S062180

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RICHARD VALDEZ, Defendant and Appellant.	SUPREME COURT FILED FEB 26 2010 Frederick K. Ohlrich Clerk Deputy

APPELLANT'S REPLY BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, Los Angeles County

THE HONORABLE GEORGE W. TRAMMELL, III AND
THE HONORABLE ROBERT ARMSTRONG, JUDGES PRESIDING

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9 Witkin, Cal.Procedure (3d ed. 1985), Appeal, § 315, p. 326. 106

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RICHARD VALDEZ, Defendant and Appellant.	No. S062180 (Super. Ct. No. BA108995)

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this brief, appellant does not reply to respondent's arguments which are adequately addressed in appellant's opening brief. Unless expressly noted to the contrary, the absence of a response to any particular argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined. For the convenience of the Court, the arguments in this reply

are numbered to correspond to the argument numbers in Appellant's Opening Brief.[1]

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[1] In this brief appellant employs the following acronyms for citation to the record in this matter: "AOB" refers to appellant's opening brief, "RB" refers to respondent's brief, and "RT" and "CT" refer to the reporter's and clerk's transcripts, respectively. "SuppCT" refers to the supplemental clerk's transcripts. Finally, all statutory references are to the Penal Code unless otherwise noted.

ARGUMENTS 1 AND 2

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3

THE TRIAL COURT ERRONEOUSLY PERMITTED THE PROSECUTION TO PRESENT NUMEROUS PHOTOGRAPHS OF SANGRA GANG MEMBERS, GANG GRAFFITI, AND OTHER GANG EVIDENCE THAT WAS IRRELEVANT, CUMULATIVE, AND HIGHLY INFLAMMATORY

In his opening brief, appellant argued that the trial court erred in allowing the prosecution to introduce extensive gang-related evidence that was not probative of any disputed issue at trial, including (1) numerous photographs of various members of the Sangra gang, some of which did not depict either appellant or any of his co-defendants; (2) photographs of the defendants' tattoos; (3) photographs of gang graffiti; and (4) a drawing that was recovered from the search of the residence of a Sangra gang member who was not on trial. The trial court's erroneous ruling in admitting the inflammatory and irrelevant photographs at issue here deprived appellant of his federal constitutional rights to due process, a fair trial, and to reliable determinations as to guilt and penalty (U.S. Const., 6th, 8th & 14th Amends.). (AOB 117-138.)

Respondent contends that appellant's claim is almost entirely forfeited. Respondent further contends that, in any event, the trial court properly admitted the gang evidence because it was highly relevant not only to the charged gang enhancement but also to the underlying crimes, and, in

the context of the whole case, it was not prejudicial. (RB 78-92.)[18] Respondent's contentions are incorrect.

A. Appellant's Argument is Cognizable on Appeal

Respondent argues that appellant did not object in the trial court to the majority of the exhibits he now challenges. Therefore, respondent asserts that, to the extent appellant's argument is based upon statutory grounds, it has been forfeited as to nearly all of the challenged exhibits. Respondent further contends that defense counsel made no constitutional objection whatsoever in the trial court, and that appellant's argument is thus forfeited to the extent it is based upon constitutional grounds. (RB 85-86.) Respondent's position is incorrect.

As appellant explained in his opening brief (AOB 125-126), at trial the prosecution proffered a large volume of gang-related evidence. First, the prosecutor introduced numerous photographs of various Sangra members, some brandishing weapons and "throwing" gang signs.[19] In several of these photographs neither appellant nor co-defendant Palma was

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[18] As to each count of the indictment, the People alleged that the offense was "committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members" (§ 186.22, subds. (b)(1) and (b)(2)). (IV CT 1142-1146.)

[19] Exh. 3 (13 RT 1673, 1743; 1 SuppCT IV 61-62); Exh. 7 (13 RT 1740; 1 SuppCT IV 63-64); Exh. 8 (13 RT 1746; 20 RT 2734; 1 SuppCT IV 65-66); Exh. 12-A (14 RT 1846; 1 SuppCT IV 71); Exh. 58 (20 RT 2720; 1 SuppCT IV 124-125); Exh. 78 (21 RT 2754-2755; 1 SuppCT IV 145-146); Exh. 79 (21 RT 2754-2755; 1 SuppCT IV 147-148); Exh. 93 (23 RT 3029; 1 SuppCT IV 166-167). Exhibit 12-A consists of photographs that were taken from the scrapbook that was marked for identification as Exhibit 12. (29 RT 3678-3679; 1 SuppCT IV 71.)

pictured; in one of them, Palma but not appellant was pictured.[20] In addition, the prosecution introduced a photograph of the tattoos on appellant's back;[21] seven photographs of various tattoos on Palma's neck, chest, arms, hands, back, and legs;[22] and, two photographs of urban gang graffiti.[23] The prosecutor also introduced two pieces of paper with the word "Sangra" written in calligraphic letters, one of which also had the handwritten notation "touch this and you die."[24] Finally, the prosecution elicited testimony about Exhibits 71 (i.e., "Notice of Determination that the Sangra Gang is a Criminal Street Gang Within the Meaning of Penal Code Section 186.22") and 91 (i.e., a drawing of a drive-by shooting recovered during a search of Jose "Pepe" Ortiz's residence), ostensibly for the purpose of proving the gang enhancement.[25]

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[20] Exh. 7 (13 RT 1740; 1 SuppCT IV 63-64); Exh. 58 (20 RT 2720; 1 SuppCT IV 124-125). Palma, but not appellant, was identified in Exhibit 78. (21 RT 2754-2755; 1 SuppCT IV 145-146.)

[21] Exh. 57 (18 RT 2275; 19 RT 2523; 1 Supp. CT IV 122-123).

[22] Exh. 50 (18 RT 2275; 1 SuppCT IV 108-109); Exh. 51 (18 RT 2275; 1 SuppCT IV 110-111); Exh. 52 (18 RT 2275; 1 SuppCT IV 112-113); Exh. 53 (18 RT 2275, 2277; 1 SuppCT IV 114-115); Exh. 54 (18 RT 2275, 2280; 1 SuppCT IV 116-117); Exh. 55 (18 RT 2275; 1 SuppCT IV 118-119); Exh. 56 (18 RT 2275, 2280; 1 SuppCT IV 120-121).

[23] Exh. 72 (19 RT 2526; 1 SuppCT IV 137-138); Exh. 73 (19 RT 2526; 1 SuppCT IV 139-140).

[24] Exh. 60 (18 RT 2359; 1 SuppCT IV 126-127); Exh. 92 (23 RT 3028-3029; 1 SuppCT IV 165-166).

[25] Exh. 71 (19 RT 2507; 1 SuppCT IV 53); Exh. 91 (23 RT 3027-3028; 1 SuppCT IV 54-55). These exhibits were marked for identification but were not introduced into evidence. (19 RT 2507; 23 RT 3027.)

According to respondent, defense counsel objected specifically only to Exhibits 50 through 57, which were photographs of the defendants' tattoos (12 RT 1251-1528, 1532-1533), an unidentified photograph which was excluded by the court (12 RT 1529-1532), and "pictures of the graffiti" taken from appellant's photo album (12 RT 1535-1538). Respondent asserts that counsel's objections to other exhibits were not sufficiently specific. (RB 85-86.) However, a review of the record demonstrates that, contrary to respondent's contention, the objections interposed by Mr. Bestard, counsel for appellant, encompassed all of the gang-related exhibits challenged by appellant.[26]

As a preliminary matter, it should be noted that defense counsel for appellant and co-defendant Palma offered to relieve the prosecution from the burden of proving the gang enhancement by way of stipulation, because they objected to all of the gang-related exhibits. Mr. Bestard initially stated that he would stipulate that appellant was a Sangra street gang member. (12 RT 1521.) Mr. Bestard argued that, if the prosecution were to accept that stipulation, the photograph of appellant's tattoos "is simply cumulative since it does not show anything as to the crime itself or doesn't show any relevance at all as to the crime that was committed." (12 RT 1521-1522.)[27] Mr. Uhalley then offered to stipulate that Palma was a member of Sangra

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[26] For the sake of clarity, appellant refers to counsel for appellant (i.e., Mr. Bestard) and counsel for co-defendant Palma (i.e., Mr. Uhalley) by name throughout the instant argument.

[27] Insofar as Mr. Bestard argued that the photograph of appellant's tattoos "does not show anything as to the crime itself or doesn't show any relevance at all as to the crime that was committed" (12 RT 1521-1522), his objection encompassed use of that evidence for all purposes, not just to prove the gang enhancement.

and that Sangra was a violent street gang for the purposes of proving the enhancement, explaining that

> we're offering that stipulation in order to keep out all of these additional gang photographs and gang packets and gang scrapbooks that the district attorney has. If that stipulation is accepted, I don't believe that any of those photographs are then relevant.

(12 RT 1522.)

After the prosecutor refused to accept defense counsel's proposed stipulation on the ground that it did not fully prove the gang enhancement and that the gang-related photographs were necessary to show motive and intent, both Mr. Bestard and Mr. Uhalley offered to stipulate to the "exact" language of the gang enhancement. (12 RT 1522-1528.) Mr. Uhalley also made clear that, should the prosecution agree to the stipulation, "we would not want *any* of these photographs to come in. I mean, that certainly seems to me that relieves the burden of the People of proving that allegation." (12 RT 1528; emphasis added.)[28]

In addition to seeking to have the gang evidence excluded by stipulating to the language of the gang enhancement, Mr. Bestard objected to each category of gang evidence now challenged by appellant. First, Mr. Bestard joined the following objection, interposed by Mr. Uhalley:

> My objection is that I object to any photographs in which my client is not depicted in the photograph. I don't object to a limited number of photographs coming in in which my client

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[28] Although the court trial court overruled the "objection" as to the tattoo photographs at that point (12 RT 1528), a plain reading of the record shows that defense counsel had objected to *all* gang-related photographs. (12 RT 1521-1522, 1528.)

> is in the photographs, but many of the photographs are just cumulative and I would object to them on those grounds.

(11 RT 1480-1481; emphasis added.) The trial court did not rule on their objection at that time, but instead instructed the prosecutor to mark the exhibits he intended to use so that it could more specifically address the objections. (11 RT 1481-1485.)

Second, Mr. Bestard objected to "at least 12 photographs" depicting gang members as cumulative of the photograph depicting appellant's tattoos. (12 RT 1529, 1532.) He argued that the prosecutor could not establish that the gang members depicted in one of the photographs were even members of Sangra, observing that the individuals shown in the photograph were masked, and that one of them wore a shirt bearing the name of a different gang. (12 RT 1529-1530; see also 11 RT 1479.) Citing Evidence Code section 352, Mr. Bestard argued that, without a proper foundation, the photograph was irrelevant. (12 RT 1529-1530.) Mr. Uhalley subsequently stated, "Well, I join in Mr. Bestard's objection that many of the photographs are cumulative and being offered simply for the purposes of prejudice of the defendant." (12 RT 1532.) The trial court sustained the objection to the photograph of masked gang members, but not as to the other 11 photographs. (12 RT 1532.)[29]

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[29] After the trial court sustained the objection, the prosecutor asked, "As to that photograph?" The trial court responded, "That's all I have before me." (12 RT 1532.) However, as appellant has explained above, defense counsel had objected to the admission of all photographs depicting gang members. (12 RT 1529-1530, 1532.)

Mr. Bestard subsequently objected to three photographs depicting gang members, again on the ground that they were cumulative.[30] Although he did not clearly describe those photographs, the discussion between the court and counsel strongly suggests that one of the photographs depicted Anthony Torres, who was being tried separately (VI CT 1569).[31] (12 RT 1533-1534.) Another photograph depicted gang members at the "Sangra wall." (12 RT 1534.)[32] The court admitted all three photographs over defense objection. (12 RT 1534-1535.)

Third, Mr. Bestard objected on relevancy and foundational grounds to photographs of gang graffiti, particularly graffiti purportedly showing appellant's gang moniker, asserting that there was more than one "Primo"

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[30] Both the trial court and counsel agreed that they had already gone over those photographs. (12 RT 1533-1534.) In other words, the three photographs were among the group of photographs which was the subject of defense counsel's previous objection.

[31] The prosecutor explained that "the purpose of this photo, your Honor, [is it depicts] one of the defendants [who] is not here that we allege was in the car with Mr. Palma and Mr. Valdez when they drove to do the murders holding the weapon." (12 RT 1533.) Based on this description, the prosecutor apparently was referring to a photograph depicting an armed Torres with six other individuals (none of whom was appellant or Palma), which he would later introduce as Exhibit 7 (13 RT 1740-1741; 1 SuppCT IV 63-64).

[32] Mr. Bestard apparently was referring to the photograph that would later be introduced as Exhibit 8, described as "a photograph that was taken at the Sangra wall." (20 RT 2734; 1 SuppCT IV 65-66.) He also may have been referring to Exhibit 79, which depicts appellant and other individuals standing near the "Sangra wall." (21 RT 2754-2755; 1 SuppCT IV 147-148.)

in the Sangra gang. (12 RT 1535-1536.)[33] The court overruled those objections as well. (12 RT 1537-1538.)

Fourth, Mr. Bestard objected to the photographs in appellant's scrapbook as cumulative, reiterating his offer to stipulate that appellant was a Sangra gang member. (12 RT 1541.) That objection too was overruled. (12 RT 1542.) Four of the photographs contained in the scrapbook were admitted as Exhibit 12-A. (29 RT 3678-3679; 1 SuppCT IV 71-72.)

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[33] Respondent observes that the photographs of graffiti to which Mr. Bestard objected had been taken from appellant's photo album, and claims that they were not offered at trial. (RB 86; see also Exh. 12A [1 SuppCT IV 71].) However, the prosecutor did introduce, and elicit testimony regarding, photographs contained in the scrapbook, which was marked into evidence as Exhibit 12. (14 RT 1846-1847; VI CT 1680, 1682.) Moreover, Mr. Bestard's objections applied equally well to the other exhibits depicting graffiti which the prosecutor offered at trial, including Exhibit 7 (a photograph on which gang writing, including the monikers of the gang members depicted in the photograph, was scratched), Exhibit 8 (a photograph depicting gang members posing in front of the "Sangra wall," on which the moniker "Primo" and other graffiti appears), Exhibit 12-A (which included a photograph of appellant, on which the moniker "Primo" was scratched, and a photograph depicting appellant and other gang members, on which the phrase "True Blue" was scratched), Exhibit 58 (a photograph on which gang writing, including the word "Sangra" and the monikers of the gang members depicted in the photograph, was scratched), Exhibit 72 (a photograph depicting a fence on which the word "Sangra" and other graffiti appears), Exhibit 73 (a photograph depicting graffiti, including the letters "SG"), Exhibit 78 (a photograph on which gang writing, including the word "Sangra" and the monikers of the gang members depicted in the photograph, was written or scratched), and Exhibit 79 (a photograph depicting appellant and other individuals standing near the "Sangra wall"). (13 RT 1740, 1746; 14 RT 1846; 19 RT 2526; 20 RT 2720, 2734; 21 RT 2754-2755; 1 SuppCT IV 63-66, 71, 124-125, 137-140, 145-148.)

Moreover, after the trial court overruled Mr. Bestard's objection to the second group of gang member photographs, which apparently included Exhibit 7 and Exhibit 8 and/or 79, the following exchange took place:

> Mr. Uhalley: These are all over the objection of the defendants, right?
>
> The Court: Yes.
>
> Mr. Bestard: We will note that when they are marked in evidence.
>
> The Court: Yes, outside the presence of the jury. That we have one we have gone through a whole bunch of photos and in some instances we have referred to something that perhaps singles them out, but I think that at some point when they're marked and either we have a side bar conference and something else or before we bring the jury out is to make your record because then we'll have specific designations. I think we definitely need that.

(12 RT 1534-1535.) Respondent apparently relies upon the court's phrase "specific designations" to support its argument that Mr. Bestard's objection to some of the exhibits was not specific and that his failure to object when the exhibits were marked at trial forfeited the argument. (RB 84, 86.)[34] However, the trial court's statement reflected a concern that the trial record be clear, not a willingness to revisit its rulings regarding the gang-related exhibits. (12 RT 1535.) Because the prosecutor had not marked the

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[34] Respondent cited 12 RT 1541-1542 in support of its contention that the trial court advised defense counsel to make specific objections at trial. (RB 86.) Respondent's reliance upon those pages is misplaced, as the court issued no such warning there. Although the trial court discussed trial objections at 12 RT 1540, it was merely explaining the general procedure to be followed whenever an attorney intended to ask a question he reasonably anticipated would elicit an objection.

exhibits, but instead had "basically [] divided [them] into two groups" (12 RT 1521), the court and counsel were forced to discuss them in terms of general categories (i.e., photographs of gang members, photographs of graffiti, and photographs culled from appellant's scrapbook) and by "referr[ing] to something that perhaps singles them out." (12 RT 1529, 1535, 1541.)

Indeed, it would have been futile to interpose or renew an objection at trial. When it overruled the defense objections discussed above, the trial court never indicated that it would be willing to reconsider those rulings at trial. (11 RT 1480-1481; 12 RT 1521-1542.) In contrast, the trial court expressly noted that it would be willing to reconsider its decision to exclude the photograph of masked gang members. (12 RT 1532.) Accordingly, the issue was not waived. (See *People v. Hill* (1998) 17 Cal.4th 800, 820 [appellate issue not waived for failure to object if objection would be futile].)

Under these circumstances, appellant interposed specific and sufficient objections to *all* of the challenged exhibits, preserving this issue for appeal. Moreover, appellant's federal constitutional claims have also been preserved for review. A state court's procedural or evidentiary ruling is subject to federal review where it has infringed upon a specific federal constitutional provision or has deprived the defendant of the fundamentally fair trial guaranteed by due process. (*Pulley v. Harris* (1984) 465 U.S. 37, 41; *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 919-920.) Also, as this Court has noted, "no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts

and to apply a legal standard similar to that which would also determine the claim raised on appeal." (*People v. Yeoman* (2003) 31 Cal.4th 93, 117; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6 [trial objection under Evidence Code sections 352 and 1101 preserved a claim that the asserted error violated due process and appellant's Eighth Amendment right to a reliable verdict].) Because appellant's federal constitutional claims are otherwise identical to his claims based on California statutes, the federal claims are preserved. (*People v. Smith* (2005) 35 Cal.4th 334, 356; *People v. Smith* (2003) 31 Cal.4th 93, 117.)

At a minimum, appellant's objections were sufficient to preserve an argument that the erroneous admission of the exhibits violated his right to due process. (*People v. Partida* (2005) 37 Cal.4th 428, 433-439.) In *Partida*, the defendant argued on appeal that evidence of his gang involvement was inherently prejudicial, and therefore admission of that evidence violated due process. (*Id.* at pp. 433, 437.) This Court concluded that, where the defendant objected at trial that the court erred in admitting certain evidence because it was more prejudicial than probative under Evidence Code section 352, his claim that the trial court's error in overruling the objection violated his due process rights could be raised on appeal. (*Ibid.*)

As in *Partida*, this case involved the admission of inherently prejudicial gang evidence, and the trial court's admission of that evidence similarly violated due process. Moreover, appellant's objections that the evidence was irrelevant, cumulative and prejudicial fully apprised the trial court of the federal due process, fair trial, and Eighth Amendment reliability grounds of his claim. (*People v. Partida, supra,* 37 Cal.4th at pp. 433-439; *People v. Cole*, *supra*, 33 Cal.4th at p. 1195, fn. 6.)

B. The Trial Court Abused Its Discretion In Admitting the Photographs

As appellant has argued, defense counsel offered to stipulate to the "exact" language of the gang-enhancement allegation as set forth in the indictment. (12 RT 1258.) Therefore, the proposed stipulation would have relieved the prosecution of any burden to prove the gang enhancement.

Respondent argues that the prosecutor also offered the gang evidence to prove motive and intent. (RB 87.) However, the challenged gang evidence, particularly photographs which did not depict appellant or co-defendant Palma, had no tendency to prove either motive or intent, and its admission was fundamentally unfair. *People v. Albarran* (2007) 149 Cal.App.4th 214 is instructive. In that case, the trial court admitted "a panoply of incriminating gang evidence" (*id.* at p. 227), including the following: (1) evidence that Albarran was a member of a "dangerous" street gang (*id.* at p. 220); (2) the testimony of a gang expert regarding members of Albarran's gang who were uninvolved in the charged offenses, "the wide variety of crimes they had committed and the numerous contacts between the various gang members (other than Albarran) and the police," and a specific threat to kill police officers contained in graffiti made by members of his gang; and, (3) numerous references to the Mexican Mafia (*id.* at pp. 227-228).

The Court of Appeal concluded that even if evidence of Albarran's gang membership and some evidence concerning gang behavior were relevant to the issue of motive and intent, the trial court had admitted other extremely inflammatory gang evidence which had no connection to the charged offenses. (*Id.* at p. 227.) In particular, evidence regarding the identities of other members of the gang and crimes they had committed,

evidence regarding the threat against the police, and the references to the Mexican Mafia was irrelevant to the underlying charges and "had no legitimate purpose in [the] trial." (*Id.* at pp. 227-228, 230.) The court's admission of the gang evidence in this case constituted error for the same reasons.

Moreover, the prosecution could have relied upon other, less inflammatory evidence to show motive and intent. For instance, the prosecutor could have relied upon the expert opinion of Dan Rosenberg, a sergeant assigned to the gang unit of the Los Angeles County Sheriff's Department, who testified that the Sangra gang was an "ongoing organization, association, or group of three or more members" (19 RT 2506); that there was "no doubt" that a primary activity of the Sangra street gang was the commission of various felony offenses, that Sangra has a "common name" and "a common identifying sign or symbol," and that its members "throw particular gang signs exclusive to Sangra" (19 RT 2508); and that Sangra was a "terrorist street gang" and that it had been classified as such in March 1990 by the Los Angeles Superior Court (19 RT 2506). (See *People v. Albarran*, *supra*, 149 Cal.App.4th at p. 227.)

To the extent there was a dispute as to whether appellant was an active member of the Sangra gang at the time of the offenses, prosecution witnesses Veronica Lopez, Victor Jimenez, Renee Chavez, and Witness No. 16 all testified, without objection from the defense, that they knew that appellant was a member of the gang.[35] Similarly, Jimenez, Witness No. 16, and Richard Valdemar provided testimony establishing that Palma was a

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[35] See 13 RT 1662-1663 (Veronica Lopez); 13 RT 1734 (Victor Jimenez); 14 RT 1949 (Renee Chavez); 20 RT 2677 (Witness No. 16).

member of the gang, again without defense objection.[36] Moreover, several witnesses testified that Torres, Logan, and Ortiz were members of the Sangra gang, and Victor Jimenez and Witness No. 16 acknowledged that they were themselves members.[37] Contrary to respondent's position (RB 89), whether appellant was a member of the Sangra gang was not in dispute.

Under these circumstances, the prosecution was obliged to accept the stipulation and abandon its efforts to introduce the gang photographs. (See *People v. Hall* (1980) 28 Cal.3d 143, 152 ["if the defendant offers to admit the existence of an element of the crime, the prosecutor must accept that offer, and refrain from introducing evidence to prove that element"]; accord, *People v. Bonin* (1989) 47 Cal.3d 808, 849 [because the defense offered to stipulate to an element, "the court should have compelled the prosecution to accept the defendant's offer and barred it from eliciting testimony on the facts covered by the proposed stipulation"].)

