IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

DANIEL SANCHEZ COVARRUBIAS,

Defendant and Appellant.

_____/

Case No. S075136
(Monterey Superior Court
No. SC942212(C))

AUTOMATIC APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA, COUNTY OF MONTEREY

HONORABLE ROBERT MOODY, JUDGE, PRESIDING

APPELLANT'S REPLY BRIEF

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TO THE HONORABLE RONALD M. GEORGE PRESIDING JUSTICE AND THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

PREFACE

The briefing that follows addresses those portions of Respondent's Brief that warrant additional discussion beyond what is already contained in Appellant's Opening Brief. As to respondent's allegations which are not addressed below, appellant respectfully refers the Court to his opening brief.

I.

RESPONDENT MISSTATES THE GUILT PHASE EVIDENCE

A. Introduction

The primary factual issue in this case concerned appellant's intent. The prosecutor alleged that appellant acted pursuant to a preconceived plan with Antonio Sanchez to burglarize Ramon Morales's house, steal Morales's property and murder Morales as well as any other occupants of the house. Appellant acknowledged that he entered Morales's house with Antonio Sanchez and two other persons but appellant maintained that his only purpose was to help retrieve property belonging to Antonio Sanchez. Appellant denied any intent to steal or murder.

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B. The Prosecution's Evidence As To Appellant's Intent To Steal And Murder Was Neither "Undisputed" Nor "Overwhelming"

Respondent contends that the evidence of appellant's intent to steal and murder was "overwhelming" and that "[t]here was no dispute that appellant, at the very least, aided and abetted the murders." (RB 56; see also RB 62, 64, 87, 159.) This characterization of the record is plainly inaccurate.

It is true that the defense did not contest some of the foundational facts such as appellant's entry of the Morales house with Antonio Sanchez and the others. Nor did appellant dispute that Antonio Sanchez and one of the others, Joaquin Nuñez, were armed with firearms when they entered Morales's house. Also, appellant did not contest the prosecution's evidence that he was present when the occupants of the house were shot and that he fled to Mexico after the shootings.

However, the evidence that appellant knowingly joined and participated in a conspiracy to steal and murder was far from "overwhelming" and certainly was not "undisputed." The record contains substantial evidence which could have left rational jurors with a reasonable doubt that appellant intended to steal Morales's property and murder the occupants of Morales's house.

First, appellant's recorded statement disavowed any intent to steal or murder. Appellant stated that, to his knowledge, the only purpose in going to the house was to retrieve property belonging to Antonio Sanchez. Furthermore, the record fails to demonstrate that the jurors disbelieved appellant's recorded statement. (See p. 3-4, below.)

Second, appellant had no motive to steal from Ramon Morales. As argued by the defense, appellant had no "stake" in the dispute between Antonio Sanchez and Ramon Morales. (52 RT 10268.) And, the prosecutor agreed: "You know, Antonio really was the one that had the bone to pick here. He was the one that had it in for Ramon Morales." (52 RT 10224:19-24; see also 52 RT 10244 [". . . look at the . . . photos of Ramon Morales, he was overkilled. He wasn't just killed. He was overkilled with that AR-15."].) Thus, the prosecution's evidence allowed the jurors to reasonably infer that Sanchez had a vengeful motive which he did not disclose to the others,

including appellant.[1]

Third, the physical evidence presented by the prosecution corroborated appellant's denial of an intent to steal and murder. Even though the house had been thoroughly searched for 15-20 minutes – and appellant's fingerprints showed that he participated in the search – appellant did not take $378 in cash and other items of value including several handguns. (AOB, pp. 37-38; 146-47.) Instead, according to prosecution witness Jose Luis Ramirez, appellant took only two of the three handguns from a box in the kitchen, and gave at least one of these to Antonio Sanchez. (See 41 RT 8032-33; 50 RT 9852-53.) This evidence permitted the jurors to rationally infer that appellant's recorded statement was truthful and that he only intended to take property that belonged to Sanchez.

Fourth, the defense forcefully cross-examined Ramirez as to his claims that appellant knowingly joined a plan to steal and murder. During this cross-examination Ramirez – who received an extremely favorable plea bargain as incentive to testify against appellant – admitted that he lied to the police about crucial parts of his story. (See 42 RT 8217-18.)

In sum, respondent's suggestion that the evidence of appellant's intent to steal and murder was "overwhelming" and without "dispute" is a gross misstatement of the record.

C. The Jurors Did Not "Necessarily Disbelieve" Appellant's Disavowal Of An Intent To Steal

Respondent asserts that the jurors "necessarily disbelieved" appellant's recorded statement which disavowed an intent to steal the victims' property. (RB 64; see also RB 67.) This assertion is plainly erroneous because the jurors were able to convict appellant of robbery even if they concluded that appellant only intended to retrieve property belonging to Sanchez and nothing in the jurors' verdicts demonstrated that they found intent to steal in another context. (See AOB pp. 164-65.)

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[1] Such an inference was further supported by a telephone call between Ramirez and Antonio Sanchez the day after the shootings during which Ramirez said to Sanchez:"I didn't think you were going to do that." (42 RT 8242; 8248-49; 8250 [Ramirez testified that he would have warned Morales if he had known that anything serious was going to happen].)

As respondent acknowledges, to convict appellant of robbery the jurors merely had to find that appellant "intended to take the personal property of another from the possession of another." (RB 61, 63; see also CALJIC No. 9.40 as given in the present case [53 RT 10463-646; CT 1307-08].) Thus, as respondent also acknowledges, the jurors could have convicted appellant of robbery even if they "believed that appellant's only plan before entering the house was to recover Sanchez's property. . . ." (RB 63; see also RB 61 [jury could have convicted appellant of robbery even if "appellant believed that *Sanchez* had the right to take back his own property. . . .].) Accordingly, the jurors did not "necessarily disbelieve" appellant's recorded statement in reaching their verdicts.

D. The Jurors Did Not Necessarily Find That Appellant Aided And Abetted Ramirez's Thefts

Respondent claims that the jurors "found" that appellant "aided and abetted Ramirez in stealing [the items Ramirez looted]." (RB 67; see also RB 64 [". . . the guilt verdicts on the robbery charges demonstrate that the jury believed Ramirez to the extent that appellant had the intent, at the very least, to aid and abet him in his robbery. . . ."].) This assertion is erroneous because the verdicts do not necessarily include a finding that appellant aided and abetted Ramirez's thefts. To the contrary, the special verdict finding that appellant conspired to commit robbery (AOB, p. 11) allowed the jurors to convict appellant of robbery and robbery felony murder without having to find that appellant aided and abetted Ramirez's thefts. (See AOB 174-75.)

Nor did the conspiracy to commit robbery verdict necessarily include a finding that appellant aided and abetted Ramirez's thefts or intended to steal. The jurors could reasonably have inferred that the conspiracy was between appellant and Antonio Sanchez – i.e., to retrieve Sanchez's property – and that Ramirez acted on his own when he took the items from the house. Such an inference was suggested by appellant's recorded statement disavowing any intent to further Ramirez's "looting" (4 SCT 1037) and by counsel's argument that Ramirez saw this as an "opportunity" to take things for himself. (52 RT 10271.) And, this "opportunity" argument was further reinforced by the fact that Ramirez took "his brand" of hair oil ("Tres Flores") and pawned the necklace. (41 RT 8042, 8045-46; 44 RT 8633, 8649-50, 8655-56.)

Nevertheless, once the jurors found that appellant "conspired" with Antonio Sanchez to retrieve Sanchez's property the instructions allowed the jurors to convict appellant of robbery and robbery felony murder without finding that appellant aided and abetted Ramirez and without finding that appellant intended to permanently deprive an owner of his or her property. (See p. 3-4, above.)

In sum, the jury's verdicts do not include either an express or implied finding that appellant knowingly and intentionally aided and abetted Ramirez's takings.

E. The Special Verdicts Indicate That The Jurors Did Not Unanimously Believe The Prosecution's Theory Of The Case

Respondent's interpretation of the facts is also contrary to the jurors' disposition of the special verdict allegations on use of a knife, use of a firearm, and conspiracy to commit murder.

The prosecutor relied on the knife-use allegation to support her theory that appellant intended to steal:

> "What was his [appellant's] intent when he opened that door? Well, we know what he did. He went in there and he grabbed Fernando Martinez and he put a knife to his neck. And then his pals started rifling through things in that house. They went there to steal. They went there to take things and that's exactly what they did." (52 RT 10254:6-12.)

However, the jurors apparently rejected the prosecutor's theory that appellant's knife-use evidenced an intent to steal because they unanimously found that allegation not true. (AOB, p. 11.) Thus, the jurors' verdict on the knife-use allegation was consistent with appellant's disavowal of an intent to steal.

The jurors also failed to find in favor of the prosecution on the question of whether appellant intended to murder as demonstrated by the jurors' inability to return a verdict as to the conspiracy to commit murder allegation. (4 CT 997; 56 RT 11046.) Additionally, the jurors could not reach a verdict on the use of a firearm allegation. (AOB, pp. 11-12.) These verdicts further demonstrate that the jurors did not unanimously accept the prosecution's theory of the case.

II.

RESPONDENT MISSTATES THE PENALTY PHASE EVIDENCE

Respondent misstates the record by suggesting that the penalty trial was not close due to the strength of the aggravating evidence.

Understandably the prosecutor did everything she could to emphasize the graphic circumstances of the shootings throughout both the guilt and penalty trials. Nevertheless, focusing solely on the aggravating circumstances only tells half the story.

As the judge recognized, there was an "inexplicable disconnect" between appellant's character and the crimes he was accused of committing. (72 RT 14218.) Appellant had no prior felony convictions and no ingrained history of criminal violence. And, all the witnesses who knew appellant consistently recounted his generosity and warmth. He loved his family – which included a wife and four young children – and worked hard to provide for them. In sum, it would have been totally out of character for appellant to have knowingly participated in the charged crimes. Indeed, during pretrial negotiations three different judges concluded that a life sentence would be appropriate for appellant. Judge Moody, Judge Phillips and Judge Price engaged in plea discussions with appellant's attorney and the district attorney. Judges Price and Phillips both "felt strongly" that a life without parole sentence would be a "fair and prudent disposition of this case." (2 SCT 316.) Judge Moody agreed with this assessment. (22 RT 4202-04.)

Even the prosecutor was at a loss to reasonably explain why appellant would have knowingly joined in a plan to rob and murder people he did not even know. The prosecutor argued that appellant was a killer "by nature" (53 RT 10416-18) but this claim was pure speculation and at odds with the uncontested evidence of appellant's good character.

CLAIM 1

JUROR 16 SHOULD NOT HAVE BEEN EXCUSED WITHOUT ORAL VOIR DIRE BECAUSE HIS QUESTIONNAIRE RESPONSES WERE NOT "UNEQUIVOCALLY DISQUALIFYING"

[AOB 51-66; RB 34-43]

A. Overview

In his opening brief appellant contended that prospective Juror 16 should not have been excused over defense objection without conducting oral voir dire to clarify the prospective juror's conflicting and ambiguous responses. Respondent acknowledges that "Juror 16 could not say definitely that he would 'always' vote for life imprisonment. . . ." (RB 41.) Nevertheless respondent maintains that the juror was properly excused without oral voir dire because:

> "When read in context of his very strong opinions against capital punishment, Juror 16's indications that he would very likely[2] vote for life imprisonment regardless of the evidence demonstrated an inability to perform his duty as a juror." (RB 41.)

However, reliance on written responses alone to excuse prospective jurors for cause is permissible only if from those responses "it is clear (and "leave[s] no doubt") that a prospective juror's views about the death penalty would satisfy the *Witt* standard (*Wainwright v. Witt*, *supra*, 469 U.S. 412) and that the juror is not willing or able to set aside his or her personal views and follow the law. [Emphasis added.] (*People v. Wilson* (2008) 44 Cal.4th 758, 787; see also *People v. Avila* (2006) 38 Cal.4th 491, 531 [a prospective juror may properly be excused for cause without oral voir dire only if the questionnaire "leave[s] no doubt that [the jurors's] views on capital punishment would prevent or substantially impair the performance of [the juror's] duties in accordance with the court's instructions and the juror's oath."].) In other words, unless the questionnaire responses are "unequivocally disqualifying" oral questioning should be conducted. (See *People v. Stewart* (2004) 33 Cal.4th 425, 450.)

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[2] To be accurate, Juror 16 said he would "most probably" vote for life, not that he would "very likely" vote for life. (6 CT 1573.)

As demonstrated in appellant's opening brief (Claim 1, pp. 51-66) and below (pp. 9-12), Juror 16's questionnaire responses were not "unequivocally disqualifying" and did "leave doubt" about whether he should have been dismissed. Therefore, the judge erroneously rejected counsel's request to conduct oral voir dire.

B. Standard Of Review

The reviewing courts typically defer to the trial judge's resolution of ambiguities and conflicts in the potential juror's stated views. (See e.g., *Wainwright v. Witt* (1985) 469 U.S. 412, 428, fn. 9; *People v. Stewart*, *supra*, 33 Cal.4th at 451.) However, such deference is not appropriate when the judge has not assessed the juror's demeanor during face-to-face voir dire. Because "so much may turn on a potential juror's demeanor" (*Uttecht v. Brown* (2007) 551 U.S. 1 [127 S.Ct. 2218, 2223; 167 L.Ed.2d 1014]; see also *People v. Wilson*, *supra*, 44 Cal.4th at 780), evaluation of the prospective juror's demeanor "is a factor of critical importance in assessing the attitude and qualifications of potential jurors. [Citation.]" (*People v. Wilson*, *supra*, 44 Cal.4th at 779; *Uttecht v. Brown, supra*, 127 S.Ct. at 1022.)

In *Wilson*, this Court discussed the essential link between assessment of a potential juror's demeanor and deference to the trial judge in light of *Uttecht* as follows:

> The United States Supreme Court has recently expounded on the propriety of deferring to a trial court's ruling on a challenge for cause, explaining that "the finding may be upheld even in the absence of clear statements from the juror that he or she is impaired because 'many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.' [Citation.] Thus, when there is ambiguity in the prospective juror's statements, 'the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, [is] entitled to resolve it in favor of the State.'" ([Citation to *Uttecht v. Brown,* 127 S.Ct. 2218, 2223].) (*People v. Wilson*, *supra*, 44 Cal.4th at 779.)

Accordingly, this Court should review the judge's ruling de novo without deference to the judge's ruling below.

C. A Prospective Juror Should Not Be Excused Without Oral Voir Dire Unless The Juror's Written Questionnaire Responses Are "Unequivocally Disqualifying" And "Leave No Doubt" That The Juror Is Unqualified

In *People v. Stewart* (2004) 33 Cal.4th 425, 45–52 this Court held that a prospective juror should not be dismissed without oral voir dire when the written questionnaire responses only "provided a *preliminary* indication that the prospective juror *might* prove, upon further examination, to be subject to a challenge for cause." [Emphasis in original]. (*People v. Stewart*, *supra*, 33 Cal.4th at 448.) Even though the questionnaire responses established that the prospective jurors opposed the death penalty and, as a result, would find it "very difficult" to vote for death, this Court concluded that their responses were not "unequivocally disqualifying." (*Id.* at 450.)

Since *Stewart,* this Court has consistently held that oral voir dire is not required when the questionnaire responses are "unequivocally disqualifying" and "leave no doubt" that the juror was disqualified.

For example, in *Avila* dismissal based solely on the questionnaire was proper because three of the four *Avila* jurors unequivocally stated that, regardless of the evidence, they would "automatically" vote to defeat the death penalty in every case. (*People v. Avila*, *supra*, 38 Cal.4th at 531-32.) And dismissal of the fourth juror (C.H.) was proper because she could not even vote on the question of penalty and could not set aside her personal feelings and follow the law. (*Ibid.*) Under these circumstances the questionnaire left "no doubt" that the juror was disqualified.

Similarly, in *People v. Cook* (2007) 40 Cal.4th 1334 the questionnaire alone justified excluding prospective juror Marie R. because she "specifically stated her unequivocal refusal to consider the possibility of imposing the death penalty. . . Her answer to question No. 48 revealed that, regardless of what the evidence would show at trial or at the penalty phase and regardless of what instructions she would receive, [she] could not consider the possibility of imposing the death penalty. . . ." [Emphasis added.] (*People v. Cook, supra,* 40 Cal.4th at 1343-44.)

Likewise, in *People v. Wilson*, *supra*, 44 Cal.4th at 781-90 the judge properly excused two jurors without oral voir dire due to their unequivocal

affirmative responses to the question regarding whether they would "ALWAYS" vote . . . for life . . . ." In concluding that the *Wilson* questionnaire comported with the requirements established in *Avila* this Court concluded that the *Wilson* "phraseology is the equivalent of that . . . approved in *Avila*; the capitalization and underscoring of the word 'always' must have made clear to all prospective jurors that the question sought to determine if the juror would automatically vote one way or the other irrespective of the evidence." (*Id.* at 787.)

In sum, from *Stewart*, *Avila*, *Cook* and *Wilson* "the rule emerges that reliance on written responses alone to excuse prospective jurors for cause is permissible if, from those responses, it is clear (and 'leave[s] no doubt') that a prospective juror's views about the death penalty would satisfy the *Witt* standard. . . ." [Emphasis added.] (*Wilson*, 44 Cal.4th at 787.)

D. Juror 16's Questionnaire Responses Were Not "Unequivocally Disqualifying" Because (1) Juror 16 Did Not State That He Would "Always" Or "Automatically" Vote For Life; (2) He Did Not Foreclose The Possibility That He Could Set Aside His Personal Views And Follow The Law And (3) His Other Responses Were Ambiguous

In the present case – in contrast to *Avila*, *Cook* and *Wilson* – Juror 16's response to the automatic life question "left doubt" as to whether he was disqualified under the *Witt* standard. In response to the key automatic-life question Juror 16 equivocally stated that he would "most probably" vote for life. (6 CT 1574.) As respondent acknowledges, use of the term "most probably" in answering a yes-or-no question expresses an inability to "commit" to the answer. (See RB 41 [attorney general observes that by responding "Yes, most probably" to Question 59F the juror "could not commit to following the law"].) This inability to "commit" left doubt about the prospective juror's ability to serve under the *Witt* standard. (Compare *People v. Wilson*, *supra*, 44 Cal.4th at 787 [no doubt as to disqualification when jurors stated that they "would ALWAYS vote . . . for life . . ."]; *People v. Cook*, *supra*, 40 Cal.4th 1343-44 [prospective juror stated her "unequivocal refusal" to consider voting for death]; *People v. Avila*, *supra*, 38 Cal.4th at 531-32 [no doubt where jurors indicated they would "automatically" vote for life].)

Indeed, Juror 16's statement that he would "most probably" vote for life

was no more disqualifying than the *Stewart* jurors' admission that it would be "very difficult" for them to vote for death. In each case the juror's responses –without further inquiry– merely revealed a preference or favoring of life over death, which is not disqualifying under *Witt*. The juror's indication of other possibilities cried out for further inquiry and explanation of the jurors' task.

> "Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will 'substantially impair the performance of his [or her] duties as a juror' under *Witt*, *supra*, 469 U.S. 412." (*People v. Stewart*, *supra*, 33 Cal.4th at 447 [emphasis added].)

Thus, a prospective juror is not disqualified even if a prospective juror would "assign a greater than average weight to the mitigating factors" or "impose a higher threshold before concluding that the death penalty is appropriate. . . ." (*Ibid.*, citing and quoting *People v. Kaurish* (1990) 52 Cal.3d 648, 699.)

Accordingly, Juror 16's statement that he would "most probably" vote for life was not "unequivocally disqualifying." While suggesting that it would be "very difficult" for him to vote for death, it did not foreclose the possibility that Juror 16 was "nonetheless . . . capable of following his oath and the law." (*People v. Kaurish*, *supra*, 52 Cal.3d at 699.) Indeed, this possibility was reinforced by Juror 16's statement that he "most probably could set aside his personal views and follow the law. (6 CT 1574 [Question 59(F)].) Accordingly, the questionnaire responses failed to "negate the *possibility* the juror[] could set aside [his] feelings and deliberate fairly." [Emphasis added.] (*People v. Avila*, *supra*, 38 Cal.4th at 530.)

