IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. MAGDALENO SALAZAR, Defendant and Appellant.	CRIM. No. S077524 Death Penalty Case Los Angeles County Superior No. BA081564

APPELLANT'S REPLY BRIEF

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

The Honorable Robert J. Perry, Judge Presiding

MICHAEL J. HERSEK
State Public Defender

JESSICA K. MCGUIRE
Assistant State Public Defender

ELLEN J. EGGERS
Deputy State Public Defender
Cal. State Bar No. 93144

770 L Street, Suite 1000
Sacramento, CA 95814

Attorneys for Appellant

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PEOPLE OF THE STATE OF CALIFORNIA	)	
	)	
Plaintiff-Respondent,	)	
	)	**Supreme Court**
v.	)	**No. S077524**
	)	
MAGDALENO SALAZAR,	)	**Los AngelesCounty**
	)	**Superior Court**
Defendant-Appellant.	)	**No. BA 081 564**

INTRODUCTION

In this reply, appellant addresses specific contentions made by respondent, but does not reply to arguments which are adequately addressed in his opening brief. The failure to address any particular argument, sub-argument or allegation made by respondent or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented.

I

APPELLANT'S FIRST DEGREE MURDER CONVICTION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A. Kathy Mendez's Testimony Was Refuted by the Physical Evidence and Therefore Inherently Incredible

In order for the Court to meaningfully evaluate the sufficiency of the evidence in this case, it must have a clear understanding of the physical layout of the crime scene. For this reason appellant is contemporaneously filing with this reply brief, a Notice of Designation in the superior court, pursuant to Rules of Court, rule 8.224, designating People's Exhibit Nos. 1 and 2.

People's Exhibit No. 1 consists of a photo board with four photographs, labeled 1A, 1B, 1C and 1D. These photographs depict, from different angles, the Beef Bowl, the Au Rendez Vous Café, and the car of the victim, Enrique Guevara. Guevara's car is the one which was backed into the parking space in front of the Au Rendez Vous Café. Exhibit 1B shows the storefronts of both the Beef Bowl and the Au Rendez-Vous. The front door of each restaurant is marked with a downward-facing arrow, and Guevara's car – a small gray Toyota facing outward from the café – is circled in blue felt-tip ink. (4 RT 809.) Exhibit 1C shows both storefronts and the car from a slightly different angle.

People's Exhibit No. 2 is a diagram depicting the storefronts and the parking lot, with cars parked in front of the two restaurants. Markings were made on the diagram by witnesses – specifically Kathy Mendez and Emilio Antelo – to show their respective positions and the positions of appellant, Enrique ("Rascal") Echeverria, and Guevara prior to commencement of the shooting. Of particular significance, is an arrow drawn by Kathy Mendez,

indicating where, and in which direction, she saw Guevara walking prior to the shooting. Mendez's arrow has Guevara walking past the Beef Bowl from east to west. (3 RT 645-646.)[1] However, Guevara's car was parked west of the Beef Bowl, in front of the entrance to the Au Rendez-Vous Café (4 RT 750), and Emilio Antelo placed him in front of the Au Rendez-Vous at the time of the confrontation, by marking the diagram with an "X." (*Ibid.*) Antelo, the security guard who was standing by the entrance to the Beef Bowl (4 RT 740, 748-749, 757), further testified that had Guevara gotten to the entrance of the Beef Bowl, he would have stopped Guevara from entering because he was not wearing a shirt. (4 RT 758.) Respondent apparently did not review the exhibits prior to writing the Respondent's Brief, since the brief asserts that Guevara "got out of the car and walked past the Yoshinoya [Beef Bowl] towards the café next door." (RB 21.) This description is not consistent with the physical layout of the scene or the location of Guevara's car. His car was parked right in front of the café (backed in), so in order to walk to the café, he would not have walked *past the Beef Bowl.*

Given the location of Guevara's car, Mendez's testimony that she saw appellant and Rascal push Guevara and wrestle with him as he passed from east to west in front of the Beef Bowl (3 RT 646-647), was inherently incredible.[2] On the other hand, Emilio Antelo's testimony that Guevara had

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[1]Throughout this brief references to the reporter's transcript will be designated by the volume number followed by "RT" and the appropriate page number.

[2] Kathy Mendez testified at Rascal's trial that she had not personally witnessed appellant and Rascal wrestle with Guevara, but had merely repeated what others told her. (3 RT 693.)

gotten out of his car and was standing in front of the Au Rendez-Vous when the confrontation occurred (4 RT 750), is consistent with the crime scene evidence. Guevara was found dead inside of the Au Rendez-Vous Café, and all of the bullet casings were recovered from that vicinity. (4 RT 816.)

Antelo's testimony was also consistent with prosecution witness Patrick Turner's alleged statement to the police on the night of the crime, that the confrontation took place in front of the Au Rendez-Vous Café. (4RT 788, 810.)[3] In addition, the fact that Antelo did not mention seeing any wrestling indicates that it occurred after Antelo turned to go into the Beef Bowl and heard the first shot fired. At the first shot, Kathy Mendez and all the other patrons of the Beef Bowl dropped to the ground. (3 RT 610, 615.)

Furthermore, as shown by Exhibits 1B and 1C, the doorway of the Au Rendez-Vous Café was out of the range of view from inside the Beef Bowl, where Kathy Mendez was standing when the shooting started. (4 RT 816.) Therefore, Kathy Mendez's testimony that she saw appellant shoot Guevara (3 RT 695) was also refuted by the physical evidence at the crime scene, thereby rendering her testimony inherently unbelievable.

Review of the above-described exhibits thus makes clear that this is *not* simply a case in which the witnesses gave conflicting testimony as respondent contends (RB 19), but instead a case in which it was *physically impossible* for the only witness who testified that she saw appellant shoot

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[3] Turner was a transient (4 RT 723), who was serving a prison sentence for "robbery and drugs," at the time of his testimony. (4 RT 791.) On the night of the crime, Turner had been drinking beer with friends (*ibid*), and stopped to buy cigarettes "at the donut shop," which was in the same mini-mall as the Beef Bowl. (4 RT 783.) Turner's trial testimony revealed that his memory of the incident was extremely vague. (See 4RT 782-806.)

the victim – Kathy Mendez – to have seen what she said she saw.

B. The Prosecution's Theory That Appellant and Rascal Chased Guevara Into the Au Rendez-Vous Café, That Guevara Grabbed Rascal's Gun, and That Appellant Shot Both Guevara and Rascal From The Doorway, Was Nothing More Than Unsupported Speculation

The prosecution's theory at trial, as articulated by the prosecutor in both his guilt phase opening statement and closing argument, was that Guevara ran into the Au Rendez Vous Café to get away from Rascal and appellant, but then turned around, started wrestling with Rascal, grabbed Rascal's gun (a 25 caliber pistol), and shot Rascal. (3 RT 599; 5 RT 1004, 1047.) The prosecutor further postulated that appellant, standing in the doorway of the Au Rendez Vous, began shooting the .9 mm, hitting Guevara nine times and Rascal three times. (3 RT 599; 5 RT 1004, 1005, 1008.) Finally, because the bullet casings recovered from the scene belonged to only two guns, the prosecutor argued (5 RT 1000), and respondent now argues, that the only reasonable inference is that Guevara was unarmed, but wrestled away Rascal's gun and then shot him with it in self-defense. (RB 22.)

However, a careful review of the record reveals that the prosecution's theory that Guevara grabbed the .25 caliber gun away from Rascal was not supported by the evidence. The basis of that theory was the fact that no witness testified to having seen Guevara with a gun before the shooting started. (5 RT 1001, 1002, 1006.) However, no witness other than Rascal was actually present when the shooting started. Although Kathy Mendez testified to having witnessed the shooting, as explained above and in appellant's opening brief, given Mendez's location when the shooting began, there is no way that she could have actually seen it. Emilio Antelo

also did not witness the shooting. (4 RT 744.)

Patrick Turner allegedly told the police that he saw "the suspect in the white shirt" wrestle with the victim into the Au Rendez-vous Café and then pull out a gun, and the "second suspect in the black shirt" begin shooting into the restaurant from the doorway (4 RT 811), but in his testimony at trial, Turner denied having witnessed any physical altercation outside of the Au Rendez-Vous, and claimed that he only saw the men arguing. (4 RT 786.) When the prosecutor then read Turner the statement he had allegedly made to the police, Turner first agreed with the substance of the statement, but subsequently stated:

> All we see is a guy running out of the donut shop after the shooting was over. They took off. And one guy was laying in the middle of the donut shop floor. That's all.

(4 RT 788.) The prosecutor again asked Turner whether he saw anyone "draw a gun," or "with a gun in their hand," and Turner repeated:

> All we could see is – we didn't see the gun. They just ran out of the donut shop and left.

(*Ibid.*)

Turner's alleged statement to the police that he saw the first suspect (Rascal) pull out a gun inside the Au Rendez-Vous café was also inconsistent with Emilio Antelo's testimony that Rascal had a gun in his hand when he first approached Guevara outside the café. Furthermore, as noted above, Antelo never mentioned having seen either appellant or Rascal wrestling with Guevara before the shooting started, which indicates that any wrestling that occurred, had to have happened *after* the first shots were fired.