The prejudicial effect of the evidence substantially outweighed any minimal probative value of the gang evidence, and it should not have been admitted under Evidence Code sections 352 and 1101. (AOB 132-135.) There was no connection between these photographs, drawings, and gang graffiti and the circumstances leading to the shootings in this particular case. (AOB 134.) Moreover, because the evidence linked appellant to

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[36] See 13 RT 1734 (Victor Jimenez); 18 RT 2278 (Richard Valdemar); 20 RT 2678 (Witness No. 16).

[37] See 13 RT 1736 (Victor Jimenez about Torres); 14 RT 1913 (Elizabeth Torres about Torres); 14 RT 1950 (Renee Chavez about Torres); 19 RT 2542 (Jill Steele about Torres); 1 SuppCT IV 47 (Witness No. 13 tape-recorded statement about Torres); 14 RT 1948 (Renee Chavez about Logan); 14 RT 1969 (Renee Chavez about Ortiz); 13 RT 1734 (Victor Jimenez about himself); 20 RT 2677 (Witness No. 16 about himself).

other Sangra gang members, it likely led the jury to believe that appellant had the propensity to commit the kind of crimes for which he was on trial simply because of his association with the gang. (AOB 132-135.) Similarly, the evidence may have led the jury to find appellant guilty if they believed that Sangra members committed the shootings, even if they had a reasonable doubt that appellant himself was among them.

Respondent argues that the evidence was necessary to establish that appellant and Palma were committed, dedicated, ruthless members of a criminal street gang who would unthinkingly obey an order to murder an individual and in carrying out that order kill his family as well. (RB 89.) Respondent fails to explain, however, the relevance of photographs depicting gang members other than appellant. Even the photographs depicting appellant and/or his moniker had no probative value as to the critical disputed question: whether appellant had any involvement in the charged offenses. There was no evidence as to when or under what circumstances the photographs were taken, other than the fact that appellant's scrapbook was dated 1995. (12 RT 1541.)

Under these circumstances, this Court must find that the trial court abused its discretion in admitting the gang evidence, in violation of appellant's constitutional rights. (AOB 127-136.)[38]

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[38] Respondent also argues that the trial court's determination under Evidence Code section 352 did not result in any federal constitutional violations. (RB 90.) For the reasons set forth in Section A, *ante*, respondent is incorrect.

C. The Use of the Challenged Gang Evidence Was Unduly Prejudicial

Respondent contends that the admission of any photographs that should have been excluded was harmless, because they were used comparatively briefly and were not particularly emphasized during witness examination or during argument. (RB 85, 90-91.)

However, the record shows that the prosecutor devoted a significant portion of his examination of numerous witnesses to eliciting testimony regarding the photographs. (13 RT 1673-1676 [prosecutor examined witness Veronica Lopez regarding whether appellant appears to be "throwing a gang sign" in Exh. 3, even after she testified that she was unfamiliar with Sangra gang signs]; 13 RT 1740-1741 [prosecutor elicited testimony of Victor Jimenez that Exh. 7 depicts Anthony Torres holding a gun]; 13 RT 1743-1745 [prosecutor examined Jimenez as to whether appellant is "throwing Sangra gang signs" in Exh. 3]; 13 RT 1746-1749 [prosecutor examined Jimenez as to whether appellant appears in Exh. 8, about the "Sangra wall" photograph, and about graffiti on the wall, including the moniker "Primo"]; 14 RT 1846-1849 [prosecutor examined Jimenez about photographs contained in appellant's scrapbook]; 19 RT 2507 [prosecutor examined a gang expert regarding Exh. 71, a 1990 document from the Los Angeles County District Attorney's Office titled "Notice of Determination that the Sangra Gang is a Criminal Street Gang Within the Meaning of Penal Code Section 186.22"]; 20 RT 2719-2721 [prosecutor asked Witness No. 16 to examine Exh. 58, a photograph in which his face had been crossed out and a "187" written across his chest, and elicited the witness's testimony that the exhibit made him concerned]; 21 RT 2755 [prosecutor asked Witness No. 16 to identify the people

depicted in Exh. 78, who included Palma but not appellant]; 21 RT 2755-2757 [prosecutor asked Witness No. 16 to examine Exh. 79 and identify appellant]; 23 RT 3028-3029 [prosecutor elicited testimony from gang expert regarding Exh. 91, a drawing of a drive-by shooting recovered during a search of Jose "Pepe" Ortiz's residence]; 23 RT 3029-3032 [prosecutor asked police officer to describe Exh. 93, a photograph depicting appellant, Ortiz and other individuals, including one who was later murdered].)[39]

Respondent also observes that the prosecutor mentioned only two of the photographs in his closing argument (RB 85, 90), but this merely suggests that the prosecutor could not explain how the vast majority of the photographs introduced into evidence supported his theory. The fact that the prosecutor did not emphasize the photographs in his closing argument, the very stage of the trial when he would be expected to explain how they fit his theory of the case, suggests that he introduced them for their prejudicial effect, not because they were truly relevant. (11 RT 1480-1481; 12 RT 1529, 1532.)

Contrary to respondent's argument, the prejudicial effect would not have been cured by CALJIC No. 1.00 or any other jury instructions. The wide array of photographs depicting menacing individuals and images, some of which did not even include appellant or Palma, had no relevance to the murders. It escapes appellant how the gang photographs tend to establish that appellant was involved in the murders. Instead, they could

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[39] The prosecutor later withdrew Exhibit 71 from evidence and the trial court sustained a defense objection to the admission of Exhibit 91 (25 RT 3271-3275; 26 RT 3291), but only after the prosecution elicited testimony relating to those exhibits.

only have prejudiced the jury against appellant. The risk that the jury would "misuse [the evidence] as character trait or propensity evidence" and "use such evidence to punish a defendant because he is a person of bad character, rather than focusing upon the question of what happened on the occasion of the charged offense" (*People v. Gibson* (1976) 56 Cal.App.3d 119, 128-129) was heightened because it was given no instructions regarding the proper use of the evidence. (See, e.g., CALJIC No. 2.50.)

As the Court of Appeal in *People v. Albarran, supra*, observed with respect to similarly irrelevant and inflammatory gang evidence,

> there was a real danger that the jury would improperly infer that whether or not Albarran was involved in these shootings, he had committed other crimes, would commit crimes in the future, and posed a danger to the police and society in general and thus he should be punished. Furthermore, this gang evidence was extremely and uniquely inflammatory [footnote omitted], such that the prejudice arising from the jury's exposure to it could only have served to cloud their resolution of the issues.

(*People v. Albarran, supra*, 149 Cal.App.4th at p. 230.) As a result, the Court of Appeal concluded that admission of the prejudicial gang evidence violated Albarran's federal constitutional right to due process, rendering his trial fundamentally unfair. (*Id.* at p. 232.) The evidence in this case had precisely the same effect.

Because the People cannot establish that the error was harmless beyond a reasonable doubt, reversal is required. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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THE TRIAL COURT IMPROPERLY ADMITTED HIGHLY PREJUDICIAL AND IRRELEVANT TESTIMONY FROM THREE WITNESSES ABOUT THREATENING INCIDENTS, NONE OF WHICH WAS SHOWN TO BE RELATED TO APPELLANT, IN VIOLATION OF APPELLANT'S RIGHTS TO A FAIR TRIAL AND RELIABLE JURY VERDICTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

In his opening brief, appellant argued that the trial court improperly permitted the prosecutor to elicit speculative, irrelevant and highly prejudicial testimony from three witnesses – David Sandate, Witness No. 16, and Witness No. 13 – about threatening incidents and about their fear of testifying in this case.[40] The prejudicial impact of admitting that testimony was compounded by the prosecutor's references during closing argument to these incidents. The admission of this evidence fatally infected the trial with unfairness and violated appellant's rights to due process and a fair trial, an impartial jury, and a reliable penalty determination (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17). (AOB 139-159.)

Respondent contends that the trial court properly admitted the evidence because it was relevant to the credibility of the witnesses. Respondent further argues that any error was harmless. (RB 96-101.) Respondent's position is incorrect.

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[40] This testimony is summarized at length in appellant's opening brief. (AOB 139-147.)

A. Contrary to Respondent's Position, the Evidence Was Neither Relevant Nor Admissible

Appellant argued that the trial court erred in admitting the threat evidence because there was no evidence that any of the threatening incidents were authorized by or attributable to appellant in any way, and therefore none of the evidence of threats or of fear of testifying was admissible as direct evidence of guilt. Moreover, appellant demonstrated that the prosecutor failed to "establish the relevance of the witness's state of mind by demonstrating that the testimony is inconsistent or otherwise suspect" (*People v. Yeats* (1984) 150 Cal.App.3d 983, 986; see also *People v. Brooks* (1979) 88 Cal.App.3d 180, 187-188). (AOB 149-153.)

Respondent suggests that the credibility of a witness is always relevant. (RB 96, citing Evid. Code, § 780 and *People v. Rodriguez* (1999) 20 Cal.4th 1, 9.) The authorities cited by respondent do not stand directly for that proposition, but instead concern the factors relevant to assessing a witness's credibility. (Evid. Code, § 780 [listing factors "the court or jury may consider in determining the credibility of a witness"]; *People v. Rodriguez*, *supra*, 20 Cal.4th at p. 9 ["always relevant for impeachment purposes are the witness's capacity to observe and the existence or nonexistence of any fact testified to by the witness"].)

Respondent also asserts that, in light of authority since *Yeats* and *Brooks*, it is unclear that a showing of a specific inconsistency or other suspect circumstance is a necessary prerequisite to the admission of witness intimidation evidence. (RB 95-98.) However, respondent has interpreted *Yeats* and *Brooks* far too broadly, ignoring the connection made in those cases between the witness's credibility and the witness's fear of retribution.

In *Yeats*, the defendant was charged in connection with a "hit and run" in which a deputy sheriff was injured. A witness, George Hoover, gave testimony suggesting that the deputy's injuries impaired his ability to make reliable observations at the scene. The Court of Appeal concluded that the trial court properly admitted evidence that a man, not the defendant, had contacted Hoover after the accident and attempted to pressure him into testifying falsely that the deputy's headlights were off at the time of the accident. According to the Court of Appeal, it was proper to admit evidence tending to show that Hoover was fearful and had a motive not to tell the truth. In so ruling, the court reasoned that Hoover's testimony was helpful to the defendant in that it raised an inference that the man who threatened Hoover was the actual driver. (*People v. Yeats*, *supra*, 150 Cal.App.3d at pp. 985-987.)

In *Brooks*, a witness, Audrey Blount, identified the defendant as having robbed the bakery where she worked. (*People v. Brooks*, *supra*, 88 Cal.App.3d at pp. 183-184.) According to the Court of Appeal, the trial court properly admitted evidence that Blount had been threatened by the defendant's mother as relevant to explain the inconsistency between Blount's initial identification of the defendant and her later retraction of that identification. (*Id.* at pp. 184-185, 187.) However, the Court of Appeal further held that the trial court had erred in admitting the testimony of another witness, Nadine Harris, who stated that she had been threatened by the defendant's girlfriend. Because no inconsistent testimony had preceded the prosecutor's questioning of Harris, there was no issue of credibility. (*Id.* at pp. 184-185, 187.)

Since *Brooks* and *Yeats* were decided, reviewing courts have at least implicitly followed the rule set forth in those cases. (See, e.g., *People v.*

Burgener (2003) 29 Cal.4th 833, 868-869 [holding that a witness's testimony that she had been afraid to tell the truth during a previous proceeding because of threats made against her and her children, and that the defendant was the source of the threats, was relevant to her credibility].) Significantly, in each of the cases cited by respondent, the reviewing court noted that there was some indication that the witness's testimony was suspect. (See *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1450 [evidence of the defendant's gang membership was admissible for several reasons, including on the issue of the credibility of a key prosecution witness who testified that he had initially lied to police about the defendant's identity because he "was afraid of what might happen" and that he had been warned by gang members not to tell the police anything]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368-1369 [after a witness admitted that he left the scene of the shooting and did not voluntarily provide information to the police because he was afraid he or his family would be harmed, the prosecutor elicited his testimony that he had been threatened], overruled on another ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.)

In light of these decisions, respondent is incorrect in asserting that the threat evidence was properly admitted. (RB 96.) According to respondent, "[t]he whole context in which the prosecutor elicited evidence of Witness 13's fear was her *retreat* at trial from statements she had made earlier to police." (RB 96, emphasis added.) In so arguing, respondent presumes that Witness No. 13's "purported memory failures" were not genuine. (*Ibid.*) But as this Court has explained, "[n]ormally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. [Citation.]"

(*People v. Ledesma* (2006) 39 Cal.4th 641, 711.) Therefore, it cannot be said that her testimony that she was unable to recall certain details was a retreat from her earlier statements. Indeed, in every instance in which Witness No. 13 testified that she did not remember details of what she told the police, she affirmed her prior statements to investigators and her preliminary hearing testimony when the prosecutor refreshed her recollection by reading them to her. (15 RT 2085-2087, 2089-2090, 2093-2096.) Because Witness No. 13 never testified inconsistently with her prior statements or testimony, the testimony concerning the shooting incidents at her workplace were not relevant to her credibility.

The threat evidence was also irrelevant to the issue of Witness No. 16's credibility. For instance, insofar as Witness No. 16's credibility was in question because he had been granted immunity in exchange for his testimony, the threat evidence was plainly irrelevant. (20 RT 2677-2678, 2798.) The threat evidence was similarly irrelevant with respect to Witness No. 16's admission that he lied (20 RT 2715) and defense counsel's cross-examination with respect to inconsistencies in his testimony (21 RT 2768-2770, 2774-2775, 2781-2784, 2790-2799, 2802-2806, 2810, 2857-2865, 2870-2871). His admitted lie and the inconsistencies in his testimony related to his attempts to minimize his own knowledge of and involvement in the crime, and/or the fact that his testimony about the crime was significantly more detailed and inculpatory than his statements to the police. As such, this was not the sort of situation where threat evidence would be relevant – i.e., where a witness disavows or recants earlier statements implicating a defendant due to fear of retribution. (See *People v. Warren* (1988) 45 Cal.3d 471, 484-486 [evidence that witnesses wanted nothing to do with the case relevant after they refused to identify defendant]; *People v.*

Chacon (1968) 69 Cal.2d 765, 779 [prosecution witness evasive and uncooperative], overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Yeats*, *supra*, 150 Cal.App.3d at p. 987 [evidence tending to show that witness was fearful provided a motive for him not to tell the truth].)

Finally, in light of the prosecutor's failure to show specific inconsistencies, as required by *Yeats* and *Brooks*, there is no merit to respondent's suggestion that the threat evidence was admissible simply because the probative value of David Sandate and Witness No. 13's testimony was high. (RB 97-98.) For the same reason, respondent is incorrect in asserting that Witness No. 16's testimony regarding a photograph in which his face had been scratched out and "187" written across his chest was admissible to corroborate his testimony regarding his fear of retaliation from Sangra. (RB 97-98.)

Therefore, as appellant has argued (AOB 149-153), the trial court erred in admitting the threat evidence.

B. The Evidence Should Have Been Excluded Under Evidence Code Section 352

Respondent contends that appellant has forfeited his claim that the evidence was improperly admitted under Evidence Code section 352 because he made no such objection in the trial court. Respondent further contends that, even if appellant had objected under Evidence Code section 352, the threat evidence was properly admitted. (RB 99-100.) Respondent's contentions are incorrect.

Appellant objected on various grounds to threat testimony elicited from Witness No. 13 (15 RT 2097-2098 [lack of foundation], 2099 [improperly calling for a conclusion], 2102 [relevancy]), Sandate (20 RT

2575 [relevancy]), and Witness No. 16 (20 RT 2719 [relevancy and lack of foundation]), but the trial court overruled each of those objections. These objections necessarily implicated a concern that the threat evidence would "necessitate undue consumption of time" and/or "create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury" within the meaning of Evidence Code section 352. (*People v. Yeoman* (2003) 31 Cal.4th 93, 117; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6 [trial objection under Evidence Code sections 352 and 1101 preserved a claim that the asserted error violated due process and appellant's Eighth Amendment right to a reliable verdict].)

In any event, because the trial court overruled appellant's objections to Witness No. 13's testimony, making it clear that it would admit evidence relating to the threats, it would have been futile to object on Evidence Code section 352 grounds. The futility of such an objection was reinforced by the court's rulings with respect to the testimony of Sandate and Witness No. 16.

People v. Brooks, *supra*, 88 Cal.App.3d at p. 186 is instructive. There, the Court of Appeal rejected the prosecution's argument that, because defense counsel failed to object to witness Nadine Harris's testimony regarding a threat by the defendant's girlfriend, the defendant's argument that Harris's testimony constituted irrelevant, prejudicial hearsay could not be raised for the first time on appeal. In so ruling, the Court of Appeal observed that

> the [trial] court called a hearing to consider exclusion of the evidence immediately after Harris said, "I was threatened." Defense counsel had neither the opportunity nor the need to object under these circumstances. Further, the defense had vigorously objected to the prosecutor's previous questions of eyewitness Blount, at which time the court ruled that evidence was to be considered only as it revealed her state of mind.

> Thus, the second time such an issue arose, it was clear how the court intended to rule and another objection was unnecessary.

(*Ibid.*)

Because the trial court had repeatedly overruled objections to testimony regarding threat evidence, any objection under Evidence Code section 352 to further threat evidence would have been futile, and thus was unnecessary. (AOB 143, fn. 61.) Under these circumstances, appellant's argument that the trial court erred in admitting the evidence under Evidence Code section 352 is cognizable on appeal. (*People v. Antick* (1975) 15 Cal.3d 79, 95, abrogated by statute on another ground as stated in *People v. Castro* (1985) 38 Cal.3d 301, 312; *Green v. Southern Pac. Co.* (1898) 122 Cal. 563, 565.)

Respondent claims that "[it] could not possibly have alarmed the jury to learn that, of the multitude of witnesses who appeared at trial, many of whom were referred to by number, three were subject to threats." (RB 99.) On the contrary, it is likely that the jurors were extremely alarmed by evidence that *any* witnesses had been threatened. In light of evidence that two of the witnesses had been threatened or feared retaliation despite the fact that their identities had not been disclosed and that they had moved or been relocated, the jurors likely felt that they too were vulnerable to retaliation. (See 42 RT 4379-4380 [after the jury's verdict of death was read, the trial court reported that some of the jurors were concerned about their safety].) Such concern may have been stoked by the prosecutor's

argument that the witnesses would have to live in fear of retaliation for the rest of their lives. (29 RT 3611-3612.)[41]

Respondent also dismisses appellant's argument that the evidence raised a "likelihood that the jury will attribute the third party's conduct to the defendant, and infer from it that he is a bad man who is more likely than not guilty of the charged crime." (RB 99, quoting AOB 154-155.) Yet, the crux of the prosecutor's theory at trial, and respondent's theory now, is that "appellant and Palma were committed, dedicated, ruthless members of a criminal street gang who would unthinkingly obey an order to murder an individual and in carrying out that order kill his family as well." (RB 89; see also RB 99-100.)[42] In light of the prosecutor's theory that appellant was

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[41] This fear could only have been reinforced by Sandate's testimony that he had left his job following his encounter with an unknown individual who asked him why he was testifying against Luis Maciel, despite his claim that he did not leave the company because of that encounter. (20 RT 2575.)

[42] In this regard, appellant draws this Court's attention to a significant error in a section of respondent's statement of facts regarding the supposed efforts of Sangra members to coordinate with each other following Palma's arrest. Specifically, respondent states that, on May 15, 1995, Torres's girlfriend, Jill Steele, called appellant at Torres's behest. (RB 24, citing 19 RT 2542-2546; 20 RT 2603-2605.) In fact, Steele testified that she telephoned "the Valdez residence at 1359 Peppertree Circle in West Covina" (19 RT 2546), not that she spoke to appellant himself. Significantly, other evidence was introduced to show that appellant was living in Utah on May 15, 1995, and that he had moved out of the Peppertree Circle residence at least two weeks before that date. (24 RT 3174-3177 [testimony of appellant's stepfather, Trentt Hampton, that appellant was living in his home in Utah between April 30 and June 1, 1995]; 26 RT 3331-3332 [one-way Southwest Airline ticket for passenger Richard Valdez from Ontario, California to Salt Lake City, Utah, dated April 30, 1995].)

part of a gang whose members ruthlessly and unthinkingly engaged in criminal conduct on its behalf, it hardly could have mattered to the jury whether appellant or a third party made the threats. They would have attributed those threats to appellant, believing that he was so closely associated with the gang that he might as well have made or endorsed the threats, and that he benefitted from them.

As appellant has argued, the probative value of the threat evidence was substantially outweighed by the danger of prejudice, and therefore the trial court erred under Evidence Code section 352 in admitting it. (AOB 153-155.)

C. The Trial Court Committed Prejudicial Error by Failing to Give Appropriate Admonitions and Instructions Limiting the Jury's Consideration of Evidence of Threats to Witnesses, and Witnesses' Fears of Retaliation, to Assessing Credibility

Although this Court has held that a trial court generally has no sua sponte duty to instruct on the limited uses of evidence (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051), an exception to that rules applies when such evidence: (1) plays a dominant role in the prosecutor's case against the accused; (2) is highly prejudicial; and (3) is minimally relevant for any other legitimate purpose. (*People v. Milner* (1988) 45 Cal.3d 227, 251-252; *People v. Collie* (1981) 30 Cal.3d 43, 63-64.) Appellant has argued that this exception applies to the evidence of fear and threats presented here, because the dominant theme of the prosecutor's case against appellant was the dangers and threats posed by street gangs. (AOB 155-158.)

Respondent contends that the exception invoked by appellant is inapplicable because the evidence was highly probative and minimally, if at all, prejudicial. Moreover, respondent denies that the threat evidence was a

"dominant theme" of the prosecution's case. (RB 100-101.) Respondent's position is incorrect.

Appellant has amply demonstrated that the risk of prejudice raised by the threat evidence substantially outweighed its probative value. (See Sections A and B, *ante*; see also AOB 149-155.)

Moreover, respondent's suggestion that "it is [not] even remotely plausible to claim that the intimidation evidence was a 'dominant theme'" is flatly wrong. (RB 101.) The prosecutor's theory was that appellant and other Sangra members committed the crimes on behalf of the Mexican Mafia, who targeted victim Anthony Moreno because he had dropped out of the Mexican Mafia and victim Gustavo Aguirre because he had robbed drug dealers, some of whom were receiving "protection" from the Mexican Mafia. Indeed, explication of this theory represented the great majority of the prosecutor's closing argument. (27 RT 3396-3397, 3411-3423, 3426-3435, 3437, 3439, 3442-3460; 29 RT 3613-3622, 3624, 3632-3668, 3672-3675.) During his argument, the prosecutor also referred to testimony that witnesses feared they would be killed because they were testifying, and that the Mexican Mafia was willing to wait many years to exact revenge. (27 RT 3417, 3428; 29 RT 3610-3611.)

It was in this context that the prosecutor referred to the threat evidence. (29 RT 3611-3612.) Even if his remarks concerning threats or fear of retaliation did not themselves constitute the prosecution's dominant theme, they were closely connected to the evidence and argument concerning the threat posed by gangs.

Under these circumstances, the trial court had a sua sponte duty to give a limiting instruction at both phases of the trial, and its failure to do so was error.