Nor did Juror 16's responses demonstrate that his views "would actually preclude him from engaging in the weighing process and returning a capital verdict." (*People v. Kaurish*, *supra*, 52 Cal.3d at 699.) In fact, Juror 16 expressly stated that (1) consideration of appellant's background including his emotional difficulties and substance abuse would be helpful in deciding whether to impose death or LWOP; (2) he would not reject any of those factors

automatically, and (3) the fact that appellant had young children would not preclude him (Juror 16) from voting for a penalty of death. (6 CT 1574-75.)

In sum, Juror 16's questionnaire responses were not "unequivocally disqualifying." His questionnaire "left doubt" which could only have been resolved by face-to-face oral voir dire. Without such *oral* voir dire "[w]e simply do not know how . . . [Juror 16] would have responded to appropriate clarifying questions. . . ." (*People v. Stewart*, *supra*, 33 Cal.4th at 450-51.)

CLAIM 9

THE JUDGE PREJUDICIALLY ABUSED HIS DISCRETION BY COMPELLING APPELLANT TO WEAR A STUN BELT

[AOB 109-135; RB 50-57]

A. Appellant Does Not Dispute That Some Kind Of Restraint Was Justified

Contrary to what respondent suggests, appellant's stun belt claim does not dispute that "the use of some type of restraint was justified by the circumstances appearing on the record." (RB 53-54.) Appellant's claim assumes that some kind of restraint was justified. But, in deciding what restraint to employ, the judge erred by failing to consider and weigh the adverse psychological impact of the stun belt on appellant and to consider less invasive restraints. (See AOB, pp. 115-118.)

B. Appellant Adequately Objected To The Stun Belt And, Even Without An Objection, The Judge Should Have Considered The Impact Of The Stun Belt On Appellant And The Suitability Of Less Invasive Alternatives

Respondent suggests that appellant was obligated to inform the judge that "he would prefer visible shackles" to the stun belt. (RB 55.) This suggestion fails to aid respondent's cause for several reasons.

First, appellant did adequately express his desire for a restraint other than the stun belt when defense counsel objected to "that kind of restraint" (10 RT 1813) and asserted that there were "less invasive ways to do it. . . ." (27 RT 5211-12.) Also, counsel informed the judge about appellant's concern that the stun belt would be unnecessarily activated. (10 RT 1814.) These on-the-record statements by defense counsel were more than sufficient to put the judge on notice that appellant desired a less invasive restraint than the stun belt.

Second, respondent erroneously assumes that the only less invasive option would have been "visible shackles." There is nothing in the record establishing that the use of visible shackles was the only other available option. The sheriff acknowledged that appellant could have been adequately restrained with "shackles and/or leg irons" but did not indicate that such restraints would necessarily have been visible to the jurors.

Third, even if the defense did not adequately object to the stun belt and request "less invasive" restraints, the judge was still obligated to evaluate the availability of other restraint options, to weigh the psychological impact of the stun belt against those other restraint options, and to assure that appellant was restrained by the least invasive option. (See *People v. Duran* (1976) 16 Cal.3d 282, 293, fn. 12.)

C. The Rationale And Holding Of *Mar*[3] Should Apply To Appellant

Respondent argues that *Mar* should not apply to the present case because "[t]he trial court cannot be faulted for failing to anticipate the promulgations of new considerations for future trials." (RB 55.) However, the core of the decision in *Mar* – that the judge should weigh the psychological impact of a stun belt restraint before ordering its use – was founded on this Court's early recognition of the psychological impact of physical restraints:

> "As the Court of Appeal accurately noted, the holding in *Duran* clearly was not limited to restraints upon a defendant that are visible to the jury. (See id. at p. 292.) Although the court in *Duran* emphasized the adverse effect that visible restraints might have upon a jury, it also relied upon the circumstance – highlighted by this court's early decision in *Harrington*, *supra*, 42 Cal. 165 – that the imposition of such a restraint upon a defendant during a criminal trial 'inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense. . . .' [Citations.]" (*People v. Mar, supra*, 28 Cal.4th at 1219.)

Thus, the decision in *Mar* was a logical extension of prior case law rather than the "promulgation" of a new rule. Moreover, even if *Mar* is read to have created a new rule, that rule should apply in the present case which is not yet final.[4]

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[3] *People v. Mar* (2002) 28 Cal.4th 1201.

[4] Because the requirements set forth in *Mar* protect the defendant's fundamental federal constitutional rights (see AOB, pp. 119-24), those requirements should apply retroactively to non-final cases on direct appeal. (See *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1013; *In re Moore* (2005) 133 Cal.App.4th 68, 75-76; *In re Consiglio* (2005) 128 Cal.App.4th 511, 514.)

D. Respondent's Harmless Error Discussion Misstates The Federal Standard And Misrepresents The Record In The Present Case

1. Respondent's Discussion Of The Federal Harmless Error Standard Erroneously Shifts The Prosecution's Burden To Appellant

Respondent claims that any error in compelling appellant to wear a stun belt was harmless under both the state and federal standards: "Under either standard there is nothing in the record to suggest that the use of the stun belt had any effect on the trial." (RB 55-56.) However, in making this claim respondent ignores *U.S. v. Durham* (11th Cir. 2002) 287 F.3d 1297, the case cited by *Mar* as illustrative of the federal standard. (*People v. Mar, supra*, at 1225, fn. 7.) As explained in *Durham*, if the defendant's right to participate in his own defense has been violated, the "conviction is unconstitutionally tainted and reversal is required unless the State proves the error was harmless beyond a reasonable doubt.'[Citation]." (*U.S. v. Durham, supra*, 287 F.3d at 1308.)[5]

Thus, the error is not harmless under the federal standard simply because "the defendant cannot name any outcome-determinative issues or arguments that would have been raised had he been able to participate at trial." (*Id.* at p. 1309; see also AOB, pp. 126-28 [discussing *Riggins v. Nevada* (1992) 504 U.S. 127 and *Deck v. Missouri* (2005) 544 U.S. 622.) Such a result would "impermissibly transfer the burden of proof back to the defendant, [and] it also would eviscerate the right in all cases where there is strong proof of guilt. [Citation.] 'The right to be present at one's own trial is not that weak.' [Citation.]" (*U.S. v. Durham, supra*, 287 F.3d at 1309; see also *Wrinkles v. State* (Ind. 2001) 749 N.E.2d 1179, 1194 ["A defendant's ability to participate in his own defense is one of the cornerstones of our judicial system."].)

Moreover, the attorney general fails to respond to appellant's discussion

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[5] In finding the error was not harmless in *Durham*, the court stated that "it is not sufficient for the government to point out that the defendant was represented by an attorney looking out for his interests, thus rendering the defendant's presence or participation at trial unnecessary. Such a claim 'ignores the fact that a client's active assistance at trial may be key to an attorney's effective representation of his interests.' [Citation.]." (*United States v. Durham, supra*, 287 F.3d 1297, 1308-1309.)

of the record which shows that the stun belt likely had a detrimental psychological impact on appellant. (I.e., (1) the stun belt's proclivity for inflicting "mental anguish" on those who are required to wear it; (2) the stun belt's abysmal record of 42% accidental activations which was revealed to appellant in the stun belt information provided by the sheriff; and (3) appellant's stated fear that the belt would be unnecessarily activated. AOB, pp. 128-129.)

In sum, given the likelihood that the stun belt negatively impacted appellant's federal constitutional rights, respondent should have the burden of demonstrating that the error was harmless beyond a reasonable doubt.

2. Respondent Has Failed To Demonstrate That The Error Was Harmless At The Guilt Trial

Respondent maintains that any error in requiring appellant to wear a stun belt was harmless because the guilt phase "was not close." (RB 56.)

> The guilt phase evidence was overwhelming. There was no dispute that appellant, at the very least, aided and abetted the murders. Ramirez's testimony demonstrated that appellant was part of the plan to enter the Morales home, rob the occupants, and kill any witnesses. Ramirez's testimony was corroborated by the physical evidence, and by appellant's own admissions. The only substantial dispute was whether appellant was actually aware of his companions' plans, and whether he actually used a weapon. (RB 56.)

Furthermore, respondent asserts that the present case was "[u]nlike the situation in *Mar*, where the case was based on the credibility of the prosecution witnesses versus credibility of the defendant, the case here was not based solely on one prosecution witness's testimony." (RB 56.)

Both of these characterizations of the record are inaccurate.

First, the evidence was not "overwhelming." Appellant substantially discredited the testimony of the key prosecution witness (Ramirez) and through appellant's recorded statement disavowed any intent to kill the occupants of the house or steal their property. (See 50 RT 9816-17; 4 SCT 1037; Exhibit 85A.)

Second, as in *Mar*, the key issues in the present case depended on the jurors' resolution of a credibility contest between appellant (via his recorded statement) and the key prosecution witness, Jose Luis Ramirez. (See AOB

Claim 10 § B(2), pp. 141-46 and § D, pp. 147-50.) Thus, even though appellant did not testify, his in-court demeanor was important. The jurors undoubtedly observed appellant during trial and – as suggested by the prosecution – "look[ed] into [his] eyes." (67 RT 13237.)

Third, the verdicts in the present case demonstrate that the jurors did not accept important parts of the prosecution's case. For example, the jurors unanimously rejected Ramirez's testimony that appellant used a knife to hold Fernando Martinez at bay immediately after appellant and the others entered the house. (See AOB, p. 11.) In so doing, the jurors also presumably rejected the prosecutor's theory that appellant's alleged use of a knife against Martinez exhibited an intent to help the others steal from the occupants of the house.[6]

Additionally, the jurors did not unanimously accept two other crucial prosecution theories: (1) that appellant conspired with the others to commit murder and (2) that appellant used a firearm. (See AOB, pp. 11-12.) Given this demonstrative evidence revealing that the jurors had significant doubts about the prosecution's evidence, the present case provides an even more compelling basis for reversal than did *Mar*.

3. Respondent Has Failed To Demonstrate That The Error Was Harmless At The Penalty Trial

Respondent does not address the issue of whether the stun belt error was harmless at the penalty trial. However, the attorney general's responses to other penalty issues suggest that respondent would argue that the error was harmless because "[a]ppellant's participation in the 'massacre,' outweighed

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[6] The prosecution relied on the use of a knife allegation to support its theory that appellant conspired with Ramirez to steal property from the occupants of the house and knowingly aided and abetted Ramirez in doing so:

> What was his [appellant's] intent when he opened that door? Well, we know what he did. He went in there and he grabbed Fernando Martinez and he put a knife to his neck. And then his pals started rifling through things in that house. They went there to steal. They went there to take things and that's exactly what they did. (52 RT 10254:6-12.)

In light of this argument, the jurors' unanimous rejection of the knife allegation (AOB, p. 11) suggests that some jurors had doubts about the prosecution's vicarious liability allegations which were heavily dependent on Ramirez's questionable credibility.

any mitigating evidence provided by [sic] defense." (See RB 171.) Respondent also would likely have quoted the trial judge who stated that "the nature and severity of these offenses simply overwhelms the proven factors in mitigation. . . ." (RB 220 [citing 72 RT 14217].)

However, the above approach to the penalty phase evidence omits critical mitigating circumstances.

First, even though the jurors had already found appellant liable for the murders at the guilt trial, they still had to weigh the nature and extent of appellant's participation in the crimes for which he was convicted. For example, the jurors' rejection of the knife-use allegation and inability to reach a verdict on the conspiracy to commit murder, as well as the use of a firearm allegations suggests that one or more jurors had a reasonable doubt that appellant (1) intended to kill and/or (2) personally shot the victims. These doubts were potentially powerful mitigating circumstances which countered the prosecution's characterization of appellant as an evil person who intentionally robbed and killed because it is his "nature" to do so. (See AOB Claim 59 § G(2), pp. 550-51.)

Second, the judge observed "an inexplicable disconnect" between appellant's character and the crimes he was accused of committing. (72 RT 14218.)[7] Appellant had no prior felony convictions and no history of criminal violence. And, all the witnesses who knew appellant consistently recounted his generosity and warmth. He loved his family – which included a wife and four young children – and worked hard to provide for them. In sum, it would have been completely out of character for appellant to have knowingly participated in the charged crimes.

Third, the stun belt adversely affected appellant's ability to "maintain a positive demeanor before the jury." (*People v. Mar*, *supra*, 28 Cal.4th at 1226.) As particularly relevant to the penalty trial, the belt likely impaired appellant's ability to "react and respond to the proceedings and to demonstrate remorse or compassion." (See *Riggins v. Nevada*, *supra*, 504 U.S. at 143-44, Kennedy, J., concurring.) "The prejudice can be acute during the sentencing

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[7] In attempting to address this obvious "disconnect" the prosecutor could only speculate that it was appellant's "nature" to commit such crimes.

phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies. [Citation.]" (*Ibid.*) Hence, any impact the stun belt may have had on appellant's demeanor was critical.

For example, the judge described appellant's demeanor during the trial as "passive." (72 RT 14216.) While the judge concluded that passiveness is mitigating, the jurors could well have considered passiveness in the face of the emotional penalty evidence to indicate coldness or lack of remorse. (See e.g., *Atkins v. Virginia* (2002) 536 U.S. 304, 320-21 [demeanor of mentally retarded defendant "may create an unwarranted impression of lack of remorse for their crimes"]; *People v. Adcox* (1988) 47 Cal.3d 207, 258 [prosecutor argued that defendant's cold demeanor showed absence of remorse]; *People v. Williams* (1988) 44 Cal.3d 883, 971-72 [trial judge may cite defendant's "calm" trial demeanor as weighing against modification of death judgment]; Theodore Eisenberg, Stephen P. Garvey, Martin T. Wells, "*But Was He Sorry? The Role of Remorse in Capital Sentencing,*" 83 Cornell L. Rev. 1599 (Sept. 1998) [The defendant's demeanor during trial also influences jurors' beliefs about remorse]; Scott Sundby, *The Jury and Absolution: Trial Tactics, Remorse and the Death Penalty,* 83 *Cornell Law Review* 1557 (1998) [The primary source of the jurors' perceptions concerning the defendant's remorse . . . appeared to be the defendant's demeanor and behavior during trial. What repeatedly struck jurors was how unemotional the defendants were during the trial, even as horrific depictions of what they had done were introduced into evidence].)

Jurors' perceptions concerning the defendant's remorse, or lack thereof, are primarily molded by the defendant's demeanor during trial. (Scott Sundby, *The Jury and Absolution: Trial Tactics, Remorse and the Death Penalty,* 83 *Cornell Law Review* 1557 (1998).) Thus, it can be especially prejudicial to the defense for the defendant to remain passive while horrific descriptions of the crime are put into evidence. (*Ibid.*)

Moreover, in the present case appellant's character was a key disputed issue at the penalty trial. The defense presented evidence of appellant's good character including his kind and generous nature and the fact that he had no

prior felony convictions and no record of any criminal violence. (See Penalty Phase: Statement Of Facts § C(2)-(5), pp. 523-25, incorporated herein.) On the other hand, the prosecutor contended that appellant had the character of a murderer and specifically urged the jurors to "look into [appellant's] eyes" in deciding whether he deserved sympathy. (67 RT 13237.) Hence, appellant's demeanor during both the guilt and penalty trials was a critical factor for the jurors to evaluate in deciding whether or not appellant should be executed.

In sum, for all of the reasons discussed above, as well as in appellant's opening briefing, respondent has not and cannot demonstrate that the stun belt error was harmless beyond a reasonable doubt as to penalty.

CLAIM 10

THE JURORS WERE ERRONEOUSLY PERMITTED TO CONVICT APPELLANT OF THE ROBBERY-BASED CHARGES EVEN IF THEY BELIEVED THAT APPELLANT'S ONLY INTENT WAS TO HELP RETRIEVE SANCHEZ'S PROPERTY

[AOB 136-179; RB 58-64]

In his opening briefing appellant contended that the robbery instruction which governed the jurors' deliberations erroneously allowed the jurors to convict appellant of robbery even if they believed that appellant merely intended to help retrieve property belonging to his cousin, Antonio Sanchez. (AOB pp. 136-179 and pp. 195-205.) Respondent acknowledges that the instructions allowed the jurors to convict appellant of robbery even if "they believed that appellant's only plan before entering the house was to recover Sanchez's property. . . ." (RB 63; see also RB 61 [jury could have convicted appellant of robbery even if "appellant believed that *Sanchez* had the right to take back his own property. . . .].) Nevertheless, respondent argues that appellant was lawfully convicted of robbery because:

(A) The robbery instruction given to appellant's jury (CALJIC No. 9.40) correctly adopted the literal language of Penal Code § 211 (RB 60-61);

(B) The claim of right doctrine defines a defense and not an element of robbery (RB 59-60);

(C) Even if appellant only intended to help retrieve Sanchez's property, appellant was still guilty of robbery because he did not own the property (RB 63-64); and

(D) None of the property taken from the Morales residence actually belonged to Sanchez. (RB 62.)

As demonstrated below, each of respondent's contentions are unpersuasive and should be rejected.

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A. This Court Should Reject Respondent's Assertion That By Tracking The Literal Language of Penal Code § 211 CALJIC No. 9.40 Correctly Stated The Law

1. Respondent's Position

Respondent argues that CALJIC No. 9.40 correctly stated the law because Penal Code § 211 requires only an intent to deprive "the possessor" of property – not "to deprive 'the owner' of property." (RB 60-61.)[8] Hence, under respondent's interpretation, appellant was still guilty of robbery "[e]ven if appellant believed that *Sanchez* had the right to take back his own property [because] appellant intended to take the personal property of another, from the possession of another. [Citation to Pen. Code §§ 484, 211.]" (RB 61.) In other words, according to respondent it would have been "incorrect and unnecessary" to require appellant's jurors to find that he intended to permanently deprive "an owner" of his or her property. (RB 61-62.) This argument should be rejected.

2. Penal Code § 211 Is Declaratory Of The Common Law Which Includes Intent To Permanently Deprive An Owner Of His Or Her Property As A Core Element Of Robbery

Respondent's position is erroneous because the decisions of this Court

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[8] Penal Code § 211 provides as follows:

> Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear. (Cal. Pen. Code § 211, enacted 1872.)

As given in the present case CALJIC No. 9.40 adopted the literal language of Penal Code § 211 as follows:

> "1. A person had possession of property of some value however slight;
> 2. The property was taken from that person or from [his] [her] immediate presence;
> 3. The property was taken against the will of that person;
> 4. The taking was accomplished either by force or fear; and
> 5. The property was taken with the specific intent permanently to deprive that person of the property." (53 RT 10463-66; 6 CT 1307-08.)

have consistently held that the California larceny statutes are "declaratory of the common law" which includes intent to steal – defined as intent to deprive an owner of his or her property – as an element of both theft and robbery. (*People v. Chun* (2009) 45 Cal.4th 1172, 1183-1184; *People v. Avery* (2002) 27 Cal.4th 49; *People v. Davis* (1998) 19 Cal.4th 301; *People v. Tufunga* (1998) 21 Cal.4th 935; *People v. Kunkin* (1973) 9 Cal.3d 245; *People v. Butler* (1967) 65 Cal.2d 569; *People v. Ford* (1964) 60 Cal.2d 772; *People v. Sanchez* (1950) 35 Cal.2d 522.) As this Court has long held:

> ". . .[T]he test . . . is: did [the accused] intend to permanently deprive the owner of his property? If he did not intend so to do, there is no felonious intent. . . ." [Emphasis added.] (*People v. Brown* (1894) 105 Cal. 66, 69; see also *People v. Williams* (2009) 176 Cal. App. 4th 1521, 1528-29] [an accomplice who assists another person in repossessing his own property lacks the specific intent to deprive another of his or her property].)

Hence, the "Blue Ribbon" CALCRIM Committee, which rewrote the standard criminal jury instructions from scratch, concluded that the very element omitted by CALJIC No. 9.40 in appellant's trial – i.e., intent to deprive an owner of his or her property – is a core element of robbery upon which the jury must be instructed. (See discussion of CALCRIM No. 1600 (New January 2006), Element 5, p. 24-25, below.)

