*, the penalty is seldomly imposed. (*Furman v. Georgia*, *supra*, 408 U.S. at p. 312.) As an empirical matter, in California the death penalty is rare for robbery felony murder. Only five percent of death-eligible robbery felony murderers (who had no more aggravating special circumstances) are sentenced to death. (Shatz, *supra*, at p. 745.)[13] Consequently, the deterrence rationale cannot justify executing a robbery felony murderer.

With regard to the retribution rationale, *Tison*'s conclusion that intent to kill was "a highly unsatisfactory means of definitively

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[12] (...continued)
conclusion that the death penalty did not deter robberies or robbery murders. (See *Tison v. Arizona*, *supra*, 481 U.S. at p. 148 ; see also *id.* at p. 173, fn. 11 (dis. opn. of Brennan, J.).)

[13] This very infrequent use of the death penalty for robbery felony murder death penalty raises both risk of arbitrariness and proportionality concerns and suggests that the imposition of the death penalty even for an intentional robbery felony murder is barred by the Eighth Amendment. (See, Shatz, *supra*, at pp. 745-768.)

distinguishing the most culpable and dangerous murderers" (*id.* at p. 157) has been called into question by *Kennedy*'s assumption that intentional murder is the sine qua non for imposing capital punishment for crimes against individuals. The heart of the retribution rationale is that the criminal penalty must be related to the offender's personal culpability (*Tison v. Arizona*, *supra*, 481 U.S. at p. 149), which is determined by the acts he committed and the mental state with which he committed them. Notwithstanding *Tison*, intentional and unintentional murderers are not similarly culpable. As the high court previously had noted, "[i]t is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" (*Enmund v. Florida*, *supra*, 458 U.S. at p. 798, quoting H. Hart, Punishment and Responsibility 162 (1968); see *Tison v. Arizona*, *supra*, 481 U.S. 137 at p. 156 ["Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."].) Moreover, the high court's Eighth Amendment narrowing jurisprudence already holds that not all murders can be classified as "the most serious of crimes" (*Kennedy v. Louisiana*, *supra*, 128 S.Ct. at p. 2650) so as to warrant the death penalty. (See *Penry v. Lynaugh* (1989) 492 U.S. 302, 327 [to avoid arbitrary and capricious sentencing, the states must limit the death penalty to those murders "which are particularly serious or for which the death penalty is particularly appropriate"].)

In sum, the death penalty is disproportionate to the crime of felony murder *simpliciter*. The national consensus is overwhelmingly against imposing the death penalty for an unintentional felony murder, and there is no constitutional justification for inflicting the death penalty for that crime.

To uphold appellant's death sentence risks California's "descent into brutality, transgressing the constitutional commitment to decency and restraint." (*Kennedy v. Louisiana*, *supra*, 128 S.Ct. at p. 2650.) This Court should reverse appellant's death judgment.

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## V.

## THE COURT COMMITTED INSTRUCTIONAL ERRORS THAT UNFAIRLY AND PREJUDICIALLY BOLSTERED THE CREDIBILITY OF PROSECUTION WITNESSES IN VIOLATION OF APPELLANT'S DUE PROCESS AND OTHER FUNDAMENTAL CONSTITUTIONAL RIGHTS.

Appellant has argued that the trial court committed error when it gave incomplete and insufficient jury instructions on assessing the credibility of witnesses. It deleted the final factor of CALJIC No. 2.20 and it failed to instruct at all with CALJIC No. 2.27. This instructional error was prejudicial since the prosecution's case depended on the testimony of two witnesses whose credibility was suspect, Lupe Valencia, an immunized self-proclaimed participant in the robbery, and Artero Vallejo, a drug dealer, addict and informant who was angry at some of the men he implicated in the murder. (AOB 80-87.)

### A. Deletion of Applicable Paragraphs of CALJIC No. 2.20.

Artero Vallejo's credibility was suspect under many of the factors listed in CALJIC No. 2.20, *including* the factor deleted by the trial court – "past criminal conduct of a witness amounting to a misdemeanor." Respondent believes this claim is waived because appellant did not suggest a special instruction or complain that the one given was incomplete. (RB 70-71.) The claim is properly before this Court for review, and the trial court's failure to give the complete instruction denied appellant a fair trial and due process of law.