In point of fact, no witness besides Rascal was in a position to describe what happened when the shooting started, specifically, who shot

whom and in what order. The physical evidence corroborates Rascal's testimony that Guevara pulled a gun from his pocket and shot him. (5 RT 890.) Not only was gunshot residue found on both of Guevara's hands (5 RT 942), but Rascal also sustained six gunshot wounds to the front of his body (neck, chest, both hands and stomach), which was consistent with his testimony that Guevara fired six shots at him. (5 RT 871, 891.) Although Antelo did not initially see a gun in Guevara's hand, by the time Antelo claimed he heard Rascal cock his gun, his view of Guevara was partially obstructed by Rascal, who stood between Antelo and Guevara. (4 RT 743.)[4] Furthermore, as noted above, Antelo had already turned to go inside the Beef Bowl when the shooting actually started (4 RT 744), so it is quite possible, if not highly likely, that Guevara had a gun hidden somewhere in his pants that he pulled out after Antelo had turned away.[5] It is also possible that Guevara returned to his car to obtain the .25 caliber gun.[6] In any event, it simply defies reason that a man with a cast on his leg, would be able to take away a loaded, cocked gun pointed directly at him, from the hand of an able-bodied gang-member, and then shoot the latter multiple times. The only *reasonable* inference is that Guevara used his own .25

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[4]Antelo never testified that he saw Guevara get out of his car *and then return to his car,* however, Guevara's passenger testified that after he (the passenger) got out of the car to buy food at the Beef Bowl, Guevara "walked to the car." (3 RT 730-731.) The fact that Antelo did *not* see this happen establishes that Antelo was not fully aware of all the events which took place after Guevara backed into a parking space and got out of his car.

[5] Guevara was a member of the Mara Salvatrucha gang. (1 RT 428.)

[6] Pursuant to a stipulation Guevara's passenger would have testified that after he headed toward the Beef Bowl to buy food, the victim, Enrique Guevara, "walked to the car." (3 RT 730-731.)

caliber gun to shoot Rascal.

C. If, as Respondent Argues, Guevara Shot Rascal With Rascal's Gun and Appellant Shot Guevara to Keep Him From Killing Rascal, Appellant Was Not Guilty of Murder

If, in fact, Guevara wrestled Rascal's gun away from him, then Rascal was unarmed when Guevara shot him. Under these circumstances, Guevara could not have reasonably believed that he was in imminent danger of being shot by Rascal and that it was necessary to shoot Rascal in self-defense. Accordingly, shooting Rascal would amount to an unlawful use of deadly force by Guevara. As the jury was instructed, "The right of self-defense ends when there is no longer any apparent danger of further violence of the part of an assailant." (CALJIC 5.52; 5 RT 966.)

On the other hand, if appellant shot Guevara to prevent him from killing an unarmed Rascal, this would be justifiable as a killing in defense of another. The jury in this case was instructed as follows, that:

> Homicide is justifiable and not unlawful when committed by any person in the defense of himself *or another* if he actually and reasonably believed that the individual killed intended to commit a forcible and atrocious crime and that there was imminent danger of that crime being accomplished. A person may act upon appearances whether the danger is real or merely apparent.
>
> The killing of another person in self-defense is justifiable and not unlawful when the person who does the killing actually and reasonably believes, one, that there was imminent danger that the other person will either kill him or cause great bodily injury, and two, that it is necessary under the circumstances for him to use self-defense force or means that might cause the death of the other person, for the purpose of avoiding death or great bodily injury to himself.

(CALJIC 5.13, and 5.12, as modified; 5 RT 961, emphasis added.)[7]

While self-defense or defense of another is not generally available as a defense if the defendant's conduct creates circumstances in which the victim is legally justified in resorting to self-defense against the defendant, it *is* available when the victim's use of force against the defendant, or another, is unlawful, even when the defendant set in motion the chain of events that led the victim to attack the defendant. (*People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179-1180; *People v. Randle* (2005) 35 Cal.4th 987, 1002; *People v. Frandsen* (2011) 196 Cal.App.4th 266, 272-273.)[8]

Thus, under the scenario postulated by respondent, even assuming Rascal and appellant were the initial aggressors, approaching Guevara with guns drawn when he was unarmed, appellant would have been justified in shooting Guevara in defense of Rascal once Guevara gained possession of Rascal's gun and started shooting him with it.

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[7] Although the second paragraph refers only to self-defense, and not defense of another, when read together with the first paragraph it should be apparent that the same principals apply to both killing in self-defense and killing in defense of another.

[8] All of the cases cited involve the applicability of the defense of imperfect self-defense, but the relevant principles apply to both perfect and imperfect self-defense. The difference between the two defenses is that perfect self-defense involves a reasonable belief that lethal force is necessary to protect oneself or another from an imminent danger, and therefore renders a homicide justifiable, whereas imperfect self-defense involves an actual, but *un*reasonable belief that such force is necessary, and obviates malice, thereby mitigating unlawful homicide to manslaughter. (*People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1227.)

D. Respondent's Theory of Premeditation and Deliberation Is Not Supported by Substantial Evidence, and Is Based Entirely Upon Speculation

What respondent claims to be substantial evidence of premeditation and deliberation, is nothing more than a series of inferences based upon speculation. Although reasonable inferences may constitute substantial evidence in support of a conviction, "an inference is *not* reasonable if it is based only on speculation." (*People v. Hughes* (2002) 27 Cal.4th 287, 365, emphasis added.)

Respondent speculates that appellant and Rascal went to the Beef Bowl "looking for trouble." (RB 16.) However, the prosecution's own witness, Kathy Mendez, testified that they went to the Beef Bowl to eat. (3 RT 633.) She also testified that the Beef Bowl was frequented by more than one gang, and that appellant and Rascal were concerned that they might be attacked by rival gang members who might also be eating there. (3 RT 631.) For this reason, they identified their gang membership to Messrs. Lemus, Salazar and Ramirez, and asked them where they were from (i.e., whether they were from a gang). (3 RT 620.) For the same reason, they discussed not "getting caught slippin," and appellant told Rascal to go to the car to get the "cuete," or gun. (3 RT 642.)

This testimony does not support the inference urged by respondent that appellant and Rascal "were targeting unsuspecting victims obviously looking for trouble." (RB 17.) Neither Mendez, nor Lemus and Salazar indicated that appellant and Rascal were behaving in a threatening manner or were intent on provoking a violent confrontation. Indeed, Juan Salazar testified, "He was just mumbling. I wasn't even paying attention to them." (3 RT 620.)

Nor was the presence of handguns proof that appellant and Rascal went to the Beef Bowl planning to shoot someone. As Kathy Mendez explained, "It was something normal for me for one of them to say go get the gun. *It wasn't a big deal. I didn't know nothing was going to happen.* So I wasn't really worried about that." (3 RT 684, emphasis added.)

The situation, as described by the witnesses, was therefore entirely distinguishable from *People v. Francisco* (1994) 22 Cal.App.4th 1180, 1192, a case cited by respondent, in which premeditation and deliberation were established by testimony that the defendant obtained a gun with the express purpose of shooting someone, and then drove around looking for someone to shoot. In the instant case, by contrast, appellant's and Rascal's words and actions established that they were on the defensive from the moment they arrived at the Beef Bowl. Had appellant and Rascal been "targeting victims" and "looking for trouble," as respondent contends, logic dictates that they would have entered the Beef Bowl fully armed, and would not have worried about "getting caught slippin."[9]

Even assuming for the moment that appellant, rather than Rascal, shot and killed Guevara, there were multiple factors establishing that the shooting was a spontaneous response rather than a premeditated act. First, as the prosecutor conceded at trial, *Guevara* – not Rascal, not appellant – *fired the first shots*. The subsequent shooting, whether by Rascal or by appellant, occurred in response to those shots. Second, the responsive shots were fired in rapid succession, immediately following the initial shots (3 RT 656; 4 RT 745), which was indicative of a spontaneous reaction. (Compare

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[9] Kathy Mendez that "getting caught slipping" means being unprepared or not paying attention, and getting shot by rival gang members. (3 RT 637-638.)

People v. Wells (1988) 199 Cal.App.3d 535, 541 [fact that defendant fired shots slowly in order to take careful aim was evidence of premeditation].) Third, the distance from which the shots were fired and the location and trajectory of the bullet wounds, also suggests a spontaneous gun battle rather than a planned killing.[10] (Compare *People v. Francisco, supra*, 70 Cal.2d at p. 27 [fact that shots fired from close range indicative of preconceived design].) In short, there was no evidence to support an inference that appellant would have shot Guevara had Guevara not shot Rascal.

While gang rivalry was undeniably a causal factor underlying the exchange of gunfire in this case, there was no indicia on appellant's part of any "cold calculated judgment . . . evidenced by planning activity, a motive

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[10] The pathologist who performed Guevara's autopsy found no soot or stippling on Guevara's body, indicating that he had to have been shot from a distance of more than two feet. Guevara died lying face down, with his head pointing in the direction of the front door of the Au Rendez-Vous. (See People's Exhibits 2 and 3.) According to the pathologist, four of the bullets entered Guevara's body from the front. These included entry wounds to the left side of Guevara's chest (4 RT 823); to the top of his left shoulder (4 RT 826); to the right side of his neck (4 RT 827); and to his left hand. (4 RT 831.) The pathologist was able to determine that three of these bullets – the ones that entered Guevara on the left side of his chest, the left side of his neck and the top of his left shoulder, had a downward trajectory, indicating that they were shot from above. (4 RT 824.) However, four bullets entered Guevara's body from the rear. He had entry wounds in the back of his head, his right rear shoulder, his right rear armpit, and the left side of his mid-back. (4 RT 825.) The shots to the back of Guevara's head and his right rear shoulder also had a downward trajectory. The pathologist was not able to determine the trajectory of the bullet that entered near Guevara's right armpit, but he was able to determine that the bullet that struck the left side of Guevara's mid-back, had an upward trajectory (4 RT 846-849), and therefore could only have been shot from behind. (See also People's Exhibits 6 and 7.)

to kill, or an exacting manner of death." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306.) To the extent appellant and Rascal were armed with guns, Kathy Mendez explained that having to worry about getting shot was, for better or for worse, part of their everyday reality, and therefore being armed was not, under such circumstances, indicative of a plan to kill someone. Moreover, this was not a situation like the one described in *People v. Rand* (1995) 37 Cal.App.4th 999, which respondent relies on for the proposition that motive to kill is reasonably inferred from the hatred of rival gang members. (RB 17.) In that case, the defendant shot the victim simply because he believed the latter to be a member of a rival gang. (*Id.* at p. 1001.) In the instant case, the only reasonable inference to be drawn from the evidence was that appellant – assuming he rather than Rascal shot and killed Guevara — only started shooting after Guevara shot Rascal.