In sum, because Penal Code § 211 is declaratory of the common law, CALJIC No. 9.40 erroneously adopted the literal statutory language which omitted the common law element of intent to permanently deprive an owner of his or her property.

3. This Court Has Already Expressly Rejected Respondent's Literal Interpretation Of Penal Code § 211

Respondent's position is the same one advanced by Justice Mosk in his dissent to this Court's decision in *People v. Butler* (1967) 65 Cal.2d 569, 577:

> I would rely upon the specific provisions of Penal Code section 211, which raise no issue of ownership of property forcibly taken, but only its possession. Here, possession of the money was in the deceased, and when it was taken from him by means of force, the crime of robbery was committed. (*Id.*, at 577, Mosk, J., dis. opn.)

However, the *Butler* majority expressly rejected Justice Mosk's position and held that "a specific intent to steal, i.e., an intent to deprive an owner

permanently of his property, is an essential element of robbery. [Citing *People v. Ford* (1964) 60 Cal.2d 772, 792; *People v. Morlock* (1956) 46 Cal.2d 141, 146; *People v. Sanchez* (1950) 35 Cal.2d 522, 526.]" (*People v. Butler*, *supra*, 65 Cal.2d at 573.)

Moreover, *People v. Tufunga* (1998) 21 Cal.4th 935 reaffirmed *Butler's* rejection of Justice Mosk's position by holding that the legislative history of Penal Code § 211 "plainly reflects the Legislature's intent to incorporate the common law claim-of-right defense as part and parcel of the *animus furandi* [intent to steal] element found in the current robbery statute." (*People v. Tufunga*, 21 Cal.4th at 947; see also *People v. Chun*, *supra*, 45 Cal.4th at 1183-84 [recognizing incorporation of common law in the statute defining theft (Penal Code § 484)].) Thus, *Tufunga* reiterated this Court's long standing view that "a felonious taking, that is, a taking done with the intent to steal another's property, is a required element at the core of every robbery." [Emphasis added.] (*People v. Tufunga*, *supra*, 21 Cal.4th at 948.)

Additionally, respondent's position is also inconsistent with the current California standardized instructions, CALCRIM. The CALCRIM instructions – which were compiled by a "Blue Ribbon" Committee of trial judges, appellate justices and other criminal law experts including representatives from numerous district attorneys and the California Department of Justice – supplanted the CALJIC instructions in 2006.[9] The CALCRIM robbery instruction (CALCRIM No. 1600) implicitly repudiated CALJIC No. 9.40 by adding – as Element 5 – the requirement that " . . . the defendant . . . intended to deprive the owner of [the property] . . . " as follows (emphasis added):

> To prove that the defendant is guilty of [robbery], the People must prove that:
>
> 1. The defendant took property that was not (his/her) own;
>
> 2. The property was taken from another person's possession and immediate presence;
>
> 3. The property was taken against that person's will;

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[9] Effective January 1, 2006, the California Judicial Council withdrew its endorsement of the CALJIC instructions and adopted the CALCRIM instructions. Use of the CALCRIM instructions rather than the CALJIC instructions is strongly encouraged. (Cal. Rules of Court, rule 2.1050(e); *People v. Reyes* (2008) 160 Cal.App.4th 246, 251; see also *People v. Thomas* (2007) 150 Cal.App.4th 461, 465.)

4. The defendant used force or fear to take the property or to prevent the person from resisting;

AND

5. When the defendant used force or fear to take the property, (he/she) intended (to deprive the owner of it permanently/ [or] to remove it from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property).

In sum, respondent unpersuasively argues that the intent element for robbery was correctly defined in Justice Mosk's dissenting opinion in *Butler* and in CALJIC No. 9.40. The former has been rejected by the decisions of this Court and the latter by CALCRIM No. 1600.

4. Respondent's Position Is Also Inconsistent With A Lesser Included Analysis Of The Robbery Statute

This Court has made it clear that the intent elements for both theft and robbery are identical because robbery is "a species of aggravated larceny." [Internal citations and quotation marks omitted.] (*People v. Tufunga*, *supra*, 21 Cal.4th at 947-48.)[10] Thus, because intent to permanently deprive an owner of his or her property is an element of theft (see *People v. Chun*, *supra*, 45 Cal.4th at 1183-84)[11] such an intent is also an element of robbery.

5. Appellant's Judge Had A Sua Sponte Duty To Correct CALJIC No. 9.40 Even Though It Was A "Standardized" Instruction

Respondent also argues that because the "standardized jury instruction" on robbery at the time of appellant's trial (i.e., CALJIC No. 9.40) did not

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[10] "Since robbery is but larceny aggravated by the use of force or fear to accomplish the taking of property from the person or presence of the possessor [citation], the felonious intent requisite to robbery is the same intent common to those offenses that, like larceny, are grouped in the Penal Code designation of theft. (Fn. omitted.)" [Internal quotation marks omitted.] (*People v. Butler*, *supra*, 65 Cal.2d 572-573; see also *Rodriguez v. Superior Court* (1984) 159 Cal. App. 3d 821, 826.)

[11] See also *People v. Avery* (2002) 27 Cal.4th 49, 54-57 [the intent to steal required for larceny is not present without an intent equivalent to the intent to "permanently deprive the owner of property"]; *People v. Davis*, *supra*, 19 Cal.4th at 307; CALJIC No. 14.02.)

require an intent to permanently deprive "the owner" of the property,[12] the judge had no sua sponte duty to instruct on such intent. (RB 61-62 ["the trial court had no *sua sponte* duty to modify the standardized jury instructions"].) However, respondent's position is contrary to well settled constitutional principles which require the judge to instruct sua sponte on all essential elements of the charge.[13] "[A] court may give only such instructions as are correct statements of the law. [Citation.]" (*People v. Gordon* (1990) 50 Cal.3d 1223, 1275; see also *People v. Cummings* (1993) 4 Cal.4th 1233, 1337 [duty to instruct correctly].) Thus, the intent to deprive an owner of his or her property was an element of the charge against appellant and the judge had a duty to instruct on this element even if the "standardized instruction" did not include it:

> "As one of the essential elements of robbery is a specific intent to steal [citations], it follows that it was the trial court's duty in the case at bench to so instruct the jury even without a request therefor by the defendant. [Citations.]" (*People v. Ford* (1964) 60 Cal.2d 772, 792-93; *People v. Stewart* (1968) 267 Cal.App.2d 366, 375-76 ["The jury must, in addition to the statutory definition of robbery, also be told that a felonious taking involves the specific intent to steal – i.e., the intent to permanently deprive an owner of his property"].)

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[12] CALJIC No. 9.40 as given in the present case only required an intent to "deprive [the person in possession of the property] of the property." (6 CT 1307-08; see also p. 22, fn. 8, above.)

[13] An instructional error relieving the prosecution of its burden of proving an element of the charge violates the defendant's rights under both the United States and California constitutions. (*In re Winship* (1970) 397 U.S. 358; *People v. Cole* (2004) 33 Cal.4th 1158, 1208; *People v. Flood* (1998) 18 Cal.4th 470, 479–480; *People v. St. Martin* (1970) 1 Cal.3d 524; see also p. 28, above.) Hence, the judge has a sua sponte duty to modify or correct a "standardized" instruction which omits an essential element of the charge. (See *People v. Thompkins* (1987) 195 Cal.App.3d 244, 250 [the rote recitation of general form instructions will not always suffice to fulfill the court's instructional obligations]; see also, *People v. Alvarez* (1996) 14 Cal.4th 155, 217 [58 CR2d 385] ["CALJIC No. 1.00 is not itself the law. Like other pattern instructions, it is merely an attempt at a statement thereof."].) As this Court has explained: "Though we cite [CALJIC] for reference purposes, we caution that jury instructions, whether published or not, are not themselves the law, and are not authority to establish legal propositions or precedent." (*People v. Morales* (2001) 25 Cal.4th 34, 48 fn 7.)

B. The Claim Of Right Doctrine Embodies An Element Of Robbery, Not Just An Affirmative Defense

Respondent asserts that CALJIC No. 9.40 correctly stated the elements of robbery because "absence of a claim of right is not an element, and the courts have indicated as much by consistently ruling that a trial court need not instruct on the claim of right defense unless there is substantial evidence suggesting that the defense may be applicable." (RB 59.)

However, the cases relied on by respondent (see RB 60) fail to support respondent's foundational assumption that intent to steal is not an element of robbery because those cases did not purport to enumerate the essential elements of robbery. Instead, they addressed the sufficiency of the evidence to justify an affirmative defense instruction on a claim of right "defense."

For example, in *People v. Tufunga*, *supra*, this Court considered the defendant's appellate claim that the trial judge had erroneously refused the "defense requested" instruction on claim of right. (*People v. Tufunga*, *supra*, 21 Cal.4th at 942 ["At trial, the defense requested instruction on a claim-of-right defense to the charge of robbery."].) Hence, the Court considered this issue in light of the rules requiring the reviewing court to evaluate whether there is "supporting evidence" for the "theory" to which the defense instruction relates. (*Id.* at 944.) And, the other cases relied on by respondent similarly limited their consideration to the propriety of a "defense" instruction.[14]

Accordingly, the cases cited by respondent are inapposite. The standard by which a court evaluates the propriety of a defense instruction "does not govern the trial court's duty to instruct on the essential elements of the crime."

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[14] *People v. Barnett* (1998) 17 Cal.4th 1044, 1042-47 [analyzing propriety and adequacy of affirmative defense instruction on claim of right]; *People v. Hendricks* (1988) 44 Cal.3d 635, 642-43 [defense requested instruction on claim of right properly refused]; *People v. Gates* (1987) 43 Cal.3d 1168, 1182 [same]; *People v. Johnson* (1991) 233 Cal.App.3d 425, 458 [judge properly refused defense requested instruction on claim of right]; *People v. Romo* (1990) 220 Cal.App.3d 514, 518-20 [same].

The one case cited by respondent which did not consider the propriety of a defense instruction, *People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1018, further reinforces appellant's contention that intent to steal is an element of robbery. In finding substantial evidence of robbery *Alvarado* concluded: "[a]ny rational trier of fact could surely have . . . concluded beyond a reasonable doubt that appellants intended to steal." (*Ibid.*)

(*People v. Flood* (1998) 18 Cal.4th 470, 481.) This is so "[b]ecause, under the due process guarantees of both the California and United States Constitutions, the prosecution has the burden of proving beyond a reasonable doubt each essential element of the crime [citation], the jury may find for the defendant even if the only evidence regarding an element of the crime favors the prosecution, but that evidence nevertheless falls short of proving the element beyond a reasonable doubt." (*Ibid.*)[15]

Therefore, while the judge is not always obligated to give a defense theory or pinpoint instruction, there is an absolute duty to instruct *sua sponte* on every essential element of the charge in every case. (*People v. Flood*, *supra*, 18 Cal.4th at 480; see also *Apprendi v. New Jersey* (2000) 530 U.S. 46; *People v. Breverman* (1998) 19 Cal.4th 142, 189; *People v. Figueroa* (1986) 41 Cal.3d 714, 725-27; CALCRIM No. 1600, Bench Notes, "Instructional Duty," Paragraph 1; see also p. 26, fn. 13, above.) "Failure to submit to the jury the essential elements of the crime is 'fundamental' error." (*Screws v. United States* (1945) 325 U.S. 91, 107.)[16]

Indeed, respondent acknowledges this point in another context by observing that even if the jury disbelieved appellant's recorded statement, the jury "still had to find that appellant harbored the requisite criminal intent for the charged crimes. . . ." (RB 143.)

In sum, decisions such as *Tufunga* – which considered the propriety of a "defense" instruction on claim of right – are not authority for respondent's contention that the elements of robbery were correctly stated by CALJIC No. 9.40. (See *People v. Dillon* (1983) 34 Cal.3d 441, 473-74 [cases are not

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[15] For example, in a murder case defenses such as accident, heat of passion and unconsciousness can negate malice. (See e.g. CALCRIM No. 510, 511, 3425.) But, even if the judge were to properly find the evidence insufficient to justify a defense instruction on such a defense, this would not eliminate the judge's duty to *sua sponte* instruct on the essential elements of murder including malice. (See e.g., CALCRIM No. 520, Bench Notes, "Instructional Duty," Paragraph 1; see also *People v. Flood*, *supra*, 18 Cal.4th at 481.)

[16] Conversely, even if the judge does correctly instruct on a particular defense, such instruction will not cure a failure to instruct on an element of the charge. (See *People v. Coria* (1999) 21 Cal.4th 868, 881 [correct instruction on mistake did not cure omission of knowledge element].)

authority for matters not considered].)[17] In fact, if the *Tufunga* Court had been asked to decide the question before the Court in the present case – whether there is a *sua sponte* duty to instruct on intent to deprive an owner of his or her property as a core element of robbery – the answer would have been "yes." *Tufunga* recognized that "a felonious taking, that is, a taking done with the intent to steal another's property, is a required element at the core of every robbery." [Emphasis added.] (*People v. Tufunga, supra*, 21 Cal.4th at 948.)

Respondent also cites *State v. Mejia* (N.J. 1995) 662 A.2d 308, 318 in asserting that appellant "incorrectly elevate[s] the claim of right *defense* to the level of an element of the offense itself." [Emphasis in original.] (RB 59.)

> "For purposes of robbery, the claim of right defense effectively serves as mitigation or justification for the defendant's resort to self help; even though the defendant may have the requisite intent to permanently deprive, we deem that the taking is not culpable if the defendant successfully asserts that he or she was acting in good faith under a claim of right. [Citations.]" (RB 60.)

This argument is unpersuasive for two reasons. First, it assumes as true the very factual issue which appellant contests: whether he had the "requisite intent to permanently deprive. . . ." (RB 60.) Thus, even if this Court were to embrace the *Mejia* analysis, this would not defeat appellant's contention that

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[17] The cases cited by respondent are also inapposite because the claim of right in those cases was based on the defendant's intent to take money or property from the victim to settle an alleged debt or obligation. (See *People v. Barnett* (1998) 17 Cal.4th 1044 [". . . defendant's claim of right amounted to no more than a rough estimate of a disputed debt"]; *People v. Hendricks* (1988) 44 Cal.3d 625, 642 [alleged money owed for services as prostitute]; *People v. Gates* (1987) 43 Cal.3d 1168, 1182 [alleged right to money owed defendant from proceeds of forgery ring]; *People v. Johnson* (1991) 233 Cal.App.3d 425, 457-58 [intent to recover $1,000 allegedly owed to defendant for drug transaction]; *People v. Romo* (1990) 220 Cal.App.3d 514, 520 [defendant took victims's property to "settle the score"]; *People v. Holmes* (1970) 5 Cal.App.3d 21, 23-24 [defendant took items from employer's garage allegedly in payment for wages].) Hence, in those cases, the defendant sought to have the jury instructed that – even if the defendant intended to deprive the owners of their money or property – there was no robbery if the defendant had a bona fide belief that he had a legal right to take the owner's money or property. Accordingly, the cases cited by respondent do not authorize an instruction on robbery which omits the requirement of an intent to deprive an owner of his or her property. (*People v. Dillon, supra*, 34 Cal.3d 473-74 [cases are not authority on matters not considered].)

the jurors were never required to find that he had "the requisite intent to permanently deprive" the owner of his or her property.

Second, this Court has previously rejected respondent's *Mejia* argument and should not revisit it:

> "Unlike the court in *Mejia*, *supra*, 662 A.2d 308, however, we have concluded that California's Legislature incorporated the common law claim-of-right doctrine into the statutorily defined mens rea element of robbery when it codified that offense over 100 years ago, and that consequently, we are not free to judicially abolish it and thereby effectively expand the statutory definition of the crime. [Citation.]" (*People v. Tufunga*, *supra*, 21 Cal.4th at 953.)

C. The Intent To Steal Element Of Robbery Applies To Both Owners Who Seek To Retrieve Their Property And Non-Owners Who Help Retrieve The Owner's Property

Respondent acknowledges that the instruction allowed the jurors to convict appellant of the robbery based charges even if they "believed that appellant's only plan before entering the house was to recover Sanchez's property. . . ." (RB 63; see also RB 61 [jury could have convicted appellant of robbery even if "appellant believed that *Sanchez* had the right to take back his own property. . . .].) Nevertheless, respondent argues that allowing such a result was not error because claim of right principles do not "apply to a third party who recovers property for the owner." (RB 63.) This argument should be rejected.

Respondent's "policy" argument that the intent to steal element should not apply to a non-owner who helps another recover his or her property (RB 63-64) is unpersuasive. An intent to return the property to the owner (with the present ability to do so) has long been held to be inconsistent with the felonious intent to steal required for theft and robbery:

> In *People v. Brown*[18] the defendant defended against a charge of stealing a bicycle by testifying that he intended to return it. We held that the testimony, if believed, would make him not guilty of larceny. 'While the felonious intent of the party taking need not necessarily be an intention to convert the property to his own use, still it must in all cases be an intent to wholly and permanently deprive the owner thereof.'" [Internal citations omitted.] (*People v. Avery*, 27 Cal.4th at 56-57; see also *People*

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[18] *People v. Brown* (1894) 105 Cal. 66.

> *v. Davis*, *supra*, 19 Cal.4th at 307 [citing *Brown*]; *People v. Kunkin* (1973) 9 Cal.3d 245, 251 [quoting *Brown* and holding that "theft by larceny requires a specific intent to permanently deprive the rightful owner of his property"].)[19]

Hence, even if the non-owner personally takes the owner's property from "the possession of another" or assists the owner in doing so, there is no larceny if the non-owner simply intends that the property be restored to the owner. (See generally *People v. Williams*, *supra*, 176 Cal.4th at 1528-29.) In other words, "[i]f he did not intend [to permanently deprive the owner of the property] there is no felonious intent. . . ." [Emphasis added.] (*People v. Brown*, *supra*, 105 Cal. at 69.)

Similarly, one who agrees to help another person recover their property does not act with intent to steal and allowing that person to be convicted of aiding and abetting or conspiracy to commit robbery would be plainly illogical:

> "It would defy logic and common sense to hold that a defendant who absconds with goods by force under a good faith belief that he was repossessing his own property does not thereby commit robbery, but that his accomplice, who assists him in the same act and shares the same intent, may be found guilty. The latter, just as surely as the former, lacks the specific intent to deprive another of his or her property." (*People v. Williams*, *supra*, 176 Cal. App. 4th at 1528.)[20]

Accordingly, this Court should reject respondent's contention that the

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[19] *Avery* expanded the rationale of *Brown* to temporary takings where there is "the intent to deprive the owner of the main value of his property. . . ." (*Id.* at 57.) However, even under this expanded definition appellant's jurors could have had a reasonable doubt that appellant formed a felonious intent to steal based on his stated intent to only help Antonio Sanchez recover his property.

[20] Furthermore, such a rule would illogically predicate aider and abettor and conspiracy liability on an alleged robbery which the perpetrator never committed. Such a result would be contrary to established law which holds that proof beyond a reasonable doubt that the perpetrator committed a crime is an essential prerequisite for aider and abettor liability. (See *People v. Perez* (2005) 35 Cal.4th 1219, 1227 [aiding and abetting liability requires the completion of an independent attempted or completed crime]; see also *People v. Woods* (1992) 8 Cal.App.4th 1570, 1586 ["the jury first must determine the crimes and degrees of crimes originally contemplated and committed, if any, by the perpetrator"]; *People v. Patterson* (1989) 209 Cal.App.3d 610 [holding that perpetrator must harbor the requisite mental state of the charge as essential requisite to conviction of the aider and abettor].)

prosecution did not need to prove that appellant intended to deprive an owner of his or her property.

D. Appellant's Intent Was A Material, Factually Disputed Issue Even If The Property Which Was Taken Did Not Belong To Antonio Sanchez

Respondent suggests that the jurors did not need to find that appellant intended to permanently deprive an owner of his or her property because the only property actually taken belonged to the occupants of Morales's house:

> "Here, although there was evidence, according to appellant, that he went to the Morales house to get some items that belonged to Sanchez, there was no evidence that the property that was *actually stolen* from the Morales' home was the property that belonged to Sanchez." [Original emphasis.] (RB 62.)