Respondent's assertion that this claim has been waived seems to be based upon a misperception of the nature of the claim. In support of its waiver theory, respondent cites *People v. Dennis* (1998) 17 Cal.4th 468,

514, where this Court found a claim waived on appeal because there had been no attempt at trial to clarify or alter the instruction being complained about on appeal. The claim presented in *Dennis*, however, is very different from the one presented here. In *Dennis*, the appellant argued that the jury instructions were deficient and erroneous because they did not separately define malice in terms that related specifically to a fetus and thus improperly permitted the jury to transfer the malice found in the woman's killing to the killing of her fetus. *Dennis* stands for the specific proposition that a party may not complain on appeal that "an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Lang* (1989) 49 Cal.3d 991, 1024.) Similarly, where the claim relates to the fact that the words in an instruction needed to be clarified in some fashion, the defendant needs to make that request in the trial court. (See *People v. Anderson* (1966) 64 Cal.2d 633, 639.) Neither of these propositions governs appellant's claim.

Appellant's claim is not that CALJIC No. 2.20 was faulty in some fashion. He is not arguing that the instruction was inadequate because the words actually used needed to be defined, altered, or modified in some way. To the contrary, appellant believes the instruction should have been given to the jury worded as it was at the time of appellant's trial. The error was not in giving an instruction correct in law, but in failing to give the entire instruction. Respondent's argument is inapt to this situation, and the claim has not been waived.

Respondent next claims that even if the claim is not waived, appellant has "stated no grounds to support his claim of instructional error," citing *People v. Wader* (1993) 5 Cal.4th 610, 644-645. (RB 71.) In *Wader*,

however, this Court ruled that the trial court did not err in failing to instruct sua sponte with CALJIC No. 2.21 because it *had* properly instructed with CALJIC No. 2.20. Here, 2.20 was not fully given.

Respondent relies heavily on *People v. Rogers* (2006) 39 Cal.4th 610, 644-645, but in *Rogers* this Court did not state that the trial court committed no error in failing to instruct with all the factors of CALJIC No. 2.20. It concluded that "any error was harmless," because there was no reasonable possibility the outcome of the penalty phase would have differed had the jury been instructed with the omitted factors. (*Id.* at p. 904.) Respondent's argument that other instructions allowed the jurors to consider Vallejo's prior criminal conduct does not, as respondent states, support the conclusion that the trial court did not err in failing to instruct with the full CALJIC instruction. (RB 72-73.) The trial court committed error. The issue is whether it was harmless. In this case, it was not.

Respondent argues that the error was harmless because nothing precluded the jury from considering Vallejo's misdemeanor conduct. There is a major difference, however, between being allowed to deduce the significance of evidence and being instructed that the evidence can be used for a specific purpose – that is, to assess credibility. Respondent states that defense counsel emphasized Vallejo's prior criminal conduct in his closing argument (RB 73), but counsel did not refer to the conduct in terms of credibility per se, but instead to suggest Vallejo's participation in the robbery and killing. (See 6 RT 1857-1859.) Moreover, the court did not instruct the jurors that Vallejo's prior criminal conduct, alone, could be considered in assessing his credibility. The jury is presumed to have followed the court's instructions and not to have used evidence for impermissible purposes. (See *People v. Sanchez* (2001) 26 Cal.4th 834,

852.) The jurors cannot be presumed to have used Vallejo's prior criminal conduct as impeachment without an instruction authorizing them to do so.

Given the significance of Vallejo's testimony, his often inconsistent statements, and the scope of his prior criminal conduct, the error cannot be dismissed as harmless.

**B. Failure to Instruct with CALJIC No. 2.27.**

Respondent again begins with the assertion that this claim was waived because appellant did not request instruction with CALJIC No. 2.27. In the next paragraph, however, respondent acknowledges that a "trial on a charge of murder and robbery is . . . a 'criminal case in which no corroborating evidence is required,' and an instruction along the lines of CALJIC No. 2.27 'should be given.'" (RB 75, quoting *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885.) This Court should address the merits of appellant's claim.

Respondent argues that no instruction was necessary because sufficient corroboration was presented at trial. (RB 75-78.) A number of her examples corroborate only that a crime occurred, *not* that appellant was the perpetrator. (See e.g., RB 76, fn. 42.) Respondent also seems to suggest that Lupe's testimony was corroborated by the gun that Lupe said appellant had taken from the clerk, and that Vallejo offered further corroboration when he testified that appellant showed him the gun. (RB 77.) These are the two witnesses, however, who appellant argues need corroboration.