Thus, when all of the facts and circumstances surrounding the events of that night are considered together, it should be readily apparent that the evidence was not "'supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.'" (*People v. Solomon* (2010) 49 Cal.4th 792, 812, quoting *People v. Perez* (1992) 2 Cal.4th 1117, 1125.) This Court must therefore find that there was insufficient evidence to support the conviction of first degree murder. Appellant's conviction of murder and his death sentence must be reversed.

* * * * *

II

BY INSTRUCTING THE JURY WITH THE FLAWED UNANIMITY-OF-DOUBT LANGUAGE IN THE 1996-REVISED VERSION OF CALJIC NOS. 8.71 AND 8.72, THE TRIAL COURT UNCONSTITUTIONALLY LOWERED THE STATE'S BURDEN OF PROOF FOR MURDER AND FIRST DEGREE MURDER

A. Introduction

In this case, the jury was asked to determine if appellant was guilty of first degree murder or the lesser offenses of second degree murder or manslaughter. In accordance with CALJIC Nos. 8.71 and 8.72, the trial court instructed the jury on how to respond to doubts regarding whether appellant was guilty of the lesser or greater offense. The 1996 revision of these pattern jury instructions that the trial court gave the jury, however, contained a fundamental flaw.

The law dictates that the jury must find a defendant guilty of a lesser offense when it has a reasonable doubt as to whether he is guilty of the lesser or greater offense. The version of CALJIC Nos. 8.71 and 8.72 given in this case, however, instructs jurors that they must find a defendant guilty of the lesser offense only if they unanimously agree there is a reasonable doubt as to whether he is guilty of the greater or lesser offense.

Long-established legal principle holds that when a defendant is charged with a lesser and greater offense, the burden of proof is on the prosecutor to prove the greater offense beyond a reasonable doubt. In the absence of unanimity regarding guilt of the greater offense, the jury may convict on the lesser offense only. "It has been consistently held in this state since 1880 that when the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be

instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense." (*People v. Dewberry* (1959) 51 Cal.2d 548, 555, quoted in *People v. Lee* (2011) 51 Cal.4th 620, 656.) By requiring all twelve jurors to have a reasonable doubt regarding the greater offense, in contravention of this principle, those instructions unlawfully and erroneously lowered the prosecution's burden of proof.

Respondent argues that CALJIC Nos. 8.71 and 8.72 correctly stated that law and that the jury, viewing the instructions as a whole, would not have applied an improper burden of proof while making its guilt determinations. Syntax, rules for harmonizing conflicting jury instructions, and common sense all undercut respondent's assertions.

For the reasons articulated in the Opening Brief (AOB 70-90) and below, this Court must conclude that giving CALJIC Nos. 8.71 and 8.72 in this case constituted reversible error.

B. This Claim Is Cognizable on Appeal

Respondent contends that appellant has forfeited this claim because trial counsel did not request clarifying or amplifying language for CALJIC Nos. 8.71 and 8.72. (RB 24.) Respondent is incorrect.

This claim is cognizable on appeal. First, instructional errors are cognizable on appeal even without an objection when they affect a defendant's substantial rights. (Pen. Code, §§ 1259, 1469; see, e.g., *People v. Flood* (1988) 18 Cal.4th 470, 482, fn. 7.) Second, this Court has explained that the forfeiture rule that respondent invokes "does not apply when, as here, the trial court gives an instruction that is an incorrect statement of the law." (*People v. Hudson* (2006) 38 Cal.4th 1002, 1012.) Because appellant argues that CALJIC Nos. 8.71 and 8.72 incorrectly

instructed the jury on the pertinent law, appellant had no duty to lodge a contemporaneous objection in the trial court. Third, this Court in *People v. Moore* (2011) 51 Cal.4th 386, 410, found this identical appellate claim cognizable where defense counsel had requested that the trial court give CALJIC Nos. 8.71 and 8.72 in his list. If this claim was preserved for appeal in a case where defense counsel requested the instructions, it surely has been preserved in this case, in which defense counsel merely acquiesced to the trial court giving the instructions. Accordingly, respondent's assertion of forfeiture is inapplicable to this claim.

C. CALJIC Nos. 8.71 and 8.72 Were Erroneous and Likely Caused the Jury to Apply an Unconstitutionally Low Burden of Proof

1. Standard of Review

Appellant and respondent agree that this Court reviews this claim of instructional error to determine "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, quoting *Boyde v. California* (1990) 494 U.S. 370, 380; see also, AOB 85; RB 24-25.) Contrary to respondent's contention (RB 25-30), the version of CALJIC Nos. 8.71 and 8.72 with which the trial court instructed the jury in this case likely led the jury to apply the wrong burden of proof to conclude that appellant had committed a first degree murder.

2. CALJIC Nos. 8.71 and 8.72 Misstated the Law

In re Winship (1970) 397 U.S. 358, 361-364, made clear that the due process clause constitutionally compelled the historical practice of requiring each element of a criminal offense to be proven beyond a reasonable doubt. Penal Code section 1097 implements this constitutional principle when

there exists a doubt regarding the gradation of crime a defendant has committed. That statute provides:

> When it appears that the defendant has committed a public offense, or attempted to commit a public offense, and there is reasonable ground of doubt in which of two or more degrees of the crime or attempted crime he is guilty, he can be convicted of the lowest of such degrees only.

(Pen. Code, § 1097.) Neither CALJIC No. 8.71 nor CALJIC No. 8.72 adhere to the due process clause's requirement that every element of the greater offense be proven beyond a reasonable doubt for the jury to convict of the greater degree.

In addition, the right to a unanimous verdict in criminal cases is secured by the state Constitution and state statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163 & 1164; *People v. Collins* (1976) 17 Cal.3d 687, 693), and protected from arbitrary infringement by the due process clause of the Fourteenth Amendment to the United States Constitution (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488). Thus, every juror must agree that every element has been proven beyond a reasonable doubt. In the absence of agreement on every element, the jury cannot convict a defendant of that offense. If there is consensus on the lesser but not greater offense, the jury cannot convict on the greater offense. The burden of proof is on the prosecution to prove each element to each juror beyond a reasonable doubt.

By requiring consensus on doubt rather than on the establishment of each element of the degree of the offense, CALJIC Nos. 8.71 and 8.72 unduly limited the circumstances in which appellant could receive the benefit of doubt between two gradations of a crime. Both CALJIC Nos. 8.71 and 8.72 erroneously instructed the jurors that they could give

appellant the benefit of doubt between two gradations of a crime only if they "unanimously agree that [they] have a reasonable doubt." (2 CT 426-427.) As appellant articulated in his Opening Brief (AOB 73-80), the unanimity requirement ran afoul of the due process requirement of *In re Winship*.

This Court recognized in *People v. Moore* that the CALJIC Nos. 8.71 and 8.72 instructions the trial court gave in this case were problematic. This Court explained: "Prior to revision in 1996, neither instruction required unanimity on reasonable doubt as to the greater offense in order for a juror to give the defendant the benefit of such a reasonable doubt." (*People v. Moore*, *supra*, 51 Cal.4th at p. 409, fn. 7.) Consequently, this Court concluded that trial courts should not give the 1996 revision of those instructions. (*Id.* at p. 411.)

Respondent claims that the jury instructions did not require actual unanimity of opinion, but rather agreement that at least one juror had a reasonable doubt regarding appellant's guilt for the greater offense. Respondent states that "the instructions only call for the jury to unanimously agree that there is a *doubt* as to the nature of the crime or degree of the murder." (RB 25.) Respondent adds:

> In other words, the jurors only have to unanimously agree that at least one juror has doubt as to the nature of the crime or the degree of murder to give a defendant the benefit of the doubt and convict him of the lesser charge. Once the jury unanimously agrees that at least one juror, *not the entire jury*, has a doubt as to the degree of guilt, the defendant, or appellant in this case, would receive the benefit of the doubt, and be convicted of the lesser charge.

(RB 25-26.) Respondent's interpretation of CALJIC Nos. 8.71 and 8.72 strains both syntax and common sense.

> Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors.

(2 CT 435.) In the full context of other instructions that explicitly specify when a switch from unanimous to individual opinion is indicated, it seems especially unlikely that a reasonable juror would assume that the instructions in CALJIC No. 8.71 intended singular "you" when the plural "you" was so clearly indicated.

CALJIC No. 8.72 uses the identical pertinent language as CALJIC No. 8.71. CALJIC No. 8.72, entitled "Doubt Whether Murder or Manslaughter," provides:

> If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of such doubt and find it to be manslaughter rather than murder.

(2 CT 427.) Thus, respondent's interpretation of the jury instructions is as incorrect for CALJIC No. 8.72 as it is for CALJIC No. 8.71.

In addition, if respondent's interpretation of CALJIC Nos. 8.71 and 8.72 were correct, then this Court in *People v. Moore*, *supra*, 51 Cal.4th at p. 411, would have had no reason to have called the instructions problematic. If the jurors knew that unanimity of doubt was not required, then the instructions would not have conflicted with Penal Code section 1097. Furthermore, the Court of Appeal cases that have rejected this claim, on which respondent relies, did not adopt respondent's interpretation of those instructions. Rather, those cases recognized that CALJIC Nos 8.71 and 8.72 were flawed but concluded that other instructions likely ensured

CALJIC No. 8.71 states the condition for finding for the lesser offense as requiring that "you have a reasonable doubt whether the murder was of the first or second degree." Respondent claims that any reasonable juror would read the condition for finding for second rather than first degree murder as requiring only that *one* juror have a reasonable doubt as to the degree of guilt. That is, respondent argues that any reasonable juror would understand the pronoun to refer to a singular "you." However, the phrase is immediately preceded by not one but two instances of an unambiguously plural "you." The full sentence reads:

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree.