D. Appellant's Federal Constitutional Claims Are Cognizable on Appeal

Contrary to respondent's claim (RB 101, fn. 56), appellant's federal constitutional claims have been preserved for review. A state court's procedural or evidentiary ruling is subject to federal review where it has infringed upon a specific federal constitutional provision or has deprived the defendant of the fundamentally fair trial guaranteed by due process. (*Pulley v. Harris* (1984) 465 U.S. 37, 41; *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 919-920.)

Moreover, as this Court has noted, "no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal." (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 117; see also *People v. Cole*, *supra*, 33 Cal.4th at p. 1195, fn. 6.) Because appellant's federal constitutional claims are identical to his claims based on California statutes, the federal claims are preserved. (*People v. Smith* (2005) 35 Cal.4th 334, 356; *People v. Smith* (2003) 31 Cal.4th 93, 117.)

At a minimum, appellant's objections were sufficient to preserve an argument that the erroneous admission of the exhibits violated his right to due process. (*People v. Partida* (2005) 37 Cal.4th 428, 433-439.) In *Partida*, the defendant argued on appeal that evidence of his gang involvement was inherently prejudicial, and therefore admission of that evidence violated due process. (*Id.* at pp. 433, 437.) This Court concluded that, where the defendant objected at trial that the court erred in admitting

certain evidence because it was more prejudicial than probative under Evidence Code section 352, his claim that the trial court's error in overruling the objection violated his due process rights could be raised on appeal. (*Ibid.*)

As in *Partida*, this case involved the admission of inherently prejudicial evidence, and the trial court's admission of that evidence similarly violated due process. Moreover, appellant's objections that the evidence was irrelevant, cumulative and prejudicial fully apprised the trial court of the federal due process, fair trial, and Eighth Amendment reliability grounds of his claim. (*People v. Partida, supra,* 37 Cal.4th at pp. 433-439; *People v. Cole*, *supra*, 33 Cal.4th at p. 1195, fn. 6.)

Accordingly, appellant's federal constitutional claims are cognizable on appeal.

E. Reversal of the Entire Judgment is Required

Appellant has argued that the erroneous admission of the evidence, particularly in the absence of a limiting instruction, denied appellant his constitutional rights to due process and to a fair trial by jury (U.S. Const., 6th & 14th Amends.), and arbitrarily deprived him of his state-created liberty interest in not being convicted on irrelevant, speculative and statutorily-prohibited evidence, also a due process violation (U.S. Const., 14th Amend.; see, e.g., *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346). In addition, since this inherently and highly prejudicial threat evidence was also improperly considered by the jury at the penalty phase, its admission violated appellant's constitutional right to a reliable penalty verdict (U.S. Const., 8th & 14th Amends.), and it is at least reasonably possible that it skewed the essentially "normative" penalty determination against him (see

Brown v. Sanders (2006) 546 U.S. 212, 217-218; *People v. Brown* (1988) 46 Cal.3d 432, 447-448). (AOB 158-159.)

Respondent contends that there is no reasonable probability that any evidentiary or instructional error in admitting the threat evidence affected the outcome of this case. According to respondent, the "evidence could not have weighed very heavily in the jury's deliberations, given the violent and gang-oriented nature of the case." (RB 101.) Respondent goes on to argue, "That witnesses would be intimidated was to be *expected* in a case such as this, regardless of who the particular defendants were, and would not have impacted the jury's determination of the issues in this case." (*Ibid.*; emphasis in original.) Each of these assertions is incorrect.

While the jurors *might* have expected witnesses to be nervous about testifying in a gang case, it is unlikely that they expected to hear testimony anywhere near as frightening as the following: Witness No. 13 feared that she and her children would be killed because she was testifying (15 RT 2098-2099); after she moved to a new house and began working at a new location, two drive-by shootings took place at her new workplace (15 RT 2103, 2111); Sandate was confronted at his workplace, and that he subsequently left that job (20 RT 2575); and, Witness No. 16 initially refused to answer questions when called before the grand jury because he was scared for his safety and believed that his family would be killed, and police later recovered a photograph in which his face had been scratched out and "187" scratched across his chest (20 RT 2719-2721). Because the prosecutor suggested that the crimes occurred as part of a conspiracy in which appellant was deeply involved (27 RT 3448; 29 RT 3646), the jurors would have attributed the threats to appellant, even if they believed that they were made by a third party.

Accordingly, the entire judgment must be reversed.

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THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE THE HEARSAY STATEMENTS OF RAYMOND SHYROCK AS "DECLARATIONS AGAINST INTEREST" UNDER EVIDENCE CODE SECTION 1230

In his opening brief, appellant argued that the trial court erroneously allowed the prosecution to introduce out-of-court statements by a member of the Mexican Mafia under the hearsay exception for "declarations against interest" in Evidence Code section 1230. Those statements were inadmissible as declarations against interest because they failed to satisfy the requisite criteria under that hearsay exception. Moreover, the prosecution failed to meet its burden to show that the declarant was unavailable to testify at trial. The admission of this evidence also violated appellant's rights guaranteed by the confrontation clauses of the United States Constitution and the California Constitution. (AOB 160-178.)

Respondent contends that appellant has waived his claim that the trial court prejudicially erred in allowing the prosecution to introduce out-of-court statements by a member of the Mexican Mafia under the hearsay exception for "declarations against interest" in Evidence Code section 1230. Respondent further contends that the trial court properly admitted the statements and that any error was harmless. (RB 102-116.)

Appellant has nothing further to add with respect to this issue, which is therefore joined. For the reasons set forth in his opening brief, appellant asks this Court to reverse the entire judgment.

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THE TRIAL COURT ERRED BY REFUSING TO INSTRUCT THE JURY THAT WITNESS NO. 16 WAS AN ACCOMPLICE AS A MATTER OF LAW

In appellant's opening brief, he demonstrated that Witness No. 16 was an accomplice as a matter of law, and argued that the trial court erred in failing to instruct the jury to that effect. The trial court's error allowed the jury to return convictions and death sentences against appellant based upon the unreliable and uncorroborated testimony of Witness No. 16 alone. (AOB 179-209.)

Respondent contends that there was no error in that the jury reasonably could have found that Witness No. 16 was not an accomplice, and that, in any event, the asserted error was harmless. (RB 116-125.) Respondent's contentions are incorrect.

A. The Trial Court Erred In Denying Appellant's Request For An Instruction That Witness No. 16 Was An Accomplice as a Matter of Law

Respondent concedes that the "jury undoubtedly would have been entitled to find that Witness 16 was an accomplice," but adds that "that was not the only permissible inference." (RB 121.)[43] However, appellant has amply demonstrated that Witness No. 16 was an accomplice as a matter of law because, according to his own testimony, he acted with knowledge of the criminal purpose of the alleged perpetrators and with the intent or

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[43] Respondent's suggestion "that that was not the only permissible inference" (RB 121) is inconsistent with its concession that the trial court erred in instructing the jury pursuant to CALJIC No. 2.11.5 because Witness No. 16 was an unjoined perpetrator. (RB 125-128.)

purpose of encouraging or facilitating the commission of the offense. (AOB 195-199.)

First, contrary to respondent's position, the record leaves no doubt that Witness No. 16 was aware well before the shootings that the group had a criminal purpose. Witness No. 16 testified that on the afternoon of April 22, 1995, co-defendant Jimmy Palma asked him for a ride to Anthony Torres's house because "the brothers wanted him" and "they had to take care of something." (20 RT 2681, 2683.) By "the brothers," Witness No. 16 understood Palma to mean the Mexican Mafia. (20 RT 2683.) A few hours later, Witness No. 16 drove Palma to Torres's house. (20 RT 2681; 21 RT 2763-2765.) Witness No. 16 and Palma entered the house, where as many as six other Sangra members were already gathered in Torres's room, including Torres, "Pepe" (Jose Ortiz), "Tricky" (Daniel Logan), "Primo" (appellant), and "Creepy." (20 RT 2682, 2684, 2697-2698, 2723-2726; 21 RT 2775-2776, 2801.)[44] Witness No. 16 saw a shotgun by the foot of the bed in Torres's room. (20 RT 2685.)

Indeed, Witness No. 16 repeatedly testified that he believed that the Sangra gang members were going to commit murder when they left Anthony Torres's house to go to El Monte. (20 RT 2687-2688, 2694; 21 RT 2776-2777, 2781, 2782, 2784, 2848-2849.) For instance, as respondent acknowledges (RB 117), Witness No. 16 testified that he heard Jose Ortiz say they had to "take care" of someone in El Monte, and that he took Ortiz's

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[44] As appellant has noted (AOB 23, fn. 20), the prosecutor did not ask Witness No. 16 to identify "Creepy." On cross-examination, Witness No. 16 testified that he did not know Creepy by any other name. (21 RT 2776.)

statement to mean that somebody might be or would be killed. (20 RT 2687; 21 RT 2776-2777.)

Even if Witness No. 16's earlier statements to the police were ambiguous as to whether he knew that the group was planning to *kill* anyone, as respondent suggests (RB 117, fn. 61, and 121-122), they show unambiguously that he knew the group had some criminal purpose. (21 RT 2782 ["We had to take care of something. What that was, I wasn't sure who or how many people would have been killed."], 2802-2803 ["I said I wasn't sure what they were going to do, if they were going to [box or get money from people in El Monte] or kill somebody."], 2804 ["I said killing, too. I said anything could have happened that night."], 2859 [before leaving for Maxson Road, "I just knew there might have been a possibility [people would be killed] because if you are going to take a gun, you know, anything could happen."].)

It is immaterial that Witness No. 16 was not present during the murders, but parked several blocks away, or that he did not drive any of the direct perpetrators of the killings. (RB 122.) Witness No. 16 drove fellow Sangra members to El Monte, that is, to a different city controlled by a different gang. (15 RT 2027-2028; 20 RT 2700-2703.) One of his passengers was Ortiz, who, by Witness No. 16's own account, "seemed to be in charge." (21 RT 2767, 2801.) If Witness No. 16 parked several blocks away from the house on Maxson Road, it was only because Ortiz directed him to do so. (20 RT 2703-2704.) Ortiz, who looked up and down the street, was clearly acting as a lookout and monitoring the offenses. (20 RT 2705.)[45]

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[45] Respondent suggests both (1) that Witness No. 16 acted as a mere (continued...)

Moreover, Witness No. 16's statements that he felt compelled to drive his companions to El Monte (20 RT 2714; 21 RT 2775) are belied by his own testimony, which establish beyond question that he willingly and intentionally assisted in the commission of the crimes. First, Witness No. 16 had long been an active member of Sangra. At the time of appellant's trial, Witness No. 16 was 23 years old, and he had been a member of Sangra since he was 15 years old. He had participated in gang "missions" and bore a "Sangra" tattoo on his stomach. (20 RT 2677; 21 RT 2768, 2771, 2801, 2831, 2867.) Although he testified that he was no longer a member, he admitted that he had never been "jumped out" of the gang. (21 RT 2768.) At any rate, he admitted that he was still a member of the gang on the date of the crimes. (21 RT 2767.)[46]

Second, Witness No. 16's testimony makes clear that he acted willfully throughout the day of the shootings. Again, Palma told Witness No. 16 that "the brothers" (meaning the Mexican Mafia) wanted Palma to do something, and that Palma needed Witness No. 16 to drive him to Torres's house after Palma received a page. (20 RT 2681, 2683; 21 RT 2761-2762.) When Palma received the page, Witness No. 16 drove Palma

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[45](...continued)
chauffeur and may not have known any criminal conduct was afoot when he left Torres's house, *and* (2) that he felt compelled to drive his companions to Maxson Road. (RB 122.) This is simply illogical. If he did not realize criminal conduct was afoot, it is unlikely he would have felt he was being pressured or compelled to drive.

[46] Witness No. 16 later testified that he was longer an active gang member on the date of the crimes, but he acknowledged that he had seen Palma several times in April 1995. At that time, he knew Palma was a gang member, and he was "partying" with Palma at Torres's house on the night of the crimes. (21 RT 2808.)

to Torres's house as requested. (20 RT 2681; 21 RT 2763-2765.) Witness No. 16 went into Torres's house with Palma, where he observed other Sangra gang members, as well as a shotgun at the foot of Torres's bed. (20 RT 2684-2685.) Witness No. 16 heard Ortiz – whom Witness No. 16 considered to be an older, respected member of the gang – tell the group that they had to "go to El Monte to take care of something," which Witness No. 16 understood to mean that somebody "would get killed." (20 RT 2687, 2690-2691, 2726; 21 RT 2767.) No one in the room told Ortiz that they did not want to go to El Monte to take care of the problem there. (20 RT 2696.)

Witness No. 16's explanation as to how he was "compelled" fell far short of establishing any actual compulsion, as the following exchange demonstrates:

[Prosecutor]:	Can I ask you something? You were working full time, you had a job for a number of years. Why did you go?
[Witness No. 16]:	Because they wanted me. I guess I got pressured into it.
[Prosecutor]:	Well, did they say you had to go?
[Witness No. 16]:	In a way.
[Prosecutor]:	Well, explain what you mean. You've got to tell us what your state of mind is.
[Witness No. 16]:	*They just asked for a car to follow them down there and I agreed to go.*

(20 RT 2714; emphasis added.) In light of this testimony, the jury could not have reasonably found that Witness No. 16 did not specifically agree to or

intend to facilitate the crimes, contrary to respondent's suggestion otherwise. (RB 123.)[47] At most, his testimony suggests that he felt "compelled" to participate due to a sense of gang loyalty or obligation.[48]

Under these circumstances, as appellant has explained (AOB 196), Witness No. 16 drove the "backup car" to the crime scene with knowledge of the criminal purpose of the Sangra gang members, i.e., to kill someone, and therefore he was an aider and abettor to and/or co-conspirator in the murders. (*People v. Luparello* (1986) 187 Cal.App.3d 410, 439.) Indeed, by his own admission, he agreed to drive them to the scene. (20 RT 2714.)

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[47] In support of its claim that the jury reasonably could have credited Witness No. 16's claim that he felt compelled to drive to El Monte, respondent observes that the trial court indicated it would have granted a motion under Penal Code section 1118.1 had Witness No. 16 been on trial. (RB 122, citing 25 RT 3260.) However, the trial court's remark should be dismissed outright, as the evidence regarding Witness No. 16's connection to the crimes was nowhere near as well-developed as it would have been had he actually been on trial. (§ 1118.1 ["In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."].) That is, because Witness No. 16 was not actually on trial, the court could not meaningfully comment on how it would rule on such a motion if he were on trial.

[48] At any rate, appellant has observed that Witness No. 16's self-serving claim that he was "told to" go along to El Monte, and that (in the prosecutor's words) he "felt compelled" to go (21 RT 2775), did not relieve him of criminal liability for the multiple murders. Not even the threat of future danger of loss of life is a defense (*People v. Lewis* (1963) 222 Cal.App.2d 136, 141; *People v. Otis* (1959) 174 Cal.App.2d 119, 125-126), and the defense of coercion is not available at all when the charged offense is punishable by death (*People v. Petro* (1936) 13 Cal.App.2d 245, 248).

Moreover, even if Witness No. 16 only intended to facilitate a robbery or an assault in El Monte – and did not intend or foresee that the murders would be committed – he would still be liable for the offenses actually committed. (See *People v. Medina* (2009) 46 Cal.4th 913, 919-920; see also *People v. Prettyman* (1996) 14 Cal.4th 248, 260-262; *People v. Montano* (1979) 96 Cal.App.3d 221, 227, superceded by statute on another ground, as stated in *People v. Singleton* (1980) 112 Cal.App.3d 418, 424.)

People v. Medina, *supra*, 46 Cal.4th 913 is illustrative. There, a verbal challenge by the defendants (Jose Medina, George Marron, and Raymond Vallejo, all members of the Lil Watts street gang) resulted in a fistfight between the defendants and the victim, a member of another street gang. After the fistfight ended, one of the defendants shot and killed the victim, who was driving away from the scene of the fight. (*Id.* at p. 916.) The Court of Appeal held that there was insufficient evidence to support a finding that Medina's act of firing a gun was a reasonably foreseeable consequence of the gang attack in which Marron and Vallejo participated. (*Id.* at p. 920.) In reversing this holding, this Court considered, among other things: the importance in gang culture of avenging behavior that gang members perceive as disrespectful; Lil Watts was a violent street gang that regularly committed gun offenses; and, "in the gang context, it was not necessary for there to have been a prior discussion of or agreement to a shooting, or for a gang member to have known a fellow gang member was in fact armed." (*Id.* at pp. 922-925.) This Court also discussed a number of prior gang-related cases in support of its conclusion that, at least under the evidence presented at trial, a homicide was a reasonably foreseeable consequence of the gang confrontation. (*Id.* at pp. 925-927.)

Here, the evidence established, among other things, that Witness No. 16 was a long-time Sangra member; he had participated in gang "missions" (presumably, gang-related criminal activities); and he was aware that the alleged perpetrators intended to commit some criminal conduct (whether robbery, assault or murder), and he agreed to facilitate that conduct. Moreover, the evidence established that two of the victims were targeted because they had disrespected the Mexican Mafia. Specifically, Gustavo "Tito" Aguirre had robbed drug dealers, including some who were receiving "protection" from the Mexican Mafia (15 RT 2019, 2042, 2044, 2062), and Anthony "Dido" Moreno had dropped out of the Mexican Mafia (15 RT 2001, 2006, 2030; 18 RT 2255, 2268). Either offense would lead the Mexican Mafia to kill the person who committed it. (18 RT 2271-2272.) Finally, gang experts testified regarding various aspects of gang culture. Among other things, Sergeant Dan Rosenberg, a Los Angeles County Sheriff's deputy and Gang Unit supervisor, testified that a primary activity of the Sangra street gang was the commission of various criminal offenses, and he opined that it would enhance the gang's reputation to commit a crime at the direction of or in association with the Mexican Mafia. (19 RT 2505-2507, 2510.)

Third, the jury was specifically instructed on the predicate crime of murder (6 CT 1734-1739 [CALJIC Nos. 8.10 (1994 Revision), 8.11, 8.20, 8.30 and 8.31]), satisfying the trial court's obligation to "identify and describe the target or predicate crime that the [alleged aider and abettor] may have aided and abetted." (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 268.) In light of Witness No. 16's testimony that he believed that the Sangra gang members were going to commit murder, the instructions on

murder satisfied the requirement that the trial court identify and describe the predicate crime. (20 RT 2687-2688, 2694; 21 RT 2776, 2781, 2782, 2784.) Although the trial court did not instruct the jury on other possible predicate offenses, such as robbery or assault, the jury surely would have recognized that Witness No. 16 knew his companions were planning *specific* criminal conduct, whether robbery, assault or murder. (21 RT 2782, 2802-2804, 2848-2849, 2859.) By contrast, the trial court in *Prettyman* failed to identify or describe any predicate offenses whatsoever. (*People v. Prettyman*, *supra*, 14 Cal.4th at pp. 258, 270.)

Under these circumstances, Witness No. 16 "aided and abetted the commission of [] criminal act[s]" (whether robbery, assault or murder) and "the offense[s] actually committed [were] a natural and probable consequence" of those acts. (See *People v. Prettyman*, *supra*, 14 Cal.4th at p. 268.) Accordingly, this Court should reject respondent's suggestion that the jury "readily could have found that Witness No. 16 was not an accomplice on the basis that he drove a car not to the crime scene but to a location several blocks away, that he did not transport any of the direct perpetrators, that he was not sure what his fellow gang members intended to do when they left Torres's house, and that, significantly, even if he did know what was going to happen he did not specifically agree to it or intend to facilitate it." (RB 123.)

B. The Trial Court's Error In Refusing to Find That Witness No. 16 Was an Accomplice As a Matter of Law and in Failing to So Instruct the Jury Was Prejudicial

Appellant has more than sufficiently demonstrated that the trial court prejudicially erred in failing to instruct the jury that Witness No. 16 was an accomplice as a matter of law. (AOB 199-209.) Nonetheless, appellant

here contests respondent's contention that there was evidence that tended to connect him to the crime in such a way as to lend credence to Witness No. 16's testimony. (RB 123-125.)

First, respondent notes that appellant was identified by Witness No. 13 and Elizabeth Torres as having been present with the other Sangra gang members before they left the Torres house on the night of the murders. (RB 124.) However, as appellant has pointed out (AOB 203), neither of them claimed to have seen appellant leave the house together with the other men. Thus, even if the jury credited Mrs. Torres and Witness No. 13's testimony, the jury could not reasonably infer from appellant's mere presence at the Torres house earlier in the evening that he left with the other Sangra gang members and went to El Monte later in the evening, much less that appellant played any role in the offenses. (*People v. Robinson* (1964) 61 Cal.2d 373, 400 [the necessary corroborative evidence must connect the defendant with the crime itself, not simply with its perpetrators].)

Second, respondent suggests that the crime scene evidence substantiated Witness No. 16's version of what he was told had happened. (RB 124.) However, apart from the fact that one man had been shot in the head and another man may have been shot as he was running away from the gunman (20 RT 2629-2632, 2635, 2711-2713; 21 RT 2821, 2827), Witness No. 16 simply could have invented his testimony regarding the crime scene based on nothing more than the offenses alleged (setting aside the possibility that he had learned or been given information about the crime scene from a police officer or some other extraneous source).

Third, respondent claims that the ballistics evidence connected appellant directly to the crime. (RB 124.) According to respondent, "unexpended [.45 caliber] rounds found in appellant's recently-vacated

residence had without doubt been used in one of the murder weapons (19RT 2441-2447), and a [.38 or .357 caliber] bullet found in appellant's current residence had 'likely' been fired through the other murder weapon (19RT 2429-2431)." (RB 124.)[49] However, a review of the record demonstrates that the connection between the ballistics evidence and appellant was tenuous at best.

As appellant has demonstrated (AOB 206-207), the jury could not reasonably infer that the unexpended .45 caliber rounds (i.e., Exhibit 59) were connected to him at all. Appellant was not even living in the Peppertree Circle apartment when the .45 caliber bullets were recovered on May 15, 1995, and he had not lived there for more than two weeks. (21 RT 2875-2876 [testimony of appellant's landlady, Alwina Luparello, that when she went to the apartment sometime in early May to collect rent, she did not see appellant there but she did see his brother, Alex Valdez]; 24 RT 3174-3177 [testimony of appellant's stepfather that appellant was living in his home in Utah between April 30 and June 1, 1995]; 26 RT 3331-3332 [one-way Southwest Airline ticket for passenger Richard Valdez from Ontario, California, to Salt Lake City, Utah, dated April 30, 1995].)[50]

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[49] Respondent is referring to Exhibit 59 (18 RT 2356-2357, 2366-2367; 19 RT 2446-2447) and Exhibit 65 (19 RT 2424, 2429-2431; 22 RT 2938-2939), respectively.

[50] Respondent states incorrectly that the unexpended rounds were found in "appellant's recently-vacated residence" (RB 124), apparently referring to a house on South Greenleaf Drive in West Covina, where he had lived before moving to an apartment on Peppertree Circle, also in West Covina. (18 RT 2355-2356, 2359; 21 RT 2882; 22 RT 2971-2975; 1 SuppCT IV 128-134 [Exh. 61 (rental agreement for Peppertree Circle apartment, signed by appellant on April 4, 1995)].) In fact, the unexpended

(continued...)

Significantly, various individuals other than appellant lived in or otherwise had access to the Peppertree Circle apartment. Luparello testified that she had rented the residence to appellant, his brother Alex, and a woman named Rachel Frodsham on April 1, 1995. (21 RT 2873.) Luparello also testified that she believed that there were "a lot of people living inside" the apartment in early May, 1995, though she did not know who they were. (21 RT 2876.) The testimony of other witnesses established that numerous Sangra gang members had access to the apartment. (14 RT 1835-1836; 21 RT 2852-2854.) And when the apartment was searched by police, appellant's brother, Alex Valdez, told law enforcement officers that the closet in which the bullets were found was his. (18 RT 2368.)