More to the point, respondent argues that in cases where corroboration existed, courts have found no error when the trial court failed to instruct with CALJIC No. 2.27, citing *People v. Alvarado* (1982) 133 Cal.App.3d 1003, and *People v. Haslouer* (1978) 79 Cal.App.3d 818. (RB

75.) Respondent conspicuously fails to mention *People v. Pringle* (1986) 177 Cal.App.3d 785, 788-790, cited in the opening brief, where the appellate court recognized that "the jury could disbelieve the corroborating evidence," a "dilemma" not addressed in *Haslouer* or *Alvarado* but "inferentially" resolved in defendant's favor in *Rincon-Pineda*, *supra*, 14 Cal.3d 864, where this Court required that CALJIC No. 2.27 be given in every criminal case in which no corroborating evidence is required to sustain a conviction.

The trial court committed error when it failed to instruct with CALJIC No. 2.27, and the error was prejudicial for all the reasons stated in the opening brief. (AOB 85-86.)

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## VI.
## THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT.

Appellant's conviction should be reversed because several standard jury instructions given at appellant's trial, specifically, CALJIC Nos. 2.90, 2.01, 8.83, 8.83.1, 1.00, 2.21.1 and 2.22, lowered the requisite standard of proof beyond a reasonable doubt. (AOB 88-96.) Respondent answers 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 substantive reply is necessary.

Appellant does, however, find it necessary to address respondent's assertion that he is barred from challenging CALJIC nos. 2.21.1 and 2.21.2 because he requested those instructions. (RB 86-87.) It is true that in a one-page document, defense counsel requested that the trial court give 22 standard CALJIC instructions, including 2.21.1 and 2.21.2. (2 CT 418.) For the doctrine of invited error to apply, however, it must be clear from the record that counsel had a deliberate tactical purpose in suggesting or acceding to an instruction, and did not act out of ignorance or mistake. (See *People v. Maurer* (1995) 32 Cal.App.4th 1121, 112.) When it would have made "no sense" for defense counsel to request a particular instruction, it is likely that counsel's request for the instruction was made out of ignorance or by mistake, unless the record indicates that defense counsel had his eye on an appeal. (*Id.* at p. 1128. See also *People v. Dunkle* (2005) 36 Cal.4th 861, 895 [no invited error even though trial counsel joined in prosecutor's request for jury instruction later challenged on appeal]; *People v. Moon* (2005) 37 Cal.4th 1, 37 [because counsel did not specifically ask the trial court to refrain from reinstructing the jury with the applicable guilt phase

instructions, counsel's actions did not absolve the trial court of its obligation to instruct]; compare *People v. Hernandez* (1988) 47 Cal.3d 315, 353 [counsel's argument indicated a tactical purpose for requesting the instruction]; *People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1264 [counsel's alleged acquiescence in the error "cannot be viewed as a tactical choice" where counsel "appeared to be confused and at a loss to explain how the [instruction at issue] fit into the case"].)

In this case, counsel cited no authority for the requested CALJIC instructions and presented no argument. There appears no conceivable tactical purpose for counsel's request of an instruction that erroneously lessens the prosecutorial burden of proof.

In addition, Penal Code section 1259 provides a separate basis for rejecting respondent's forfeiture argument. Under that section, an appellate court will consider an alleged instructional error even when defense counsel acquiesced to an erroneous instruction, if the resulting error affected the "substantial rights of the defendant." (Pen. Code, § 1259; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7 [citing § 1259 in reviewing appellate challenge to trial court's removal of element of offense from jury's consideration despite absence of objection].) Here, where the instructional error lessened the prosecutor's burden of proof, the error affects appellant's "substantial rights." Consequently, this Court should reach the merits of appellant's claim.

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## VII.

## THE COURT ERRED IN REFUSING TO GIVE JURY INSTRUCTIONS THAT WERE VITAL TO A PROPER CONSIDERATION OF THE EVIDENCE OF AN ALLEGED PRIOR ACT OF VIOLENCE, THEREBY VIOLATING APPELLANT'S RIGHTS UNDER FEDERAL AND CALIFORNIA CONSTITUTIONS TO A FAIR PENALTY PHASE HEARING AND RELIABLE DEATH VERDICT.

Appellant has argued that the trial court erred in failing to reinstruct the jurors at the penalty phase with CALJIC No. 2.20 regarding the credibility of a witness, CALJIC No. 2.22 regarding weighing of conflicting testimony, CALJIC No. 2.00 regarding direct and circumstantial evidence and CALJIC No. 2.01 regarding sufficiency of circumstantial evidence. (AOB 100-113.) Respondent concedes that it was error for the trial court not to reinstruct on these general principles. (RB 94.) She argues, however, that the error was harmless. Appellant disagrees.