(2 CT 426.) The two instances of "unanimously" in the first two phrases ("you . . . unanimously agree that the crime of murder has been committed" and "you unanimously agree that you have a reasonable doubt") make it very clear that these pronouns refer to the full jury. It stretches the bounds of credulity that any reasonable juror would interpret the condition "that *you* have reasonable doubt" that immediately follows these unanimous plural pronouns as a condition intended to refer to a single juror's opinion. It would have been necessary for the instructions to add "at least one of you" to signify that the third "you" in CALJIC No. 8.71 is singular.

In fact, jury instructions commonly do add clarification when a singular "you" is required. For example, the second paragraph of CALJIC No. 17.40 provides:

that the jury did not apply those instructions unconstitutionally. (See *People v. Gunder* (2007) 151 Cal.App.4th 412, 424-425; *People v. Pescador* (2004) 119 Cal.App.4th 252, 256-258.) Thus, even courts that have upheld the instructions recognized that CALJIC Nos. 8.71 and 8.72 incorrectly stated the law.

Thus, this Court should conclude that the challenged instructions misstated the law and infringed upon appellant's constitutional rights.

3. The Other Jury Instructions Did Not Overcome the Flaws in CALJIC Nos. 8.71 and 8.72

Respondent cites six other jury instructions and argues that those instructions prevented the jury from applying an incorrect legal standard and thereby lowered the prosecution's burden of proof when it determined whether appellant was guilty of murder or manslaughter and of first degree or second degree murder. (RB 29-30.) As noted in his Opening Brief, appellant acknowledges that the jury instructions must be viewed as a whole. (AOB 80-85.) Contrary to respondent's argument, however, the other jury instructions did not counteract the harm that the misstatements of law in CALJIC Nos. 8.71 and 8.72 had created.

a. CALJIC No. 17.40

CALJIC No. 17.40, which instructed the jurors that appellant and the prosecution were entitled to their individual opinion, was not an antidote for the legal errors made in CALJIC Nos. 8.71 and 8.72. Respondent contends that this instruction and others "clearly informed the jurors not to forsake their individual opinions when considering appellant's guilt or innocence." (RB 29.) But assuming that respondent's contention is correct, it does not directly address the fundamental flaw in CALJIC Nos. 8.71 and 8.72: the legal significance of having some, but not all, jurors hold a reasonable

doubt regarding appellant's guilt of the greater offense. Penal Code section 1097 requires that appellant receive the benefit of the doubt in that circumstance. CALJIC Nos. 8.71 and 8.72 do not articulate that requirement.

As respondent notes (RB 26-29), the Third District Court of Appeal in *People v. Pescador*, *supra*, and *People v. Gunder*, *supra*, concluded that CALJIC No. 17.40 did ensure that a jury instructed with the 1996 revision of CALJIC Nos. 8.71 and 8.72 would not apply an unconstitutionally low burden of proof. That conclusion, however, relies on a dubious premise.

The Third District determined that a jury, after considering CALJIC No. 17.40, would conclude that the unanimity requirement in CALJIC Nos. 8.71 and 8.72 applies only to the returning of verdicts. The Court of Appeal explained:

> What is crucial in determining the reasonable likelihood of defendant's posited interpretation is the express reminder that each juror is not bound to follow the remainder in decisionmaking. Once this principle is articulated in the instructions, a reasonable juror will view the statement about unanimity in its proper context of the procedure for returning verdicts, as indeed elsewhere the jurors are told they cannot return any verdict absent unanimity and cannot return the lesser verdict of second degree murder until the jury unanimously agrees that the defendant is not guilty of first degree murder. Thus, nothing in the instruction is likely to prevent a minority of jurors from voting against first degree murder and in favor of second degree murder.

(*People v. Gunder*, *supra*, 151 Cal.App.4th at p. 425, italics omitted.)

The Third District's reasoning has two flaws. First, the text of CALJIC Nos. 8.71 and 8.72 neither states nor implies that the unanimity-of-doubt requirement applies only to the returning of verdicts. Second, as this Court observed in *People v. Moore*, *supra*, 51 Cal.4th at p. 411-412, the

unanimity-of-doubt language is superfluous because another jury instruction informed the jury that its verdicts must be unanimous. In *Moore*, CALJIC No. 8.75 served that purpose. The trial court did not give CALJIC No. 8.75 in this case; however, the trial court gave CALJIC No. 8.74, which informed the jury of the unanimous-verdict requirement. (2 CT 429.) Because CALJIC Nos. 8.74 and 17.40 dealt squarely with unanimous verdicts, but neither CALJIC No. 8.71 nor 8.72 mentioned verdicts, it is far-fetched to assume that a reasonable juror would have concluded that CALJIC Nos. 8.71 and 8.72 applied only to verdicts and not to the deliberative process.

Furthermore, the manner in which the Court of Appeal reconciled the jury instructions infringed a principle for harmonizing conflicting instructions. As appellant argued extensively in the Opening Brief, a correct statement of law in a general instruction cannot neutralize the misstatements of law made in a specific instruction. (AOB 80-83.) The principle that a correct general instruction cannot trump an erroneous specific instruction has been part and parcel of California law for over one hundred years. (See *Rathbun v. White* (1910) 157 Cal. 248, 253 ["Nor was the vice of the instruction cured by the general direction that plaintiff must establish every material allegation of the complaint by a preponderance of the testimony"].)

For these reasons, CALJIC No. 17.40 did not prevent the jury from applying an unconstitutionally low burden of proof due to CALJIC Nos. 8.71 and 8.72's erroneous unanimity-of-doubt requirement.

b. CALJIC No. 8.50

Likewise, CALJIC No. 8.50, which instructed the jury that the prosecution bears the burden to prove that an unlawful killing was murder and not manslaughter could not counteract the incorrect statements of law

in CALJIC Nos. 8.71 and 8.72. First of all, CALJIC No. 8.50 addressed only the situation covered by CALJIC No. 8.72 and not the degree-of-murder question addressed in CALJIC No. 8.71. In addition, CALJIC No. 8.50 did not directly address the narrow circumstance that the misstatement of law in CALJIC No. 8.72 impacted: whether the jury must give the benefit of the doubt when some, but not all, the jurors have a reasonable doubt regarding whether the homicide was a murder or manslaughter. In addition, as appellant argued in the Opening Brief, the correct statements of law in CALJIC No. 8.50, a general instruction, could not cure the misstatements of law in CALJIC No. 8.72. (AOB 83-85.)

c. CALJIC No. 1.01

Respondent argues that the trial court giving CALJIC No. 1.01 helped ensure that the jury would not have applied CALJIC Nos. 8.71 and 8.72 in a manner that violated appellant's constitutional rights. (RB 29.) Respondent's argument is unconvincing.

In his Opening Brief, appellant argued that CALJIC No. 1.01 had the opposite impact. As appellant asserted, the language in CALJIC Nos. 8.71 and 8.72 that this Court deemed problematic in *People v. Moore, supra*, was too clear for this jury to disregard when construing the jury instructions as a whole. (AOB 83-85.) When jury instructions are clear, yet conflicting, the best way for the jury to harmonize the instructions is to consider the specific instruction to be an exception to the rule stated in the general instruction. (See *Francis v. Franklin* (1985) 471 U.S. 307, 319-320 [holding general instructions regarding prosecution's burden of proof "do not dissipate the error in the challenged portion of the instructions"]; *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, 823 [applying to jury instructions the statutory-construction canon of the specific controlling the general], overruled on

other grounds by *Byrd v. Lewis* (9th Cir. 2009) 566 F.3d 855.) Thus, contrary to respondent's argument, CALJIC No. 1.01 did not ensure that the jury had applied the proper burden of proof to convict appellant of first degree murder.

d. CALJIC Nos. 2.01, 2.61, and 2.90

Respondent contends that three instructions pertaining to the burden of proof prevented the jury from applying an improperly low burden in this case. (RB 29-30.) CALJIC No. 2.90 instructed that appellant was innocent until proven guilty. (2 CT 390.) CALJIC Nos. 2.01, 2.61, and 2.90, however, could not undo the damage done by the misstatements of law in CALJIC Nos. 8.71 and 8.72.

As articulated above, legally accurate general instructions cannot correct the misstatements of law made in specific instructions. Moreover, there are additional reasons the burden-of-proof instructions were not the silver bullets respondent contends they were.

CALJIC No. 2.01, which instructed the jury that the facts or circumstances relied upon to prove a defendant's guilt must themselves be proven beyond a reasonable doubt (2 CT 377), was particularly ill-suited to counteract the legal errors in CALJIC Nos. 8.71 and 8.72. The jury would necessarily have used the same facts to find first degree murder that it did to find an unlawful killing.

Respondent's argument regarding CALJIC No. 2.90, which instructed that appellant was innocent until proven guilty (2 CT 390), is circular: The principle that a defendant is innocent until proven guilty does not help a jury determine when guilt has been proven. CALJIC Nos. 8.71 and 8.72 provided the jury with the wrong burden of proof in situations where some, but not all, jurors had doubts regarding whether a defendant

was guilty of the lesser offense. The problem with CALJIC Nos. 8.71 and 8.72 concerned when a defendant would be proven guilty, not a defendant's status before he had been proven guilty.