But appellant's claim concerns his intent – not whether or not the property actually taken belonged to Sanchez.[21] Even if none of the items taken belonged to Sanchez, this would not have cured the error in omitting the intent to steal element of robbery. Again, ". . . the test . . . is did [appellant] intend to permanently deprive the owner of his property? If he did not intend so to do, there is no felonious intent. . . ." (*People v. Brown*, *supra*, 105 Cal. at 69; see also *People v. Williams*, *supra*, 176 Cal. App. 4th 1521, 1528-29.) In other words, if the jurors had a reasonable doubt that appellant intended to steal then they should not have been permitted to convict him of robbery even if the property which was actually taken did not belong to Sanchez.

E. The Verdicts Of Guilt As To The Robbery-Based Charges Do Not Necessarily Include A Finding That Appellant Formed A Felonious Intent To Steal

As respondent acknowledges, to convict appellant of robbery the jurors merely had to find that appellant "intended to take the personal property of another from the possession of another." (RB 61; see also CALJIC No. 9.40 as given in the present case [53 RT 10463-646; CT 1307-08]; AOB Claim 10, § E, pp. 150-51.) And, as respondent also acknowledges, the jury instructions allowed the jurors to convict appellant of the robbery based charges even if

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[21] However, even if the actual ownership of the property was at issue the jurors could have reasonably inferred – from appellant's recorded statement and the fact that only certain guns were taken – that the .32 gun which Sanchez took and gave to Ramirez and/or the two guns allegedly taken by appellant from the kitchen belonged to Sanchez.

they believed that appellant's only intent was to recover Sanchez's property. (RB 63; RB 61 [jury could have convicted appellant of robbery even if "appellant believed that *Sanchez* had the right to take back his own property. . . ."]; see also p. 3, above.)

Hence, the jurors' guilty verdicts as to the robbery-based charges did not necessarily include a finding that appellant intended to permanently deprive an owner of his or her property.

F. Failure To Submit The Intent To Steal Issue To The Jury Was Prejudicial Error

Respondent contends that any error was harmless because (1) there was substantial evidence that appellant intended to steal; (2) the verdicts demonstrated that the jurors believed the prosecution's evidence and disbelieved appellant's recorded statement; and (3) the prosecutor did not argue that the jury could find appellant guilty if they believed his story. These arguments are unpersuasive because respondent misstates the record and fails to apply the *Chapman* standard of prejudice as articulated in *Neder v. U.S.* (1999) 527 U.S. 1. (See generally *People v. French* (2008) 43 Cal.4th 36, 53.)

1. Whether Or Not The Record Contains Substantial Evidence That Appellant Intended To Steal Is The Wrong Standard

Respondent argues that any error in removing the intent to permanently deprive issue from the jury was harmless because there was "substantial evidence," as testified to by Ramirez, that appellant, along with the others, planned to rob and kill the Moraleses. (RB 64.) This argument is specious because in the present case the faulty instruction removed an essential element of the charge from the jury and, therefore, the error "preclude[d] the jury from making a finding on the *actual* element." (Original emphasis.) (*Neder v. U.S.*, *supra*, 527 U.S. .at 10; see also *People v. Pitto* (2008) 43 Cal.4th 228, 246-47; Kennard, J. Dis. Opn.) Hence, the error should not be held harmless simply because the prosecution presented substantial evidence from which the jurors could have found the omitted element. Instead, this Court should apply the *Chapman*[22] standard of prejudice as specified by the United States Supreme Court in *Neder v. U.S.* (1999) 527 U.S. 1, 15-17. (See *People v. Sandoval*

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[22] *Chapman v. California* (1967) 386 U.S. 18.

(2007) 41 Cal.4th 825, 838 [citing *Neder v. U.S.*, *supra*, 527 U.S. at p. 19].)[23]

Under *Neder* the failure to submit an element of the crime to the jury may be found harmless beyond a reasonable doubt (per *Chapman*) "if the evidence supporting the [element] is overwhelming and uncontested, and there is no 'evidence that could rationally lead to a contrary finding.' [Citing and quoting *Neder*]." [Emphasis added.] (*People v. French*, *supra*, 43 Cal.4th at 53; see also *People v. Epps* (2001) 25 Cal.4th 19, 29-30 [denial of state right to jury determination of prior conviction was harmless "where defendant did not contest the issue"]; *People v. Ortiz* (2002) 101 Cal.App.4th 410, 415-16 ["if no rational jury could have found the element unproven, the error is harmless beyond a reasonable doubt . . ."]; compare *People v. Cross* (2008) 45 Cal.4th 58, 70, Baxter, J., concurring [Defendant did not claim that the record "contains evidence that could rationally lead to a contrary finding."].) In other words, this Court "must ask whether the record contains evidence that could rationally to a contrary finding with respect to the omitted element." (*Neder v. U.S.*, *supra*, 527 U.S. at 19; see also *People v. Sandoval*, *supra*, 41 Cal.4th at 838.)

In the present case, the answer to this question is yes. The jurors could rationally have been left with a reasonable doubt as to whether appellant intended to permanently deprive an owner of his or her property. (See pp. 35-37, below; see also AOB pp. 162-63.) Hence, under the *Neder* standard, the error was not harmless beyond a reasonable doubt.

2. The Jurors Did Not Resolve The Omitted Factual Issue In Another Context

Respondent asserts that the jurors' verdicts show that they found in favor of the prosecution on the omitted intent-to-steal question because the jurors believed the key prosecution witness, Jose Luis Ramirez, and "necessarily disbelieved" appellant. This assertion is plainly erroneous. Respondent does not refer to anything in the instructions which would have required the jurors to find the omitted element in order to reach the verdicts which they returned. To the contrary, the instructions allowed the jury to convict appellant of robbery without finding the omitted element. (See p. 3,

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[23] Appellant does not abandon his contentions that the error was reversible per se. (See AOB, pp. 159-161.)

above.)

3. The Arguments Of Counsel Did Not Cure The Error

Respondent suggests that the instructional error was cured by the fact that the prosecutor "did not argue that if the jury believed appellant's story, it could still find him guilty of conspiracy." (RB 65.) This contention should be rejected out of hand. First, because the *Neder* standard requires the reviewing court to focus on "the evidence" the arguments of counsel should not have any bearing on the assessment of prejudice. (See AOB, pp. 166-68.) Second, the jurors were emphatically admonished that the judge's instructions, and not the arguments of counsel, must control. (See AOB, pp. 170-71.) Third, even if the jurors disobeyed the judge's admonition and followed the prosecutor's definition of robbery, this would not have cured the error because the prosecutor's argument did not purport to correct the error in CALJIC No. 9.40. To the contrary, the prosecutor relied on the erroneous language to argue that robbery requires a "person" to possess property and an intent by the taker to permanently deprive the person in possession of the property. (52 RT 10232-33; see also 10224-25 [theft is "taking something from someone else with intent to permanently deprive; to keep it from the other person"].)

In sum, the prosecutor's argument did not cure the erroneous instruction – it reinforced it.

4. The Jurors Could Rationally Have Doubted That Appellant Intended To Permanently Deprive An Owner Of His Or Her Property

The record contains substantial evidence from which the jurors could have been left with a reasonable doubt that appellant acted with an intent to permanently deprive Ramon Morales or the other occupants of their property.

First, in his recorded statement appellant disavowed an intent to "loot" (i.e., steal the occupants' property) and indicated that he only intended to help Sanchez retrieve his property. (See 50 RT 9816-17; 4 SCT 1037; Exhibit 85A.) Nor does the record demonstrate that the jurors disbelieved appellant's recorded statement. (p. 3, above.)

Second, appellant's statement as to his intent was corroborated by the fact that – although appellant searched the house for 15 to 20 minutes (41 RT 8028) – he only took two handguns from the box in the kitchen even though

there were other handguns in the box and elsewhere in the house.[24] Moreover, other items of value – including $ 378 in cash – were not taken. (AOB, pp. 36-37.) Respondent asserts that this fact is not important because the "looting" was interrupted by the arrival of Ramon and Martha Morales. (RB 65.) However, by the time the Morales's arrived the house had already been searched for 15 to 20 minutes (41 RT 8028) and, as described by the prosecutor, the house had been "tossed." (See AOB, pp. 36-37.) Thus, the jurors could reasonably have inferred that appellant intended only to retrieve property belonging to Sanchez because appellant did not take the other handguns, the $378 in case, or the other items of value.

Third, appellant's disavowal of an intent to steal was consistent with the undisputed fact that appellant had no motive to cause injury to or steal from the occupants of the Morales house. (See CALJIC No. 2.51; 6 CT 1244 ["absence of motive may tend to show the defendant is not guilty"].)[25]

Fourth, the allegation that appellant intended to steal was largely founded on the testimony of Jose Luis Ramirez. The defense substantially discredited Ramirez's testimony with evidence of (1) Ramirez's motive to lie in order to obtain a favorable plea bargain; (2) key inconsistencies between Ramirez's pre-trial statements to the police and testimony at trial; and (3) Ramirez's admission under oath that he deliberately lied to the police. (42 RT 8217-18.)

Fifth, the jurors apparently disbelieved important portions of Ramirez's testimony since the jury either rejected or could not reach a verdict on three

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[24] When they searched the house the police found a .380 handgun in the wooden box in the kitchen. There were no usable prints on it. (46 RT 9073-75.) The police also found a Taser gun on the floor next to the TV cart in the bedroom. (46 RT 9070-71.) During subsequent searches of the residence in January and February 1995 two additional .380 caliber pistols were found in the bedroom in a cardboard moving box (50 RT 9871-72.) and a .22 rifle was found outside in the chicken coop. (46 RT 9081-84.)

[25] Defense counsel emphasized that the dispute was between Antonio Sanchez and Ramon Morales and that there was no "evidence to prove to you that [appellant] had some sort of stake in this matter." (52 RT 10268; see also 52 RT 10266:19-25 [appellant had no grudge against anyone; no motive]; 52 RT 10266:28-10267:2 [same].) The prosecutor agreed with this assessment: "You know, Antonio really was the one that had the bone to pick here. He was the one that had it in for Ramon Morales." (52 RT 10224:19-24.)

special allegations which were largely founded on Ramirez's testimony. (See p. 5, above.)

In sum, the error was prejudicial as to the robbery-based charges because a "rational jury could have found the missing element unproven. . . ." (*People v. Ortiz*, *supra*, 101 Cal.App.4th at 415-16.) Moreover, the other verdicts should be reversed as well because the record fails to demonstrate that those verdicts were reached independent of the defective robbery instruction and conviction. (See AOB, pp. 172-78.)

CLAIM 12

APART FROM HIS DUTY TO INCLUDE THE ELEMENT OF INTENT TO STEAL IN THE DEFINITION OF ROBBERY, THE JUDGE SHOULD HAVE INSTRUCTED ON CLAIM OF RIGHT AS AN AFFIRMATIVE DEFENSE

[AOB 195-205; RB 58-64]

As set forth in Claim 10 above (pp. 21-37), the judge erroneously failed to submit a core element of the robbery charge to the jurors, i.e., the intent to deprive an owner of his or her property. The judge's failure to submit this essential element to the jurors was reversible error regardless of whether or not the judge was also obligated to instruct on the affirmative defense of claim of right. (*Apprendi v. New Jersey*, *supra*, 530 U.S. 46; *Screws v. United States*, *supra*, 325 U.S. 91; *People v. Flood*, *supra*, 18 Cal.4th at 480.) Nevertheless, even if the robbery instruction had been correct, the judge erred by failing to give a claim of right defense instruction *sua sponte*.

Respondent asserts that "there was no evidence" supporting a claim of right instruction:

> Here, although there was evidence, according to appellant, that he went to the Morales house to get some items that belonged to Sanchez, there was no evidence that the property that was *actually stolen* from the Moraleses' home was the property that belonged to Sanchez. (RB 62, emphasis in original.)

This assertion, even if true, would not defeat appellant's argument because the claim of right defense goes to the defendant's intent, not the character of the property actually taken. Even if the person is motivated by a belief that is mistaken (*People v. Butler*, *supra*, 65 Cal.2d at 573) or unreasonable (*People v. Romo*, *supra*, 220 Cal.3rd at 518) the claim of right defense still applies provided the belief was held in good faith. When a person takes property under a good faith belief that he is repossessing his own property, or assisting another in doing so, he "lacks the specific intent to deprive another of his or her property." (*People v. Williams*, *supra*, at p. 1528.)

Accordingly, regardless of the fact that Ramirez took property not belonging to Sanchez, the claim of right defense still applied to appellant

based on appellant's recorded statement that he did not intend to further Ramirez's "looting." (See AOB pp. 28-29.)

Furthermore, the prosecution never established who owned the guns allegedly taken by Sanchez (the .32 handgun) and appellant (two handguns from the box in the kitchen). (See AOB pp. 31-32.) In light of appellant's recorded statement and the fact that other guns in the house were not taken (see AOB pp. 45, 146-47), the jurors could reasonably have inferred that the .32 handgun and/or the two handguns from the kitchen – at least one of which appellant allegedly gave to Sanchez[26] – belonged to Sanchez.[27]

Respondent also erroneously claims that any error in failing to instruct on claim of right was harmless beyond a reasonable doubt because "the guilt verdicts on the robbery charges demonstrate that the jury believed Ramirez to the extent that appellant had the intent, at the very least, to aid and abet him in his robbery . . . [and] that the jury necessarily disbelieved" appellant's statement to the contrary. (RB 64.) These assertions misstate the record and ignore the trial judge's instructional omissions. (See pp. 3-4, above.) The verdicts do not demonstrate that the jurors disbelieved appellant's recorded statement. (See AOB pp. 164-65; ARB p. 3, above.)

Nor did the prosecutor's argument cure the error as suggested by respondent. (RB 65.) The jurors were admonished by the judge to "accept and follow the law as I state it to you. . . ." (6 CT 1223; see also AOB, pp. 170-71 [counsel similarly admonished the jurors].) The reviewing court should assume that the jurors understood and "faithfully follow[ed]" this admonition. (*People*

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[26] Ramirez testified that appellant put one of the two guns from the kitchen into Sanchez's jacket pocket. (41 RT 8033.) Ramirez did not know what appellant did with the second gun. (*Ibid.*)

[27] Appellant's statement that Sanchez could not see his property when he "looked around . . . with his eyes" did not establish that the handguns belonged to someone other than Sanchez. as suggested by respondent (RB 62.) Sanchez could have uncovered the .32 handgun during the search and the handguns which appellant allegedly took were concealed in a box in the kitchen. (See AOB pp. 31-32; 46 RT 9073.) Moreover, according to Ramirez, Sanchez asked Ramon Morales for guns. (41 RT 8033.) From this statement the jurors could have inferred that the guns were not in plain view. Appellant searched the box in the kitchen after Sanchez asked Morales for the guns. (41 RT 8033-34.)

v. Mickey (1991) 54 Cal.3d 612, 689.)[28]

Moreover, even assuming *arguendo* that the jurors did not "accept and follow the law as [the judge] state[d] it to [them]," counsels' arguments did not supply the elements which were missing from the judge's instructions. Neither the prosecutor nor defense counsel explained the nature of the felonious intent required for conviction of robbery and neither told the jurors that a good faith claim of right could negate that intent. To the contrary, in defining the elements of robbery for the jurors, the prosecutor simply repeated the judge's deficient robbery instruction (CALJIC No. 9.40). (52 RT 10231-32.)[29] Thus, the prosecutor's argument repeated and reinforced the instructional omission which enabled the jurors to convict appellant of conspiracy to robbery, conspiracy to commit robbery, and robbery felony murder even if he merely intended to help retrieve Sanchez's property.

In sum, because appellant's claim of right defense was never submitted to or resolved by the jurors, the judgment should be reversed. (See AOB claim 12, pp. 201-205.)

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[28] "The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions." (*People v. Mickey*, supra, 54 Cal.3d at 689, fn 17; see also *People v. Delgado* (1993) 5 Cal.4th 312; *People v. Cruz* (2001) 93 Cal.App.4th 69, 73 ["We presume that the jury 'meticulously followed the instructions given.' [Citation.]"].)

[29] The prosecutor did briefly allege that appellant intended "to steal." (52 RT 10254.) However, the prosecutor did not attempt to correct the judge's instruction or otherwise convey the requirement of an intent to permanently deprive an owner of his or her property. Hence, the prosecutor's passing reference to intent to steal did not give the jurors a reasonable basis to doubt the accuracy of the judge's robbery instructions. To the contrary, the prosecutor expressly relied on the language of the judge's instruction to specify the elements of robbery. (52 RT 10231-32.)

CLAIM 13A

JUROR UNANIMITY WAS REQUIRED BETWEEN RAMIREZ'S "LOOTING" AND APPELLANT'S ALLEGED TAKING OF THE HANDGUNS FROM THE BOX IN THE KITCHEN

[AOB 206-215; RB 65-69]

A. Even If Unanimity Was Not Required As To All Four Takings, At A Minimum It Was Required As To Ramirez's And Appellant's Takings

In his opening brief appellant contended that the jurors could have based their robbery verdicts on any of four different takings presented by the evidence. (AOB, pp. 207-210.)

Respondent generally argues that all four takings were part of "but one robbery at the Morales's home" under the "continuous conduct" rule which "applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them." (RB 66, citing and quoting *People v. Stankewitz* (1990) 51 Cal.3d 1124, 1132.) Respondent asserts that this rule relieved the judge of any duty to assure juror unanimity because "appellant's only defense to the robbery was that he was intoxicated and had no knowledge about what was going to happen in the house and defense counsel's closing argument did not suggest different defenses for each stolen item." [Emphasis added.] (RB 67.)

Respondent's argument misstates the record. As discussed in appellant's opening brief, the evidence provided a reasonable basis for the jury to distinguish between all four takings. (AOB Claim 13, pp. 208-210.)

However, even assuming *arguendo* that juror unanimity was not required as to all the takings, at a minimum it was required as to Ramirez's and appellant's takings. As respondent acknowledges, appellant's alleged taking of the kitchen handguns "differed from the other three takings" (RB 67) and "some jurors . . . might have found appellant guilty based on the VCR, .32 handgun, necklace and hair oil but not the two handguns from the kitchen." (RB 68 [internal citations and punctuation omitted].)

Respondent nevertheless argues that unanimity was not required as to Ramirez's and appellant's takings because even though some jurors might have relied on Ramirez's takings and not on appellant's, the "reverse is not

true." (RB 68.)

> If the jury believed appellant's claim that he had no intent to aid and abet Ramirez's taking of the necklace, hair oil, gun, and VCR, then it would have also believed that he had no intent to steal the two handguns. It is 'inconceivable that a juror would [sic] believed [Ramirez's] testimony' that appellant stole two handguns from the kitchen, but 'somehow find' he had no intent to aid and abet Ramirez's robbery of the other items. [Citations.] (RB 68.)

This assertion is not persuasive because it erroneously assumes that appellant presented the same defense to both Ramirez's takings and appellant's own taking of the kitchen handguns. In fact, appellant's defenses to the two takings were substantially different and the evidence provided the jurors with a reasonable basis to distinguish between the takings.

As to Ramirez's takings – for which appellant was accused vicariously – the defense contended that Ramirez acted on his own and, thus, appellant should not be held liable for the items Ramirez stole.[30] This defense was supported by appellant's recorded statement disavowing any intent to further Ramirez's "looting" (4 SCT 1037) and by counsel's argument that Ramirez saw this as an "opportunity" to take things for himself. (52 RT 10271.) And, this "opportunity" argument was further reinforced by the fact that Ramirez took "his brand" of hair oil ("Tres Flores") and pawned the necklace. (41 RT 8042, 8045-46; 44 RT 8633, 8649-50, 8655-56.)