The connection between appellant and the .38./.357 bullet "found in appellant's current residence" (RB 124) is similarly tenuous. In fact, that bullet was found in a house on Greenleaf Drive, where appellant had lived before moving to the Peppertree Circle apartment. (22 RT 2938-2939; 23 RT 3152-3154.) In any event, there was no evidence that that bullet had "likely" been fired through the other murder weapon, contrary to respondent's claim. (RB 124.) Instead, ballistics expert Dale Higashi testified that he attempted to determine whether Exhibit 64 [an expended .38/.357 bullet recovered from a bathroom wall at the Maxson Road residence], Exhibit 65 [an expended .38/.357 bullet recovered from the Greenleaf Drive residence] and Exhibit 66 [an expended .38/.357 bullet recovered during an autopsy] were fired from the same gun. The general

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[50](...continued)
rounds were found in the Peppertree Circle residence. (18 RT 2356-2357, 2366-2367.)

rifling characteristics of the three bullets were "consistent," i.e., each one had five lands and grooves with a right-hand twist. However, he could not find enough individual characteristics to conclusively determine whether they had been fired from the same gun. (19 RT 2419-2431; 22 RT 2938-2939.)[51] It is hardly surprising that bullets of the same caliber share such general characteristics, but that hardly it makes it "likely" that they were fired from the same gun.

Under these circumstances, when Witness No. 16's testimony is set aside, there did not exist evidence sufficiently connecting appellant with the commission of the offenses "in such a way as reasonably may satisfy a jury that the accomplice [was] telling the truth." (*People v. Davis* (2005) 36 Cal.4th 510, 543.)

Accordingly, the trial court's refusal to instruct the jury that Witness No. 16 was an accomplice as a matter of law requires reversal of appellant's convictions and death judgment.

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[51] Higashi certainly did not testify that the three bullets were all "likely" fired from the same revolver, as respondent claims. (RB 22, 124.)

7

THE TRIAL COURT PREJUDICIALLY ERRED BY INSTRUCTING THE JURY WITH CALJIC NO. 2.11.5 BECAUSE THE JURY MAY HAVE INTERPRETED THE INSTRUCTION AS PRECLUDING IT FROM CONSIDERING WITNESS NO. 16'S IMMUNITY FROM PROSECUTION IN ASSESSING HIS CREDIBILITY

Evidence was presented at trial that Witness No. 16 was directly involved as an aider and abettor and/or co-conspirator in the crimes. (20 RT 2679-2688, 2690-2691, 2694-2715, 2723-2735; 21 RT 2755-2757, 2761-2767, 2775-2780, 2782-2790, 2799-2833, 2848-2781.) Evidence was also presented that he had been granted immunity in exchange for his testimony against appellant and co-defendant Jimmy Palma. (20 RT 2678-2679, 2715-2718, 2721-2722, 2758-2760, 2780, 2793-2799, 2802, 2834.) Nevertheless, the trial court instructed the jury, pursuant to CALJIC No. 2.11.5, that it should not "discuss or give any consideration as to why" persons other than the defendant who may have been involved in the crime were not being prosecuted in this trial. (CALJIC No. 2.11.5 (1989 Revision); VI CT 1754; 27 RT 3380-3381.) Because the instruction operated to preclude the jury from considering why Witness No. 16 was not being prosecuted in this trial, the trial court prejudicially erred in giving it, and reversal of the entire judgment is required. (AOB 210-216.)

Respondent concedes that CALJIC No. 2.11.5 should not be given in a case like the present one where an unjoined perpetrator is also a witness at trial, but contends that the claim is forfeited and that, in any event, any error was harmless. (RB 125-128.) Respondent's contentions are without merit.

A. Appellant Has Not Forfeited This Argument

As respondent points out (RB 126), this Court has held that where the instruction is properly given as to some unjoined perpetrators but not others, a defendant ordinarily waives a claim of error arising from the giving of CALJIC No. 2.11.5 if he or she fails to request a limiting instruction. (*People v. Sully* (1991) 53 Cal.3d 1195, 1218.) However, instructional errors are reviewable even without objection if they affect a defendant's substantial rights. (§§ 1259, 1469; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312; *People v. St. Martin* (1970) 1 Cal.3d 524, 531.) Appellant has amply demonstrated that the error deprived him of substantial rights – namely, his rights to a fair trial and to present a complete defense. (AOB 213-214.)

Merely acceding to an erroneous instruction does not constitute invited error; nor must a defendant request amplification or modification when the error consists of a breach of the trial court's fundamental instructional duty. (*People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.)

Accordingly, the instant argument is cognizable on appeal.

B. The Trial Court's Error Was Prejudicial

As noted above, respondent acknowledges that the trial court should not have given CALJIC No. 2.11.5 because an unjoined perpetrator – i.e., Witness No. 16 – was a witness at trial. (RB 126.) According to respondent, any error was harmless because other instructions "adequately directed the jury how to weigh the credibility of witnesses." (*Ibid.*, citing *People v. Cornwell* (2005) 37 Cal.4th 50, 88, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Respondent is incorrect.

Contrary to respondent's position (RB 126-128), the error was not cured by the other instructions which were given at trial. Most important, the error was not cured by CALJIC No. 2.20, which directed the jury to consider the existence of any "bias, interest, or other motive" in evaluating a witness's testimony. (6 CT CT 1772; 29 RT 3688.) In particular, that instruction did not negate the fact that CALJIC No. 2.11.5 *specifically* and *affirmatively* precluded the jury from considering an accomplice witness's immunity from prosecution in assessing his credibility. Thus, the jury may well have understood that, while they were permitted to consider a witness's "bias, interest or other motive" as a general matter, they were specifically forbidden from considering why an accomplice witness was not being prosecuted for the crimes about which he was testifying. (AOB 213-214.)

Indeed, nothing in the "full panoply of witness credibility and accomplice instructions" (RB 126-127, citing *People v. Lawley* (2002) 27 Cal.4th 102, 162-163) advised the jurors that they properly could consider the fact that Witness No. 16 had been granted immunity in assessing his credibility. *Lawley* and the other cases cited by respondent fail to explain satisfactorily, if at all, why jurors would understand that, "although the separate prosecution or nonprosecution of coparticipants, and the reasons therefor, may not be considered on the issue of the charged defendant's guilt, a plea bargain or grant of immunity may be considered as evidence of interest or bias in assessing the credibility of prosecution witnesses." (*People v. Lawley*, *supra*, 27 Cal.4th at p. 162; see also *People v. Carrera* (1989) 49 Cal.3d 291, 312-313; *People v. Sheldon* (1989) 48 Cal.3d 935, 947; *People v. Malone* (1988) 47 Cal.3d 1, 50-51; *People v. Fonseca* (2003) 105 Cal.App.4th 543, 550.) If anything, jurors naturally would view a plea

bargain or grant of immunity as associated with the "prosecution or nonprosecution of coparticipants, and the reasons therefor," and therefore as a matter not to be considered.[52]

This Court has reasoned that "[i]mplicit in the direction to view an accomplice's testimony with distrust is the judgment that an accomplice has an implied motive to testify in a manner beneficial to himself." (*People v. Malone*, *supra*, 47 Cal.3d at p. 51.) This reasoning, however, presumes that jurors will disregard the clear direction of CALJIC No. 2.11.5 – to "not discuss or give any consideration as to why the other people are not being prosecuted in this trial or whether they have been or will not be prosecuted in the future" (VI CT 1754; 27 RT 3380-3381) – and consider the grant of immunity in evaluating Witness No. 16's credibility. Yet, jurors are routinely called upon to disregard inferences raised by matters they hear in court,[53] and reviewing courts presume that they are able to do so (see

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[52] For this reason, appellant respectfully requests that this Court reconsider its position that "the full panoply of witness credibility and accomplice instructions" properly instruct the jury with respect to evaluating an unjoined perpetrator's credibility. (See *People v. Lawley*, *supra*, 27 Cal.4th at p. 162.)

[53] See, e.g., CALJIC No. 1.00 [instructing juries, among other things, that "if anything concerning the law said by the attorneys . . . conflicts with [the court's] instructions on the law, [the jury] must follow [the court's] instructions"]; CALJIC No. 1.02 [instructing juries that: statements made by the attorneys during trial are not evidence; if an objection to a question is sustained, not to guess what the answer might have been or speculate as to the reason for the objection; they are not to assume to be true any insinuation suggested by a question asked of a witness; they are not to consider any offer of evidence that was rejected, or any evidence stricken by the court]; CALJIC No. 2.09 [regarding evidence limited as to purpose]; CALJIC No. 2.25 [instructing jury not to draw

(continued...)

People v. Delgado (1993) 5 Cal.4th 312, 331). Similarly, while the version of CALJIC No. 2.11.5 given in this case explained to the jury that its "sole duty [was] to decide whether the People have proved the guilt of these defendants" (6 CT 1754; 27 RT 3380-3381) – language not present in the 1988 version of the instruction deemed to be defective by this Court (see *People v. Fonseca, supra*, 105 Cal.App.4th at p. 550 and cases cited therein) – this instruction failed to advise the jury that it was permitted to consider the fact that Witness No. 16 had been granted immunity.

Respondent also suggests incorrectly that, in light of the examination and cross-examination of Witness No. 16, the argument relating to his credibility, and substantial evidence of guilt other than Witness No. 16's testimony, there is no reasonable probability of a different outcome had a limiting instruction been given. (RB 127.) First, the prosecutor engaged in misleading argument to suggest that Witness No. 16 was not an accomplice on the basis of the evidence at this trial. For instance, the prosecutor argued that the jury would not have convicted Witness No. 16 of being accomplice. (27 RT 3451, 3457.) According to the prosecutor, the only evidence against Witness No. 16 was that, on one occasion, Elizabeth Torres identified him as having been at her house with her son and other Sangra members prior to the crimes. The prosecutor argued that the evidence otherwise established nothing more than his knowledge that the murders would be committed and his presence near the crime scene. (27 RT 3451-3454; 29 RT 3664-3665.) In so arguing, the prosecutor ignored the overwhelming evidence showing that Witness No. 16 not only knew his fellow Sangra members were going to El Monte for some criminal purpose, whether robbery, assault or murder,

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[53](...continued)
certain inferences from a witness's refusal to testify].

but that he *agreed* to drive some of them there to carry out that purpose. (20 RT 2687-2688, 2694, 2714; 21 RT 2776-2777, 2781, 2782, 2784, 2802-2803, 2848-2849.)

Moreover, the prosecutor suggested that Witness No. 16 was not an accomplice because the crime would have happened even if he had not driven Jose "Pepe" Ortiz to El Monte. (27 RT 3453.) But, of course, that is not the test. The critical question was whether Witness No. 16 acted with knowledge of the criminal purpose of the perpetrators and with an intent or purpose either of committing the offense or of encouraging or facilitating the commission of the offense. (*People v. Beeman* (1984) 35 Cal.3d 547, 560 [defining aiding and abetting].) The evidence established that he did. Indeed, the prosecutor acknowledged that Ortiz was "one of the ring leaders." (29 RT 3665.)

Second, irrespective of the prosecutor's examination of and argument regarding Witness No. 16, the jury necessarily deliberated under the erroneous belief that it could not consider the fact that he had been granted immunity from prosecution. The jury was specifically instructed that "if anything concerning the law said by the attorneys . . . conflicts with [the court's] instructions on the law, [the jury] must follow [the court's] instructions." (VI CT 1709-1710 [CALJIC 1.00].) It must be presumed that the jurors followed this instruction. (*People v. Delgado*, *supra*, 5 Cal.4th at p. 331.)

Third, appellant has amply demonstrated that Witness No. 16's testimony was critical to the prosecution's ability to obtain murder convictions against appellant, and that, absent Witness No. 16's testimony, the case against appellant was weak. (Argument 6, AOB 179-209 and pp. 79-82, *ante*; Argument 7, AOB 215-216.) Most important, Witness. No. 16

was the only witness whose testimony implicated appellant as one of the two shooters.

As such, this case is distinguishable from *People v. Sheldon*, *supra*, 48 Cal.3d at p. 947, cited by respondent. (RB 127.) In that case, the trial court's error in giving CALJIC No. 2.11.5 was deemed harmless because, among other things: (1) apart from the testimony of the defendant's wife (who testified against him in exchange for a reduced sentence), there was substantial evidence of his guilt; (2) there was very little evidence supporting the theory that his wife may have taken a major role in the murder and other offenses; and (3) the defendant had full opportunity to cross-examine her, and to explore and argue to the jury any possible bias or collateral motive on her part. (*Ibid.*)[54]

Contrary to respondent's contention, then, the error was unduly prejudicial, and, contrary to respondent's contention (RB 128, fn. 65), violated appellant's federal constitutional rights to a fair trial and to present a complete defense. (U.S. Const., 6th and 14th Amends.) Accordingly, reversal of the entire judgment is required.

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[54] It should also be noted that Sheldon's jury was given the full set of instructions for evaluating accomplice testimony, including the admonition that accomplice testimony should be viewed with distrust. (*People v. Sheldon*, *supra*, 48 Cal.3d at p. 947.) Here, the jury instructions left it up to appellant's jury to determine whether Witness No. 16 was an accomplice. (27 RT 3353-3356; 6 CT 1714-1720 [CALJIC No. 3.19].) Therefore, it cannot be assumed that the jury viewed Witness No. 16's testimony with the distrust it demanded.

8

APPELLANT'S CONVICTIONS AND THE DEATH JUDGMENT MUST BE REVERSED BECAUSE LIABILITY CANNOT BE BASED ON AN UNCHARGED CONSPIRACY

In his opening brief, appellant argued that the trial court erred in allowing an uncharged conspiracy to be used as a theory of criminal liability for murder, denying the federal constitutional due process and jury trial guarantees. (AOB 217-226.)

Respondent contends that there was no error and that, even if the uncharged conspiracy theory of liability was invalid, the error was harmless. (RB 128-132.) Respondent's contention is incorrect.

A. The Trial Court Erred in Permitting the Prosecution to Present An Uncharged Conspiracy Theory

Appellant acknowledges that, as respondent points out (RB 127-129), this Court has long permitted the use of an uncharged conspiracy as a theory of liability. (See *People v. Belmontes* (1988) 45 Cal.3d 745, 788-789, and cases cited therein.) However, appellant has demonstrated that prosecution of a defendant under an uncharged conspiracy theory violates both federal constitutional principles prohibiting conviction of an uncharged offense and California law requiring that crimes be defined solely by statute. (AOB 218-221.) Therefore, it is appropriate that this Court reconsider its earlier decisions approving the use of an uncharged conspiracy to establish liability for charged offenses. (AOB 221-223.)

Respondent also rejects appellant's argument that an uncharged conspiracy as a theory of criminal liability creates an impermissible mandatory presumption in violation of *Sandstrom v. Montana* (1979) 442 U.S. 510 and *Carella v. California* (1989) 491 U.S. 263. (RB 130-131.)

According to respondent, the instructions given here, unlike those in *Sandstrom* and *Carella*, did not tell the jury that it could presume any *particular* element of murder based on proof of predicate facts. (RB 130.) This is true. Yet the instructions here were even worse than in those cases.

As appellant pointed out (AOB 223-224), so long as the jury found him to be a co-conspirator, the instructions made it unnecessary for them to find that he acted as a principal by either directly committing the crime or aiding and abetting in its commission. In other words, the conspiracy instructions given in this case created a mandatory presumption as to *all* of the elements of murder. They operated to inform the jury "'that it must assume the existence of the ultimate, elemental fact from proof of specific, designated basic facts'" (*People v. Roder* (1983) 33 Cal.3d 491, 498, quoting *Ulster County Court v. Allen* (1979) 442 U.S. 140, 167). (AOB 223-224.)

Appellant submits that this error and its effects should not be ignored or obscured by casting the uncharged conspiracy instructions as a mere "theory of liability" rather than a mandatory presumption of the type addressed in *Sandstrom v. Montana*, *supra*, 442 U.S. 510 and *Carella v. California*, *supra*, 491 U.S. 263. (RB 130.) In any event, as appellant explains in the following section, there can be no confidence that the jury relied on a legally valid theory of liability in reaching its verdict.

B. The Error Was Prejudicial

Contrary to respondent's position (RB 131-132), the trial court's error in permitting the use of an uncharged conspiracy as a basis for liability for first degree murder was prejudicial.

First, respondent is incorrect in contending that the jury's finding that appellant personally used a firearm in the commission of each offense

necessarily indicates that the jury believed appellant was one of the shooters. Although the jurors were advised that "[t]he term 'personally used a firearm'. . . means that the defendant must have intentionally displayed a firearm in a menacing manner, intentionally fired it, or intentionally struck or hit a human being with it" (6 CT 1745 [CALJIC No. 17.19 (1996 Revision)]), they may have believed that the personal use allegation must be found true so long as *someone* involved in the conspiracy used the firearm in the manner described in CALJIC No. 17.19. That is, the jury may have interpreted CALJIC No. 6.11, regarding the joint responsibility shared by each member of a conspiracy, to mean that appellant must be deemed liable for a co-conspirator's use of a firearm. (6 CT 1723 [CALJIC No. 6.11 (1991 Revision) [Conspiracy – Joint Responsibility]].) Moreover, in light of ballistics evidence purportedly tying ammunition found in apartments where appellant had lived to the weapons used in the shootings (18 RT 2355-2357; 19 RT 2429-2431, 2441-2442, 2444-2446, 2451), the jury may have found the weapon use allegation to be true even if they believed that Sangra members other than appellant had committed the offenses, simply because they believed the ammunition had belonged to appellant.

The jury was especially likely to view the alleged conspiracy in such a sweeping manner given the prosecution theory that Sangra members committed the offenses in a well-planned, coordinated fashion, for the benefit of their gang and at the behest of the Mexican Mafia. (27 RT 3399-3400, 3403-3406, 3416-3423, 3445-3450.) In support of its theory, the prosecutor introduced evidence that: (1) the Mexican Mafia controlled Southern California street gangs, including Sangra (18 RT 2267, 18 RT 2272-2273, 2278); (2) on the evening of the shootings, Sangra members

gathered at Anthony Torres's house (14 RT 1883-1885, 1907, 1909; 15 RT 2074-2082, 2086, 2096; 20 RT 2681, 2684; 21 RT 2763-2766) and then drove to El Monte (20 RT 2697-2698; 21 RT 2775, 2801); (3) a number of calls were placed to Luis Maciel's pager from the residences of Jose Ortiz, Anthony Torres, and Jimmy Palma on the evening of April 22, 1995, and the next day (20 RT 2608-2609, 2613-2614, 2616-2618; 23 RT 3027); and (4) Sangra was a "terrorist street gang," whose members had a "common name," a "common identifying sign or symbol," and gang signs unique to their gang (19 RT 2506-2508). The prosecution also introduced the opinion of a gang expert that a primary activity of the Sangra street gang was the commission of various criminal offenses, and that it would enhance the gang's reputation to commit a crime at the direction of or in association with the Mexican Mafia. (19 RT 2506-2508, 2510.) In light of the extraordinarily broad scope of the prosecution's gang evidence, it is likely that the jury found appellant guilty, even if they had a reasonable doubt that he had actually participated in the shootings, simply because they believed him to be liable for acts committed by other members of his gang.

Second, respondent incorrectly suggests that the error was harmless as to appellant's convictions for the murders of Maria Moreno, Laura Moreno and Ambrose Padilla. A gang expert, Richard Valdemar testified the Mexican Mafia's "code of conduct" forbids the killing of children. (18 RT 2316, 2319.) Thus, a "hit" resulting in the murders of children would be considered a "dirty hit" by the Mexican Mafia (18 RT 2320), and anyone who committed such a hit would be subject to discipline by the gang. (18 RT 2274, 2320, 2328.) Accordingly, in light of the uncontradicted evidence that the Mexican Mafia did not order or intend for the children to be killed (23 RT 3120-3122, 3130), it cannot be said that appellant shared Palma's

intent to shoot the children, or that it was reasonably foreseeable that Palma would shoot them.

In any event, respondent is incorrect in arguing that any error in presenting an uncharged conspiracy theory was harmless because the jury, even if it relied upon that theory, necessarily also relied upon a legally proper theory, i.e., aiding and abetting. (RB 131-132, citing *People v. Guiton* (1993) 4 Cal.4th 1116, 1130.) Because the jury found appellant guilty of first degree murder on general verdict forms (VII CT 1800-1804), it cannot be ascertained which theory or theories the jury relied on in convicting appellant of five counts of murder. Therefore, as appellant has pointed out, respondent cannot show that the jury did not rely on the invalid conspiracy theory in arriving at the murder finding. (AOB 224-225.)

Moreover, no theory of liability may be considered legally proper in light of the numerous evidentiary, instructional and judicial errors affecting the guilt verdicts. (See Arguments 1 through 7, 9 and 10.) Those errors operated, among other things, to: (1) permit the prosecutor to introduce improper, inflammatory propensity evidence, and to present the jury with a frightening, exaggerated sense of the reach and unity of purpose among the Sangra and Mexican Mafia members (Arguments 3 through 5); (2) preclude the jury from properly assessing the credibility of Witness No. 16, a critical prosecution witness, thereby making it more likely that the jury would credit his testimony implicating appellant (Arguments 6 and 7); (3) preclude a proper consideration of the conspiracy theory of liability (Argument 9); and (4) unfairly disparage the defendants and undermine the gravity and solemnity of the proceedings (Argument 10). At the same time, those errors improperly undercut defense evidence introduced to show that appellant was not involved in the case and that one of the victims, Gustavo "Tito"

Aguirre, may have provoked a gang called the "Border Brothers" by robbing drug "connections" associated with that gang. (13 RT 1655-1657, 1680-1681; 14 RT 1826-1832; 15 RT 2042-2045, 2048.)

Accordingly, for these reasons and those stated in the opening brief, the entire judgment must be reversed.

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THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GIVING INCOMPLETE AND CONFUSING INSTRUCTIONS ON CONSPIRACY

In his opening brief, appellant argued that the trial court failed to give complete and accurate instructions relating to the law of conspiracy. Specifically, the trial court failed to identify any overt acts, failed to identify the object or objects of the conspiracy, failed to require unanimous agreement on the object or objects and overall finding of conspiracy, and failed to require proof beyond a reasonable doubt, violating appellant's federal constitutional rights under the Sixth, Eighth and Fourteenth Amendments to a fair jury trial, reliable guilt determination and due process, as well as state constitutional and statutory rights. (AOB 227-240.)

Respondent contends that the claim was forfeited by appellant's failure to object or to request additional or clarifying instructions. Respondent further contends that there was no instructional error. (RB 132-139.) Respondent's contentions are incorrect.

A. The Argument is Cognizable on Appeal

As respondent points out, "[g]enerally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general and incomplete unless the party has requested appropriate clarifying or amplifying language." (RB 133, quoting *People v. Guiuan* (1998) 18 Cal.4th 558, 570.) Nevertheless, appellant's failure to object to the trial court's instructions in this regard, or to request any additional instructions, does not waive the issue, because a trial court has a sua sponte duty to give correct instructions regarding the principles of law essential to the determination of the case, that is, those "closely and openly connected with the facts before the court, and which are necessary for the jury's

understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, quoting *People v. St. Martin* (1970) 1 Cal.3d 524, 531.)