CALJIC No. 2.61, which instructed the jury about the prosecution's burden to prove every element of every offense beyond a reasonable doubt (2 CT 388), shared its fundamental shortcoming with CALJIC Nos. 2.01 and 2.90. The jury could not have reached the questions whether a defendant is guilty of murder or manslaughter, or first or second degree murder, until the jury had concluded that the defendant was guilty of an unlawful killing or murder, respectively. Accordingly, as respondent acknowledged in its brief, the jury would not have considered CALJIC Nos. 8.71 and 8.72 until it had already unanimously determined appellant's guilt. (RB 25.) Thus, the jury could have believed that the dictates of CALJIC Nos. 2.01, 2.61, and 2.90 had been satisfied before it began to consider the murder/manslaughter or first degree/second degree murder questions. Consequently, the jury may have thought that appellant no longer got the benefit of doubts held by some, but not all, jurors when the jury has already found that appellant had committed an unlawful killing, or, with respect to the degree-of-murder question, a murder.

e. The Jury Note Asking the Trial Court What Happened If the Jury Was Split Regarding the Degree of Murder Showed That CALJIC Nos. 1.01, 2.01, 2.61, 2.90, 8.50, and 17.40 Did Not Counteract the Misstatements of Law in CALJIC Nos. 8.71 and 8.72

On the third day of jury deliberations, the jury submitted the following note:

> Clarification from the Court: What happens if jury is unanimous for verdict of murder but cannot agree on 1st or

2nd degree?[11]

(2 CT 365.) Penal Code section 1097 mandates that the jury convict a defendant of the lesser offense when the jury has doubts regarding whether he has committed the greater or lesser offense, and the jury note suggests that the jurors were not aware of this requirement. The note thereby debunks respondent's argument that the other instructions in the jury charge ensured that the jury did not apply the misstatements of law in CALJIC Nos. 8.71 and 8.72 when determining whether appellant committed a first degree murder. If the jurors knew that they should give the defendant the benefit of the doubt when some, but not all, jurors had doubts regarding whether appellant had committed a first degree murder, they would not have needed to pose this question to the trial court during deliberations.

D. The Instructional Error Was Prejudicial

4. The Error Was Structural

Respondent's rebuttal to appellant's structural-error argument misconstrues appellant's claim. In his Opening Brief, appellant argued that CALJIC Nos. 8.71 and 8.72 lowered the prosecution's burden of proof when the jury unanimously agreed that the prosecution had proven the lesser offense beyond a reasonable doubt but disagreed regarding whether there was a reasonable doubt that appellant had committed the greater offense. (AOB 73-80, 83-85.) Respondent contends that any instructional error was not structural because it impacted neither the prosecution's burden of proof nor the jury's finding of every element beyond a reasonable doubt. (RB 31.) Given the nature of the error, however, if the instructions

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[11] In Argument III, *infra*, appellant asserts that the judge's response to the question the jury posed in the note constitutes reversible error.

were erroneous under the standard of *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72, they necessarily lowered the prosecution's burden to prove each element beyond a reasonable doubt. The United States Supreme Court in *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280-282, held that an instructional error vitiating the reasonable-doubt standard constituted structural error because the error prevented the criminal trial from reliably serving its function and the error's precise effects could not be measured. Because the instructional error in this case also undermined the reasonable-doubt standard, this Court should find the instructional error to be prejudicial without having to undertake a harmless-error analysis.

4. The Error Was Not Harmless

If this Court does undertake a harmlessness analysis, it should nevertheless reverse appellant's first degree murder conviction. Respondent cannot show that the instructional error was harmless beyond a reasonable doubt.

a. The Evidence Was Not Overwhelming

Contrary to respondent's contention, the evidence of appellant's guilt of first degree murder was not overwhelming. (RB 30-34.) As explained in Argument I, the evidence that appellant committed a first degree murder was weak, if not insufficient. Enrique ("Rascal") Echeverria was the only testifying witness who observed the shooting. He testified that Enrique Guevara shot and seriously injured him before succumbing in a shootout. Rascal getting shot several times suggests that appellant had either a complete defense-of-others defense or an imperfect defense-of-others defense that would have reduced the murder charge to voluntary manslaughter. Moreover, the evidence that there was a shootout could have, at a minimum, created a reasonable doubt regarding premeditation.

In addition, the evidence cited by respondent to show supposedly overwhelming evidence of guilt fell far short of the mark. As explained in the AOB as well as Argument I, *ante*, evidence that appellant said he did not "want to be caught slipping" is as least as consistent with him intending to defend himself against other gangs in a disputed territory than it is of him intending to initiate a firefight against rival gang members. Likewise, appellant approaching Lemus, Salazar, and Ramirez at the Beef Bowl did not demonstrate that appellant planned to commit a murder. None of the three witnesses testified that appellant was aggressive. (AOB 65.) Appellant asking them where they are from was at least as consistent with defending himself as with being the aggressor. Moreover, evidence that appellant and Rascal approached Guevara and asked "don't I know you from somewhere?" had limited probative value. As explained in Argument I herein, Kathy Mendez could not have seen or heard what took place prior the shooting. Moreover, Patrick Turner's testimony about the events just prior to the shooting was so inconsistent that it could present sufficient evidence of premeditation, much less provide overwhelming evidence of appellant's guilt of first degree murder. (AOB 44-50; Argument I, *ante*.)

b. Other Factors Indicated That This Was a Close Case

There were several signals that the jury did not perceive the evidence of appellant's guilt of first degree murder to be overwhelming. At the guilt phase, the deliberations lasted longer than it took the parties to give their opening statements, elicit evidence, and make their closing arguments. (AOB 90.) Additionally, the jury requesting readbacks of the testimony of Mendez, Turner, and Rascal further shows that the jury was grappling with the core issues in the case. (2 CT 363; 5 RT 1055.) Lastly, the note the jury

gave the trial court on the third day of deliberations revealed that the jurors were divided with respect to whether appellant was guilty of first or second degree murder. (2 CT 365.)

c. Instructing the Jury With the 1996-Revised-Version of CALJIC No. 8.72 Was Not Harmless Beyond a Reasonable Doubt

Respondent cannot demonstrate that the instructional error in CALJIC No. 8.72 was harmless beyond a reasonable doubt. Unlike in *People v. Moore*, *supra*, appellant was not charged with felony murder. Consequently, appellant could be convicted of murder only if the jurors unanimously determined that the prosecution had proven malice beyond a reasonable doubt. The improper unanimity-of-doubt requirement in CALJIC No. 8.72 created a likelihood that the jury found appellant guilty of murder although some of the jurors had reasonable doubts whether appellant had acted with malice.

Based on the evidence that appellant had acted to defend Rascal, whom Guevara had shot several times, appellant had a viable imperfect-defense-of-others defense that would have negated the malice element of murder. Accordingly, the possibility that some jurors had a reasonable doubt regarding whether appellant had acted with malice was far more than theoretical. Therefore, respondent cannot demonstrate beyond a reasonable doubt that the jury would have found appellant guilty of murder, rather than manslaughter, if it had been properly instructed regarding when a defendant receives the benefit of the doubt on the murder-manslaughter question.

d. Instructing the Jury With the 1996-Revised-Version of CALJIC No. 8.71 Was Not Harmless Beyond a Reasonable Doubt

At the very least, respondent cannot show that the erroneous CALJIC

No. 8.71 instruction was harmless. At the time it submitted the note on the third day of deliberations, the jury was divided regarding whether appellant had committed first or second degree murder. As explained above (see *ante*, at pp. 29-30), the note suggested that the jurors did not know that they were obliged to give appellant the benefit of the doubt when they were unsure whether he had committed a first or second degree murder. Besides demonstrating that the general jury instructions regarding the burden of proof and jurors' duty of individual decisionmaking did not prevent the jury from construing CALJIC No. 8.71 literally, the jury question suggests that the misstatement of law in CALJIC No. 8.71 impacted the first degree murder verdict.

Because the trial court answered the jury's question by directing it to CALJIC No. 8.71 (see Argument III, *post*), it is apparent that the jurors never understood that they were, under Penal Code section 1097, required to give appellant the benefit of the doubt regarding the degree of murder even if not all jurors held such doubts. Appellant, Rascal, and Guevara being engaged in a firefight gave the jury ample evidence from which to conclude that appellant did not premeditate and deliberate the homicide. Between the content of the jury note and the state of the evidence, respondent cannot demonstrate that the trial court giving the flawed revision of CALJIC No. 8.71 was harmless beyond a reasonable doubt. Consequently, this Court should vacate the first degree murder conviction.

* * * * *

III

THE TRIAL COURT'S FAILURE TO CORRECTLY RESPOND TO THE JURY'S WRITTEN QUESTION WAS REVERSIBLE CONSTITUTIONAL ERROR

A. Introduction

On the third day of deliberations, as the jurors were grappling with whether to convict appellant of first or second degree murder, the jury sent the court a note explicitly requesting clarification regarding the unanimity requirement:

> Clarification from the Court: What happens if jury is unanimous for verdict of murder but cannot agree on 1st or 2nd degree?

(2 CT 365.) The court wrote the following response:

> Answer: The jury's attention is directed to Instruction 8.71 on page 57 of the instructions.

(2 CT 365; 6 RT 1057.) In addition to being erroneous, this response insufficiently fulfilled the trial court's duty to clarify the law on matters for which the jury has revealed its confusion.

Respondent argues that the trial court acted properly by referring to an instruction it had already given. (RB 35-37.) However, as explained in Argument II, *ante*, the instruction misstated the pertinent law. The 1996-revised version of CALJIC No. 8.71 erroneously demanded jury unanimity prior to giving appellant the benefit of the doubt between first and second degree murder. By referring the jury to an incorrect instruction when the jury sought guidance on how to apply the law, the trial court abrogated its duty to clarify the law. This failure to respond adequately to the jury's question compounded its initial error and improperly lowered the prosecution's burden of proof.

B. This Claim Has Been Preserved for Appeal

Respondent contends that appellant has forfeited this claim because defense counsel was consulted about, and did not object to, the trial court's response. (RB 35.) The cases cited by respondent are inapposite, and this claim is cognizable on appeal.

The forfeiture rule respondent seeks to invoke does not apply when the trial court answers the jury question with an incorrect statement of law. It is only for accurate answers that this Court imposes a contemporaneous-objection requirement for responses to jury questions:

> When the trial court responds to a question from a deliberating jury with a generally correct and pertinent statement of the law, a party who believes the court's response should be modified or clarified must make a contemporaneous request to that effect; failure to object to the trial court's wording or to request clarification results in forfeiture of the claim on appeal.