On the other hand, appellant's defense was fundamentally different as to the kitchen handgun takings. The defense attacked Ramirez's allegation that appellant actually took the handguns. While the defense acknowledged that the Ramirez takings had occurred, neither appellant in his recorded statement nor defense counsel in argument conceded the fact that appellant took the

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[30] According to appellant – who did not know Ramon Morales and was not a party to the disagreement between Morales and Antonio Sanchez (41 RT 8007) – the group went to Morales's residence merely to "pick up"some things which Antonio had left there. (50 RT 9816-17, Exhibit 85A [appellant's video taped statement]; 4 SCT 1037.) They took guns as a "precaution" because Morales had threatened Sanchez. (4 SCT 1037.) There was no plan (conspiracy) to "loot" the residence or to kill anyone. (*Ibid.*) Thus, appellant's recorded statement provided a rational basis upon which some jurors could have had a reasonable doubt that appellant was vicariously liable for Ramirez's takings.

handguns from the kitchen. Instead, the defense suggested that Ramirez was either lying or mistaken about seeing appellant take the handguns. This defense was based on Ramirez's inconsistent pre-trial statements about what he saw and his admission at trial that he lied to the police regarding his purported observations of appellant taking the handguns. (AOB, pp. 18-19, 31-32, 209.)[31]

Alternatively, if the jurors concluded that appellant did take the kitchen handguns, but credited appellant's recorded statement that his only intent was to help recover property belonging to Sanchez, they could have found him guilty of robbery on the basis of his retrieval of those two handguns, and rejected liability based on Ramirez's self-motivated takings.

Furthermore, the jurors also had a rational basis to differentiate between (1) Ramirez's testimony about the "plan" to rob and murder and (2) Ramirez's testimony that he saw appellant taking the kitchen handguns.

Ramirez testified that while appellant and Antonio Sanchez were talking in the car, Sanchez said they were "going to go to [Ramon Morales's] house to rob him and to kill him" and nobody said anything in response. (40 RT 7854.) Ramirez also testified that while parked in the car at the victims' residence, before going inside, "they talked about going in to "get some drugs, steal stuff and kill them." (41 RT 8006.) However, it is doubtful that all the jurors fully credited this testimony especially in light of their failure to reach a verdict as to the conspiracy to commit murder allegation and the jurors' unanimous rejection of the use of a knife allegation. (See AOB, p. 11.) Additionally, even if the jurors had believed Ramirez's testimony as to what Sanchez said in the car, Ramirez was unclear about what appellant said, if anything, about the alleged plan:

Q. (By District Attorney) What did Daniel say about Ramon Morales?
A. I don't remember.
Q. When Antonio said that "we were going to go to Ramon

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[31] Alternatively, appellant's video statement that he only intended to help retrieve Sanchez's property provided another different defense to the alleged taking of the kitchen handguns. However, as discussed in Claims 10 and 12 (pp. 21-40, above) the instructions allowed the jury to convict appellant of robbery even if the jurors concluded that appellant believed the kitchen handguns belonged to Sanchez.

Morales's to rob him and kill him," did anyone comment in return?

A. Like what?

Q. Did anyone say anything?

A. No.

Q. Did anyone say, "Yes, that's what we'll do"?

. . .

A. No. No.

. . .

Q. Did Daniel make any comments?

. . .

A. I don't remember. [Emphasis added.] (40 RT 7854:13-7855:7.)

In light of the ambiguities in Ramirez's testimony as to what was actually communicated during the pre-entry conversation, some jurors could have doubted whether appellant knowingly conspired with or aided and abetted Ramirez.[32]

On the other hand, the jurors had a different set of factors to consider in assessing the accuracy of Ramirez's alleged observation of appellant taking the handguns from the kitchen. It is true that the defense challenged Ramirez's ability to observe appellant and the reliability of his observations in light of his inconsistent and untruthful pretrial statements. (See AOB, pp. 18-19, 31-32, 209.) Nevertheless, the jurors could have concluded that Ramirez's observations of appellant's actions were more reliable than Ramirez's hazy recollection and subjective interpretation of the pre-entry statements made in the car.

In sum, because the defenses and evidence differed, the jurors had a reasonable basis to distinguish between Ramirez's takings and appellant's alleged taking of the kitchen handguns. Accordingly, the jurors should have been required to unanimously agree which of these takings constituted robbery.

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[32] The verdict convicting appellant of conspiracy to commit robbery and burglary did not necessarily include a jury finding that appellant conspired with Ramirez. The jurors could reasonably have concluded that the conspiratorial agreement was between appellant and Antonio Sanchez to enter the house and recover Sanchez's property. (See p. 4, above.)

B. The Arguments Of Counsel Did Not Preclude The Jurors From Reaching A Divided Verdict

Respondent asserts that defense counsel's failure to "suggest different defenses for each item stolen" affirmed that the takings were all "part of the same robbery. . . ." (RB 67.) However, appellant did rely on different defenses vis-à-vis Ramirez's takings versus appellant's alleged takings. (See pp. 42-44, above.)

As to Ramirez's takings both appellant's recorded statement denied any intent to further Ramirez's "looting." (See pp. 41-44, above.) Thus, defense counsel argued that Ramirez stole items from the house on his own accord as evidenced by the fact that he took the "Tres Flores" hair oil because it was the brand he used. (52 RT 10271 ["Jose saw this as a great opportunity"].) On the other hand, appellant did not admit taking the kitchen handguns and the inconsistencies in Ramirez's testimony permitted the jurors to reasonably infer that Ramirez's alleged observation of appellant taking the guns was either mistaken or a deliberate lie. (See AOB p. 209.)

Nor did the prosecutor expressly argue that the robbery charges had to be based on Ramirez's takings and not appellant's. Indeed, under the definition of robbery which the jurors received – and the prosecutor repeated – the jurors reasonably could have convicted appellant of robbery for taking the kitchen handguns even if they did not find him to be vicariously liable for Ramirez's takings. (See AOB pp. 208-210.)

For all of the above reasons the arguments of counsel did not preclude the jurors from convicting appellant of the robbery-based charges without unanimously agreeing that either the takings by Ramirez or by appellant constituted robbery.

C. The Failure To Require Unanimity Was Prejudicial

As set forth above, juror unanimity was required between Ramirez's takings and appellant's alleged taking of the kitchen handguns because appellant did not offer "essentially the same defense to each of the [takings]" and the jurors had a "reasonable basis to distinguish between them." (*People v. Stankewitz*, *supra*; *People v. Davis*, *supra*.)

First, the evidence provided different defenses to each taking. As to Ramirez's takings the defense primarily relied on appellant's lack of intent to

aid and abet and/or conspire with Ramirez. As to the kitchen handguns the defense disputed the prosecution's allegation that appellant took the handguns.

Second, the evidence as to the different takings was substantially different. (See pp. 42-44, above.)

Third, the legal elements applicable to Ramirez's takings compared to appellant's takings differed significantly. As to Ramirez's takings the jurors had to find the added specific intent element necessary to convict appellant of robbery based on conspiracy and/or aiding and abetting, i.e., a specific intent to assist or encourage Ramirez's takings. On the other hand, as to appellant's alleged takings the jurors did not need to find any additional specific intent beyond that required by an incomplete robbery instruction. (See Claim 10, pp. 21-37, above.)

In sum, "[o]n the facts of this case some jurors may have had a reasonable doubt as to whether [appellant aided and abetted and/or conspired with Ramirez] while other jurors may have had a doubt about whether [appellant took the handguns from the kitchen]. Under these circumstances the trial court's failure to give the unanimity instruction was prejudicial. [Citations.]" (*People v. Davis*, *supra*, 36 Cal.4th at 561.) Accordingly, the robbery conviction, as well as all the other convictions which may have been predicated on the robbery, should be reversed. (See AOB pp. 213-14.)

CLAIM 13B

JUROR UNANIMITY SHOULD HAVE BEEN REQUIRED BETWEEN THE .32 HANDGUN – WHICH ANTONIO SANCHEZ APPROPRIATED – AND THE HAIR OIL, NECKLACE AND ELECTRONIC EQUIPMENT WHICH RAMIREZ APPROPRIATED

[AOB 206-215; RB 65-69]

Respondent argues that there was no reasonable basis for the jurors to distinguish among the electronic equipment, hair oil, necklace, and the .32 caliber handgun taken by Ramirez: ". . . [A]s to three of the four separate takings alleged by appellant he has not demonstrated a separate defense or difference in the evidence." (RB 67.)

However, respondent fails to recognize a significant distinction between the items looted by Ramirez – electronic equipment, necklace and hair oil – and the .32 handgun. Ramirez testified that Antonio Sanchez gave him the .32 while they were inside the victims' house. (41 RT 8022-23; 8042; 8238-39.) Thus, unlike the other items, the .32 handgun was appropriated by Antonio Sanchez, not Ramirez.

From this key factual distinction those jurors who had a reasonable doubt that appellant aided and abetted or conspired with Ramirez – based on the evidence and defense argument that Ramirez took the necklace and hair oil for himself (see p. 42, above) – could still have convicted appellant of robbery vicariously based on Sanchez's appropriation of the .32 handgun.

On the other hand, Ramirez's testimony did not state when or where Sanchez obtained the .32 handgun. Thus, some jurors could have doubted that Ramirez obtained the .32 handgun from Sanchez, inferring instead that Ramirez appropriated the handgun himself. Or, some jurors could have doubted that the handgun was appropriated from the house, inferring instead that either Sanchez or Ramirez brought the gun with them when entering the house. It is possible that Ramirez would have lied about this issue because it made Ramirez look less culpable to say that Sanchez gave him the gun as opposed to admitting that he, Ramirez, appropriated it or entered the house while armed. It was important for Ramirez to downplay his role in the incident

to better his negotiating position with the prosecution.[33]

In sum, there was a reasonable basis for the jurors to differentiate between the .32 handgun and the other items taken by Ramirez. The failure to require juror unanimity as to these takings was prejudicial error because some jurors may have relied on the .32 handgun allegedly appropriated by Sanchez, and not the "looted" items (hair oil, necklace and electronic equipment) which Ramirez appropriated, while other jurors may have relied on the looted items and not the .32 handgun. (See *People v. Davis*, *supra*, 36 Cal.4th at 563.)

Moreover, the error was also prejudicial because the jurors could have split their robbery verdict between the .32 handgun appropriated by Sanchez and the kitchen handguns allegedly taken by appellant. Some jurors could have doubted that appellant took the kitchen handguns[34] but still found appellant vicariously guilty of robbery based on the taking of the .32 handgun by Sanchez. Other jurors could have doubted that Sanchez appropriated the .32 handgun but found that appellant took the kitchen handguns. Thus, the failure to require unanimity was prejudicial for this reason as well and all the robbery-based convictions should be reversed.

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[33] He ultimately received an extremely favorable plea bargain. (AOB, pp. 5-6.)

[34] Appellant did not admit taking the kitchen handguns and the inconsistencies in Ramirez's testimony permitted the jurors to reasonably infer that Ramirez's alleged observation of appellant taking the guns was either mistaken or a deliberate lie. (See AOB p. 209.)

CLAIM 14

IN ARGUING THAT THE *IRELAND* ERROR WAS HARMLESS RESPONDENT AGAIN MISCHARACTERIZES APPELLANT'S CLAIM 10

[AOB 216-221; RB 70]

Respondent concedes that the jurors were erroneously permitted to convict appellant of murder in violation of the merger doctrine as articulated by this Court in *People v. Ireland* (1969) 70 Cal.2d 522. (RB 70.) Nevertheless, respondent maintains that the error was harmless under the rationale of *People v. Garrison* (1989) 47 Cal.3d 746, 778 because the jury also found that appellant committed robbery felony murder. (RB 70-71.) In so arguing respondent dismisses appellant's contention that the robbery felony murder finding was also flawed in the following footnote:

> Appellant contends that the error was prejudicial because the failure to give claim-of-right instructions rendered the robbery theory of felony-murder invalid as well. (AOB, p. 219.) However, as discussed above, appellant was not entitled to claim-of-right instructions to the robbery or murder charges. (RB 71, fn. 21.)

This passage reveals respondent's fundamental misunderstanding of appellant's claims and the law of robbery in California. The heart of appellant's contentions in Claim 10 is that the judge failed to submit essential elements of the robbery charge to the jurors. Thus, these claims are predicated on the judge's absolute duty to submit all essential elements of the charge to the jury, not on the judge's duty to "give claim-of-right instructions." While appellant does make such an argument in Claim 12, the core contentions in Claim 10 are totally independent of that claim.

Respondent is also wrong in asserting that the robbery-based verdicts were correctly reached under the definition of robbery advanced in Justice Mosk's dissenting opinion in *People v. Butler* and echoed in the version of CALJIC No. 9.40 given to appellant's jurors. The former was rejected by the majority opinion in *Butler*, as well as numerous subsequent decisions of this Court, and the latter was rejected by the CALCRIM Committee. (See p. 24, above.)

Accordingly, the robbery-based verdicts were fundamentally flawed and should not be utilized to "cure" the *Ireland* error.

CLAIM 15

THE WITNESSES MADE HEARSAY ASSERTIONS WHEN THEY POINTED IN RESPONSE TO THE DISTRICT ATTORNEY INVESTIGATOR'S REQUEST TO MAKE AN IDENTIFICATION

[AOB 222-240; RB 71-78]

Appellant's opening brief contended that the judge erroneously allowed the alleged arson-based overt acts to be proved by the inadmissible hearsay testimony of a district attorney investigator. (AOB, pp. 222-240.) The investigator was allowed to testify, over defense objection, that two witnesses, (Juan Martinez Avalos and Jose Luis Ramirez), linked Sanchez to the alleged arson. Ramirez identified the trailer where Sanchez obtained a $100 bill, and Avalos identified that same trailer as the residence of Angel Martinez, who allegedly hired Sanchez to commit the arson.

Respondent contends that the out-of-court identifications by Avalos and Ramirez were not hearsay because by simply pointing at the same trailer they merely committed a verbal act. (RB 73-74.)

Respondent's argument is not persuasive because the identifications would have been meaningless without consideration of what the witnesses asserted about the trailer. There would have been no link to the arson if the investigator had simply testified that each witness pointed to a trailer. Only by considering what the witnesses communicated about the trailer – i.e., that it was (1) the residence of the arson suspect and (2) where Sanchez got the $100 bill – could the jurors rely on the identification to connect Sanchez to the arson.

Accordingly, the identifications were not simply verbal acts. The cases cited by respondent are distinguishable because in each of those situations the witness did not testify as to any out-of-court communication other than the act itself. (See RB 74.) In the present case, by contrast, the witness testified as to both the act – pointing at the trailer – and the out-of-court statement (question) to which the act asserted an answer. In other words, the witness did not merely testify as to an out-of-court act but to an out-of-court statement (answer to a question) which constituted a verbal assertion. In the case of Avalos the out-of-court answer was offered to prove that Avalos believed the party

responsible for the arson resided in Trailer 35. In the case of Ramirez, the out-of-court answer was offered to prove that Ramirez believed Trailer 35 was the one where Antonio Sanchez obtained the $100 bill he used to buy ammunition.

Accordingly, when the witnesses pointed at the trailer in response to the investigator's request to make an "identification" their "non-verbal conduct [was] intended by [the witnesses] as a substitute for oral or written verbal expression." (Evidence Code § 225.) That is, the act of pointing by Avalos was a "substitute" for the "oral . . . expression" that: "This is the trailer where the person responsible for the arson resides." And, Ramirez's pointing was a "substitute" for the "oral . . . expression" that: "This is the trailer where Antonio Sanchez got the $100 bill." Such "oral expressions" were inadmissible hearsay whether made overtly or implicitly through "pointing to an object for identification." (Witkin, *California Evidence*, (4th Ed. 2000) § I(D)(4), p. 686; Imwinkelried and Hallahan, *California Evidence Code Annotated* (2005), pp. 281-84; *In re Cheryl H.* (1984) 153 Cal.App.3d 1098, 1126-27; see also *Crawford v. Washington* (2004) 541 U.S. 36 [admission of hearsay without cross-examination violates the Sixth Amendment right to confrontation].) When a person points at something in response to a request to make a specific identification, the pointing is assertive because it is subjectively intended to convey a verbal response to the identification requested:

> Acts such as . . . pointing to an object for identification . . . are equivalent to verbal statements and are equally subject to the hearsay rule when an attempt is made to prove them by the testimony of the witness. (Witkin, *California Evidence, supra.*)

On the other hand, in the cases cited by respondent the acts were not hearsay because they were "nonassertive." (See *People v. Fields* (1998) 61 Cal.App.4th 1063, 1069 [no hearsay objection to evidence that a telephone number appearing on defendant's pager matched that of a pay telephone which a caller had used to secure cocaine; the testimony amounted to "nonassertive," "circumstantial" evidence of the relationship between the defendant and the caller]; *Ernst v. Municipal Court* (1980) 104 Cal.App.3d 710, 718-19 [statement was nonassertive]; *People v. Harris* (1978) 85 Cal.App.3d 954, 954 [same].) "In other words, in the cases cited by respondent the "verbal act" was

not hearsay because the person performing the act or making the statement did not have the "subjective *intention* to assert something." [Emphasis in original.] (Imwinkelried and Hallahan, *California Evidence Code Annotated* (2009), § 1200, p. 317; see also *Id.* at § 225, pp. 30-31; *People v. Bolin* (1998) 18 Ca.4th 297, 320 [admissible out-of-court statement was nonhearsay because it was *not* a declaratory assertion].)

Respondent also contends that any error in admitting the hearsay identification by Avalos and Ramirez was harmless because:

> There was no reasonable probability that the jury would have found overt acts 3 and 4 to be not true even had the court excluded Investigator Moore's testimony. (RB 75.)

However, this contention is founded on a crucial misstatement of the record. Respondent argues that even without the hearsay identifications "the jury still would have heard . . . [that] Sanchez received $100 from a trailer on North Main as payment for committing an arson. . . ." [Emphasis added.] (RB 75.) However, Ramirez's statement that the $100 was "payment for committing an arson" was not admitted for that purpose. Moore's testimony was that Jose Luis Ramirez had said the $100 was for burning a truck; it was admitted only for the purpose of explaining Moore's investigation and it was not to be considered as to whether there actually was an arson. (43 RT 8495-96; AOB, pp. 24-25, fn. 41.) When Ramirez actually testified about the matter himself, he said only that the $100 was paid to Sanchez for a "debt." Ramirez was not permitted to testify that the debt was payment for burning a vehicle. (40 RT 7831-35; AOB, p. 25.)

Accordingly, without the inadmissible hearsay identifications, the jury could only speculate that the "debt" for which Sanchez received the $100 was in fact the arson. Thus, the hearsay identifications – which linked the trailer where Sanchez got the $100 to the arson suspect – provided the only substantial evidence from which the jurors could have reasonably inferred that Sanchez committed the arson.

In sum, respondent's assertion that the jurors would have found the arson-based overt acts without the inadmissible hearsay should be rejected.

Also unpersuasive is respondent's contention that the jurors would have found one of the other four charged overt acts even if they did not find the two

overt acts predicated on arson. (RB 75-76.) Of the remaining four overt acts, two were likely rejected by one or more jurors[35] and the other two were based on extremely weak evidence.[36] Under these circumstances, it is much more likely that the jurors relied on the arson-related overt acts – which were well-proved albeit by the inadmissible hearsay – as opposed to any of the other overt acts.

Respondent also erroneously contends that the arson would not have had a prejudicial impact as other-crimes evidence: "The fact that the hearsay evidence was damaging to appellant's case does not, in and of itself, demonstrate prejudice." (RB 76.) Respondent's position is inconsistent with this Court's recognition that other-crimes evidence "has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 314.)

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[35] Overt Acts 5 and 6 alleged *inter alia* that appellant and the others planned to rob, burglarize and kill or murder the occupants of the Morales residence. (6 CT 1329-1330.) However, because the jurors could not agree that appellant conspired to commit murder it is also unlikely that they found that appellant joined a plan to rob, burglarize, and kill or murder as alleged in Overt Acts 5 and 6.

[36] Overt Act 1 depended on a juror finding that appellant joined the conspiracy five days before the shootings and Overt Act 2 required the jurors to find that appellant joined the conspiracy the day before. However, the prosecution failed to present any direct evidence establishing that appellant had already joined the conspiracy on those dates. Ramirez provided the only testimony as to any conspiratorial discussions between appellant and Sanchez and those discussions occurred on the day of the shootings. (AOB, pp. 18-29.) Moreover, the jurors appeared to be concerned about the issue of when appellant joined the conspiracy since they asked the judge for clarification of this issue during deliberations. (See AOB, pp. 119-120.)