Appellant had no prior convictions, and the only aggravating evidence presented was the alleged shooting in August 1994. Respondent argues that the evidence of appellant's guilt with assault with a firearm was "overwhelming," but the only evidence of appellant's guilt was the testimony of three relatives of Arcadia Hernandez, appellant's former girlfriend and mother of his two children. Arcadia and appellant were "mad at each other" at the time of the alleged shooting. (7 RT 1914.) In fact, they "were always arguing." (7 RT 1992.) And they clearly were at odds over custody of the children. Arcadia was upset that appellant had picked up Marco and they fought when she went to retrieve him. (7 RT 1914-1918.) In addition, appellant's mother had asked to adopt Marco, but Arcadia refused. (7 RT 1991.) The witnesses were unquestionably biased against appellant. Other than their accounts, no evidence tied appellant to a

shooting. The officer who responded to the incident did not even bother to contact appellant. No weapon was found in appellant's possession. And the testimony of the three witnesses gave conflicting accounts of what allegedly occurred. Arcadia's sister said appellant had a shotgun and fired upwards. (7 RT 1918-1919.) Her husband said appellant had a handgun or pistol, and he testified that appellant shot at the car. (7 RT 1929.) He did not tell this to the officer. (7 RT 1931.) Another of Arcadia's sisters first testified that she did not see a gun, but then said she saw appellant pull something from his pants and then heard bullets. (7 RT 1925.) None of the witnesses told the officer that he or she had seen a bullet hole in the car. And the officer, who recalled that he looked at the car, did not report any bullet holes. (7 RT 1957.) No independent witness corroborates bullet holes in the car.

Respondent dismisses the inconsistencies, noting simply that the testimony about the type of firearm and in what direction it was fired "varied somewhat." (RB 90, fn. 47.) Respondent ignores the fact that no unbiased evidence inculpated appellant. Moreover, even if appellant was involved in a shooting, the direction he fired was critical. Shooting in the air is very different from shooting at an occupied car.

Under these circumstances, instruction on how to evaluate the credibility of the three prosecution witnesses was essential, and the court's instruction to disregard earlier instructions (7 RT 2040), while failing to instruct with instructions applicable to the penalty phase case, was prejudicial.

Respondent argues that prosecutor's and defense counsel's closing argument was sufficient to inform the jurors that the guilt phase instructions applied to a determination of whether appellant committed assault with a

firearm. (RB 96-97.) In the first place, the attorneys referred only to standard of proof beyond a reasonable doubt; they did not argue that the credibility and circumstantial evidence instructions given at the guilt phase applied at the penalty phase. (7 (16 RT II 2046-2047, 2066.) More importantly, attorney argument is no substitute for proper instruction. (*Carter v. Kentucky* (1981) 450 US 288 ["arguments of counsel cannot substitute for instructions by the Court"]; *People v. Cole* (2004) 33 Cal.4th 1158, 1204 [presuming that jurors treated "the prosecutor's comments as words spoken by an advocate in an attempt to persuade," quoting *People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8]; *People v. Miller* (1996) 46 Cal.App.4th 412, 426, fn, 6 ["While we have no trouble utilizing the argument of counsel to help clear up ambiguities in instructions given, there is no authority which permits us to use argument as a substitute for instructions that should have been given"].)

Respondent also argues that the jurors were aware of the potential bias or interest of the prosecution witnesses. (RB 97-98.) Even if this were true, the error, and the harm, occurred because the jurors were instructed *to ignore* earlier instructions, one of which included what to consider in assessing the credibility of a witness.

Finally, respondent argues that evidence supports the death verdict, citing appellant's possession of a pellet gun in 1991, his defiance of a probation officer and middle school fights. (RB 98-99.) Appellant does not condone such behavior, but adolescent fights and disobedience are hardly death-worthy aggravation. Respondent also cites victim impact evidence and the circumstances of the offense to justify the verdict. (RB 99-100.) Appellant neither disputes nor minimizes the pain suffered by Mr. Hassan's family or the tragedy of his death. But capital punishment must "be limited

to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (*Kennedy v. Louisiana*, *supra*, 554 U.S. at p. 420, quoting *Roper v. Simmons* (2005) 543 U.S. 551, 568, internal quotation marks omitted). The facts of this case simply do not fall within that narrow category. Under these circumstances, the trial court's failure to properly instruct the jurors at the penalty phase of trial cannot be dismissed as harmless. The penalty verdict must be reversed.