Respondent's reliance upon *People v. Guiuan*, *supra*, 18 Cal.4th 558 and *People v. Dennis* (1998) 17 Cal.4th 468, 514, is misplaced. In *Guiuan*, which involved a prosecution for kidnapping and attempted murder, Guiuan's accomplices testified as prosecution witnesses. (*People v. Guiuan*, *supra*, 18 Cal.4th at pp. 561-563.) Accordingly, the trial court gave CALJIC No. 3.18, the standard instruction to view accomplice testimony with distrust. (*Id.* at p. 563.)[55] However, although some of the accomplice testimony was possibly favorable to Guiuan, the trial court did not modify the instruction sua sponte to state that it did not apply to testimony favorable to the defendant. (*Id.* at p. 560.) This Court held that, in the absence of an objection or request that the instruction be modified, the trial court did not err in giving the standard instruction, which was consistent with this Court's then-existing rule and with prior statutory and decisional law. (*Id.* at pp. 569-570.)

Appellant sees little if any harm flowing from the instruction at issue in *Guiuan*. While the jurors were not told that the instruction did not apply to testimony favorable to the defendant, Guiuan could not have been prejudiced by an instruction which merely advised the jurors to examine an accomplice's testimony (whether favorable to the defendant or not) "with care and caution" and to "give it the weight to which [they found] it to be

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[55] CALJIC No. 3.18, as given in that case, provided that "[t]he testimony of an accomplice ought to be viewed with distrust. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled after examining it with care and caution in the light of all the evidence in the case." (*People v. Guiuan*, *supra*, 18 Cal.4th at p. 563.)

entitled." Indeed, the instruction was consistent with other instructions relating to the jury's evaluation of a witness's credibility, particularly CALJIC No. 2.20. (*People v. Guiuan, supra*, 18 Cal.4th at pp. 578-583 (conc. and dis. opn. of Brown, J.).) Because *Guiuan* involved a jury instruction which, though imperfect,[56] correctly stated the law then in effect, the trial court in that case fulfilled its obligation to instruct the jury as to the principles of law "closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. Sedeno, supra*, 10 Cal.3d at p. 715.)

Similarly, in *People v. Dennis, supra*, 17 Cal.4th 468, which involved a prosecution arising from the killing of a pregnant woman and her fetus, this Court rejected the defendant's argument that the trial court's instructions on malice improperly allowed the jury to apply any malice found toward the woman to the killing of the fetus. (*Id.* at p. 514.) While this Court concluded that Dennis had waived any error by failing to seek additional or clarifying instructions, it also concluded that the instructions were not erroneous, observing that the jury was repeatedly instructed that a conviction for the murder of a viable human fetus requires proof that the killing was done with malice aforethought. (*Id.* at pp. 514-515.) Therefore, the trial court in that case had instructed the jury as to the principles of law "closely and openly connected with the facts before the court, and which are

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[56] This Court announced that, in future cases, the instruction on accomplice testimony should be "pretailored" to refer specifically to testimony favorable to the prosecution. (*People v. Guiuan, supra*, 18 Cal.4th at p. 570.)

necessary for the jury's understanding of the case." (*People v. Sedeno*, *supra*, 10 Cal.3d at p. 715.)

By contrast, full and fair instructions – including instructions alleging specific overt acts, alleging the object or objects of the conspiracy, and requiring unanimous agreement on the object or objects and overall finding of conspiracy – were required in this case to correctly instruct the jury on the law of conspiracy, which served as one of the bases for the murder verdicts. In the absence of such instructions, it cannot be said that appellant's jury was correctly instructed as to the principles of law within the meaning of *Sedeno*.

Under these circumstances, the argument is cognizable on appeal.

B. The Trial Court's Failure to Fully Instruct the Jury on the Law of Conspiracy Was Error

Appellant acknowledges that this Court has rejected previously the argument that the failure to allege specific overt acts constitutes error. (See *People v. Prieto* (2003) 30 Cal.4th 226, 251.) Moreover, appellant acknowledges that this Court has held that jury unanimity is not required where conspiracy is used as a theory of liability rather than as a crime itself. (See *People v. Russo* (2001) 25 Cal.4th 1124, 1134-1135; *People v. Santamaria* (1994) 8 Cal.4th 903, 918.) Nevertheless, for the reasons appellant has set forth in his opening brief, he respectfully requests that this Court reconsider its prior decisions and hold that, in cases involving a theory of uncharged conspiracy, the trial court must instruct the jury sua sponte (1) as to the specific overt acts alleged, (2) that the jury must agree unanimously as to the object or objects and overall finding of conspiracy, and (3) and that the jury must make that determination beyond a reasonable doubt. (AOB 228-232, 234-240.)

Respondent appears to concede that a trial court ordinarily is required to instruct the jury as to the object of the conspiracy (*People v. Prettyman* (1996) 14 Cal.4th 248, 266-267), but contends that the court's failure to do so in this case was not error because the jury was adequately apprised of the "target offense" (that is, the murder of Anthony Moreno) by way of the charges and the prosecutor's argument. (RB 135-136.) Although this Court has explained that a trial court need only instruct on "those [target offenses] that the prosecution wishes the jury to consider" (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 269), appellant submits that the prosecution case encompassed other potential target offenses. For instance, the jury reasonably could have inferred that the target offense was to assault (but not murder) Gustavo "Tito" Aguirre in retaliation for stealing from drug "connections" protected by the Mexican Mafia, or simply to recover whatever he had stolen. (See 27 RT 3428-3430; 29 RT 3618, 3661-3663.) In addition, the jury may have believed that Witness No. 16's testimony established at most that the gang's purpose was to assault or take money from someone. (21 RT 2782 ["We had to take care of something. What that was, I wasn't sure who or how many people would have been killed."], 2802-2803 ["I said I wasn't sure what they were going to do, if they were going to [box or get money from people in El Monte] or kill somebody."], 2804 ["I said killing, too. I said anything could have happened that night."], 2859 [before leaving for Maxson Road, "I just knew there might have been a possibility [people would be killed] because if you are going to take a gun, you know, anything could happen."].) Under these circumstances, the jury in this case may well have convicted appellant based upon nothing more than a "generalized belief that [he] intended to assist

and/or encourage unspecified nefarious conduct." (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 268.)

Therefore, the trial court's failure to give the jury instructions addressed in appellant's argument was error.

C. The Error Was Not Harmless

Respondent incorrectly suggests that the jury necessarily found that the murder of Anthony Moreno was the object of the conspiracy. (RB 138.) As appellant noted in the previous section, they may have found that the object of the conspiracy was to rob or assault someone, not to commit murder. Moreover, had they been fully and properly instructed on the law of conspiracy, the jurors may have concluded that the murders were not the natural and probable consequence of the target offense.

People v. Prettyman, *supra*, 14 Cal.4th 248 is instructive. There, the prosecution alleged that defendant Bray was guilty of murder as an accomplice. Although the trial court instructed the jury that it could find Bray guilty of murder if it determined either that she had aided and abetted the murder or that the murder was a "natural and probable consequence" of any uncharged offense(s) she had aided and abetted, the court did not identify or describe any such uncharged target offense. (*Id.* at p. 254.) This Court noted that if Bray had encouraged codefendant Prettyman to commit an assault on the victim, Van Camp, but that Bray had no reason to believe that Prettyman would use a deadly weapon (such as the steel pipe actually used in the crime) to commit the assault, then the jury could not properly find that the murder of Van Camp was a natural and probable consequence of the assault encouraged by Bray. (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 267.) If, on the other hand, the jury had concluded that Bray encouraged Prettyman to assault Van Camp with the steel pipe, or by means

of force likely to produce great bodily injury, then it could appropriately find that Prettyman's murder of Van Camp was a natural and probable consequence of that assault. (*Ibid.*) Therefore, instructions identifying and describing the crime of assault with a deadly weapon or by means of force likely to produce great bodily injury as the appropriate target crime would have assisted the jury in determining whether Bray was guilty of the murder under the "natural and probable consequences" doctrine. (*Ibid.*)

Appellant is aware that this Court recently decided *People v. Medina* (2009) 46 Cal.4th 913, in which it discussed the "natural and probable consequences" doctrine in the context of a confrontation between gang members.[57] This Court also discussed a number of prior gang-related cases in support of its conclusion that, at least under the evidence presented at trial, a homicide was a reasonably foreseeable consequence of the gang confrontation. (*Id.* at pp. 925-927.) Nevertheless, at least with respect to appellant, *Medina* is distinguishable from the instant case in significant respects.

First, contrary to respondent's contention (RB 138-139), the personal firearm use findings do not establish that the jury necessarily found that appellant directly participated in the murders. As appellant pointed out in the previous argument (*ante*, p. 92), the jurors may have believed that the personal use allegation must be found true so long as s*omeone* involved in the conspiracy used the firearm in the manner described in CALJIC No. 17.19, even if that person was not appellant.

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[57] Appellant summarized the *Medina* opinion in Argument 6, *ante*, at p. 76.

Second, respondent is incorrect in arguing that the jury necessarily concluded that the murders of Maria Moreno, Laura Moreno and Ambrose Padilla were a natural and probable consequence under either an aiding and abetting theory or a conspiracy theory of liability. (RB 138.) As appellant has pointed out (*ante*, pp. 93-94), the murders of Laura Moreno and Ambrose Padilla were not reasonably foreseeable in light of the fact that the Mexican Mafia did not intend that the children be killed and would punish anyone who violated its protocol against killing children. In any event, no theory of liability may be considered legally proper in light of the numerous evidentiary, instructional and judicial errors affecting the guilt verdicts. (See Arguments 1 through 8, and 10.) Those errors operated, among other things, to: (1) permit the prosecutor to introduce improper, inflammatory propensity evidence, and to present the jury with a frightening, exaggerated sense of the reach and unity of purpose among the Sangra and Mexican Mafia members (Arguments 3 through 5); (2) preclude the jury from properly assessing the credibility of Witness No. 16, a critical prosecution witness, thereby making it more likely that the jury would credit his testimony implicating appellant (Arguments 6 and 7); (3) improperly permitted the use of an uncharged conspiracy as a basis for liability for first degree murder (Argument 8); and (4) unfairly disparage the defendants and undermine the gravity and solemnity of the proceedings (Argument 10). At the same time, those errors improperly undercut defense evidence introduced to show that appellant was not involved in the case and that one of the victims, Tito Aguirre, may have provoked a gang called the "Border Brothers" by robbing drug "connections" associated with that gang. (13 RT 1655-1657, 1680-1681; 14 RT 1826-1832; 15 RT 2042-2045, 2048.)

For the reasons set forth above and in appellant's opening brief, then, respondent is incorrect in suggesting that, even if the instructions were erroneous, the error was harmless under either the state or federal standard. (RB 138-139.) Moreover, respondent is incorrect in suggesting that because there was no state law instructional error, there could have been no federal constitutional violation. (RB 138, fn. 69.) Accordingly, the entire judgment must be reversed.

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THE TRIAL COURT FAILED TO MAINTAIN THE PROPER JUDICIAL DECORUM BY ADDRESSING AND REFERRING TO THE JURORS, COUNSEL, AND COURT PERSONNEL BY MOCK "GANG MONIKERS" THAT RIDICULED THE DEFENDANTS AND UNDERMINED THE SOLEMNITY OF THE PROCEEDINGS, REQUIRING REVERSAL OF THE ENTIRE JUDGMENT

In his opening brief, appellant argued that the trial court violated appellant's rights to a fair trial and a fair determination of penalty when it repeatedly addressed and referred to the jurors, counsel and court personnel by mock gang monikers. (AOB 241-250.)[58] Respondent contends that the claim is forfeited for lack of an objection, and that, in any event, there was no error. (RB 139-144.) Respondent's contention is incorrect.

A. The Argument Is Cognizable on Appeal

Appellant already has demonstrated that defense counsel's failure to object did not waive the court's error. (AOB 247-248.) As he pointed out, issues relating to the bias of a trial judge have been found cognizable on appeal notwithstanding the lack of an objection in the trial court. (AOB 247-248, citing *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 244, disapproved on another ground in *People v. Freeman* (2010) ___ Cal.Rptr.3d ___, 2010 WL 184239.) Moreover, the rule that an appellate

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[58] The mock gang monikers were "Comet" (referring to counsel for co-defendant Palma); "Slippers" (referring to counsel for appellant); "Windex" (referring to the prosecutor); "Incognito," "Booky," "Ill-Bit," "Fidler," "Coco," "Eagle Scout," "Sharpy," "Rabbit," "Curly," "Tree," "V" or "6," "Sleepy," "Foxy," "Sharper," "The Suit," "Smiley," "Snickers," and "Dopey" (referring to the jurors and alternate jurors); and "Coach," "Racer," "Bambi," and "Flash" (apparently referring to court staff, perhaps including the trial judge). (23 RT 3014-3015.)

court will not consider points not raised at trial does not apply where, as here, the issue involves "the public interest or the due administration of justice." (AOB 248, citing 9 Witkin, Cal.Procedure (3d ed. 1985), Appeal, § 315, p. 326.) Finally, misconduct can be raised on appeal even absent an objection at trial if the misconduct is such that an objection and admonition to the jury to disregard the improper matter would have proved fruitless. (AOB 248, citing *People v. Malone* (1988) 47 Cal.3d 1, 36-37.)

Respondent dismisses the seriousness of the trial court's remarks by citing *People v. Sturm* (2006) 37 Cal.4th 1218. (RB 142.) There, this Court noted that

> [g]iven the evident hostility between the trial judge and defense counsel during the penalty phase, it would [] be unfair to require defense counsel to choose between repeatedly provoking the trial judge into making further negative statements about defense counsel and therefore poisoning the jury against his client or, alternatively, giving up his client's ability to argue misconduct on appeal. On this record, we are convinced that any attempt by defense counsel to object to the trial court's numerous sua sponte objections and derogatory comments 'would have been futile and counterproductive to his client.' [Citation.]

(*Id.* at p. 1237.)

Similarly, the Court of Appeal in *Catchpole v. Brannnan*, *supra*, 36 Cal.App.4th 237, held that the plaintiff's failure to object did not waive her claim of gender bias, reasoning that

> [f]ew more daunting responsibilities could be imposed on counsel than the duty to confront a judge with his or her alleged gender bias in presiding at trial. The risk of offending the court and the doubt whether the problem could be cured by objection might discourage the assertion of even meritorious claims. Requiring the issue to be raised at trial

would therefore have the unjust effect of insulating judges from accountability for bias.

(*Catchpole v. Brannon*, *supra*, 36 Cal.App.4th at p. 244.)

However, defense counsel in this case were in a similar quandary. If they declined to object, they risked an assertion by the State that they forfeited any claim relating to judicial bias or judicial misconduct flowing from the court's use of the mock gang monikers. On the other hand, if they objected to the court's comments, they risked antagonizing both the judge and jury. Finally, as appellant has pointed out, the trial court was the source of the objectionable misconduct, so there was no one to object to. (AOB 248.) Moreover, defense counsel could not reasonably be expected to object where the jurors had chosen their own gang monikers and may have been entertained by the trial court's improper jokes. (*Ibid.*)

B. Judge Trammell's Jokes Mocking the Defendants' "Gang Monikers" Contravened the Canons and Standards Governing Judicial Conduct, Violating Appellant's Rights to a Fair Trial and Reliable Penalty Determination

Respondent acknowledges that "[t]rial judges 'should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other.' [Citation.]" (RB 142, quoting *People v. Sturm*, *supra*, 37 Cal.4th at pp. 1237-1238.) However, respondent mischaracterizes the court's jokes as nothing more than "good-natured repartee" with the jury. (RB 143.) This is incorrect.

First, the trial court committed misconduct even if, as respondent asserts, its comments arose from a concern that the jury was overly somber. (RB 143.) As the Court of Appeal pointed out in *Haluck v. Ricoh*

Electronics, Inc. (2007) 151 Cal.App.4th 994, 1008, an appeal from a civil judgment,

> [i]t is obvious that much of the judge's conduct was not malicious but rather a misguided attempt to be humorous, and defendants' lawyer played into it, often acting as the straight man. But a courtroom is not the Improv and the presider's role model is not Judge Judy. We can only imagine what was in the jurors' minds as they endured a 30-plus day trial in this atmosphere or the impression of the judicial system they took away with them posttrial.

Here, appellant was charged with five counts of murder, including the murders of a mother and her two small children. He was on trial for his life. If the jury was somber, that was only appropriate under the circumstances. (See *Estes v. Texas* (1965) 381 U.S. 532, 541.)

Moreover, contrary to respondent's suggestion (RB 143), it is immaterial that the jury may have instigated the use of the mock gang monikers. At the very least, the trial court took up their joke and "ran with it," helping undermine the seriousness of the proceedings. (See *Haluck v. Ricoh Electronics, Inc.*, *supra*, 151 Cal.App.4th at p. 1003 [holding that judge committed misconduct because, although some of the improper comments were made by defendants' counsel, "the judge instigated and encouraged many of them. He also allowed, indeed helped create, a circus atmosphere, giving defendants' lawyer free rein to deride and make snide remarks at will and at the expense of plaintiffs and their lawyer."].) Indeed, the record suggests that the trial court itself instigated the joke. The subject first appears in the record when the trial court said to the jury:

> I have ascertained one thing and that is that apparently one of you has now acquired a moniker. I am not going to tell you what it is but – because if I were to tell you what it is you would know who it was, but *maybe by the time we're through*

all 18 of you will have a moniker that's assigned to you out here unbeknownst to you. I'm not sure.

(18 RT 2391; emphasis added.) On this record, the court's quip was the genesis of the joke, and the jury took their cue from the trial court in inventing the mock gang monikers.

The absurdity and ridiculousness of those monikers indicates not the jurors' "willingness to associate themselves with gang membership," as respondent would have it, but their view of the defendants as alien and beneath contempt. (RB 143.) Even if the jokes did not focus directly upon appellant, the very notion of gang monikers arose solely from the evidence that appellant, co-defendant Palma and others used such monikers. In other words, the mockery was aimed in one direction, at the defendants, and therefore it both demonstrated and stoked the jury's partiality.

Under these circumstances, the trial court's conduct constituted error.

C. The Trial Court's Error Was Prejudicial

Finally, respondent contends that even if error occurred, it was harmless. (RB 143.) Respondent essentially reiterates its argument as to why the court's comments did not constitute misconduct. For the reasons stated above, respondent's analysis is flawed.

First, it is immaterial that the comments did not refer directly to appellant. (RB 144.) The use of mock gang monikers by the trial court and the jury obviously caricatured the defendants, not anyone else involved in the trial. Again, the mockery was aimed solely at the defendants, and it both indicated and encouraged the jury's partiality.

Second, this Court cannot take seriously respondent's suggestion that the jury's adoption of gang monikers suggests that they were not prejudiced

against appellant by the fact of his gang membership. (RB 144.) It defies belief that the jurors "associate[d] themselves with gang membership." (RB 143.) It is far more plausible that the trial court and jury were holding up for ridicule the use of such monikers and, by extension, the defendants themselves. Contrary to respondent's position (RB 144), the trial court's comments did not merely concern the defendants' gang membership, but they held up the defendants for derision and ridicule.

Finally, while respondent states that "this bit of levity was an *anomaly*" (RB 144; emphasis in original), the record reveals that the trial court engaged in these jokes on October 29, 1996, and again on November 6, 1996. (18 RT 2391; 23 RT 3014-3015, 3102.) Moreover, as noted in the preceding section, the jury may have gotten the idea of fake gang monikers from the trial court (18 RT 2391), suggesting that the joke percolated and was discussed sometime between those two dates. Thus, the trial court's comments injected prejudicial humor into the proceedings.

The entire judgment must be reversed because the trial court's comments constituted structural error. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-310.)[59] At a minimum, reversal of the entire judgment is required because the People cannot establish that this federal constitutional error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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[59] Appellant sufficiently demonstrated in his opening brief that the error was structural in nature. (AOB 249.) Therefore, he need not address respondent's attempt to rebut that argument. (See RB 143-144, fn. 70.)

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THE TRIAL COURT'S RESPONSE TO THE JURY'S ANNOUNCEMENT THAT IT HAD REACHED AN "IMPASSE" IN ITS GUILT-PHASE DELIBERATIONS VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS

In his opening brief, appellant argued that the trial abused its discretion when it ordered the jurors to continue deliberating despite the fact that they had indicated that they were at an impasse and that no additional readback of testimony or clarification of instructions would assist them in reaching a verdict, and despite the foreperson's statement that he believed all of the jurors had deliberated in good faith. (AOB 251-267.)

Respondent contends that there was no abuse of discretion because the trial court (1) did not improperly rely solely on the length of deliberations in support of its ruling, and (2) did not give an improper "*Allen*" instruction.[60] (RB 144-155.) Respondent's contentions are incorrect.

A. The Trial Court Abused Its Discretion in Refusing to Grant a Mistrial When the Jurors Unanimously Reported That They Were Hopelessly Deadlocked After More Than 16 Hours of Deliberation

Penal Code section 1140 requires the trial court to discharge the jury without reaching a verdict where both parties consent or where "at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." As this Court has explained, "[t]he determination whether there is a reasonable probability of agreement rests in the sound discretion of the trial court,

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[60] See *Allen v. United States* (1896) 164 U.S. 492.

based on consideration of all the factors before it." (*People v. Halvorsen* (2007) 42 Cal.4th 379, 426.)

In his opening brief, appellant argued that "consideration of all the factors" before the trial court demanded that it grant a mistrial, and that its refusal to do so constituted an abuse of discretion. (AOB 261-263.) The following factors, at a minimum, suggested that it should have declared a mistrial: the jury submitted a note announcing that it was at an impasse (33 RT 3789; VI CT 1696, 1698); each of the jurors affirmed that no additional readback of testimony or clarification of instructions would assist in reaching a verdict (33 RT 3793-3794); the foreperson informed the trial court that he believed all of the jurors had deliberated in good faith (33 RT 3795); the jury had deliberated for approximately 16½ hours by that point (VI CT 1685, 1688, 1691, 1693, 1698); and the jury had requested a number of readbacks (30 RT 3713-3714, 3723-3725; 31 RT 3741-3755; 32 RT 3756-3763; VI CT 1685-1692, 1694-1695). However, the trial court's only stated reason for denying the motion for mistrial was that it did not believe the jury had "put in enough time. . . ." (33 RT 3796-3797.)

Respondent appears to be under the misapprehension that appellant argued that the trial court was obligated to give controlling weight *as a matter of law* to the jurors' unanimous judgment that further deliberations would be futile. (RB 150-151.) This is not so. Rather, appellant argued that, "considering all the circumstances" (AOB 263), the jurors' judgment deserved controlling weight and the trial court should have declared a mistrial. (AOB 261-263.)

As respondent observes, a trial court generally is presumed to have been aware of and followed the applicable law. (RB 151, citing *People v.*

Stowell (2003) 31 Cal.4th 1107, 1114.) However, as the *Stowell* Court explained, that rule

> derives in part from the presumption of Evidence Code section 664 'that official duty has been regularly performed.' Thus, where a statement of reasons is not required and the record is silent, a reviewing court will presume the trial court had a proper basis for a particular finding or order. [Citation.]

(*Ibid.*) Here, such a presumption is inappropriate because the record is not silent. To the contrary, the record affirmatively demonstrates that the trial court misapplied the law by deciding the motion after considering only one of several factors.