CLAIM 17

WARNING THE JURORS THAT THEY MUST DECIDE "WHAT OUR COMMUNITY WILL AND WILL NOT TOLERATE" IS AN APPEAL TO THE JURORS' PASSION

[AOB 248-252; RB 84-87]

Respondent maintains that the prosecutor did not "appeal to the jury's passion or prejudice, or suggest that the jury should convict regardless of the evidence." (RB 87.) Appellant disagrees. Urging the jurors to be the "litmus test . . . and to determine what the community will 'tolerate'" was a calculated appeal to the jurors' passions as individual citizens. By charging the jurors with the responsibility to express the will of "civilized society" the prosecutor sought to incite the jurors to look beyond the legal and evidentiary issues and reach a verdict simply because appellant was part of the group that committed the charged crimes. In other words, the prosecutor effectively urged the jurors to convict appellant and sentence him to death to protect "civilized society" regardless of whether or not appellant's involvement in the crimes was sufficient to warrant such verdicts.

CLAIM 18

THE JURORS COULD HAVE INFERRED THAT APPELLANT'S MENTAL FACULTIES WERE IMPAIRED BY INTOXICATION

[AOB 253-267; RB 88-92]

Respondent erroneously argues that there was insufficient evidence to warrant an intoxication instruction because "there was no evidence that the 'beers affected [appellant's] ability to think in any way.' [Citation.]" (RB 91.) This argument misstates the record. Two prosecution witnesses and one defense witness provided evidence that appellant was so intoxicated that they feared he might crash the car or get stopped for drunk driving. (43 RT 8429-30; 8458-62; 50 RT 9836-39.) This evidence that appellant was too drunk to safely drive a car provided substantial evidence from which the jurors could have inferred – from their common knowledge or experience – that appellant's mental faculties were impaired. (See *People v. Ramirez* (1999) 50 Cal.3d 1158, 1180 ["the potential effect of intoxication on an individual's mental state may be well known to jurors. . ."]; compare, *id.* at 1181 [witnesses failed to testify that "defendant's drinking had had any noticeable effect on his mental state or actions."]; *People v. Bandhauer* (1967) 66 Cal.2d 524 [there was "no evidence that [defendant's] drinking had any substantial effect on him . . ."]; *People v. Flannel* (1979) 25 Cal. 3d 668, 685-686, [all of the eyewitnesses testified that the defendant was "acting normal" and that the alcohol had "no effect" on his behavior. . .].)

Respondent also erroneously contends that "[t]here is no reasonable likelihood that the jurors understood the instructions to limit its consideration of intoxication evidence." (RB 92.) The language of the intoxication instruction very clearly limited its scope to "specific intent" by expressly stating that intoxication could be considered as to "specific intent" while not stating that it was applicable to mental state. Moreover, the term "mental state" was lined out on the written instruction which reinforced the obvious omission of "mental state" from the intoxication instruction.

Respondent also erroneously argues that the error was harmless. It is true that the jurors found the specific intent necessary for conspiracy notwithstanding his intoxication. However, that finding did not require the

jurors to determine whether intoxication negated the mental state of knowledge required for aiding and abetting liability. As this Court held in *People v. Beeman* (1984) 35 Cal.3d 547, 560 intent and knowledge are two separate elements of aiding and abetting each of which must be proved by the prosecution. Thus, the jurors' implicit finding that intoxication did not negate the intent element of conspiracy does not mean that they also found the knowledge element to be unaffected by intoxication.

CLAIM 19

THE DEFICIENT INSTRUCTION ON THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE WAS PREJUDICIAL AS TO THE ASSAULT AND ATTEMPTED MURDER CONVICTIONS

[AOB 268-275; RB 93-96]

A. The Verdicts Do Not Demonstrate That Appellant Was Aware Of Ramirez's And/Or Sanchez's Plan To Steal From The Occupants Of The Morales Residence

Respondent asserts that "the jury, in convicting appellant of robbery and conspiracy to commit robbery, necessarily found that appellant *was aware* of the plan to rob Morales." [Emphasis in original.] (RB 96.) This assertion – while technically correct under the deficient definition of robbery given to the jurors – erroneously suggests that the jurors found that appellant was aware that Ramirez and/or Sanchez planned to steal from the occupants of the Morales residence. The jurors' verdicts did not include such a finding because the definition of robbery they received did not require them to find that appellant was aware that the others planned to steal. (See p. 3; p. 22, fn. 8, above.) Thus, the jurors could have believed appellant's recorded statement that, to his knowledge, the plan was to only take property belonging to Antonio Sanchez and still have convicted appellant of conspiracy to rob as well as aiding and abetting a robbery. Accordingly, respondent's assertion is inaccurate to the extent that it implies the jurors found that appellant was aware the others planned to steal from the occupants.

B. The Instructional Error Was Not Waived Because It Adversely Affected Appellant's Substantial Rights

Respondent suggests that in the absence of a defense objection this Court has no duty to review the propriety of "standard CALJIC instruction[s] in effect at the time of trial. . . ." (RB 94.) This suggestion gives the CALJIC instructions a stature which they do not have.

Through usage and custom, standard pattern instructions often are cited as legal authority. However, this is a mischaracterization. "Jury instructions are only judge-made attempts to recast the words of statutes and the elements of crimes into words in terms comprehensible to the lay person. The texts of standard jury instructions are not debated and hammered out by legislators, but

by ad hoc committees of lawyers and judges. Jury instructions do not come down from any mountain or rise up from any sea. Their precise wording, although extremely useful, is not blessed with any special precedential or binding authority. This description does not denigrate their value, it simply places them in the niche where they belong." (*McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 841.)

> As explained by this California Supreme Court:
> "Though we cite CALJIC No. 12.00 for reference purposes, we caution that jury instructions, whether published or not, are not themselves the law, and are not authority to establish legal propositions or precedent. They should not be cited as authority for legal principles in appellate opinions. At most, when they are accurate, as the quoted portion was here, they restate the law." (*People v. Morales* (2001) 25 Cal.4th 34, 48 fn 7; see also *People v. Alvarez* (1996) 14 Cal.4th 155, 217 ["CALJIC 1.00 is not itself the law. Like other pattern instructions, it is merely an attempt at a statement thereof"]; *People v. Mata* (1955) 133 Cal.App.2d 18, 21 [CALJIC instructions not "sacrosanct"]; Former California Rules of Court, Appendix, Div. § I, Section 5 ["A trial judge in considering instructions to the jury shall give no less consideration to those submitted by the attorneys for the respective parties than those contained in the latest edition of California Jury Instructions – Criminal (CALJIC)."]; American Bar Association, ABA Standards for Criminal Justice Discovery and Trial by Jury (ABA, 3rd ed., 1996) Standard 15-4.4 pp. 236-237 ["[T]he fact that pattern jury instructions are available should not preclude a judge from modifying or supplementing a pattern instruction to suit the particular needs of an individual case. . . . The thrust of such objection goes not to the use of pattern instructions themselves, but rather to the practice of rote reliance upon such instructions without modification, a practice that may develop simply by virtue of their existence. . . . [P]attern instructions should be modified or supplemented by the court when necessary to fit the particular facts of a case."].)

Moreover, respondent's suggestion that errors in unchallenged standardized instructions are not cognizable on appeal contradicts the plain language of Penal Code § 1259. The failure of the defense to object to the instructional error does not preclude appellate review of that error because the substantial rights of the defendant were affected. (Penal Code § 1259; see also *People v. Slaughter* (2002) 27 Cal.4th 1187, 1199; *People v. Renteria* (2001) 93 Cal.App.4th 552, 560; *People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.)

Moreover, even if an erroneous instruction is requested by the defense,

it is still reviewable on appeal unless the invited error doctrine applies. "Error is invited only if defense counsel affirmatively causes the error and makes 'clear that [he] acted for tactical reasons and not out of ignorance or mistake' or forgetfulness. [Citation.]" (*People v. Tapia* (1994) 25 Cal.App.4th 984, 1031; see also *People v. Millwee* (1998) 18 Cal.4th 96, 158-59; *People v. Bradford* (1997) 14 Cal.4th 1005, 1057; *People v. Beardslee* (1991) 53 Cal.3d 68, 88-89; *People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1264; *People v. Jones* (1997) 58 Cal.App.4th 693, 708.) In other words, the error is reviewable unless it is clear from the record that counsel had a deliberate tactical purpose in suggesting or acceding to the instruction, and did not act out of ignorance or mistake. (*People v. Wickersham* (1982) 32 Cal.3d 307, 332; see also *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1127.)

C. The Error Warrants Reversal Of The Assault And Attempted Murder Convictions

Respondent correctly notes that once the jurors found appellant guilty of robbery they had no choice but to convict appellant of first degree felony murder. (RB 96 ["If the jury found appellant to be an aider and abettor of a robbery or burglary it was required to find him guilty of the murders. . .."].) However, at least some jurors likely relied on the natural and probable consequences doctrine to convict appellant of assault and attempted murder since the jurors could not reach a verdict on the allegation that appellant conspired to commit murder and used a firearm. (See AOB p. 11.) Accordingly, the erroneous instruction on the natural and probable consequences doctrine warrants reversal of the assault and attempted murder convictions.

CLAIM 24

THE MOTIVE AND ADMISSIONS INSTRUCTIONS WERE ONE-SIDED AND ARGUMENTATIVE

[AOB 300-304; RB 104-117]

Respondent's contention that the errors were waived should be rejected. (See pp. 58-59, above.)

As to the substantive issues, respondent erroneously contends that the motive (CALJIC No. 2.51) and admissions (CALJIC No. 2.70) instructions were neither one-sided nor argumentative because "the jury was not required to consider [Ramirez's and Sanchez's] guilt or innocence." (RB 107-108.) Not only were the jurors required to "consider" the "guilt or innocence" of Sanchez and/or Ramirez, the jurors were required to determine their "guilt or innocence." This was so because the prosecution alleged that appellant was vicariously liable under the theory he conspired with and/or aided and abetted Ramirez and/or Sanchez. Both of these theories of vicarious liability required the prosecution to prove Sanchez's or Ramirez's guilt beyond a reasonable doubt since appellant's vicarious guilt depended on the guilt of Ramirez and/or Sanchez. Thus, the matters explained in the motive and admissions instructions – some of which "benefit" the accused (see e.g., *People v. Beagle* (1972) 6 Cal.3d 441, 455) were applicable to Ramirez and Sanchez.[37] The failure to so instruct was prejudicial error for the reasons set forth in appellant's opening brief. (AOB, pp. 300-304.)

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[37] Moreover, the defense relied on Sanchez's alleged motive to argue that Sanchez, but not appellant, was guilty of murder. For this reason as well the motive instruction was applicable to Sanchez.

CLAIM 25
THE TRIAL COURT ERRONEOUSLY DIRECTED THE JURY TO ONLY FOCUS ON APPELLANT'S ALLEGED CONSCIOUSNESS OF GUILT AND NOT THE CONSCIOUSNESS OF GUILT OF THE OTHER PARTICIPANTS

[AOB 305-309; RB 104-117]

Respondent's contention that the errors were waived should be rejected. (See pp. 58-59, above.)

CLAIM 26

THE ERROR IN CALJIC NO. 2.21.2 WAS NOT CURED BY OTHER INSTRUCTIONS

[AOB 310-313; RB 104-117]

Respondent contends that any error in CALJIC No. 2.21.2 was cured because under other instructions the jury was "told that it could consider any prior inconsistent statements made by the witness or 'any admission by a witness of untruthfulness.' [Citations.]" (RB 112.) However, merely telling jurors to "consider" a witness's prior untruthfulness is far less powerful than telling the jurors that the witness "is to be distrusted" as a result of the prior untruthfulness. Accordingly, respondent's argument that the error was cured by other instructions should be rejected.

Moreover, an important focus of appellant's defense was to argue that the testimony of Jose Luis Ramirez should be distrusted because he made "willfully false" statements to the police and expressly testified that he had lied to the police. (42 RT 8217-18.) CALJIC 2.21.2 undermined the defense theory about Jose Luis Ramirez's false statements to the police because it only addressed willfully false "testimony."[38] Thus, the instruction prejudicially commented on the evidence and lessened the evidentiary weight of Jose Luis Ramirez' false statements to the police.

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[38] CALJIC 2.21.2 provided:

> A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars. (CT 1240.)

CLAIMS 29-35, 37-39

THE INSTRUCTIONAL ERRORS WERE NOT WAIVED

[AOB 323-375; 379-391; RB 118-120]

Respondent's contention that the instructional errors in Claims 29-35 and 37-39 (RB 120, 122-23) were waived should be rejected. (See pp. 58-59, above.)

CLAIM 37

DIRECT EVIDENCE MAY BE SUBJECT TO "REASONABLE INTERPRETATION"

[AOB 379-385; RB 122]

Respondent contends that CALJIC No. 2.01 is properly limited to circumstantial evidence to the exclusion of direct evidence because "[t]here is no room for 'reasonable interpretations' of direct evidence." (RB 122.) This erroneous contention should be rejected.

Direct evidence may be subject to different reasonable interpretations. For example, when a witness identifies the defendant as the person who committed the crime, the testimony is clearly direct evidence. Nevertheless, the jurors may be unable to choose between the reasonable conclusions that (1) the witness accurately identified the defendant and (2) the witness was mistaken. In such a situation the same principles of CALJIC No. 2.01 which apply to circumstantial evidence should also apply to the identification testimony: i.e., when both conclusions are reasonable, the one pointing to a not guilty verdict must be accepted.

The trial judge's failure to give such an instruction erroneously permitted appellant to be convicted upon direct evidence despite the existence of a reasonable interpretation of that evidence pointing to his innocence. This error prejudicially undermined the presumption of innocence and violated appellant's state (Article I, sections 1, 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury.

CLAIM 40

RESPONDENT FAILS TO ADDRESS THE FEDERAL CONSTITUTIONAL BASIS FOR APPELLANT'S CLAIM THAT THE RECORD IS UNRELIABLE DUE TO THE ABSENCE OF A SPANISH TRANSCRIPT OF THE SPANISH TESTIMONY

[AOB 392-397; RB 126-127]

Respondent contends that there was no error in failing to provide an audio transcript of the Spanish speaking witnesses because such a procedure is prohibited by California Government Code §68560 et seq. and §69957. (RB 127-28.) However, appellant's claim is founded on the state and federal constitutions which should take precedence over California's Government Code.

Under these constitutional provisions a complete and accurate appellate record is necessary to ensure appellant's rights to due process, effective assistance of counsel, and meaningful appellate review. (See AOB, pp. 392-93.)

Accordingly, notwithstanding the Government Code provisions relied upon by respondent, appellant's constitutional rights were prejudicially abridged by the failure to provide a Spanish transcript of the testimony of the Spanish speaking witnesses. Moreover, an accurate and complete record is also required by the Eighth Amendment to assure the reliability of appellant's guilt and penalty adjudications. (See generally *Kyles v. Whitley* (1995) 514 U.S. 419; *Beck v. Alabama* (1980) 447 U.S. 625.)

CLAIM 42

BEFORE CONDUCTING ANY CRITICAL STAGE OF THE TRIAL IN THE ABSENCE OF DEFENSE COUNSEL THE JUDGE SHOULD BE REQUIRED TO OBTAIN A PERSONAL WAIVER BY APPELLANT

[AOB 404-418; RB 128-137]

A. A Readback Proceeding Is A Critical Stage Of The Trial For Purposes Of A Defendant's Sixth Amendment Right To Counsel

In Claim 42 (AOB, pp. 404-418) appellant contended, *inter alia*, that the readback of testimony to the jurors is a critical stage of the trial and, therefore, the absence of counsel from that proceeding – without an express personal waiver by appellant – was improper. Respondent does not contest appellant's contention that the readback was a "critical stage" of the proceedings for purposes of the Sixth Amendment right to counsel but argues that no personal and express waiver of counsel by appellant was necessary. (RB 135-36.) Nevertheless, because this Court has suggested that a readback proceeding is not a critical stage of the trial for Sixth Amendment purposes, appellant will first address those decisions.

In *People v. Horton* (1995) 11 Cal.4th 1068, 1120-112 this Court concluded that – for purposes of personal presence of the defendant – a readback proceeding is not a "critical stage of the trial" because "defendant is not entitled to be personally present during proceedings which bear no reasonable, substantial relation to his or her opportunity to defend the charges against him, and the burden is on defendant to demonstrate that his absence prejudiced his case or denied him a fair and impartial trial. [Citations.]" Even though *Horton* involved the defendant's right to personal presence and not the right to counsel, three decisions of this Court have simply cited *Horton* for the proposition that a readback proceeding is not "a critical stage of the trial" for purposes of the right to counsel. None of those decisions discussed the important differences between the right to personal presence and the right to counsel and, therefore, they did not fully consider the issue raised by appellant.[39] Accordingly, *Ayala*, *Box* and *Cox* are not valid authority for the

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[39] Those decisions and their perfunctory consideration of the questions (continued...)

proposition that the right to counsel does not apply to a readback proceeding. (See *People v. Dillon* (1983) 34 Cal.3d 441 [opinions are not authority for propositions not considered].)

Even assuming *arguendo* that absence of the defendant at a readback proceeding is not constitutional error,[40] the absence of counsel is a different matter.

First, it is counsel who is charged with the duty to identify and state objections to trial error. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1202 [trial counsel has the duty to protect the record when their client's trial interests are at stake]; *In re Horton* (1991) 54 Cal.3d 82, 95 ["'it is counsel, not defendant, who is in charge of the case. By choosing professional representation, the accused surrenders all but a handful of "fundamental" personal rights to counsel's complete control of defense strategies and tactics.'"]; *People v. Hinton* (2006) 37 Cal.4th 839, 874 [same].) Thus, counsel's presence at a readback proceeding is necessary to assure that any error which occurred during the readback was properly objected to and either corrected below or preserved for appeal. (*People v. Sumstine* (1984) 36 Cal.3d 909, 917-918 [courts rely on counsel to "perform his duty as an advocate and an officer of the court to inform the accused of and take steps to protect the other rights afforded by the law . . ."].)

Second, as a person who is professionally trained to follow the

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[39](...continued)
are as follows: *People v. Ayala* (2000) 23 Cal.4th 225, 288 ["The rereading of testimony is not a critical stage of the proceedings . . ."]; *People v. Box* (2000) 23 Cal.4th 1153, 1213 [same]; *People v. Cox* (2003) 30 Cal.4th 916, 963 ["We have repeatedly stated that the rereading of testimony is not a critical stage of the proceedings."]

[40] The better view was expressed in *State v. Brown* (N.J. 2003) 827 A.2d 346, 350-352 which held that although a readback " introduces no new matter into the trial" it "is obviously critical to the jurors' deliberations" and, therefore, should be considered a "critical stage" of the proceedings at which the defendant should be present. Other courts have determined that any time the jury is required to be present the defendant has the right to be present. (See *Bales v. State* (Ind. 1981) 418 N.E.2d 215, 218; *Cape v. State* (Ind. 1980) 400 N.E.2d 161, 162-63; *People v. Harris* (N.Y. 1990) 76 N.Y.2d 810, 559 N.Y.S.2d 966, 559 N.E.2d 660, 662; *Hill v. State* (N.D. 2000) 615 N.W.2d 135, 139.)

testimony at trial, to identify the important portions of that testimony, and to remember or adequately memorialize such testimony, counsel is much better able to identify errors in the court reporter's reading of the testimony than is the defendant.

Moreover, any assumption that no error occurred while the reporter read the transcripts would be unreliable and fundamentally unfair to appellant.[41] The fact that a person may make errors in reading aloud from a written transcript is well illustrated by the number of times this court has had to rely on the written instructions to cure errors by the judge in reading aloud from the written instructions. (See, e.g., *People v. Seaton* (2001) 26 Cal.4th 598, 673 [We reiterate our recommendation that in capital cases trial courts provide juries with written instructions "to cure the inadvertent errors that may occur when the instructions are read aloud."]; *People v. Davis* (1995) 10 Cal.4th 463, 542 [when the jury has received an instruction in both spoken and written forms, and the two versions vary, we assume the jury was guided by the written version]; *People v. Crittenden* (1994) 9 Cal.4th 83, 138; *People v. McLain* (1988) 46 Cal.3d 97, 111, fn. 2; see also Anne Graffam Walker, *Language at Work in the Law: The Customs, Conventions, and Appellate Consequences of Court Reporting*, in LANGUAGE IN THE JUDICIAL PROCESS 203 (Judith N. Levi & Anne Graffam Walker eds., 1990).)