(*People v. Dykes* (2009) 46 Cal.4th 731, 802.) Though pertinent, the trial court's response in this case was incorrect. Accordingly, this claim does not fall within the ambit of the forfeiture rule that respondent raises.

Defense counsel's duty to seek clarification of answers to jury questions parallels the analogous requirement for the instructions with which the trial court charges the jury. In both situations, the contemporaneous-objection requirement applies only to legally correct instructions. As explained in section B of Argument II (see *ante*, at p. 15), a defendant does not forfeit his right to appeal the validity of a jury instruction that incorrectly states the law even when defense counsel did not seek amplification or clarification of that instruction. (See *People v. Hudson*, *supra*, 38 Cal.4th at p. 1012.) Thus, like Argument II, this claim has been preserved for appeal.

C. The Trial Court Erred When It Responded Inadequately to the Jury's Request for Clarification of the Pertinent Law

The trial court failed to give an adequate response to the jury's request for clarification. Although respondent claims that the trial court appropriately answered the jury question by directing the jury's attention to CALJIC No. 8.71 (RB 35-37), that initial instruction was ambiguous at best. As appellant argues in the Opening Brief and explains below, it was an egregious error for the trial court to respond to a request for clarification by referring the jury back to an instruction that obfuscates the point of law it is meant to explain.

The obligation to clarify the pertinent law falls to the court. When answering a jury question, the trial "court has a primary duty to help the jury understand the legal principles it is asked to apply." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97, quoted in RB 36 and cited in AOB 92.) Indeed, Penal Code section 1138 requires trial courts to answer jury questions "on points of law." (Pen. Code, § 1138; see also, *People v. Rigney* (1961) 55 Cal.2d 236, 246 [trial court has duty to answer jury questions].) The trial court's answer must be "accurate, responsive, and balanced." (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1331.)

Most importantly, when the court is made aware of a jury's potential misapprehension of the law, it must take steps to ensure correct understanding. (See *Bollenbach v. United States* (1946) 326 U.S.607, 612-613 ["when a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy"].) The court must fulfill its duty by clarifying the law. (See *People v. Cleveland* (2004) 32 Cal.4th 704, 755.)

When determining the adequacy of the trial court's response, the dispositive factor is whether the instruction is accurate. In *People v. Elkins* (1981) 123 Cal.App.3d 632, as here, the defendant challenged on appeal the trial court answering a jury question by referring to a previously given instruction. Citing the accuracy of the instruction as the critical factor for determining the validity of the trial court's response, the Court of Appeal explained:

> Put plainly, when reinstructing the jury and answering questions posed by jurors, the court does not, contrary to appellant's argument, commit error merely because it paraphrases previously given instructions. [Citation.] The real issue is whether the law was correctly stated.

(*Id.* at pp. 639-640, citing *People v. Rigney*, *supra*, 55 Cal.2d at pp. 245-246.)

Accordingly, trial courts have the discretion to answer a jury question by referring to a correct instruction that it has already given. (See, e.g., *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212-1213.) Appellant acknowledged this in his Opening Brief. (AOB 93.) However, a trial court abuses its discretion when it reinstructs the jury with the original misleading explication of the law.

When it directed the jury to the misleading 1996-revised version of CALJIC No. 8.71, the trial court failed its duty to clarify the pertinent law. As appellant articulated in Argument II, *ante*, CALJIC No. 8.71 erroneously stated the law. That response was particularly problematic because CALJIC No. 8.71 misstated the precise legal principle about which the jury sought clarification.

As explained in Argument II, *ante*, requiring unanimity for giving appellant the benefit of the doubt regarding whether he had committed a

first or second degree murder conflicted with Penal Code section 1097 and *In re Winship*, *supra*, 397 U.S. at pp. 361-364. Under the applicable law, the benefit-of-the-doubt requirement should have been triggered if even a single juror perceived a reasonable doubt regarding whether appellant had committed a first or second degree murder.

By failing to clarify the essential requirement of unanimity for conviction of the *greater* offense, the trial court exacerbated the error it made when it initially instructed the jury with CALJIC No. 8.71. (See Argument II, *ante*.) This Court recently noted that a trial court compounded the error it made in giving an incorrect jury instruction when, in response to a jury question, it affirmed the correctness of an erroneous instruction. (See *People v. Brents* (2012) 53 Cal.4th 599, 613 ["the court's response to the jury compounded the court's previous error by wrongly telling the jury that [its instruction] was correct as written"].) The trial court functionally did the same in this case by directing the jury's attention to CALJIC No. 8.71.

Respondent premises its argument that the trial court's response was adequate on the assumption that CALJIC No. 8.71 clearly and correctly states the law. Respondent argues that the court simply answered the jury's question by referring to CALJIC No. 8.71, which respondent noted "was full and complete." (RB 36.) Respondent adds:

> Under the circumstances, the trial court could reasonably infer that the jury had overlooked CALJIC No. 8.71 and that the instruction provided the answer to their question.

Respondent further speculates that the jury's lack of additional questions indicates its satisfaction with the court's response:

> This inference is supported by the fact that the jury's question was apparently answered because the record shows the jury did not request further clarification on the issue.

(RB 37.)

Nevertheless, the jury appearing to be satisfied with the court's answer does not suffice: What matters is whether the jury correctly understood the pertinent law. The absence of further questions may have indicated the jury's willingness to base a verdict on the information that the court had given. But, because the information misstated the law, it is mere conjecture to presume that the verdict was reached in accordance with the law.

Moreover, the jury's question in itself belies respondent's assumption that the jury unanimously agreed that appellant had committed a first degree murder. The jury asking "What happens if the jury is unanimous for verdict of murder but cannot agree on 1st or 2nd degree?" shows the jury had been split on the question of first or second degree murder. The question also confirms that the existing instructions had already failed to clarify for the jury how they were to proceed under those circumstances. Although it is theoretically possible that further deliberations following the trial court's response led to unanimity on the issue of first degree murder, there is no reason in logic to draw that inference. Rather, the sequence of events leads to the logical inference that some jurors, believing that CALJIC No. 8.71 required unanimity of doubt on the degree of murder before appellant could receive the benefit of that doubt, improperly voted to convict appellant of first degree murder despite having reasonable doubts regarding whether appellant had committed a first or second degree murder. Given the inadequacy of CALJIC No. 8.71 to dispel the confusion surrounding the unanimity requirement, respondent's assumption that the court's response gave the jury a correct understanding of the law is entirely speculative. The more reasonable inference is that if the jury was confused

before it sent the note to the judge, simply repeating the same instruction could not possibly have resolved the jury's confusion. Accordingly, the trial court erred when it responded to the jury's question without offering a clear explanation of the ambiguities present in the governing law.

D. In the Absence of Giving a Legally Correct Version of CALJIC No. 8.71, the Trial Court Should Have Instructed the Jury with CALJIC No. 17.11; CALJIC No. 17.10 Was Insufficient Here

As appellant argues in his Opening Brief (AOB 96-98), the trial court should have responded to the jury's question with CALJIC No. 17.11 or a legally correct version of CALJIC No. 8.71. Either of these instructions would have clarified the jury's question seeking guidance specifically on how it should proceed when split between returning a conviction for first or second degree murder. Furthermore, either of these instructions would have met the trial court's obligation to instruct the jury on Penal Code section 1097's benefit-of-the-doubt requirement, to which, as interpreted in *People v. Dewberry* (1959) 51 Cal.2d 548, the jury is bound regardless of whether the greater and lesser crimes were different degrees of the same offense or different offenses altogether. The trial court gave neither instruction.

Respondent claims that the trial court had no duty to instruct the jury with CALJIC No. 17.11 sua sponte because the instructions in CALJIC No. 17.10 were sufficient. (RB 37-38.) Respondent's contention cannot withstand scrutiny.

Even if giving CALJIC No. 17.10 can typically comply with the law when the trial court has a sua sponte duty to give CALJIC No. 17.11, as respondent argues (RB 37-38), in this case CALJIC No. 17.10 was inadequate. The trial court's instructions pursuant to CALJIC No. 17.10 failed to provide the jury with accurate instruction regarding Penal Code

section 1097 as it pertained to the question of first or second degree murder:

> If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict him of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime.
>
> The crime of voluntary manslaughter is lesser to that charged in Count I, namely, murder.
>
> Thus, you are to determine whether the defendant is guilty or not guilty of the crime charged in Count I, or of any lesser crime. In doing so, you have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it productive to consider and reach a tentative conclusion on all charges and lesser crimes before reaching any final verdict. However, the court cannot accept a guilty verdict on a lesser crime unless you have unanimously found the defendant not guilty of the charged crime.

(2 CT 340.) Crucially, the instruction did not inform the jury that it had to convict appellant of the lesser offense if it had a doubt regarding whether appellant had committed first or second degree murder.

This critical failing in the trial court's instruction contrasts with the instructions that the Court of Appeal upheld in a case upon which respondent primarily relies, *People v. Barajas* (2004) 120 Cal.App.4th 787, 792-794 (see RB 37-48). In *Barajas*, the Court of Appeal found no error in the trial court not giving CALJIC No. 8.72 sua sponte on the murder/manslaughter question because the trial court gave CALJIC No. 17.10 on that precise issue. *Barajas* is distinguishable from this case because here the trial court omitted the degree-of-murder issue in CALJIC No. 17.10.

The error committed in this case is analogous to the one committed by the trial court in *People v. Dewberry*, *supra*. The *Barajas* court explained that the trial court in *Dewberry* erred because it instructed the jury about Penal Code section 1097's benefit-of-the-doubt requirement with respect to the degree of murder, but not the murder/manslaughter question. The *Barajas* court articulated: "Our Supreme Court held that the refusal to give this instruction was error because the instructions as given had 'the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder' and not also as between murder and manslaughter." (*People v. Barajas*, *supra*, 120 Cal.App.4th at p. 793, quoting *People v. Dewberry*, *supra*, 51 Cal.2d at p. 554.) The trial court in this case made the converse error: It instructed the jury with CALJIC No. 17.10 on the murder/manslaughter question, but not with respect to the degree of murder.