Even if the trial court was familiar with the evidence in the case and the temperament of the jury, the record suggests that it did not actually consider those factors. (Cf. *People v. Caradine* (1965) 235 Cal.App.2d 45, 47, 50 [the trial court properly found that it was not reasonably probable the jury would reach a verdict after asking the foreman "a good many questions" regarding the state of their deliberations, and the foreman apparently responded to the satisfaction of the entire jury].) Therefore, respondent's reliance upon *Caradine* is misplaced. (RB 151.)

Similarly misplaced is respondent's reliance on *People v. Price* (1991) 1 Cal.4th 324. There, this Court concluded that "because the penalty trial lasted over three weeks and the entire trial (excluding jury selection) over seven months, the trial court could reasonably determine that the jury had not deliberated sufficiently on the voluminous evidence presented to it, and that a finding of deadlock would be premature." (*Id.* at p. 467.) However, a review of *Price* reveals several facts from which the trial court in that case reasonably could reach that determination.

First, the jury foreperson reported that, at the time she wrote a note declaring that the jury had reached an impasse, she was "not sure" whether further deliberations would produce a verdict. (*Id.* at p. 465.) Second, the foreperson advised the court that, after submitting the note, the jury had taken another vote, the "numbers [had] changed," and she believed that the jury might not be at an impasse. (*Ibid.*) Third, after the jury submitted a second note declaring an impasse, the trial court polled the jurors, one of whom was unsure whether he or she agreed that further deliberations would probably not result in a verdict. (*Ibid.*; see also *People v. Butler* (2009) 46 Cal.4th 847, 882 [when the trial court asked the jury whether there was a possibility that it could reach a verdict, one of the jurors responded, "I think so"].)

By contrast, the jury in appellant's case had requested several readbacks (30 RT 3713-3714, 3723-3725; 31 RT 3741-3755; 32 RT 3756-3763; VI CT 1685-1692, 1694-1695), suggesting that it had taken its deliberations seriously. Indeed, the foreperson advised the court that the jurors had been deliberating in good faith. (33 RT 3794-3795.) Moreover, all of the jurors in appellant's case indicated that no additional readback of testimony or clarification of instructions would assist in reaching a verdict. (33 RT 3793-3794.) Under these circumstances, the trial court had no basis to find a reasonable probability that the jury would agree on a verdict.

Accordingly, the trial court abused its discretion in denying appellant's motion for a mistrial.

B. The Trial Court's Supplemental Instruction to the Jury Was Improper Because it Encouraged the Jurors to Consider the Numerical Division

In his opening brief, appellant demonstrated that the trial court gave an improperly coercive *Allen* instruction in violation of *People v. Gainer* (1977) 19 Cal.3d 835. (AOB 263-266.)

Respondent contends that the trial court did not give an improper *Allen* instruction because it "did not instruct the jurors to take into account the fact that other jurors had decided differently, or in any other way exact pressure to return a verdict at the cost of independent judgment, but simply urged the jurors to continue properly deliberating in an attempt to reach agreement." (RB 155.) However, a careful reading of the instruction shows that it contained several of the fatal defects discussed in *Gainer*.

This Court has explained that instructing jurors to "weigh not only the arguments and evidence but also their own status as dissenters – a consideration both rationally and legally irrelevant to the issue of guilt" – improperly deflects them from their proper role as triers of fact. (*People v. Gainer*, *supra*, 19 Cal.3d at p. 848.) Therefore, as respondent itself acknowledges (RB 153), "[s]ince recognition of the existence of a majority or minority faction on the jury is irrelevant to the issue of guilt, such reference is erroneous, even if contained in an arguably noncoercive, 'balanced' . . . charge which explicitly admonishes the majority as well as the minority to reconsider their views." (*People v. Gainer*, *supra*, 19 Cal.3d at p. 850, fn. 12.)

The instruction in the instant case expressly addressed "the minority" and "the majority" as distinct groups (33 RT 3798-3799), introducing the "rationally and legally irrelevant" consideration identified in *Gainer*. That

is, the instruction essentially mandated that each juror "consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on the issues before them." (*People v. Gainer*, *supra*, 19 Cal.3d at p. 852.) Because each juror necessarily considered his or her status as a member of one group or the other, those in the majority were likely to hold more rigidly to their views (i.e., "the preponderance of opinion") and those in the minority to acquiesce in the verdict.

The court's instruction reinforced this error by telling each juror to "convince" fellow jurors that his or her position was correct. (33 RT 3797-3799.) *Smalls v. Batista* (S.D.N.Y. 1998) 6 F.Supp.2d 211 is instructive. There, the trial court, after receiving a note from the jury reporting that it was deadlocked eleven to one, gave an unbalanced *Allen* instruction over defense counsel's objection. Among other things, the court instructed the jurors as follows: "you should make every effort to convince the others," "it is your responsibility as a juror to convince the others as to the correctness of the position of views that you have," "it is your responsibility as a juror to attempt to convince the others of the correctness of your views," "it is your responsibility to convince the others, have them switch, have them adopt your views." (*Smalls v. Batista*, *supra*, 6 F.Supp.2d at p. 220.)

The district court, reviewing the case in habeas corpus proceedings, concluded that the instruction was coercive because it distorted the role of deliberating jurors, forcing them to become advocates instead of listeners. (*Ibid.*) Significantly, the instruction was improper even though the trial court had not singled out either the majority or minority. As the district court explained, the jury was deadlocked eleven to one, and, according to the instruction, the lone juror was either to accede to the arguments of the

majority or had the "responsibility" of convincing the majority of his or her position. (*Ibid.*)[61]

According to respondent, the instruction given in this case was analogous to an instruction approved in *People v. Moore* (2002) 96 Cal.App.4th 1105. (RB 153.) However, the instruction in *Moore* did not contain the defects present in the instruction challenged in the instant case. In particular, the instruction in *Moore* did not divide the jury into a "majority" and a "minority"; its description of the duties of the jurors applied to the entire jury; and it did not exhort each juror to "convince" fellow jurors that his or her position was correct. (*People v. Moore*, *supra*, 96 Cal.App.4th at pp. 1118, 1121.) The instructions discussed in *People v. George* (1980) 109 Cal.App.3d 814 and *People v. Engelman* (2002) 28 Cal.4th 436, also cited by respondent (RB 153), are similarly distinguishable.[62]

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[61] Although the trial court in this case did not know the numerical breakdown (33 RT 3797), the jurors in the minority were subject to the same pressure faced by the single juror in *Smalls*.

[62] Respondent also cites *People v. Boyette* (2002) 29 Cal.4th 381, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22. (RB 153.) That case is altogether inapposite here, however, because, unlike the present case which involves a claim of trial court error, *Boyette* involved a claim that the *prosecutor* committed misconduct during her guilt phase closing argument by encouraging holdout jurors to capitulate to the views of the majority. (*People v. Boyette*, *supra*, 29 Cal.4th at pp. 436-437.) The *Boyette* court rejected that claim of prosecutorial misconduct because the prosecutor in that case "did not exhort holdout jurors to submit to the majority's views, but argued the evidence of guilt was so strong that if any juror had doubts, they should step back and use their common sense. The exhortation to 'listen to your fellow jurors' in this context meant to listen to *the arguments* of one's fellow jurors." (*Id.* at p.

(continued...)

The instruction in this case also stands in stark contrast to one upheld in *People v. Butler*, *supra*, 46 Cal.4th 847, recently decided by this Court. There, after the jury had declared an impasse, the trial court instructed in pertinent part that:

> Although the verdict to which a juror agrees must, of course, be his or her own verdict, the result of his or her own convictions, and not a mere acquiescence in the conclusion of his or her fellows, yet in order to bring 12 minds to a unanimous result, you must examine the question submitted to you with candor and with a proper regard and deference to the opinions of each other. Remember that you are not partisans or advocates in this matter; you are impartial judges of the facts.
>
> Each of you must consider the evidence for the purpose of reaching a verdict, if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors. And with this view, it is your duty to decide the case, if you can conscientiously do so. In conferring together, you ought to pay proper respect to each other's opinions and listen with a disposition to be convinced to each other's arguments.

(*Id.* at pp. 880-881.) In rejecting Butler's claim that the instruction unfairly favored the prosecution by introducing improper considerations into the deliberations, this Court observed, among other things, that the instruction: (1) made clear that "each of you must decide the case for yourself" (*id.* at pp. 882-883); (2) did not refer to the preponderance of opinion among the jurors (*id.* at p. 883); and, (3) reminded the jurors that their purpose was to reach a verdict "if you can do so" and "if you can conscientiously do so" (*id.* at p. 884). Thus, unlike the instruction in this case, the instruction in

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[62](...continued)
437; emphasis in original.)

Butler did not "encourage[] jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on the issues before them" in violation of *People v. Gainer*, *supra*, 19 Cal.3d at p. 852. Moreover, unlike the instruction given in appellant's case, the instruction in *Butler* included a salutary reminder that the jury was to render a verdict only if it could conscientiously reach one.

For the reasons above and those stated in the opening brief, the instruction given in appellant's case was erroneous.

C. The Error Was Unduly Prejudicial

Appellant has fully set forth his argument as to why reversal of the entire judgment is required (AOB 266-267), and here responds only to respondent's claim that the replacement of Juror No. 128 and the court's instruction to begin deliberations anew vitiated any previous error in the court's instructions. (RB 156.) Respondent's analysis is flawed. Even if the reconstituted jury followed the court's instruction to "disregard the earlier deliberations as if they had not taken place" and to re-evaluate all of the evidence (35 RT 3847-3848; CALJIC No. 17.41), the jury would have viewed the defective instruction as remaining in effect, i.e., as one of the *legal principles* governing their deliberations.[63] As a result, any minority juror or jurors would have felt pressured to acquiesce to the majority view, as discussed by appellant in his opening brief. (AOB 263-266.)[64]

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[63] Of course, it must be presumed that the jury, even as reconstituted, followed the court's erroneous instruction at issue here. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.)

[64] Although the record does not reveal whether the reconstituted jury ever included a minority juror or jurors, the jury deliberated for approximately two days. (VI CT 1704, 1706; VII CT 1825.) It is likely that

(continued...)

For the reasons set forth above and in appellant's opening brief, reversal of the entire judgment is required. (*People v. Gainer*, *supra*, 19 Cal.3d at p. 849.)

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[64](...continued)
the jury divided into "majority" and "minority" groups at some point. In any event, this Court has recognized the coercive effect of such instructions, notwithstanding the fact that it may be difficult, if not impossible, to discover their prejudicial effect. (*People v. Gainer*, *supra*, 19 Cal.3d at pp. 854-855; see also *Brasfield v. United States* (1926) 272 U.S. 448, 449-450.)

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THE TRIAL COURT COMMITTED REVERSIBLE ERROR, AND VIOLATED APPELLANT'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR AND IMPARTIAL JURY, RELIABLE PENALTY DETERMINATION AND DUE PROCESS, BY PROHIBITING ANY MENTION DURING VOIR DIRE OF THE NUMBER OF VICTIMS OR THE FACT THAT THERE WERE CHILD VICTIMS

In his opening brief, appellant argued that the trial court erred in refusing to question, or to allow defense counsel to question, prospective jurors concerning their views about the fact that the case involved multiple victims, two of whom were children. The trial court's ruling precluded the defense from probing into the prospective jurors' attitudes about whether the age and number of victims would prevent or substantially impair them in performing their duties as jurors, requiring reversal of the penalty judgment. (AOB 268-285.)

Respondent contends that the trial court permissibly limited voir dire to avoid prejudgment, and did not compromise the identification of jurors whose ability to follow the law would be impaired. Respondent further contends that, to the extent there was an abuse of discretion, it was not prejudicial. (RB 157-173.) Respondent's position is incorrect.

A. The Trial Court Erred by Precluding Any Inquiry Into the Prospective Jurors' Views About the Death Penalty and Their Ability to Consider a Life Sentence in a Case in Which There Were Five Victims, Two of Whom Were Children

Death-qualification voir dire must allow for the scrutiny of the death penalty views of prospective jurors as applied to the general facts of the case about to be tried, regardless of whether those facts have been

expressly charged, because a prospective penalty-phase juror who would invariably vote for one or the other available punishments as a result of one or more circumstances likely to be present in the case being tried, without regard for the strength of the aggravating and mitigating circumstances, is subject to a challenge for cause. (See, e.g., *People v. Earp* (1999) 20 Cal.4th 826, 853). On the other hand, this Court has also observed that a defendant has no right to ask specific questions during voir dire that invite prospective jurors to prejudge the penalty issue based on a summary of the aggravating and mitigating evidence. (See, e.g., *People v. Jenkins* (2000) 22 Cal.4th 900, 990-991.)

As appellant explained in his opening brief (AOB 276-280), this Court, in *People v. Cash* (2002) 28 Cal.4th 703, reconciled those competing principles. Specifically, this Court explained that while trial courts enjoy considerable discretion in deciding where to strike the balance between voir dire so abstract that it fails to identify those prospective jurors whose death penalty views would prevent or substantially impair them in the performance of their duties in the case about to be tried and voir dire so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the likely aggravating and mitigating evidence, that discretion has outer limits which were exceeded by the ruling of the trial court in that case. (*Id.* at pp. 721-722.) Thus, a trial court errs when it categorically prohibits defense counsel from inquiring during voir dire whether prospective jurors would automatically vote for the death penalty if faced with a general fact or circumstance present in the case which could cause some jurors to vote for the death penalty regardless of the strength of the mitigating circumstances. (*Id.* at p. 721.) For that reason, a trial court may not categorically restrict voir dire to preclude "mention of any general

fact or circumstance not expressly pleaded in the information [citations]." (*Id.* at p. 722.)

In *Cash*, the salient general fact or circumstance that defense counsel wished to examine in voir dire, but which the trial court expressly excluded from the voir dire, was the fact that the defendant had committed murder previously:

> Because in this case defendant's guilt of a prior murder (specifically, the prior murders of his grandparents) was a general fact or circumstance that was present in the case and that could cause some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances, the defense should have been permitted to probe the prospective jurors' attitudes as to that fact or circumstance. In prohibiting voir dire on prior murder, a fact likely to be of great significance to prospective jurors, the trial court erred.

(*Ibid.*)

Cases subsequent to *Cash* have identified other case-specific facts or circumstances that are likely to be of great significance to prospective jurors such that their presence in a given case could cause a prospective juror to vote for the death penalty regardless of the strength of mitigating circumstances. In *People v. Roldan* (2005) 35 Cal.4th 646, 694, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, this Court observed that cases involving prior murders, sensational sex crimes, child victims, or torture were "comparable in relevance to the prior murders" in *Cash*. In *People v. Vieira* (2005) 35 Cal.4th 264, 286-287, this

Court found that multiple murder "falls into the category" of aggravating circumstances likely to be of great significance to prospective jurors.[65]

Appellant has amply demonstrated that the trial court erred by barring any inquiry into whether prospective jurors would be able to consider a life sentence in a case in which five people were murdered, and/or in which children were killed, in order to ensure that the jury could fairly and impartially determine his penalty according to law. (AOB 280-283.)

Respondent, however, asserts that the trial court permitted voir dire on multiple murder and was not required to allow a more detailed inquiry based on the prospective jurors' feelings about particular numbers of murder victims, particularly since the jurors necessarily knew the specific numbers and genders of the victims in this case when they were asked questions about their views on multiple murder. Respondent further asserts that the trial court properly excluded the fact that two of the victims were children, suggesting that that fact simply would have added to the information the jurors already knew about the circumstances of the crime. (RB 166-172.) Respondent's analysis fails.

Respondent is incorrect in suggesting that nothing required the trial court to allow a more detailed inquiry into the prospective jurors' feelings about the actual number of victims. (RB 168-169.) Indeed, respondent acknowledges that this Court has specifically pointed out that "[m]ultiple

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[65] Most recently, this Court suggested that evidence that a murder victim was dismembered "does not appear so potentially inflammatory as to transform an otherwise death qualified juror into one who *could not* deliberate fairly on the issue of penalty." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1122-1123, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; emphasis in original.)

murder falls into the category of aggravating or mitigating circumstances 'likely to be of great significance to prospective jurors.' [Citation.]" (RB 169, quoting *People v. Vieira*, *supra*, 35 Cal.4th at p. 286.)

Respondent's attempt to distinguish *Vieira* is flawed. The defendant in that case was charged with four murders, and the defense did not seek voir dire as to whether that fact would prevent or impair the juror's ability to return a verdict of life without parole. (*People v. Vieira*, *supra*, 35 Cal.4th at p. 273.) Instead, the defense requested only that the juror questionnaire include the question, "Do you feel you would automatically vote for death instead of life imprisonment with no parole if you found the defendant guilty of *two or more murders*?" (*Id.* at p. 284, emphasis added.) Therefore, while respondent correctly points out that "there was no suggestion [in *Vieira*] that voir dire should have been permitted as to the specific number of murders" (RB 169), whether the trial court should have permitted such voir dire simply was not a question before this Court.

Here, the trial court's ruling was not, as contended by respondent, "consistent with *Vieira*." (RB 169.) The trial court explicitly ruled that the number of victims was not to be raised or explored in voir dire, and it never reversed that ruling. (Cf. *People v. Vieira*, *supra*, 35 Cal.4th at pp. 286-287 [no "*Cash* error" where, among other things, the trial court never suggested that defense counsel could not raise the issue of multiple murder in voir dire, never ruled that a proposed question on the subject was inappropriate, and the defendant did not attempt to have the trial court conduct a multiple murder inquiry during voir dire].)

It is insignificant that the trial court's reading of the indictment informed the venire of the number and genders of the victims. (7 RT 1065-1068.) The trial court not only refused to tell (or allow counsel to tell) the

prospective jurors that there were five victims, but, more important, it barred counsel from inquiring as to whether consideration of the number of victims would prevent or substantially impair them in performing their duties as jurors. (3 RT 691-693; 4 RT 749-750; 5 RT 867; 8 RT 1115; 9 RT 1286-1287, 1310-1312.) Under these circumstances, the voir dire was inadequate to probe the prospective jurors' views with respect to the fact that there were five victims, a fact "'likely to be of great significance to prospective jurors.'"[66]

Respondent is also incorrect in contending that the trial court properly excluded from voir dire the fact that two of the victims were children. (RB 169-172.) In so contending, respondent speculates that the prospective jurors would have assumed, "correctly, [that the case involved] a wanton group slaughter." (RB 170.) Not so. Jurors may well have assumed that the case involved a relatively less inflammatory scenario. For instance, prospective jurors may have expected that the killings arose out of a battle between rival gangs, and that perhaps the victims had been the aggressors. But whatever scenarios prospective jurors envisioned when the charges were read, it defies belief that the fact that two of the victims were

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[66] During voir dire, the court asked a prospective juror, "What I am now asking you is whether or not in your mind do you view – are you starting off just knowing that this is a multiple – more than one murder, that there's a possibility coming to a conclusion that a defendant has committed more than one murder of either the first or second degree are you starting off you're going to just because two people are dead regardless of how it happened that you're going to impose the death penalty, automatically?" (9 RT 1284, emphasis added.) Because the court's question suggested that there were only two victims, it cannot be assumed that all of the prospective jurors realized that there were actually five victims.

children "would have added little to the overall picture of the case." (RB 170.) As respondent itself acknowledges (RB 169), this Court has repeatedly identified the involvement of child victims as a fact "that could potentially have prejudiced even a reasonable juror." (*People v. Zambrano*, *supra*, 41 Cal.4th at p. 1122 & fn. 6, quoting *People v. Roldan*, *supra*, 25 Cal.4th at p. 694; see also *People v. Box* (2000) 23 Cal.4th 1153, 1180 ["[I]t is difficult to imagine a prospective juror not having a strong emotional reaction to a three-year-old's murder, or feeling shame or embarrassment at revealing in front of others the depth of that reaction"], disapproved on another ground in *People v. Martinez* (2010) ___ Cal.Rptr.3d ___, 2010 WL 114933.)

Respondent characterizes the child-victim information in this case as "more akin to the dismemberment information [properly] withheld from the jury in *Zambrano*." (RB 170.) In so contending, respondent ignores the stark distinction drawn between the two types of evidence in *People v. Zambrano*, *supra*, 41 Cal.4th at 1122, where this Court stated:

> The sole fact as to which the defense unsuccessfully sought additional inquiry – the condition of the adult murder victim's body when found – was not one that could cause a reasonable juror – i.e., one whose death penalty attitudes otherwise qualified him or her to sit on a capital jury – invariably to vote for death, regardless of the strength of the mitigating evidence. No child victim . . . [was] involved.

Given the extremely, even uniquely, upsetting nature of child murder (see *People v. Zambrano*, *supra*, 41 Cal.4th at p. 1122 & fn. 6; *People v. Roldan*, *supra*, 25 Cal.4th at p. 694; *People v. Box*, *supra*, 23 Cal.4th at p. 1180), respondent is incorrect in asserting that the child-victim information

"was not so significant, in the context of the other information the jurors had, to pose a death-qualification problem." (RB 171.)

Respondent is also incorrect in suggesting that this Court's holding in *People v. Cash*, *supra*, 28 Cal.4th 703 was predicated on the fact that it involved "a fact wholly unrelated to the charged crimes," or, in other words, "an independent aggravating circumstance." (RB 171.) *Cash* imposes no such requirement. Its holding rests instead on the recognition that the trial court prohibited voir dire on "a fact likely to be of great significance to prospective jurors." (*People v. Cash*, *supra*, 28 Cal.4th at p. 721; see also *People v. Vieira*, *supra*, 35 Cal.4th at p. 286.) Indeed, in reaching its holding this Court pointed to prior decisions approving particularized death-qualifying voir dire on facts related to the charged crimes. (*People v. Cash*, *supra*, 28 Cal.4th at p. 721, citing *People v. Ochoa* (2001) 26 Cal.4th 398, 431 [a prosecutor may properly inquire as to whether a prospective juror could impose the death penalty on a defendant who did not personally kill the victim]; *People v. Ervin* (2000) 22 Cal.4th 48, 70-71 [same]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1320 [a prosecutor may properly inquire as to whether a prospective juror could impose the death penalty only in particularly extreme cases unlike the case being tried]; *People v. Pinholster* (1992) 1 Cal.4th 865, 916-917 [a prosecutor may properly inquire as to whether a prospective juror could impose the death penalty on a defendant in a felony-murder case].)

Appellant is aware that this Court recently addressed a claim relating to restriction of voir dire in *People v. Butler* (2009) 46 Cal.4th 847. There, the defendant was charged with two murders and faced a multiple-murder special circumstance allegation. (*Id.* at pp. 851-852.) Defense counsel sought to explore on voir dire whether any juror would automatically vote

for death if they knew the defendant had participated in the killing of a fellow inmate while in jail awaiting trial for the double murder; the prosecutor intended to introduce evidence regarding the jail killing at the penalty phase. (*Id.* at pp. 852-853, 858.) The trial court denied the defendant's request, concluding that questioning the jurors generally about "multiple killings" would suffice. (*Id.* at p. 858.) This Court held that the trial court's ruling was not an abuse of discretion for the following reasons: (1) in 1996, when the trial court made its ruling, it reasonably could rely on this Court's advisement that "[t]he inquiry is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination" (*id.* at p. 860, quoting *People v. Clark* (1990) 50 Cal.3d 583, 597); and, (2) the trial court did not prevent counsel from raising matters beyond those specifically alleged in the information, and counsel was free to, but did not, seek to ascertain the jurors' attitudes on other murders in general, or on jailhouse murders in general (*People v. Butler*, *supra*, 46 Cal.4th at pp. 860-861).