Furthermore, even court reporters, who are trained to be precise and accurate, can and do make mistakes. (See e.g., *People v. Huggins* (2006) 38 Cal 4th 175, 191 ["Because the court clearly was reading a standard instruction, it is far more likely that the punctuation supplied by the court reporter failed to accurately reflect the meaning conveyed by the court's oral instructions. . ."]; see also 2 SCT 425-433 [listing of stipulated court reporter errors identified during post-trial record correction].) Thus, the presence of counsel was necessary to help identify such errors and correct them for the jurors.

Even when the evidence requested by the jury is a tape recording which can be mechanically replayed, the proceeding is still considered an important

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[41] Therefore, reliance on such an assumption to affirm the guilt and/or penalty verdicts would violate the Eighth Amendment of the federal constitution. (See generally *Beck v. Alabama* (1980) 447 U.S. 625.)

part of the trial "because it involves the crucial jury function of reviewing the evidence." (*U.S. v. Ku Pau* (9th Cir. 1986) 781 F.2d 740, 743.)[42]

Finally, it cannot be assumed that any error which did occur would have been innocuous. When the jurors request a readback of testimony it is fair to say that such testimony is important to them. A deliberating jury's request for readback or transcripts of certain testimony may reflect the jurors' "intent to emphasize a specific portion of the trial. . . ." (*U.S. v. Hernandez* (9th Cir. 1994) 27 F.3d 1403, 1408-09; see also *U.S. v. Rodgers* (6th Cir. 1997) 109 F.3d 1138, 1145 [recognizing "the natural tendency of a deliberating jury to focus on the testimony it has requested"].) Hence, the readback of the transcript testimony was no less important than the presentation of the testimony in the first place:

> . . . [A] mistake in the reading of a shorthand symbol which defense counsel would instantly detect, an unconscious or deliberate emphasis or lack of it, an innocent attempt to explain the meaning of a word or a phrase, and many other events which might readily occur, would result in irremediable prejudice to defendant. (*Little v. U.S.* (10th Cir. 1934) 73 F.2d 861, 864.)

A critical stage is any "stage of a criminal proceeding where substantial rights of a criminal accused may be affected." (*Mempa v. Rhay* (1967) 389 U.S. 128, 134; *Bell v. Cone* (2002) 535 U.S. 685, 696 [defining a critical stage as "a step of a criminal proceeding, such as arraignment, that [holds] significant consequences for the accused"]; see also *Hovey v. Ayers* (9th Cir. 2006) 458 F.3d 892, 902.) In light of defense counsel's special duties and training discussed above, appellant's substantial rights may have been affected by allowing the reporter to readback testimony to the jurors in the absence of counsel. Hence, the absence of counsel at the readback proceeding violated appellant's right to counsel at a critical stage of the proceedings.

B. A Personal Waiver By The Accused Should Be Required Before Allowing The Accused To Be Unrepresented By Counsel At Any Critical Stage Of The Trial

Respondent contends that there was no requirement that appellant personally waive his right to counsel at the readback proceeding because a

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[42] Even though *Ku Pau* analyzed the issue under Fed. Rule of Criminal Proc. 43, the reasoning also applies to the constitutional bases for the right to presence.

personal waiver is only required when counsel is waived "for all purposes." (RB 135.) Thus, respondent argues that "[o]nce appellant was represented by counsel, counsel was permitted to make tactical decisions without appellant' express consent. [Citations.]" (RB 135.)

However, whether or not counsel should be present at a critical stage of the trial is not a "tactical" decision for counsel to make. That decision has already been made by the United States Supreme Court which has interpreted the Sixth Amendment to require the presence of counsel at "every" critical stage of the trial. (*United States v. Cronic* (1984) 466 U.S. 648, 659.) This rule applies to denials of counsel for even portions of a critical stage, as long as they are important to the trial. (See *Geders v. United States* (1976) 425 U.S. 80, 88-90 [overnight recess]; *Herring v. New York* (1975) 422 U.S. 853 [closing argument]; *Brooks v. Tennessee* (1972) 406 U.S. 605, 612-13 [nullifying counsel's ability to determine point in defense case when a single witness (defendant) would testify] [cases cited in *Perry v. Leeke* (1989) 488 U.S. 272, 280].) This follows from the long-established law that a defendant "requires the guiding hand of counsel at every step in the proceedings against him." (*Powell v. Alabama* (1932) 287 U.S. 45, 69.) Without it, the right to counsel is denied.

Moreover, there is no conceivable tactical reason for counsel to simply not show up at a readback proceeding.

Thus, the fallacy of respondent's position is the assumption that the absence of counsel from a critical stage of the proceedings may tactically benefit the defendant. As respondent recognizes, counsel is entrusted with the duty of protecting the defendant's rights and interests at all critical stages of the trial. (RB 135.) Yet counsel cannot fulfill that duty without being present. Thus, a rule allowing counsel to unilaterally forfeit the defendant's right to counsel at a critical stage of the trial could only be tactically justified under the notion that the defendant is better off without counsel than with counsel. Yet such a notion turns the basic premise of the Sixth Amendment – that counsel is necessary to protect the defendant's rights and interests – on its head. Accordingly, Sixth Amendment jurisprudence does not and should not countenance such "tactics." To the contrary, the right to counsel at all critical stages of the proceedings is absolute and the denial of the right is such

anathema to the Sixth Amendment as to require reversal per se.

In sum, there is no conceivable tactical reason consistent with the principles embodied in the Sixth Amendment for counsel to unilaterally decide to simply not appear at a critical trial proceeding. The rights which the defendant forfeits as a result of such a unilateral decision by counsel are so fundamental that personal waiver should be required.

CLAIM 47

THE MANDATORY PRESUMPTION IN CALJIC NO. 3.02 WAS PREJUDICIAL AS TO THE ASSAULT AND ATTEMPTED MURDER CHARGES

[AOB 445-450; RB 144]

Respondent contends that "even if CALJIC No. 3.02 created a mandatory presumption that appellant knew of and/or intended to encourage the coparticipants' murders by participating in the robbery (AOB, p. 447), such an instruction was not detrimental to appellant, because, under the felony-murder theory of liability, the prosecution need not prove *any* murderous intent or knowledge." (RB 145.) [Emphasis in original.]

Even assuming *arguendo* that respondent is correct as to the murder charges (but see *Sharma v. State* (Nev. 2002) 56 P.3d 868 [conviction of murder without finding that defendant had specific intent to kill violated the Due Process Clause of the federal constitution]), the error was prejudicial as to the assault and attempted murder charges which were not governed by the felony murder rule. (See Penal Code § 189.)

CLAIM 51

RESPONDENT FAILS TO EXPLAIN HOW THE INSTRUCTIONS COULD HAVE BEEN "SUFFICIENTLY UNDERSTANDABLE" WHEN A BLUE RIBBON TASK FORCE FOUND THAT THEY WERE SO UNINTELLIGIBLE TO LAY JURORS AS TO REQUIRE COMPLETE REWRITING

[AOB 469-479; RB 150]

Even though the CALCRIM Committee deemed it necessary to substantially rewrite virtually every CALJIC instruction, respondent suggests that there was nothing wrong with the CALJIC instructions except that "on occasion" they were confusing or misleading. (RB 160.) In other words, according to respondent, there was no need to massively rewrite CALJIC and the entire CALCRIM effort was simply an expensive and time-consuming lark. Of course, respondent's position is contrary to the empirical research (see AOB, pp. 472-474) and to the findings of the Blue Ribbon Commission on Jury System Improvement which conducted a "comprehensive evaluation of the jury system" and found that the CALJIC instructions were so confusing, misleading and unintelligible that they should be rewritten. (AOB, pp. 470-71.) In so doing the Commission implicitly concluded that the CALJIC instructions were not sufficiently understandable to insure that lay jurors would correctly understand and apply the law. As articulated by Chief Justice George, the goal of CALCRIM was to make the instructions "more intelligible" and to "insur[e] that jurors understand and apply the law correctly in their deliberations." (*Ibid.*) Hence, there was both empirical proof and judicial acknowledgment that the CALJIC instructions were not, as respondent asserts, "sufficiently understandable."

Accordingly, appellant's claim transcends the question of whether any specific instruction was "confusing or misleading." CALCRIM is premised on the demonstrated inability of lay jurors to correctly understand and apply the CALJIC instructions which are "based on the language of case law and statutes written by and for a specialized legal audience and expressed in terms of art that have evolved through multiple languages, in many countries, over several centuries." (*Preface to CALCRIM, Paragraph 2.*) Hence, the Blue Ribbon Committee did not find CALJIC deficient by identifying specific

language in individual instructions that was inaccurate, confusing or misleading. Instead, the Commission found a systematic problem with CALJIC – its aforementioned failure to recognize that "sound communication takes into account the audience to which it is addressed." (*Ibid.*) As set forth in appellant's opening brief, pp. 470-71, the preface to the completed CALCRIM instructions repeated the Blue Ribbon Commission's finding about the CALJIC instructions being "impenetrable" and further explained why this lack of understandability impaired the jurors' ability to "apply the law fairly and accurately." (Preface to CALCRIM, Paragraph 2.)

Accordingly, appellant should not be required to identify which particular CALJIC instructions the jurors may have misunderstood. It is practically and legally impossible (see Evidence Code § 1150) for appellant to "get inside the head" of the jurors and specify which parts of the instructions they failed to fully understand or correctly apply.

Moreover, there are objective factors in the present case which confirm the likelihood that the jurors did not understand the instructions and correctly apply the law.

First, as set forth in Claims 10 and 11 (AOB, pp. 136-194, see also pp. 21-37, above), the most critical substantive instruction in appellant's case (CALJIC No. 9.40) omitted two essential contested elements of the robbery charge.

Second, numerous other CALJIC instructions were potentially misleading yet, according to respondent, the judge had no duty to clarify them simply because they were standard CALJIC instructions. (See e.g., RB 61-62; 94; 120; 147-48; 151; 178; 179; 189.)

Third, the jurors' questions during deliberations demonstrated confusion about the instructions. (AOB, pp. 9-13.)[43]

Fourth, as criminal trials go, the present case presented special instructional challenges. The prosecutor charged appellant with ten discrete offenses as to which some of the most complex judicial doctrines and theories of liability applied: i.e., conspiracy based on six overt acts and three different

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[43] It should be noted, however, that the jurors may also have misunderstood other instructions about which they did not ask questions.

objectives; burglary based on three alternative theories of intent; three counts of first degree murder based on four alternative theories of liability (premeditation and deliberation, felony murder, conspiracy, aiding and abetting/natural and probable consequences); assault and attempted murder based on four alternative theories of liability (intent to kill, conspiracy, aiding and abetting; natural and probable consequences.) (See AOB, pp. 9-13.)

Finally, even if this Court concludes that the jurors' understanding of the CALJIC instructions was sufficient to affirm their guilt phase verdicts, the problematic intelligibility of the instructions fails to satisfy the heightened reliability required in death penalty cases. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-38.)

CLAIM 52

THERE IS NO ASSURANCE THAT THE JURORS INTERPRETED CALJIC NO. 8.80.1 IN THE SAME WAY AS DOES RESPONDENT

[AOB 483-487; RB 151-156]

In his opening brief appellant challenged the italicized language of the following CALJIC instruction (8.80.1) regarding the special circumstance findings:

> If you find the defendant in this case guilty of murder of the first degree as to Counts 1, 2 or 3, you must then determine if one or more of the following special circumstances is true:
>
> The first special circumstance is multiple murders. The second special circumstance is murder during the commission of burglary. The third special circumstance is murder while in the commission of robbery.
>
> The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.
>
> Unless an intent to kill is an element of a special circumstance, if you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true.
>
> *If you find that a defendant was not the actual killer of a human being, or if you were unable to decide whether the defendant was the actual killer or an aider or abettor or a co-conspirator, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted, and counseled, commanded, induced, solicited, requested, or assisted any act during the commission of the murder in the first degree, or with reckless indifference to human life and as a major participant who aided, abetted, counseled, commanded, induced, solicited, requested or assisted in the commission of the crime of burglary or robbery which resulted in the death of a human being, namely, Ramon Morales, Martha Morales or Fernando Martinez.* (53 RT 10457; 5 CT 1293.) [Emphasis added.]

Appellant contended that a reasonable jury of lay persons would read this language as establishing two circumstances under which the jurors must find reckless indifference:

1) If the jury found that appellant was not the actual killer, or

2) If the jury could not decide from among the following options (a)

appellant was the actual killer; (b) appellant was an aider and abettor; (c) appellant was a co-conspirator.

Respondent answers this claim by simply reading out options (2)(b) and (2)(c):

> "The fact the jury might also find a defendant to be a co-conspirator is unrelated to that necessary finding. Indeed, a jury could have believed that appellant was the actual killer *and* a co-conspirator. Thus, the fact that the jury believed that appellant was a co-conspirator is irrelevant to its finding under the special circumstance." (RB 152.) [Emphasis in original.]

Thus, respondent contends that the jurors would have read the instruction as establishing the following two circumstances under which reckless indifference must be found:

1) If the jury found that appellant was not the actual killer, or

2) If the jury could not decide whether appellant was the actual killer.

While respondent's interpretation accurately reflects the law, the jurors were not trained in the law and could not be expected to simply read out the aiding and abetting and conspiracy options from the instructional language. To the contrary, it must be presumed that the jurors followed the instructions as they were written. "The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions." (*People v. Mickey*, supra, 54 Cal.3d at 689, fn 17; see also *People v. Delgado* (1993) 5 Cal.4th 312; *People v. Cruz* (2001) 93 Cal.App.4th 69, 73 ["We presume that the jury 'meticulously followed the instructions given.' [Citation.]"].)[44]

Accordingly, because the jurors did in fact decide that appellant was a co-conspirator (Option (2)(c)) they had no choice but to follow the instructional language and return the special circumstances without determining whether appellant acted with reckless indifference to human life and was a major participant.

Nor did trial counsel waive this claim by not objecting to the "standardized" CALJIC instructions as argued by respondent. (RB 151.)

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[44] This is an example of how – as recognized by the Blue Ribbon Commission – CALJIC instructions fail to adequately communicate legal principles because they fail to consider the audience they are addressing. (See pp. 73-74, above.)

Even without an objection below the reviewing court may consider an erroneous instruction that affects the defendant's substantial rights. (See Penal Code § 1259; see also *People v. Slaughter* (2002) 27 Cal.4th 1187, 1199; *People v. Renteria* (2001) 93 Cal.App.4th 552, 560; *People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.) Therefore, the error is cognizable on appeal and the judgment should be reversed.

CLAIM 58

EVEN IF AN ABBREVIATED ADMONITION IS PERMISSIBLE DURING TRIAL, THE SPECIAL CONCERNS IN A CAPITAL CASE NECESSITATE A FULL ADMONITION PRIOR TO THE RECESS BETWEEN THE GUILT AND PENALTY PHASES OF THE TRIAL

[AOB 530-536; RB 159-162]

Respondent relies on this Court's decisions authorizing an "abbreviated admonishment" after first delivering a full one. (RB 161.) However, those cases did not concern the admonishment applicable to the hiatus between the guilt and penalty phases of a capital trial. As set forth in appellant's opening brief, the abbreviated admonition did not address the special needs which are present when the jurors are in recess between the guilt and penalty trials. The abbreviated admonishment given in the present case allowed the jurors to think about the penalty question and to form opinions about it prematurely. This was a reasonable interpretation of the admonishment, since the prohibition against forming opinions was included in the guilt phase admonition but not in the penalty phase admonition.

When a generally applicable instruction is made specifically applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may prejudicially mislead the jurors. (See AOB Claim 18 § C, p. 259, fn. 231, incorporated herein.)

Hence, the jurors had a six day period between the guilt and penalty trials during which they could form opinions regarding appellant's penalty.

Moreover, empirical studies of actual capital jurors have demonstrated a strong tendency for such premature consideration of penalty. (See W. Bowers et al, *How the Death Penalty Works: Empirical Studies of the Modern Capital Sentencing System*, 83 Cornell L. Rev. 1476 (1998) ["interviews with 916 capital jurors in eleven states reveal, however, that many jurors reached a personal decision concerning punishment before the sentencing stage of the trial"]; Bowers and Foglia, "*Still Singularly Agonizing: Law's Failure To Purge Arbitrariness From Capital Sentencing*" (203) 39 Crim. Law Bulletin 51 [same].)

Accordingly, for the above reasons, and those set forth in appellant's opening brief, the penalty judgment should be reversed.

CLAIM 59

RESPONDENT FAILS TO EXPLAIN WHY THE PROSECUTOR SOUGHT TO ADMIT THE DEMONSTRATIVE VIDEO IF IT DID NOT ENHANCE THE IMPACT OF THE EVIDENCE INCLUDED IN THE VIDEO

[AOB 537-553; RB 163-167]

Respondent contends that the audio-video "slingshot" compiled by respondent was not unduly prejudicial because the video only contained evidence which had been properly admitted into evidence:

> Appellant does not contend that any of the items on the tape were improperly admitted, or that they were, in isolation, unduly prejudicial. If each item was separately relevant and admissible, appellant does not demonstrate how the items, put together, were unduly prejudicial. (RB 165.)

However, if the audio-video montage was no more impactful than viewing the individual items in isolation, as argued by respondent, then there would have been no reason for the prosecutor to compile and present the montage in the first place. The fact is that the "theatrical" nature of the montage was calculated to inflame the passion and prejudice of the jury by unduly emphasizing the selected images and themes. Not only was the method of delivery suspect, the content was as well. Both operated in tandem to prejudice the jury. The video compilation over-emphasized some of the evidence while impliedly discrediting the rest and presenting hypotheses as fact. The prosecution chose which images to include based on their pathos – such as the photos of the smiling child. The prosecutor determined the sequence of those images. Similarly, the prosecution coordinated the timing of the 911 audio track for greatest dramatic effect. The surviving infant victim was shown more than once. The prosecutor played the film on a large screen. (67 RT 13202.) Included in the film was a clip of appellant's video statement in Spanish only. And, it used a medium particularly influential to the modern jury.[45] In short, it gave the evidence a meaning the use of still photographs or

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[45] "Jurors' most frequent encounters with packaged visual information occur through television and movies. Experts describe television viewing as a passive activity because of the lack of opportunity for viewer participation. (continued...)

verbal argument could never have achieved.[46]

Furthermore, the video was not a fair representation of the evidence because it showed appellant giving his video statement in Spanish. By showing but not translating appellant's statements in the closing argument video, the prosecutor avoided repetition of key exculpatory details – such as appellant's statements demonstrating he lacked the intent to rob or hurt the Morales – but still retained the visual impact of appellant admitting that he was involved.

Apart from the dramatic manner in which the evidence was re-packaged, the very fact that it was compiled and presented by the prosecutor – weighted as she was with the prestige of a government officer – lent it undue credibility. (*People v. Talle* (1952) 111 Cal.App.2d 650, 677.) While this video was not substantive evidence, its selective emphasis and dramatic imagery suggested the jury would treat it as such.

Thus, the theatrical video, imbued with a false sense of credibility, distorted the evidence while simultaneously increasing its force for jurors. The trial judge erred by allowing the prosecution to use an item so calculated to play upon the jurors' passions rather than their reason in making their life or death decision.

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[45](...continued)
Dr. Stanley Baran explains in *The Viewer's Television Book* that individuals typically are critical and analytical with regard to their interpersonal communications by questioning the motives and meanings of what others say. These individuals fail to apply the same analysis to watching television. Instead, 'we routinely accept [television's] communication without question.' ."(26 U. Mem. L. Rev. at p. 1448-1449.[citations omitted])

[46] See e.g., Jessica M. Silbey, Suffolk University Law School Faculty Publications: *Judges as Film Critics: New Approaches to Filmic Evidence* (2004) at p. 539 ["The case law's analogy of photographs to moving pictures is inapt."]