The other case that respondent principally cites is also inapposite. In *People v. St. Germain* (1982) 138 Cal.App.3d 507, 521-522 (see RB 38), the Court of Appeal upheld the trial court's refusal to give a special Penal Code section 1097 instruction because it was redundant to CALJIC No. 17.10, which the trial court gave with respect to the same greater and lesser offenses. Because the version of CALJIC No. 17.10 that the trial court gave in this case listed only murder and manslaughter as the greater and lesser offenses, and did not mention first and second degree murder, CALJIC No. 17.11 would not have been redundant in this case.

Accordingly, CALJIC No. 17.10 did not enunciate the dictates of Penal Code section 1097 with respect to the degree of murder. Either CALJIC No. 17.11 or an accurate version of CALJIC No. 8.71 would have instructed the jury that it had to convict appellant of second degree murder

if the jury had a reasonable doubt regarding whether appellant had committed a first degree murder. The instructions the trial court gave in this case, pursuant to CALJIC Nos. 8.71 and 17.10, failed to convey this legal principle.

E. Reversal Is Required

The trial court's incorrect response to the jury question was prejudicial. By directing the jury's attention to CALJIC No. 8.71, the trial court erroneously and unconstitutionally informed the jurors that they had to unanimously have a reasonable doubt about the degree of murder before they were required to convict appellant of second, rather than first, degree murder. One day after receiving the court's improper response to its question, the jury returned a first degree murder conviction. By failing to answer the jury's question and thereby improperly lowering the prosecution's obligation to establish guilt on every element beyond a reasonable doubt, the trial court committed reversible error.

Because the trial court's state-law error, in violation of Penal Code section 1138, had the effect of lowering the prosecution's burden of proof, thereby violating appellant's federal constitutional rights to due process of law, this Court must use the standard for prejudice that the United States Supreme Court enunciated in *Chapman v. California* (1967) 386 U.S.18, 24. Thus, this Court should reject respondent's contention, made in its brief (RB 38), that appellant must show prejudice under the reasonable-probability test of *People v. Watson* (1956) 46 Cal.2d 818, 836.

No instructional error is more prejudicial than answering a jury question incorrectly. The Court of Appeal explicated:

> [O]f the many and varied contentions of trial court error we are asked to review, nothing results in more cases of

> reversible error than mistakes in jury instructions. And if jury instructions are important in general, there is no category of instructional error more prejudicial than when the trial judge makes a mistake in responding to a jury's inquiry during deliberations.

(People v. Thompkins (1987) 195 Cal.App.3d 244, 252-253.) As the United States Supreme Court articulated, "in a criminal trial, the judge's last word is apt to be the decisive word." (*Bollenbach v. United States* (1946) 326 U.S. 607, 612.) Of course, we presume that the jury followed its instructions. (See, e.g., *People v. Hardy* (1992) 2 Cal.4th 86, 208.) Consequently, respondent cannot prove beyond a reasonable doubt that the shift from split jury to unanimity on first degree murder was not the product of the jury failing to give appellant the benefit of the doubt regarding his guilt of first degree murder and applying an unconstitutionally low burden of proof to convict.

Moreover, if other instructions given in the jury charge could have nullified the misstatement of law in CALJIC No. 8.71, as respondent argued in Argument II (RB 20-30), CALJIC Nos. 1.01, 2.01, 2.61, 2.90, 8.50, and 17.40 surely could not ensure that the jury applied the correct law after the trial court made clear that CALJIC No. 8.71 answered the jury's question.

In its brief, respondent does not analyze harmlessness under the *Chapman* standard. Instead, respondent asserts only that the error was harmless under the *Watson* standard.

Respondent contends that any error in the trial court's response was harmless because it appeared that the jury, which did not pose a follow-up question, was satisfied with and understood the original instruction. (RB 38-39.) Because the fundamental flaw with CALJIC No. 8.71 was its misstatement of law and the key error in the court's response was the

answer's inaccuracy, respondent's assertion is fallacious. In addition, as stated above, respondent's conclusion that the jury found its question to have been answered satisfactorily was speculative.

Respondent also asserts that the strength of the prosecution's evidence ensured that the court's error was harmless. As explained in Argument II, *ante*, the state of the evidence and the procedural history in this case debunks that contention. If the evidence of appellant's guilt was as overwhelming as respondent claims, the jury would never have been divided on the degree-of-murder question — and would not have posed a question seeking guidance for handling the split — in the first place. Accordingly, respondent cannot meet its burden of showing harmlessness beyond a reasonable doubt.

If this Court concludes that the trial court's response constituted state-law error but did not violate the United States Constitution, reversal is nevertheless required. Given the fact that the jury was split until the court erroneously responded to the jury question, it is reasonably probable that the jury would not have returned a first degree murder conviction if the trial court had answered the jury question with a clear and accurate explication of Penal Code section 1097.

Because appellant's death eligibility hinged on his first degree murder conviction, this Court must vacate the conviction, special circumstance, and death judgment.

* * * * *

IV

APPELLANT'S CLAIM THAT THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY THAT APPELLANT HAD NO DUTY TO WITHDRAW IF GUEVARA RESPONDED WITH SUCH SUDDEN DEADLY FORCE THAT WITHDRAWAL WAS NOT POSSIBLE IS NEITHER FORFEITED NOR MERITLESS. THE ERROR ALSO WAS NOT HARMLESS

Appellant argued that the trial court committed reversible error by failing to instruct the jury that appellant had no obligation to communicate to Guevara a desire to withdraw from the fight if the attack by Guevara was "so sudden and perilous," that appellant could not withdraw. (*People v. Quatch* (2004) 116 Ca.App. 4th 294, 302, quoting *People v. Gleghorn* (1987) 193 Cal.App.3d 196, 201.) Respondent argues (1) that the claim is forfeited, because appellant did not object to the instruction given by the trial court (CALJIC 5.56 [Self-Defense-Participants in Mutual Combat]), or request moderation thereof; (2) that the claim is meritless because the instruction was not supported by the facts; and (3) that even if the trial court erred in failing to give the instruction, the error was harmless. Each of these arguments fails.

A. The Claim Has Not Been Forfeited

A jury instruction must be complete and a correct statement of the law. (*People v. Fiu* (2008) 165 Cal.App.4th 360, 370.) Appellant established in his opening brief that the instruction given by the trial court regarding the right of self-defense in mutual combat, was neither complete nor a correct statement of the law. (AOB 99-104.) As this Court stated in *People v. Hudson*, *supra,* 38 Cal.4th at pp. 1011-1012:

'Generally, a party may not complain on appeal that an

> instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' (*People v. Andrews* (1989) 49 Cal.3d 200, 218, 260 Cal.Rptr. 583, 776 P.2d 285.) ***But that rule does not apply when, as here, the trial court gives an instruction that is an incorrect statement of the law.*** (*People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7, [parallel citations omitted]; *People v. Frazer* (2003) 106 Cal.App.4th 1105, 1116, fn. 5, [parallel citation omitted].)

(Emphasis added.)

In addition, because the error prevented appellant from arguing that if he shot Guevara, he did so as a matter of self-defense or defense of Rascal, it affected appellant's substantial rights, and is therefore reviewable on appeal notwithstanding the fact that no objection was made below. (Penal Code § 1259; *People v. Valdez* (2012) 55 Cal.4th 82, 151; *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 7 [failure to object to erroneous instruction that affects defendant's substantial rights does not bar appellate review].)

For both of the reasons stated above, appellant's claim of error has not been forfeited.

B. Based Upon the Evidence, the Instruction Was Applicable in This Case

Respondent contends that appellant's claim has no merit because the instruction in question was inapplicable to the facts of this case, as established by the evidence. (RB 42.) Respondent is wrong.

As the trial court correctly determined, there was sufficient evidence to justify giving a mutual combat instruction. Appellant and Rascal were members of the Harpys gang (3 RT 714), and Guevara belonged to Mara Salvatrucha, a rival gang, (A-1 RT 81; 1 RT 428.) Although there was testimony that appellant and Rascal drew guns (4 RT 741-743), there was no dispute that Guevara fired the first shot. Indeed the prosecutor conceded

as much. (3 RT 599.) Furthermore, while the prosecutor argued that Guevara was unarmed, and shot Rascal with Rascal's gun, there was no actual evidence establishing that to have been the case, since none of the witnesses other than Rascal witnessed the shooting, and Rascal's unrefuted testimony was that Guevara not only shot first, but he did so with own gun. (5 RT 890.)

Contrary to respondent's assertion, *People v. Quatch*, *supra*, is very much on point. That case, like the instant one, involved a shooting between members of rival gangs. (116 Cal.App.4th 297.) Also, as in *Quatch,* there was testimony in appellant's case that the victim shot first. (*Id.* at p. 298.) Accordingly, under these circumstances, appellant like Quatch, "was entitled to an instruction that would enable the jury to render a verdict in accordance with such facts." (*Id.* at p. 303.)

C. The Error Was Not Harmless

Respondent claims that even if the trial court erred, the error was harmless beyond a reasonable doubt because appellant was not acting in self-defense. (RB 43.) However, as established elsewhere in this brief and in appellant's Opening Brief, the jury could have reasonably inferred that appellant shot Guevara in defense of Rascal. By failing to properly instruct the jury, the trial court misled the jury to believe that appellant was precluded by law from asserting that defense.