The instant case is altogether distinguishable from *Butler* and cases cited therein. Unlike those cases, appellant did not request that he be allowed to provide the prospective jurors with a specific, detailed preview of the facts of the case. (Cf. *People v. Butler*, *supra*, 46 Cal.4th at pp. 852-853, 858; *People v. Mason* (1991) 52 Cal.3d 909, 939-940 [trial court properly denied defense request for permission to summarize the facts of the prosecution's case by way of "a lengthy, factually detailed question that would have given prospective jurors substantial information about defendant's victims and the manner in which they were killed]; *People v. Clark*, *supra*, 50 Cal.3d at p. 596 [in an effort to determine whether the evidence of serious burn injuries suffered by the victims would cause a jury

to automatically vote for the death penalty, defendant sought to inquire about the prospective jurors' attitudes toward such injuries].) Indeed, appellant sought voir dire on matters this Court has specifically recognized as "'likely to be of great significance to prospective jurors.'" (*People v. Vieira*, *supra*, 35 Cal.4th at p. 286.) Moreover, unlike the trial court in *Butler*, the trial court in this case repeatedly ruled that it would not allow voir dire about any facts or circumstances not expressly charged, i.e., anything beyond the fact that the case involved a capital murder and a special-circumstance allegation of "multiple murder." (4 RT 751; 5 RT 867; 8 RT 1115; 9 RT 1287-1287, 1311-1312.)

For the same reasons, this Court should reject respondent's apparent suggestion that the trial court's ruling was correct in light of *People v. Medina* (1995) 11 Cal.4th 694, 746. There, the trial court initially declined to permit voir dire as to whether prospective jurors could vote for life imprisonment if the defendant had committed multiple murder, but later reversed that ruling. (*Ibid.*) According to respondent, *Medina* "had appeared to sanction a restriction of death qualification voir dire related on [sic] multiple murder." (RB 168, fn. 79.) However, this Court later explained that the trial court in *Medina* erred when it initially declined to permit voir dire as to whether prospective jurors could vote for life imprisonment if the defendant had committed multiple murder. (*People v. Cash*, *supra*, 28 Cal.4th at p. 722; see also *People v. Vieira*, *supra*, 35 Cal.4th at p. 285 [same].)[67]

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[67] This Court characterized as mere dictum that portion of *Medina* expressing doubt that the trial court had erred. (*People v. Cash*, *supra*, 28 Cal.4th at p. 722; see also *People v. Vieira*, *supra*, 35 Cal.4th at p. 285 [same].)

Moreover, as in *Cash*, the trial court in the instant case never altered its erroneous ruling, and therefore appellant had no opportunity to reexamine any juror with respect to the multiple murder question. (*People v. Cash*, *supra*, 28 Cal.4th at p. 722; cf. *People v. Medina*, *supra*, 11 Cal.4th at p. 746 [after the trial court clarified its position with respect to the multiple murder question, the defense was free to examine prospective jurors on the murder though it failed to do so].)[68]

For the reasons set forth above and in the opening brief, the trial court abused its discretion in prohibiting voir dire on the number of victims and the fact that two of them were children.

B. Reversal of the Penalty Judgment is Required

Appellant has demonstrated already that the trial court's error requires that the penalty judgment be reversed (AOB 283-285), and here responds only to respondent's contention that any error did not substantially affect him. (RB 172-173.)

Respondent contends that "the jury necessarily knew that it was [co-defendant] Palma who had personally killed children and to whom that fact would apply much more directly as an aggravating circumstance." (RB 172.) To take this argument seriously, this Court must ignore the very heart of the state's theory, argued by the prosecutor at trial and defended by

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[68] Respondent observes that *Cash* was decided after the trial in this case, perhaps to intimate that the trial court's ruling was proper in light of *Medina*'s supposed approval of voir dire only as to "multiple murder." (RB 168, fn. 79, and 169.) If that is indeed respondent's point, it should be dismissed. Cash's trial apparently took place after *Medina* as well, yet this Court held that the trial court had erred in restricting voir dire on the issue of prior murders. (*People v. Cash*, *supra*, 28 Cal.4th at pp. 720-721, 738, 740.)

respondent on appeal: the entire context of and motivation for the crimes were gang-related, appellant participated in the crimes as a member of the Sangra gang operating under orders from a member of the Mexican Mafia, and he was equally culpable for all of the murders, regardless of whether he or Palma actually committed them. Moreover, the prosecutor's argument repeatedly referred to the number of victims and to their innocence and helplessness. (40 RT 4264, 4269, 4271-4273, 4285-4289, 4292-4293, 4295-4296, 4298-4299; see also RB 87-89, 124-125, 130-139.) Therefore, it is unlikely that the inflammatory effect of the evidence was significantly blunted by the jury's knowledge that Palma killed the children.

Because "the trial court's error makes it impossible . . . to determine from the record whether any of the individuals who [were] ultimately seated as jurors held the disqualifying view that the death penalty should be imposed invariably and automatically" because of the number of victims and/or the fact that two of the victims were children (*People v. Cash*, *supra*, 28 Cal.4th at p. 723), reversal of the penalty is required.

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THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF THREATS ALLEGEDLY MADE BY APPELLANT AS REBUTTAL AT THE PENALTY PHASE, REQUIRING REVERSAL OF THE DEATH JUDGMENT

In his opening brief, appellant demonstrated that the trial court committed reversible error during the penalty phase by admitting improper, irrelevant and highly prejudicial rebuttal testimony by Anthony France, a school counselor at San Gabriel High School, about threats appellant allegedly made as an 18-year-old high school student in connection with a fight on school grounds. Because France's testimony did not in fact rebut any mitigating evidence offered by appellant, and nothing presented by appellant "opened the door" to that evidence, admission of this evidence violated appellant's Sixth, Eighth and Fourteenth Amendment rights, requiring reversal of the death judgment. (AOB 286-306.)

Respondent contends that there was no abuse of discretion because the evidence was properly admitted. Respondent further contends that, even if there was error, admission of the challenged evidence was harmless because it was not a significant part of the penalty-phase case. (RB 173-180.) Respondent's contentions are incorrect.

A. Anthony France's Testimony Regarding The Incident At San Gabriel High School Constituted Improper Rebuttal

As a preliminary matter, appellant notes that respondent has misstated the standard governing the admission of rebuttal evidence. (RB 175 and fn. 81.) This Court has held that once the defendant has presented evidence of circumstances in mitigation, the prosecution may present rebuttal evidence "tending to 'disprove any disputed fact that is of

consequence to the determination of the action.'" (*People v. Boyd* (1985) 38 Cal.3d 762, 776, quoting Evid. Code, § 210.) This Court subsequently stated that, where a defendant places his good character in issue, rebuttal evidence presented by the prosecutor "need not meet the requirements for admissibility established in *People v. Boyd*, *supra*, 38 Cal.3d 762." (*People v. Daniels* (1991) 52 Cal.3d 815, 883, citing *People v. Rodriguez* (1986) 42 Cal.3d 730, 792.) Respondent cites *Daniels* and *Rodriguez*, apparently to suggest that rebuttal evidence need not meet the standard of *People v. Boyd* – i.e., need not "tend[] to 'disprove any disputed fact that is of consequence to the determination of the action'" – to be admitted. (RB 175 and fn. 81.)

However, a careful reading of *Daniels* and *Rodriguez* makes clear that this Court has not lowered the standard governing the admission of rebuttal evidence. In both *Daniels* and *Rodriguez*, this Court was addressing the defendants' claims that rebuttal evidence was inadmissible because it did not fall within any of the statutory aggravating factors set forth in Penal Code section 190.3. (*People v. Daniels*, *supra*, 52 Cal.3d at pp. 882-883; *People v. Rodriguez*, *supra*, 42 Cal.3d at pp. 790-792.) Those cases simply reaffirmed *Boyd*'s holding that evidence of a defendant's background, character, or conduct which is not probative of any specific listed factor has no tendency to prove or disprove a fact of consequence to the determination of the action, and is therefore irrelevant to aggravation and inadmissible. (See *People v. Boyd*, *supra*, 38 Cal.3d at pp. 775-776.) Indeed, the *Boyd* standard incorporates the language of Evidence Code section 210, which defines "[r]elevant evidence," and it is inconceivable that this Court would promulgate a standard permitting evidence other than relevant evidence.

Whatever the standard, France's testimony about the incident at San Gabriel High School was improper rebuttal. According to respondent, the rebuttal evidence was directed to the bulk of appellant's mitigation case generally, that is, to rebut the "extensive testimony regarding Mr. Valdez's background and opportunities that he had to serve our country in the Navy, to go to I.T.T. and become a productive citizen, Little League, the fact that his mother was a team mother and so forth . . . ." (RB 177, citing 40 RT 4234.) Indeed, appellant's mitigation evidence touched on various aspects of his personal and family history and/or "particular incident[s] or character trait[s]," including appellant's religious and academic education; emotional and psychological trauma he suffered as a young child; his attempts to care for his grandfather and brother; his intellectual ability; and, his apparent history of depression. (39 RT 4032-4036, 4044-4076, 4084-4089, 4102-4110, 4118-4129.)[69] Even so, the rebuttal evidence did not "disprove any disputed fact that was of consequence to the determination of the action" (*People v. Boyd, supra,* 38 Cal.3d at p. 776), and was not a response to any "particular incident or character trait" that appellant offered in mitigation (*People v. Mitcham* (1990) 1 Cal.4th 1027, 1072).

Nor was the rebuttal evidence properly admitted to correct "a misleading impression" left by the defense case. (*People v. Mason* (1991) 52 Cal.3d 909, 960-961.) As appellant has pointed out (AOB 301-302), the defense presented evidence regarding appellant's academic and behavioral problems, including evidence of the "constant conflict" between appellant

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[69] A detailed summary of the mitigation evidence to which the rebuttal evidence was purportedly directed (i.e., the testimony of defense witnesses Gary Timbs, Migel Valdez and Dr. Ronald Fairbanks) is set forth at pages 40-46 of appellant's opening brief.

and his father when appellant was in the 10th and 11th grades; appellant's involvement in street gangs; and, negative comments from appellant's teachers about his school performance. (39 RT 4057-4067; Exh. Nos. 107, 108, 109, 110, 111, 112-A, 112-B, 113; 1 SuppCT IV 241-253.)

Respondent's reliance upon *In re Ross* (1995) 10 Cal.4th 184, *People v. Clark* (1993) 5 Cal.4th 950, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, and *People v. Mitcham*, *supra*, 1 Cal.4th 1027 is misplaced. (RB 176.) In *Ross*, which involved habeas corpus proceedings, the defense presented the testimony of 15 members of petitioner's family, who testified that they loved petitioner, that he was protective and caring to other family members, and that he was abused as a child by his stepfather. (*In re Ross*, *supra*, 10 Cal.4th at pp. 190-195, 205.) This Court held that evidence of crimes and other misconduct (namely, four counts of robbery and an incident in which he threatened a probation camp cook with a large serving fork) committed by the petitioner when he was a juvenile was properly admitted to rebut evidence portraying him as a kind, protective, caring person. (*Id.* at pp. 207-209.)[70]

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[70] This Court concluded that the evidence of the petitioner's juvenile crimes and misconduct was also relevant to rebut defense testimony that petitioner's failure to be rehabilitated was partly the fault of institutional authorities, and that he expressed remorse for earlier crimes. (*In re Ross*, *supra*, 10 Cal.4th at pp. 205-206.) However, it appears that testimony regarding the failure of institutional authorities had been excluded by the referee (*id.* at p. 202), so there was nothing on that point to rebut. In addition, testimony regarding petitioner's expression of remorse is not mentioned in this Court's relatively detailed summary of the mitigation testimony. (*Id.* at pp. 190-195.) Therefore, appellant surmises that the evidence of institutional failure was raised in order to blunt the force of the rebuttal evidence (e.g., as surrebuttal evidence).

Similarly, in *Clark*, "the defense case presented the picture of a trustworthy, peaceable person, who had risen above his deprived childhood." (*People v. Clark*, *supra*, 5 Cal.4th at p. 1027.) To that end, the defense presented testimony that the defendant was never aggressive or physically violent, and that he was a good, nice person. In addition, many witnesses expressed incredulity that he could have committed the crimes for which he had been convicted. (*Ibid.*) Accordingly, the prosecutor properly inquired into instances of burglary, theft, drug selling and school suspension to rebut this depiction. (*Id.* at pp. 1026-1027.)

Finally, in *Mitcham* the defense presented a "general picture of a well-behaved youth." (*People v. Mitcham*, *supra*, 1 Cal.4th at p. 1072.) Among other things, the defense presented numerous witnesses who testified to the defendant's good character and reputation in elementary and junior high school. One witness testified that the defendant was a good student and kind to others. Another testified that Mitcham was an excellent student, highly regarded by others, who got along well with everyone; on cross-examination, that witness testified that the defendant was kind and nonviolent. (*Ibid.*) Therefore, evidence of Mitcham's acts of delinquency, including incidents of violence, was properly admitted to rebut the picture painted by the defense. (*Id.* at pp. 1072-1073.)

In each of the cases cited by respondent, the defendant gave a completely one-sided, misleading picture of his true character. Accordingly, the challenged rebuttal evidence was properly admitted because those defendants "open[ed] the door to prosecution evidence tending to rebut" their good character evidence. (*People v. Mitcham, supra*, 1 Cal.4th at p. 1072; see *People v. Siripongs* (1988) 45 Cal.3d 548, 576-578 [proper to rebut evidence of defendant's truthfulness and honesty with

evidence of prior convictions involving dishonesty].) Here, however, the defense evidence painted a more complete picture of appellant; in particular, the defense evidence did not suggest that appellant had not engaged in any such misconduct in high school. Therefore, France's testimony was improper rebuttal because it went "beyond the aspects of [appellant's] background on which [he] introduced evidence." (*In re Jackson* (1992) 3 Cal.4th 578, 613, disapproved on another ground in *In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6.)

B. It Was Prejudicial Error to Admit the Improper Rebuttal Testimony, and Reversal of the Death Judgment Is Required

Appellant has demonstrated sufficiently that admission of the rebuttal evidence was prejudicial (AOB 303-306), so he addresses only respondent's contention that the rebuttal evidence represented but a minor element of the prosecutor's case in aggravation. (RB 177-180.)

Respondent notes that the portion of the prosecutor's argument addressing the rebuttal evidence comprised less than three pages of the reporter's transcript. (RB 178.) However, the argument comprised approximately 32 pages in its entirety (40 RT 4258-4273, 4283-4300), so three pages represented a significant portion of that argument.

More important, it cannot be assumed that the jury would have voted to impose the death sentence in this case even in the absence of the improper rebuttal evidence. The guilt-phase evidence established that co-defendant Palma, not appellant, shot Maria Moreno and her two children, and that the Mexican Mafia had ordered that the children not be killed. (20 RT 2712; 23 RT 3120.) Gang expert testimony established that the killing of children would violate Mexican Mafia policy. (18 RT 2320.) The

prosecution presented no additional evidence in aggravation against appellant in its case-in-chief at the penalty phase. Thus, even if the jurors dismissed appellant's defense that he was not involved in the shootings (28 RT 3475-3482, 3485-3490, 3511-3521), they reasonably may have concluded that he had no idea Palma would shoot Moreno and her children; indeed, they reasonably may have concluded that appellant would have expected that the children would not be harmed. In the absence of the rebuttal evidence and the prosecutor's argument relating to that evidence, the jury may have voted to impose life without the possibility of parole.

Respondent points out that Dr. Ronald Fairbanks, a defense expert, testified that he found no mitigating circumstances "of major significance" and that appellant had been manipulative. (RB 179, citing 39 RT 4137-4139.) However, there were other aspects of Dr. Fairbank's testimony that the jury could have found to be mitigating, including testimony regarding appellant's intelligence, potential to be productive in a prison setting, and apparent history of depression. (39 RT 4108-4110, 4120-4129.) In addition, the jury could have found the testimony of appellant's father and other defense witnesses to warrant a verdict of life without possibility of parole.

However, admission of the rebuttal evidence permitted the prosecutor to depict appellant as a cold, ruthless and manipulative individual. (40 RT 4285-4288.) In addition, the prosecutor's reference to "the real Richard Valdez" suggested that the rebuttal evidence was somehow particularly revealing of appellant's true character. Therefore, because the jury viewed the shootings in light of the prosecutor's portrait of "the real Richard Valdez," the rebuttal evidence and the prosecutor's

argument referring to that evidence distorted the jury's sentencing determination. (40 RT 4287.)[71]

Respondent's reliance on *People v. Pinholster* (1992) 1 Cal.4th 865, *People v. Wright* (1990) 52 Cal.3d 367, and cases cited therein, is misplaced. (RB 179.) In *Pinholster*, the defendant was found guilty of two murders and other charges stemming from two violent home invasions. (*People v. Pinholster*, *supra*, 1 Cal.4th at pp. 902-909.) However, the record was "rife with examples of actual assault and battery and violent interference with an officer in the course of his duties," eight of which this Court described in its opinion. (*Id.* at pp. 961-962.) Moreover, the "[d]efendant's own testimony depicted him as an unregenerate career criminal." (*Id.* at pp. 963.) Specifically, the defendant admitted one of the charged robberies; he asserted that he was a professional robber, but not a murderer; he said he had committed hundreds of robberies over the preceding six-year period; he testified that he used a gun and victimized drug dealers; and, he admitted a prior kidnapping conviction. (*Id.* at p. 907.) Under these circumstances, any error in admitting evidence that the

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[71] For the same reasons, it cannot be assumed that the trial court's error was harmless in light of the fact that appellant threw a Kleenex box and swore at one of the jurors. (41 RT 4348-4349, 4356-4367.) But for the prejudicial evidence discussed in this argument, the jury may have overlooked appellant's action as understandable, or at least forgivable, because he believed the juror was sleeping. (41 RT 4348-4349.) Similarly, but for the challenged evidence, the jury may have concluded that he appeared at the penalty phase with a shaved head due to frustration or a sense of hopelessness, not because he was an incorrigible gang member. (Cf. *People v. Bloom* (1989) 48 Cal.3d 1194, 1216, 1227-1228 [death judgment was not constitutionally unreliable even though pro per defendant chose not to present mitigating evidence and asked the jury to impose a death sentence].)

defendant was involved in prison gang activities, was difficult to supervise, committed disciplinary violations in county jail other than assault, was one of the most violent inmates, failed to reform after discipline, stated he would do something to get back in jail if he was not sent to state prison, threatened an accomplice and others, and had a disciplinary history in state prison, was not prejudicial. (*Id.* at pp. 962-963.)

In *Wright*, the defendant was convicted of the first degree murder, burglary, rape, and attempted robbery of a 76-year-old widow. (*People v. Wright, supra*, 52 Cal.3d at p. 427.) The jury found true enhancement allegations that he had used a deadly weapon, inflicted great bodily injury on a victim of advanced age, and that he had been on parole following a term of imprisonment for a violent felony in which he had used a handgun, and also found true three felony-murder special circumstance allegations. The defendant, who initially denied involvement, admitted that he had persuaded the victim to open her front door by ruse for the purpose of robbing her since she was an "easy mark," and that he forced entry into her home, savagely beat her, at some point attempted to rape her, and murdered her. (*Ibid.*) At the penalty phase, evidence was introduced regarding the defendant's criminal history: in 1972, the defendant was convicted of a second-degree burglary during which his accomplice repeatedly had to remind the defendant not to harm the 80-year-old female victim; in 1974, the defendant robbed two different female victims at gunpoint in a bank parking lot; convictions for two other 1974 robberies involving the use of a handgun against female victims; in 1977, the defendant, armed with a shotgun, robbed a motel desk clerk and forced him to remove his trousers and stay in a closet until the defendant escaped; four days later, the defendant entered a convenience store wearing a ski mask, robbed the

female clerk at gunpoint, and ordered her boyfriend to lie on the ground, resulting in his conviction of first degree robbery with use of a handgun, and assault with intent to commit robbery; and, in mid-1977, the defendant used a razor blade to slash the abdomen of his cellmate, resulting in his conviction of assault with a deadly weapon. (*Id.* at p. 428.) Under these circumstances, this Court concluded that admission of the evidence challenged by the defendant – i.e., evidence that, while in prison, the defendant announced he would steal or kill upon his transfer or release, once threw a "temper tantrum," once voiced pleasure at doing "freaky things" to women, on one occasion verbally abused a kitchen worker he felt was no longer tolerant of him, and at some point was housed in the adjustment center – "simply pale[d] in comparison to the facts of the crimes of which he was convicted here, and his substantial criminal history." (*Id.* at pp. 428-429.)[72]

Because admission of the improper rebuttal testimony was not harmless beyond a reasonable doubt, reversal of the death judgment is required. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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[72] *People v. Burton* (1989) 48 Cal.3d 843, 864, and *People v. Brown* (1988) 46 Cal.3d 432, 449, cited by respondent (RB 179-180) and in *People v. Wright*, *supra*, 52 Cal.3d at pp. 427-429, involve similarly overwhelming aggravating evidence. As such, they are also distinguishable from the instant case.

14

THE TRIAL COURT FAILED TO INSTRUCT THE JURORS WITH CALJIC NO. 8.87 AFTER THE PROSECUTOR URGED THE JURY TO CONSIDER EVIDENCE OF THREATS AS FACTOR (B) EVIDENCE

In his opening brief, appellant argued that the death judgment must be reversed because the trial court (1) improperly allowed the prosecutor to use Anthony France's testimony regarding the incident at San Gabriel High School as "factor (b)" evidence (see Pen. Code, § 190.3, subd. (b); CALJIC No. 8.85), and (2) failed to instruct the jury that it could only consider such evidence in aggravation if the jurors found, beyond a reasonable doubt, that the defendant's conduct constituted commission of a crime involving "the express or implied threat to use force or violence." (AOB 307-323.)[73]

Respondent assumes that the trial court erred in allowing the prosecutor to use France's testimony as "factor (b)" evidence, and expressly concedes that it erred in failing to properly instruct the jury. Nevertheless, respondent maintains that any error was harmless. (RB 180-186.) Respondent's position is incorrect.

Respondent advances the unconvincing claim that the prosecutor argued the evidence under the "heading" of Penal Code section 190.3, subdivision (b), but was really treating it as rebuttal evidence. (RB 185.) Respondent effectively asks this Court to ignore the prosecutor's own words. Specifically, the prosecutor argued that "as to [section 190.3, factor (b)], there was also the testimony this morning of Mr. France regarding [appellant] and what happened at the San Gabriel High School." (40 RT

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[73] The relevant procedural background is set forth in Argument 13. (AOB 286-303 and *ante*, pp. 133-138.)

4285-4286.) Then the prosecutor argued that, even if France did not take appellant's threat seriously, what happened on Maxson Road shows that when appellant makes such a statement, "he means business." (40 RT 4286.) Therefore, there is no reason to doubt that when the prosecutor characterized the testimony as factor (b) evidence, he meant precisely that, and that he was using the evidence in direct support of his argument that appellant should be sentenced to death.[74] Even assuming that the prosecutor used France's testimony as rebuttal evidence, respondent is incorrect in arguing that the evidence was admissible for that purpose. (RB 185.) Appellant has demonstrated already that the testimony constituted improper rebuttal evidence. (Arg. 13, *ante*.)