CLAIM 60

EVEN IF A CAUTIONARY INSTRUCTION REGARDING VICTIM IMPACT IS GENERALLY NOT REQUIRED, THE AUDIO-VIDEO "SLINGSHOT" IN THE PRESENT CASE WARRANTED A CAUTIONARY INSTRUCTION

[AOB 554-561; RB 168-169]

Respondent relies on *People v. Ochoa* (2001) 26 Cal.4th 398, 455 and *People v. Zamudio* (2008) 43 Cal.4th 327, 368-69 to argue that a cautionary instruction regarding the prosecutor's audio-video "slingshot" was not required. (RB 168-69.) However, both of those cases simply addressed the propriety of instruction vis-à-vis victim impact evidence in general. Neither *Ochoa* nor *Zamudio* addressed the question of whether a cautionary instruction should be directed toward a theatrical audio-video montage of the most inflammatory prosecution evidence calculated to unduly emphasize such evidence.

Thus, *Ochoa* and *Zamudio* are not authority for the proposition that no cautionary instruction was required in the present case. (See *People v. Dillon* (1983) 34 Cal.3d 441, 473-74 [cases are not authority for matters not considered].)

Accordingly, for the reasons set forth in appellant's opening briefing (AOB, pp. 554-61) the judge prejudicially erred in failing to adequately caution the jurors regarding the audio-video "slingshot."

CLAIM 61

THE JURORS' ERRONEOUS CONSIDERATION OF THE KNIFE AND FIREARM ENHANCEMENTS WAS PREJUDICIAL ERROR

[AOB 562-564; RB 170-171]

Respondent suggests that the jurors would not have improperly utilized the alleged knife and firearm use enhancements at the penalty trial because the judge gave CALJIC No. 8.85 which governed the jurors' consideration of "other criminal activity." However, a reasonable juror would not have understood CALJIC No. 8.85 to apply to the use enhancements which were neither discrete crimes nor "other" activity. Indeed, they were part and parcel of the same transaction upon which the charges were predicated.

Nor is respondent correct in asserting that the aggravating circumstances were so overwhelming that the error could not have affected the verdict. Notwithstanding the gruesome nature of the crimes, the fact that appellant did not intend such consequences was an important circumstance which would have mitigated the aggravation in the eyes of the jurors.

CLAIM 62

THE PROSECUTOR'S MISCONDUCT WAS PREJUDICIAL AT THE PENALTY TRIAL

[AOB 565; RB 172]

Even if it was not prejudicial as to the guilt trial, the prosecutor's argument regarding what the "community" should tolerate was prejudicial as to penalty. (See AOB Claim 17, pp. 248-52.)

The evidence as to penalty was closely balanced. (See AOB Claim 59 § G(2), pp. 550-51.) The prosecution relied heavily on the circumstances of the offense and on emotional and wide ranging victim impact testimony which emphasized the lives of the victims and substantial harm caused by the perpetrators of the crimes to them and to their families.

On the other hand, the defense presented evidence of appellant's character and background which contradicted the prosecution's theory that appellant was a callous criminal who knowingly and willfully conspired to rob and murder the victims. (See AOB Penalty Phase: Statement of Facts § C, pp.521-29 [discussing substantial mitigating factors relating to both the offense and appellant's character].)

Accordingly, because the prosecutor's misconduct was a substantial error which crucially infringed upon appellant's constitutional rights to due process (6th Amendment) and to fair and nonarbitrary determination of penalty, the penalty judgment should be reversed under both the state and federal standards of prejudice. (See AOB Claim 59 § G, pp. 548-52.)

CLAIM 63

RESPONDENT FAILS TO DEMONSTRATE THAT CONSCIOUSNESS OF GUILT WAS A PROPER FACTOR IN AGGRAVATION

[AOB 566; RB 172-173]

Respondent acknowledges that the judge erroneously instructed the jurors at the penalty trial to consider the guilt phase instructions which included instructions on consciousness of guilt. (RB 173.)

Nevertheless, as with all other conceded instructional errors, respondent argues that the error was not prejudicial; respondent argues that the error was harmless because the consciousness of guilt instructions were "abstract" and, therefore, would likely have been ignored by the jurors. This argument is not persuasive because it fails to consider how the jurors would reasonably have interpreted the instructions. (See *Estelle v. McGuire* (1991) 502 U.S. 61, 72.) Under this standard, it is not likely that the jurors would have simply ignored the consciousness of guilt instructions as irrelevant abstractions. To the contrary, the prosecution presented specific evidence of appellant's flight and the jurors quite reasonably would have understood the judge's penalty phase instructions to permit consideration of such flight at the penalty trial. And, because flight obviously was not a mitigating circumstance, the jurors would have considered it to be an aggravating factor.

Accordingly, the error violated the Eighth Amendment because flight is not a statutorily authorized aggravating factor. (See AOB pp. 572-73 [improper for jurors to rely on non-statutory aggravation].)

Given the guilt phase findings which indicated jurors were closely divided and the balanced evidence at the penalty phase, this was a substantial error which prejudiced appellant at the penalty trial and independently compels reversal. In combination with other penalty phase errors, it was all the more likely to have infringed on appellant's constitutional rights and prejudicially affected the fairness of the sentencing determination. (See AOB, p. 566.)

CLAIM 67

THE JUDGE SHOULD HAVE GIVEN APPELLANT'S REQUESTED INSTRUCTION OR OTHERWISE MODIFIED "FACTOR J" TO ASSURE THE JURORS WOULD CONSIDER APPELLANT'S ACCOMPLICE STATUS IN WEIGHING AGGRAVATION AGAINST MITIGATION

[AOB 577-582; RB 178-180]

Respondent does not deny that Factor J was calculated to preclude the jurors from considering the fact that appellant was a non-shooter accomplice unless his role was "relatively minor." In fact, respondent contends that this "is exactly how the instruction should be interpreted." (RB 179.)

Nevertheless, respondent sees no constitutional deficiency in the instruction because the "jury was not precluded from considering those mitigating factors" in determining whether or not "appellant's participation was minor." (RB 180.) However, even if the jurors did consider appellant's accomplice status in making this preliminary determination, such consideration did not satisfy the Eighth Amendment because once the jurors found that appellant's role was not "relatively minor" they were precluded from putting his accomplice status on the scales when weighing aggravation against mitigation. Thus, by wholly precluding the jurors from considering important mitigating evidence in making the ultimate decision of whether appellant should live or die, the instruction prejudicially violated the federal constitutional principles set forth in appellant's opening brief. (AOB, pp. 577-82.)

Nor did counsel's argument cure the error as implied by respondent. (RB 180-81.) The judge admonished the jurors to follow his instructions and not the argument of counsel and it should be presumed that the jurors faithfully followed this admonishment. (See p. 39, above.)

Additionally, appellant did not waive the error as argued by respondent. (RB 179.) An error in the standard instructions which impacts the defendant's substantial rights is cognizable on appeal even if defense counsel did not object to it at trial. (See pp. 58-59, above.)

Finally, respondent erroneously contends that appellant's requested instruction – which would have cured the error – was properly refused because

it "highlighted one particular mitigating factor . . ." (RB 181, fn. 47.) Even assuming *arguendo* that there is generally no right to highlight one factor, surely this general rule should not apply when the requested instruction simply clarifies ambiguous or erroneous statements about that factor in other instructions. (See generally *People v. Fudge* (1994) 7 Cal.4th 1075, 1110 [judge must tailor instruction to conform with law rather than deny outright]; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 924 ["trial court erred in failing to tailor defendant's proposed instruction to give the jury some guidance regarding the use of the other crimes evidence, rather than denying the instruction outright"]; *People v. Malone* (1988) 47 Cal.3d 1, 49; *People v. Hall* (1980) 28 Cal.3d 143, 159; *People v. Whitehorn* (1963) 60 Cal.2d 256, 265; *People v. Coates* (1984) 152 Cal.App.3d 665, 670-71; *People v. Bolden* (1990) 217 Cal.App.3d 1591, 1597; *People v. Cole* (1988) 202 Cal.App.3d 1439, 1446.).) Certainly there are many CALJIC instructions approved by this Court and CALCRIM instructions approved by the Judicial Council whose sole purpose is to clarify or elucidate how the jurors should utilize specific pieces of evidence. (See e.g., CALJIC No. 2.03 [false statements]; CALJIC No. 2.51 [motive evidence]; CALJIC No. 2.52 [flight]; CALCRIM 362 [false statements]; CALCRIM 370 [motive evidence]; CALCRIM 372 [flight].)

In sum, the judge should either have given appellant requested instruction or otherwise corrected the erroneous and misleading language in the Factor J instruction. The judge's failure to do so was prejudicial error. (See AOB pp. 581-82.)

CLAIM 68

THE EXCLUDED DEFENSE EVIDENCE THAT APPELLANT EXPRESSED REMORSE AND A WILLINGNESS TO SURRENDER TO THE AUTHORITIES WAS MORE THAN "MINIMALLY RELEVANT"

[AOB 583-592; RB 181-185]

Respondent argues that the rationale of *Green v. Georgia* (1979) 442 U.S. 95 is not applicable to the present case because remorse and a willingness to surrender was only "minimally relevant to any mitigating issues." (RB 185.) This argument is not persuasive in light of the prosecution's efforts to characterize appellant as a remorseless person who killed and robbed because it was his "nature" to do so. (See p. 18, above.) As the prosecutor no doubt recognized in making this argument, whether or not appellant felt remorse was likely be an important consideration for the jurors in their penalty phase deliberations. And, empirical data bears this out.[47] Thus respondent's

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[47] (See, Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 New York University Law Review 26, 59 (2000) [A juror was apt to respond to the remorseful defendant not only with good will, but also without fear or disgust, both of which tended to recede in the face of the defendant's remorse.]; Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?* 98 Columbia Law review 1538 (1998) [Lack of remorse is highly aggravating. Almost 40% of jurors were more likely to vote for death if the defendant expressed no remorse for his offense. "Indeed, in terms of aggravation, lack of remorse was second only to the defendant's prior history of violent crime and future dangerousness." Jurors key in on this without prompting from the State.]; Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Mitigation Means Having to Say You're Sorry: The Role of Remorse in Capital Sentencing,* 83 Cornell Law Review 1599 (1998) ["All things being equal, remorse does make a difference." "Aside from the seriousness of the crime and the defendant's future dangerousness, no other factor plays a greater role in capital sentencing than remorse. In short, jurors show no mercy to those who show no remorse." "If jurors believed the defendant was sorry for what he'd done, they tended to sentence him to life imprisonment, not death." And, conversely, "if jurors think the defendant has no remorse they are more apt to sentence him to death"]; Scott Sundby, *The Jury and Absolution: Trial Tactics, Remorse and the Death Penalty,* 83 *Cornell Law Review* 1557 (1998) [Based on the California juror interviews, the defendant's degree of remorse was a significant factor for juries imposing the death penalty. Jurors identified the degree of the defendant's remorse as one of the most frequently discussed issues in the jury room at the penalty phase. Overall, 70% of the jurors raised (continued...)

contention that independent evidence of appellant's remorse was only "minimally relevant" should be rejected.

Moreover, the evidence that appellant wanted to turn himself in would have been especially powerful evidence that appellant's true character was much different from the picture of a remorseless killer which the prosecutor sought to portray. This evidence surely would have been enough especially in combination with other mitigating evidence to have persuaded at least one juror that the mitigating circumstances outweighed aggravation.

Accordingly, the penalty judgment should be reversed. (AOB , pp. 583-92.)

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[47](...continued)
lack of remorse as a reason they voted for the death penalty, often citing it as one of the most compelling reasons. Moreover, it was a theme in every one of the death cases. The primary source of the jurors' perceptions concerning the defendant's remorse... appeared to be the defendant's demeanor and behavior during trial. What repeatedly struck jurors was how unemotional the defendants were during the trial, even as horrific depictions of what they had done were introduced into evidence. Defendants were described as "blase," "bored," "unconcerned," "arrogant," "proud," "nonchalant," "showing no emotion," "cocky." One juror said "we would have liked to have spoken to him because he showed so little emotion and so little remorse. We just wanted to kind of figure out, are you human? We were kind of looking for anything, anything to find remorse." However, in the life cases, the jurors also, by and large, noted a lack of remorse, although in general it was to a lesser degree than in the death cases. Only one-third of the jurors in the life cases believed that their defendant was truly sorry for his crime. But in most of the life cases, at least one juror noted some remorse on the defendant's behalf.]; Constanzo & Constanzo, *Life or Death Decisions: An Analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework,* 18 Law and Human Behavior 151, 161 (1994) [A significant number of jurors considered the fact [in sentencing to death] that the "defendant displayed no remorse for his crime."]; William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Trials,* 15 American Journal of Criminal Law 1 (1989) [Thirty-two percent of the jurors mentioned the demeanor of the defendant as a contributing factor in the decision to recommend the death penalty. Id. at 52. Generally what the jurors were referring to was an absence of remorse. *Id.* Defendants were described as "remorseless," "emotionless"].)

CLAIM 70

APPELLANT DID NOT WAIVE HIS "FACTOR K"CLAIM

[AOB 600-602; RB 188]

Respondent argues that appellant waived his "factor (k)" claim (AOB, pp. 600-602) because his counsel failed to object to the standard CALJIC instruction on "factor (k)". (RB 189.) Lack of objection does not vitiate appellant's argument. Respondent's contention should be rejected. (See pp. 58-59, above.)

CLAIM 71

RAMIREZ'S SENTENCE WAS RELEVANT MITIGATION BECAUSE IT PROVIDED A BASIS FOR THE JURORS TO HAVE A LINGERING DOUBT ABOUT APPELLANT'S TRUE ROLE IN THE SHOOTINGS

[AOB 603-607; RB 189]

Even though the jurors convicted appellant of the charged offenses at the guilt trial, they still could have had a lingering doubt as to the extent of appellant's involvement in those offenses. For example, the jurors' inability to reach verdicts on the conspiracy to murder and use of a firearm enhancements (see AOB pp. 11-12) suggested that some jurors had a lingering doubt as to whether (1) appellant was one of the shooters and (2) whether he intended to kill.

Similarly, the unanimous verdict finding the knife-use allegation untrue demonstrated the jurors' concern about the veracity of Ramirez's testimony that appellant intended to steal property from the occupants of the house. (See p. 5, above.)

Accordingly, Ramirez's sentence was relevant mitigating evidence and the judge committed prejudicial error by refusing appellant's requested instruction.

CLAIM 91

RESPONDENT'S INCREDULOUS CLAIM THAT THERE WAS ONLY ONE ERROR THROUGHOUT THE ENTIRETY OF APPELLANT'S GUILT AND PENALTY TRIALS SHOULD BE REJECTED

[AOB 716-719; RB 218]

Respondent answers appellant's cumulative error claims (79, 90 and 91) with the following assertion:

> Aside from the burglary special circumstances discussed about (see Args X, LXIII) there were no other errors in the guilt or penalty phase. Because there was only one error in the guilt and penalty phases, there is nothing to "accumulate," and there was no violation of appellant's constitutional rights. (See *People v. Sandoval,* supra, 4 Cal.4th at p. 198.) (RB 219.)

This assertion should be rejected for several reasons.

First, in some instances, respondent has failed to recognize the existence of error due to reliance on inapposite authority. For example, respondent relied on a dissenting opinion of Justice Mosk – which this Court has repudiated – to argue that CALJIC No. 9.40 correctly omitted the element of intent to steal from its definition of robbery. (See pp. 23-24, above.)

Second, respondent fails to recognize other errors due to a misstatement or mischaracterization of the record. (See pp. 1-6, above.) For example, respondent concludes that the judge's failure to require juror unanimity was not error because appellant's defenses to the different acts of robbery were "the same." (RB 69.) Yet, the record demonstrates that the defenses were different and that the jurors had a reasonable basis upon which to distinguish between the different acts. (See pp. 41-48, above.)

Third, respondent's conclusion that there was "only one error" is contradicted by respondent's own briefing. Respondent conceded error, either unconditionally or alternatively, as to a number of claims.[48]

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[48] Claim 9 [any error was harmless] (RB 55-57); Claim 10 and12 [any error in failing to give claim-of-right instructions as to conspiracy was harmless] (RB 64-65); Claim 13 [any error re: unanimity was harmless] (RB 69); Claim 15 [any error re: hearsay was harmless] (RB 74-75); Claim 18 [any error was harmless] (RB 92-93); Claim 42 [failure to obtain written waiver of presence violated Penal Code § 977 (RB 134); if error, absence of counsel was harmless] (RB 136-37); Claim 58 [no showing that appellant was prejudiced (continued...)

Any discussion of cumulative error should include all of these errors.

In sum, respondent's discussion of cumulative error is deficient because it erroneously assumed that there was "only one" error in the guilt and penalty phases of appellant's trial. For the reasons set forth in appellant's opening brief, the judgment should be reversed due to cumulative error.

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[48](...continued)
by the abbreviated admonition given immediately prior to the recess between the guilt and penalty trial] (RB 162-63)]; Claim 59 [even if the judge should have excluded the audio-video montage, the error was harmless] (RB 167-68); Claim 61 [assuming judge should have tailored instruction, any error was harmless] (RB 171-72); Claim 63 [". . . it was error to reference back to [the consciousness of guilt instruction]"] (RB 173); Claim 77 [assuming referral-back to the general categories in error it was harmless] (RB 200).

CLAIM 95

THIS COURT SHOULD EITHER REFER THE VIENNA CONVENTION CLAIM FOR AN EVIDENTIARY HEARING OR, IF THAT REQUEST IS DENIED, DEFER ANY FINDINGS ON THE CLAIM UNTIL MR. COVARRUBIAS HAS BEEN AFFORDED AN OPPORTUNITY TO INVESTIGATE AND PRESENT THE CLAIM ON HABEAS CORPUS

[AOB 731-59; RB 222-230]

In his opening briefing Mr. Covarrubias contended that this Court should refer this matter for an evidentiary hearing to determine whether the proved violation of Mr. Covarrubias's Vienna Convention consular rights was prejudicial. Respondent argues that the claim was waived and not prejudicial.

Appellant recognizes that in *In Re Martinez* (2009) 46 Cal. 4th 945, 966 this Court concluded that state procedural default rules apply to Vienna Convention claims and that a re-determination of the merits of such claims does not require an evidentiary hearing.

Nevertheless, Mr. Covarrubias continues to contend, for the reasons set forth herein and in his opening briefing, that the claim is cognizable on direct appeal and should be referred for an evidentiary hearing on the question of prejudice. This is so because unlike Mr. Martinez – who had already raised the claim in a habeas corpus petition – Mr. Covarrubias has not yet been afforded an opportunity to investigate and present his claim due to the State's inexcusable eleven year delay in providing Mr. Covarrubias with habeas corpus counsel. Under these extraordinary circumstances the claim should be heard on direct appeal after an evidentiary hearing (per Rule 8.252) so that the claim can be investigated and heard without any further delay.

Additionally, even if this Court denies Mr. Covarrubias's request for an evidentiary hearing on direct appeal, no factual findings on the question of prejudice should be made on direct appeal without an evidentiary hearing. As this Court has recognized, the question of prejudice depends on "facts outside of the record. . . ." (*People v. Mendoza* (2007) 42 Cal. 4th 686, 711.) Accordingly, in the absence of ordering an evidentiary hearing, this Court should defer any resolution of the matter on direct appeal. (*Ibid.* ["Whether defendant can establish prejudice based on facts outside of the record is a matter for a habeas corpus petition."].)

CONCLUSION

For the foregoing reasons the judgment should be reversed.

Dated: October _____, 2009

Respectfully submitted,

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Thomas Lundy
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DANIEL SANCHEZ COVARRUBIAS

CERTIFICATION OF WORD COUNT/USE OF RECYCLED PAPER

As attorney of record herein, and pursuant to California Rules of Court, Rule 8.630, I hereby declare and certify that this brief contains 29192 words in *WordPerfect* computerized format. I also certify that this brief was printed on recycled paper per Rule 2.101.

I declare the foregoing is true and correct to the best of my knowledge under penalty of perjury this _____day of October, 2009, at Santa Rosa, California.

Thomas Lundy
Attorney for Appellant
DANIEL COVARRUBIAS