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## VIII.

## THE TRIAL COURT ERRED IN REJECTING PROPOSED PENALTY PHASE INSTRUCTIONS THAT WOULD HAVE GUIDED THE JURY'S DELIBERATIONS IN ACCORDANCE WITH THE LAW.

Appellant has argued that the trial court erred in refusing to instruct the jurors with ten requested special instructions that would have provided guidance to the jury during the penalty phase of trial. (AOB 114-134.) Respondent answers 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.

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## IX.

## CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

In his opening brief, appellant set forth various deficiencies relating to the application of the California death penalty statute. (AOB 135-154.) Respondent relies on this Court's previous decisions rejecting the issues appellant has raised in urging the Court to decline appellant's invitation to reconsider its prior rulings. (RB 120-131.) Accordingly, the issues are joined and for the most part no extended reply is necessary.

The only specific point appellant will address is respondent's contention that appellant's claims were waived because he did not object at trial. (RB 120, fn. 51.) Instructional errors that affect the defendant's fundamental rights are reviewable without objection at trial. (See *People v. Dunkle*, *supra*, 36 Cal.4th 861 [no waiver by failing to object; Pen. Code, § 1259]; *People v. Prieto* (2003) 30 Cal.4th 226, 247 [instructional errors are reviewable to the extent they affect the defendant's substantial rights].) As the court observed in *People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20, "the people make their oft-repeated, but only occasionally applicable, contention the issue was waived, or alternatively that any error was invited, because defendants failed to object to, or request a modification of, the challenged instruction. As appellate courts have explained time and again, merely acceding to an erroneous instruction does not constitute invited error. [Citations.] Nor must a defendant request amplification or modification in order to preserve the issue for appeal where, as here, the error consists of a breach of the trial court's fundamental instructional duty."

## X.

## CUMULATIVE GUILT AND PENALTY PHASE ERRORS REQUIRE REVERSAL OF THE GUILT JUDGMENT AND PENALTY DETERMINATION.

Appellant's trial was infected with numerous errors that deprived him of the type of fair and impartial trial demanded by both state and federal law. However, cognizant of the fact that this Court may find any individual error harmless in and of itself, it is appellant's belief that all of the errors must be considered as they relate to each other and the overall goal of according him a fair trial. When that view is taken, he believes that the cumulative effect of these errors warrants reversal of his convictions and death judgment. (AOB 155-157.)

Respondent asserts that there was no error, and if there was error appellant has failed to show prejudice. (RB 132.) The issue is therefore joined. Should this Court find error that it deems non-prejudicial when considered individually, it should reverse based on the cumulative effect of the errors. No further reply is necessary as respondent asserts no more than appellant's arguments are without merit.

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## CONCLUSION

For all of the reasons stated above and in appellant's opening brief, both the judgment of conviction and sentence of death in this case must be reversed.

DATED: August 8, 2011.

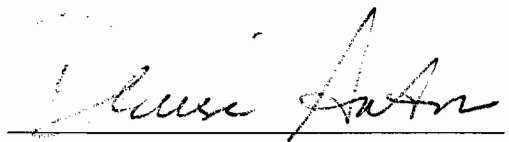
Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

DENISE ANTON
Supervising Deputy State Public Defender

**CERTIFICATE OF COUNSEL**
**(Cal. Rules of Court, rule 8.630(b)(1)(c))**

I, Denise Anton, am the Supervising Deputy State Public Defender assigned to represent appellant GEORGE LOPEZ CONTRERAS in this Appellant's Reply Brief. I directed a member of our staff to conduct 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 is 13,614 words in length.



DENISE ANTON
Attorney for Appellant

## DECLARATION OF SERVICE

Re: *People v. George Lopez Contreras* S058019

I, GLENICE FULLER, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; that I served a true copy of the attached:

**APPELLANT'S REPLY BRIEF**

on each of the following, by placing the same in an envelope (or envelopes) addressed (respectively) as follows:

Office of the Attorney General
Attn: Brian Smiley, D.A.G.
P. O. Box 94255
Sacramento, CA 94244-2550

Habeas Corpus Resource Center
Attn: Shelly Sandusky, Adrienne Toomey and Barbara Saavedra
303 Second Street, Suite 400 South
San Francisco, CA 94107

George Lopez Contreras
(Appellant)

Each said envelope was then, on August 8, 2011, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on August 8, 2011, at San Francisco, California.

DECLARANT