Respondent also contends that the challenged evidence was not a significant part of the prosecution's penalty-phase case, and that the aggravating evidence far outweighed the mitigating evidence, so that admission of the evidence was harmless. (RB 185-186.) As this Court has recognized, "[i]n light of the broad discretion exercised by the jury at the penalty phase of a capital case the difficulty in ascertaining '[t]he precise point which prompts the [death] penalty in the mind of any one juror' [citation], past decisions establish that 'any substantial error occurring during the penalty phase of the trial . . . must be deemed to have been prejudicial.' [Citations.]" (*People v. Robertson* (1982) 33 Cal.3d 21, 54.) This Court also recognized that the potential for prejudice is particularly

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[74] In support of its argument that the prosecutor used the evidence as rebuttal evidence rather than "factor (b)" evidence, respondent observes that the trial court did not instruct the jury to consider the evidence under section 190.3, subdivision (b). (RB 185.) However, appellant has demonstrated that the court's failure to give CALJIC No. 8.87 was error. (AOB 318-320.)

serious where "the error in question significantly affected the jury's consideration of 'other crimes' evidence, a type of evidence which this court long ago recognized 'may have a particularly damaging impact on the jury's determination whether the defendant should be executed.' [Citation.]" (*Ibid.*)

Here, the jury was instructed to "consider *all* of the evidence which has been received during *any* part of the trial" (41 RT 4346; VII CT 1850; CALJIC No. 8.85, italics added), and it must be presumed that the jury followed that instruction. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.) Moreover, the prosecutor explicitly urged the jury to consider "the testimony . . . of Mr. France regarding [appellant] and what happened at the San Gabriel High School" pursuant to section 190.3, factor (b). (40 RT 4285-4286.) Under these circumstances, it cannot be assumed that the jury did not view the challenged rebuttal evidence as a significant part of the prosecution's penalty-phase case, one which may have "'prompt[ed] the [death] penalty in the mind of [at least] one juror.'" (*People v. Robertson*, *supra*, 33 Cal.3d at p. 54.)

For the reasons set forth in the opening brief and in the instant brief, the jury's consideration of the non-statutory aggravation challenged here violated California law. (*People v. Boyd* (1985) 38 Cal.3d 762, 777; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 590.) Its use arbitrarily deprived appellant of his right to have his sentence determined without consideration of such evidence in violation of due process. (U.S. Const., 14th Amend.; see, e.g., *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) Moreover, the jury's consideration of "factors that are constitutionally impermissible or totally irrelevant to the sentencing process" (*Zant v. Stephens* (1983) 462 U.S. 862, 885) undermined the heightened need for reliability in the

determination that death is the appropriate penalty (U.S. Const., 8th & 14th Amends.) and requires reversal of the death judgment (see, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 585).

Finally, it is reasonably possible that appellant would have obtained a more favorable result had the jury been properly charged on consideration of evidence of other criminal activity involving "the express or implied threat to use force or violence," requiring reversal of the death judgment under state law. (See *People v. Brown* (1988) 46 Cal.3d 432, 446-448 [penalty phase error is prejudicial where there is a "reasonable possibility" of a more favorable verdict absent the error].)

Reversal of the death judgment is therefore required.

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THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND PREJUDICIALLY ERRED BY FAILING TO SPECIFICALLY REINSTRUCT THE JURY WITH GUILT-PHASE INSTRUCTIONS WHICH WERE RELEVANT TO THE EVALUATION OF THE EVIDENCE AT THE PENALTY PHASE AND BY INSTRUCTING THE JURY THAT THEY COULD APPLY THEIR "COMMON SENSE" TO IDENTIFY OTHER PREVIOUSLY GIVEN INSTRUCTIONS THAT THEY COULD DEEM INAPPLICABLE TO THE PENALTY PHASE

In his opening brief, appellant demonstrated that the trial court erred by failing to (1) instruct the jurors pursuant to CALJIC No. 8.84.1, which would have told them to "[d]isregard all other instructions given to you in other phases of this trial," and (2) reinstruct the jurors with any of the instructions that were previously given at the guilt phase that were needed to ensure that the penalty jurors knew how they should evaluate the evidence before them. The trial court compounded the error by telling the jurors that while "generally speaking" all but three of the instructions previously given at the guilt phase were applicable in the penalty phase, "there may be a couple of others that you'll find by just applying common sense . . . are just not applicable." Because these errors denied appellant's right to an accurate and reliable jury determination of his punishment, his right to a fair and reliable penalty determination, and his right to due process of law, the death judgment must be reversed. (AOB 324-332.)

Appellant therefore addresses only respondent's contention that his argument is waived. (RB 189-190.) As appellant pointed out in his opening brief (AOB 331-332), defense counsel agreed with the trial court that it had correctly identified several specific guilt-phase instructions

which were not applicable to the penalty phase, though he did not "request or invite the trial court to omit from the penalty instructions those instructions [appellant] now claims were important." (*People v. Moon* (2005) 37 Cal.4th 1, 37.) Consequently, counsel's actions did not absolve the trial court of its obligation to instruct the jury on the general principles of law applicable to the penalty phase and the error has not been waived in this case. (See, e.g., §§ 1259, 1469; *People v. Breverman* (1998) 19 Cal.4th 142, 154-155; *People v. Wickersham* (1982) 32 Cal.3d 307, 330-333, disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 201; *People v. St. Martin* (1970) 1 Cal.3d 524, 531.)

Moreover, the error is not waived even if, as respondent contends (RB 189), defense counsel expressly agreed with the court and the prosecutor that the guilt-phase instructions need not be re-read. The invited-error doctrine does not preclude appellate review if the record fails to show that counsel had a tactical reason for acceding to an erroneous instruction. (*People v. Harris* (2008) 43 Cal.4th 1269, 1299; *People v. Moon*, *supra*, 37 Cal.4th at p. 28.) Because the trial court bears the ultimate responsibility for instructing the jury correctly, the request for erroneous instructions will not constitute invited error unless defense counsel both (1) induced the trial court to commit the error, and (2) did so for an express tactical purpose which appears on the record. (*People v. Wickersham*, *supra*, 32 Cal.3d at pp. 332-335; *People v. Perez* (1979) 23 Cal.3d 545, 549, fn. 3.) Here, neither condition for invited error has been met.

People v. Holloway (2004) 33 Cal.4th 96, cited by respondent (RB 189), is distinguishable in crucial respects. There, the defendant argued that the trial court erred because it *did* repeat some (though not all) of the guilt-phase instructions regarding the evaluation of evidence, including CALJIC

Nos. 2.20 (setting forth factors to consider in assessing a witness's credibility) and 2.21.2 (stating that a witness willfully false in one aspect of his or her testimony may be distrusted as to others as well). (*People v. Holloway*, *supra*, 33 Cal.4th at p. 152.) This Court held that the defendant waived his objection by failing to raise it at trial when invited to do so by the court. (*Ibid.*) In reaching its holding, this Court pointed out that defense counsel specifically objected to certain guilt-phase instructions and agreed that another such instruction should be given, setting forth her reasons for these decisions; by contrast, she did not respond when it was time to discuss CALJIC Nos. 2.20 and 2.21.2. (*Ibid.*)

This Court further concluded that the defendant's substantial rights were not so affected as to require review even in the absence of an objection. (*Ibid.*) First, the defendant did not claim the instructions were incorrect in any respect. Second, pursuant to CALJIC No. 17.31, the jurors were instructed to disregard any instruction inapplicable to the facts as they found them; therefore, there was no reasonable likelihood that jurors would consider factors set forth in CALJIC Nos. 2.20 and 2.21.2 that were logically inapplicable to any of the penalty phase evidence. (*Id.* at pp. 152-153.)[75]

In the instant case, however, the trial court *failed* to repeat the guilt-phase instructions. Although the trial court instructed the jury pursuant to CALJIC No. 17.31 (6 CT 1784), they were not given the guilt-phase

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[75] Significantly, the trial court advised counsel that it would go through the instructions and eliminate those neither side had asked for and that did not apply to the factual decisions to be made in the penalty phase. (*People v. Holloway*, *supra*, 33 Cal.4th at p. 152.)

instructions to which that instruction would apply.[76] Moreover, the trial court failed to give CALJIC No. 8.84.1, which sets forth general instructions about the law applicable to the penalty phase of the trial and instructs the jury not to be "influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feeling." Under these circumstances, the jury was left to deliberate without essential guidance regarding the standards they should use in evaluating the evidence. Even worse, an improvised instruction given by the trial advised that "*there may be a couple of others that you'll find by just applying common sense* or are just not applicable" (41 RT 4345, emphasis added), permitting, even forcing, the jurors to somehow divine the legal principles guiding their evaluation of the penalty-phase evidence.

For the reasons set forth above and in appellant's opening brief, there was more than a "reasonable likelihood" that "the jury misunderstood the instructions" (*People v. Weaver* (2001) 26 Cal.4th 876, 984) because of the trial court's failure to specify which of the guilt-phase instructions applied at the penalty phase. The trial court's error rendered the death verdict inherently unreliable in violation of the Eighth and Fourteenth Amendments to the United States Constitution. (See, e.g., *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Eddings v. Oklahoma* (1982) 455

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[76] CALJIC No. 17.31, as given, read as follows:

"The purpose of the court's instructions is to provide you with the applicable law so that you may arrive at a just and lawful verdict. Whether some instructions apply will depend upon what you find to be the facts. Disregard any instruction which applies to facts determined by you not to exist. Do not conclude that because an instruction has been given that I am expressing an opinion as to the facts." (VI CT 1784.)

U.S. 104.) The death judgment must therefore be reversed. (*Chapman v. California* (1969) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 446-448.)

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APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HIS AUTOMATIC APPLICATION FOR MODIFICATION OF THE JURY'S DEATH VERDICT WAS DENIED BY A JUDGE WHO DID NOT PRESIDE OVER ANY PORTION OF HIS TRIAL, AND WHO FAILED TO REVIEW THE GUILT PHASE TRANSCRIPTS AND ONLY PARTIALLY REVIEWED THE PENALTY PHASE TRANSCRIPTS OF THE TRIAL

In his opening brief, appellant demonstrated that a remand for resentencing is required because Judge Robert Armstrong, who had been assigned to substitute for Judge Trammell and preside over proceedings related to motions for new trial and for automatic application for modification of the verdict, lacked familiarity with the full trial record, rendering him incapable of fulfilling his duty under Penal Code section 190.4, subdivision (e). (AOB 333-348.)

Respondent contends that there was no error because the record shows that Judge Armstrong was sufficiently familiar with the case to be able to determine whether the aggravating and mitigating evidence supported the jury's verdict. Respondent further contends that, to the extent there was error, it was harmless. (RB 194-203.) Respondent's contentions are incorrect.

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A. This Matter Must Be Remanded to the Trial Court for a New Hearing on Appellant's Motion to Modify the Verdict Because Judge Armstrong Did Not Preside Over Any Portion of the Trial Proceedings and Did Not Fully Review the Transcripts of Both the Guilt and Penalty Phases of the Trial

As respondent points out, unless the record affirmatively shows otherwise, the court is presumed to have been familiar with the record upon which it based its rulings. (RB 200, citing *People v. Almond* (1965) 239 Cal.App.2d 46, 50, disapproved on another ground in *People v. Doherty* (1967) 67 Cal.2d 9, 15.) However, that presumption must not be applied here because a plain reading of the record makes clear that the trial court lacked sufficient familiarity with the record to properly review the case pursuant to section 190.4, subdivision (e).

Contrary to respondent's claim (RB 201), Judge Armstrong's ruling showed no "manifest familiarity" with the record. First, the record indicates that he reviewed only co-defendant Palma's motion for modification of the verdict and the transcripts of the penalty phase in preparation for the hearing. (43 RT 4408, 4416.) Even assuming he reviewed any of the guilt-phase transcripts, he reviewed only those parts reflecting "the rulings that [Judge Trammel] made and the conduct in the case." (43 RT 4422.)[77]

Second, Judge Armstrong admitted that he had not read the transcripts "line by line." (43 RT 4408.) Respondent incorrectly suggests

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[77] By "the conduct in the case," Judge Armstrong obviously was referring to misconduct by Judge Trammel, which gave rise to an investigation by the Commission on Judicial Performance (43 RT 4420-4422; see also 43 RT 4383-4388, 4392, 4396, 4399-4403), not to evidence concerning the defendants' conduct.

that Judge Armstrong's comment referred only to transcripts of the part of the trial reflecting the trial court's handling of the jury's declared impasse. (RB 200-201.) While that was the general context, a close reading of the comment makes clear that Judge Armstrong was referring to his review of the case as a whole. For instance, Judge Armstrong's very next comment – namely, his complaint that "I begged counsel since March to cite some lines of the transcript to me, because it is rather voluminous" – referred to his requests that counsel supply citations in support of a motion for a new trial, a matter far broader than the court's handling of the impasse. (43 RT 4408; see also 43 RT 4388, 4398.) Indeed, Judge Armstrong's requests that counsel supply citations suggests that he was relying upon counsel because he lacked sufficient familiarity with the record to properly conduct the independent review required by section 190.4, subdivision (e).

Third, Judge Armstrong expressly considered only two factors in denying appellant's motion to modify the verdict: (1) what he characterized as the defendants' argument that "because [they] were members of the Mexican Mafia, [] they were acting under duress" (43 RT 4419);[78] and (2)

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[78] Counsel for co-defendant Palma argued in his motion to modify the verdict that the following evidence should be considered mitigating under Penal Code section 190.3, subdivision (d) ["Whether or not the offense was committed while the defense was under the influence of extreme mental or emotional disturbance"]: "A gang expert testified that when one receives an order from the Mexican Mafia, they must carry out the order or face death. This was an ordered hit." (VII CT 1930-1931.) He further argued that that evidence should be considered mitigating under section 190.3, subdivisions (g) ["Whether or not defendant acted under extreme duress or under the substantial domination of another person"] and (i) ["The age of the defendant at the time of the crime"]. (VII CT 1931-1932.) Counsel for appellant joined in the motion for modification of the verdict. (43 RT 4419.)

his belief that the killings of the children "showed a wantonness" in that the children had not been targeted by the Mexican Mafia. (43 RT 4419-4420.) Moreover, Judge Armstrong's reference to these factors did not demonstrate that he had read the record, as he could have gleaned much of this information from the motion to modify the verdict and/or argument of counsel. (See 43 RT 4416-4417; VII CT 1930-1931.)

Finally, Judge Armstrong's comments betray his unfamiliarity with the complete record in this case. For instance, Judge Armstrong failed to note *appellant's* defense theory: that appellant was not involved in any way in the murders of the five victims on Maxson Road in El Monte. (28 RT 3475-3490, 3492-3497, 3509-3517, 3519-3521; see also 13 RT 1655-1657, 1680-1681; 14 RT 1826-1832; 15 RT 2042-2045, 2048; 23 RT 3134, 3136-3140, 3153-3156; 24 RT 3174-3175, 3177, 3182; 26 RT 3331-3332; 1 SuppCT IV 177-179 [Exh. 100].)

Moreover, contrary to Judge Armstrong's ruling, the record discloses evidence that, even accepting the prosecution's account of the incident, appellant acted under extreme duress. A prosecution gang expert, Richard Valdemar, testified that the Mexican Mafia controls Hispanic and other street gangs in Southern California, as well as the jail and prison system. (18 RT 2264-2265, 2272, 2278, 2298, 2306-2307, 2333.) Valdemar testified that any street gang member who violates its regulations would eventually face discipline by the Mexican Mafia once he comes into custody. Such discipline could mean beating, stabbing, even killing a gang member who does not comply with the Mexican Mafia's order. (18 RT 2265, 2272, 2278, 2298, 2306-2307, 2333.) Finally, Valdemar testified that the Mexican Mafia is willing to wait many years, even decades, to exact revenge. (18 RT 2254, 2307.)

Similarly, as appellant has pointed out (AOB 341), Judge Armstrong's belief that appellant and co-defendant Palma were members of the Mexican Mafia betrayed a fundamental misunderstanding of their role in the incident. (43 RT 4419.) Respondent dismisses appellant's argument, contending that Judge Armstrong's comment was only made in passing and was not directly pertinent to the court's point, which was that the defendants did not act under duress. (RB 201.) But Judge Armstrong's point was not only contradicted by the record, his misunderstanding of the defendants' respective roles in the incident could only work to appellant's profound prejudice. (See Section B, *post.*)

Respondent's reliance upon *People v. Almond*, *supra*, 239 Cal.App.2d 46 is misplaced. (RB 201.) In applying the ordinary presumption that the trial court had read the transcripts, the Court of Appeal noted that the trial court had "summarized the record in terms which indicate a detailed knowledge of the testimony." (*Id.* at p. 50 and fn. 3.) In light of the fleeting, inaccurate ruling in the instant case, there can be no confidence that Judge Armstrong had "a detailed knowledge of the record."

People v. Lewis (2004) 33 Cal.4th 214, also cited by respondent (RB 202), is similarly distinguishable. There, the trial judge, who had been assigned to preside over the case after it was remanded for a new hearing on the defendant's application for modification of the verdict, indicated that he had reviewed the trial transcript. (*Id.* at pp. 223-227.) The judge "then recounted the salient circumstances of the killing as they related to aggravation." (*Id.* at pp. 226-227.) Finally, the judge found that there was no lingering doubt that the defendant was the killer, reciting a number of detailed facts in support of his finding. (*Ibid.*) Under these circumstances, the Court of Appeal reasonably concluded that the judge was able to assess

the credibility of the witnesses (albeit in a limited fashion), determine the probative force of the testimony, and weigh the evidence. (*Id.* at p. 225.)

In the instant case, however, the trial court did not indicate that it had read all of the trial transcripts, nor did it otherwise demonstrate a detailed knowledge of the case. Accordingly, the record here shows that Judge Armstrong lacked the necessary familiarity with the basic facts of the case.

B. The Trial Court's Failure to Make an Independent Determination Under Section 190.4, Subdivision (e), Violated Appellant's Rights Under the State and Federal Constitutions

Respondent contends that, even assuming Judge Armstrong's review of the trial record was deficient, any error was harmless because further review of the record would not have altered his ruling. (RB 202-203.) Respondent's analysis is flawed.

Respondent incorrectly asserts that, with the exception of duress (§ 190.3, subd. (g)), appellant alleged no mitigating factors deriving from the guilt-phase evidence. (RB 203.) In fact, appellant and co-defendant Palma asserted that the fact that the killings had been ordered by the Mexican Mafia, and that the defendants faced death if they failed to comply, also should be considered mitigating under Penal Code section 190.3, subdivisions (g) and (i). (7 CT 1931-1932; 43 RT 4419.) More important, as appellant demonstrated in the previous section, the record shows that Judge Armstrong lacked sufficient familiarity with the record to properly review the record pursuant to section 190.4, subdivision (e).

In light of Judge Armstrong's obvious misapprehension of appellant's role in the incident, it cannot be assumed that further review would only have supported more strongly his denial of the application to modify the verdict. (RB 203.) Judge Armstrong mistakenly believed that

appellant was a member of the Mexican Mafia, which he knew had ordered the killings. (43 RT 4419-4420.) Consequently, Judge Armstrong likely viewed appellant as far more death-worthy than he would have had he known that appellant was merely a member of a local street gang that was under the control of the Mexican Mafia, not a member of the Mexican Mafia itself. For instance, Judge Armstrong likely assumed that appellant had been personally involved in the decision to order the hit, or at least had a personal stake in furthering the goals of the Mexican Mafia. Similarly, Judge Armstrong would have been more likely to credit the mitigating factors cited by appellant and co-defendant Palma had he appreciated that they were under the control of the Mexican Mafia; that they faced severe punishment, even death, if they did not obey the order issued by the Mexican Mafia; and that, even assuming they were not under immediate duress, the Mexican Mafia's power was great, its reach wide, and it was willing to wait many years to exact revenge.[79]

Moreover, appellant was necessarily prejudiced to the extent that Judge Armstrong failed to consider the fact that co-defendant Palma, not appellant, shot Maria Moreno and her children, and that the killing of the children violated Mexican Mafia policy. (18 RT 2320.) Specifically, Judge Armstrong remarked that the killing of the children "showed a wantonness, as far as these defendants were concerned, to wipe out a family." (43 RT 4419-4420.) Yet, appellant almost certainly expected that the children would be unharmed in light of a Mexican Mafia policy dictating that one who commits a "dirty hit" (i.e., a killing committed in violation of edicts or

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[79] In describing the tremendous power of the Mexican Mafia, Valdemar noted that it had infiltrated government agencies and community-based organizations. (18 RT 2251-2253.)

policies issued by the Mexican Mafia) will be disciplined. (18 RT 2320, 2328-2329.) Given the profoundly aggravating nature of the child-killings, Judge Armstrong's failure to note that *Palma* committed those shootings, and that he did so in violation of Mexican Mafia policy, suggests that he was unaware of those facts. As a result, he viewed appellant as equally wanton, equally deserving of death.

Accordingly, appellant's death sentence must be vacated and the case remanded to the trial court for appropriate proceedings pursuant to section 190.4, subdivision (e).

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17

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

Appellant argued in his opening brief that many features of California's capital sentencing scheme violate the United States Constitution. (AOB 349-366.) Appellant recognizes that this Court has previously rejected these arguments, but urges the Court to reconsider them. Respondent relies on the Court's previous precedents without any substantive new arguments. (RB 204-207.) Accordingly, no reply is necessary to respondent's contentions.

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18

THE CUMULATIVE EFFECT OF ALL THE ERRORS REQUIRES REVERSAL OF THE CONVICTIONS AND DEATH JUDGMENT

Appellant has argued that the cumulative effect of the errors at trial require reversal of the convictions and sentence of death even if any single error considered alone would not. (AOB 367-370.) Respondent simply contends no errors occurred, and that any errors which may have occurred were harmless. (RB 207-208.) The issue is therefore joined. Should this Court find errors which it deems non-prejudicial when considered individually, it should reverse based on the cumulative effect of the errors. No further reply to respondent's contentions is necessary.

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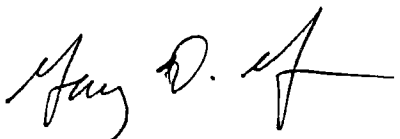
CONCLUSION

For all the aforementioned reasons, appellant's convictions and his sentence of death must be vacated.

DATED: February 26, 2010

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



GARY D. GARCIA
Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL

(CAL. RULES OF COURT, RULE 36 (B)(2))

I, Gary Garcia, am the Deputy State Public Defender assigned to represent appellant Richard Valdez in this automatic appeal. 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 34,845 words in length.

GARY GARCIA
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Richard Valdez* California Supreme Ct. No. S062180

I, Julie Frasier, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; and that on February 26, 2010, I served a true copy of the attached **APPELLANT'S REPLY BRIEF (not including ARGUMENTS 1 AND 2, FILED SEPARATELY UNDER SEAL PURSUANT TO COURT ORDER)** on the following, by placing same in an envelope addressed as follows:

Office of the Attorney General
Attn: Michael R. Johnsen, D.A.G.
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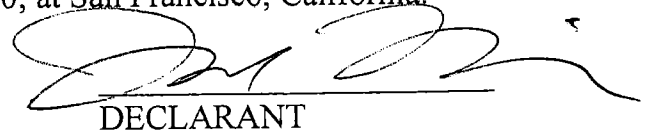
Each said envelope was then, on February 26, 2010, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct.

Signed on February 26, 2010, at San Francisco, California.



DECLARANT

AMENDED PROOF

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Antonio J. Bestard, Esq.
101 W. Mission Blvd., #218B
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Executed on February 26, 2010, at San Francisco, California.

DECLARANT