Had the jury been properly instructed that a mutual combatant has no duty to communicate a desire to withdraw from the fight, if an attack by his opponent is so sudden an perilous that the defendant cannot safely retreat, appellant would not only have been able to claim that he was legally justified in shooting Guevara, but the prosecution would have been prevented from arguing as it did repeatedly and vociferously, that appellant

had no right to defend himself or Rascal. (5 RT 1010-1012, 1017, 1050.)

Under the circumstances, respondent cannot prove beyond a reasonable doubt that the error was harmless, and reversal of appellant's conviction and death sentence is required. (*Chapman v. California* (1967) 386 U.S. 18, 24; See also *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [inquiry under *Chapman* "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error."].)

* * * * *

V

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY SUA SPONTE TO VIEW WITH CAUTION EVIDENCE OF APPELLANT'S ALLEGED PRE-OFFENSE STATEMENTS CONSTITUTED REVERSIBLE ERROR

A. Introduction

Because the prosecution relied heavily upon remarks appellant allegedly made prior to the incident, the trial court's failure to instruct the jury sua sponte with CALJIC No. 2.71.7 was both erroneous and prejudicial. Respondent concedes that the cautionary instruction was required for the single witness who identified appellant as the person who made specific remarks, but argues that it was not required for the remaining witnesses, who did not recall specifically which statements were made by appellant and which were uttered by codefendant Rascal Echevarria. Respondent further argues that the court's failure to instruct the jury in accordance with CALJIC No. 2.71.7 was harmless. (RB 45-48.) Respondent is incorrect on both counts.

B. The Trial Court Should Have Instructed the Jury to View With Caution All Statements That Appellant May Have Made, Not Merely Those Specifically Attributed to Him

In the Opening Brief, appellant argued that the trial court failed to instruct the jury in accordance with CALJIC No. 2.71.7 with respect to all of appellant's alleged statements. (AOB 105-109.) Respondent concedes that remarks Kathy Mendez purportedly heard appellant make triggered the trial court's duty to instruct the jury sua sponte with CALJIC No. 2.71.7, because she identified appellant as the speaker of specific statements. Respondent, however, contends that the instruction was not required for the statements to which Patrick Turner, Arnold Lemus, and Juan Salazar

testified because those remarks "cannot necessarily be specifically attributed to appellant." (RB 45.) Respondent's artificial distinction between statements that can and cannot be specifically attributed to appellant is untenable.

Respondent cites no case law to support its narrow conception of the scope of the trial court's sua sponte duty to give CALJIC No. 2.71.7. It appears that no such precedent exists.

The point of CALJIC No. 2.71.7 is to inform the jury of its responsibility to use caution in assessing statements purportedly made by the defendant before the crime. Before instructing the jury that "[e]vidence of an oral statement ought to be viewed with caution," CALJIC No. 2.71.7 states: "It is for you to decide whether the statement was made by the defendant." Exempting statements for which the speaker is in dispute from the requirement that trial court's give 2.71.7 sua sponte would fail to give the jury an adequate instruction on this responsibility.

This Court has explained that the instruction assists "the jury in determining if the statement was in fact made." (*People v. Beagle* (1972) 6 Cal.3d 441, 456.) But determining whether the statement was made at all would fulfill only part of the jury's duty. When the identity of the person who uttered the remark is material and in dispute, it would be no less important to determine whether the defendant made the statement than whether the statement was made at all. Notably, respondent offers no rationale for privileging the jury's duty to determine if a statement was made over the duty to determine whether it was the defendant who made the statement.

As articulated in the Opening Brief (AOB 105-107, 109-110), the prosecution elicited evidence of appellant's purported remarks and relied

heavily upon those remarks to argue that appellant intended to kill Enrique Guevara and that he did so with premeditation and deliberation. By eliciting that evidence and making damaging inferences therefrom, the prosecution left the jury dutybound to determine whether those statements were made and whether appellant had made them. Requiring the trial court to give CALJIC No. 2.71.7 sua sponte only when the speaker was identified as appellant would deprive appellant of the benefit of the cautionary instruction.

Accordingly, all the statements appellant allegedly made prior to the shootout triggered the trial court's sua sponte duty to give CALJIC No. 2.71.7. The trial court erred by failing to give that cautionary instruction.

C. The Trial Court's Failure to Instruct the Jury with CALJIC No. 2.71.7 Prejudiced Appellant

As appellant explained in his Opening Brief (AOB 109-112), the trial court's failure to give the cautionary instruction was reversible error. Appellant's pre-offense statements were critical to the prosecution's case, and testimony regarding the statements was conflicting and inconsistent. In its briefing on this issue, respondent contends that the trial court's failure to instruct the jury with CALJIC No. 2.71.7 was harmless. (RB 46-48.) Respondent's contentions are unconvincing.

Although appellant's alleged statements were used as critical evidence for the key contested issues, respondent argues that the instructional error was harmless because the alleged statements themselves were not disputed. Respondent argues that "the disputed issue was whether appellant was the aggressor and a shooter, not whether any of the statements were made." (RB 47.) At trial and in its brief, however, respondent used the testimony regarding appellant's purported remarks to infer that appellant,

rather than Guevara, was the aggressor. Because Guevara had shot Rascal several times, the evidence supported an absolute or an imperfect defense-of-others defense. (See *ante*, at pp. 8-9; 44-46.) Showing that appellant was an aggressor was critical for the prosecution to establish at trial in order to defeat that defense. Consequently, appellant's alleged pre-offense statements were intimately intertwined with the disputed issues in this case.

Moreover, respondent's assertion that no statements were disputed is also unavailing. Citing *People v. Dickey* (2005) 35 Cal.4th 884, 906, respondent argues that an instruction for caution would not have influenced the interpretation of the testimony: "Where there was no issue of conflicting evidence concerning the precise words used, their meaning or context, or whether the oral admissions were remembered and repeated accurately, it may be concluded that the instructional error was harmless." (RB 46.) In this case, however, the meaning and context of the remarks, as well as the accuracy of the witness's recollection of the exact words used, were disputed. (AOB 109-110.)

Defense counsel did dispute the testimony of Kathy Mendez regarding the alleged admissions. She testified that appellant and Rascal talked about taking "care of the neighborhood" and that appellant said he did not "want get caught slipping." (3 RT 636-637.) On cross-examination, defense counsel highlighted that Mendez previously testified that appellant or Rascal said that they did not want to get caught "sleeping," not "slipping." (3 RT 690-691.) Furthermore, at closing argument, defense counsel asserted that it was noisy and difficult to hear when Mendez purportedly heard appellant and Rascal talking about protecting the neighborhood. (5 RT 1022-1023.)

Significantly, the meaning of appellant's purported remarks about protecting the neighborhood had direct bearing on the issues of intent and premeditation. Defense counsel argued that appellant, if he fired gunshots, acted to defend Rascal. (5 RT 1033-1035.) Respondent contended that Rascal and appellant went to the Beef Bowl looking for trouble. But if appellant had said that he did not want to get caught *sleeping*, it would have implied that they were merely trying to protect themselves and their friends against potential hostile acts perpetrated by rival gang members, which would have undermined the prosecution's theory of intent and premeditation. Accordingly, the trial court's failure to give the cautionary instruction was not harmless even when evaluated with respondent's preferred standard.

Moreover, the standard by which respondent urges this Court to evaluate the prejudice from the court's instructional error is inconsistent with the purpose of the instruction as articulated by this Court decades ago. Respondent argues that a trial court's failure to give the cautionary instruction is less prejudicial when the key question about the pre-offense statements is whether they were made at all, as opposed to which precise words were used, what those words mean, and whether they were remembered accurately. (RB 46-47.) This argument has support in several of this Court's decisions. (See *People v. Wilson* (2008) 43 Cal.4th 1, 20; *People v. Dickey*, *supra*, 35 Cal.4th at p. 906; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1268; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1124-1125.) Nevertheless, this Court should reject the argument.

This Court's seminal precedents on the purpose of the cautionary instruction demonstrate that the failure to give the instruction is no less prejudicial when the defendant may not have uttered the pre-offense

statements attributed to him. As noted above, this Court has stated that "[t]he purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made." (*People v. Beagle*, *supra*, 6 Cal.3d at p. 456.) Testimony of a defendant's admissions can be damaging in instances of either unintentional inaccuracies or perjury; admissions, this Court has determined, should not be accepted without scrutiny.

> The dangers inherent in the use of such evidence are well recognized by courts and text writers. [Citations.] "It is a familiar rule that verbal admissions should be received with caution and subjected to careful scrutiny, as no class of evidence is more subject to error or abuse."

(*People v. Bemis* (1949) 33 Cal.2d 395, 398-399, quoting 2 Jones, Commentaries on the Law of Evidence, p. 620.) The cautionary instruction ensures that scrutiny.

This Court has suggested two primary reasons for requiring trial courts to give the cautionary instruction. For one, this Court has recognized that testimony of out-of-court statements can be vulnerable to imperfect memory or understanding. In instances of deliberate falsehood, that vulnerability is at least as great:

> "Witnesses having the best motives are generally unable to state the exact language of an admission, and are liable, by the omission or the changing of words, to convey a false impression of the language used. No other class of testimony affords such temptations or opportunities for unscrupulous witnesses to torture the facts or commit open perjury, as it is often impossible to contradict their testimony at all, or at least by any other witness than the party himself." 2 Jones, Commentaries on the Law of Evidence, 620. It was undoubtedly such considerations that led the Legislature to make the admitting of extrajudicial admissions into evidence conditional on the giving of a cautionary instruction.

(*People v. Bemis*, *supra*, 33 Cal.2d at p. 399.) Accordingly, this Court has

recognized that the cautionary instruction protects defendants from a witness's innocent misrecollection or outright fabrication.

More recent cases from this Court, however, depart from this precedent and privilege the former over the latter. In *People v. Bunyard*, *supra*, this Court found the failure to instruct the jury with CALJIC No. 2.71.7 with respect to the defendant's highly incriminating pre-offense statements to be harmless. Despite citing *People v. Bemis*, *supra*, this Court found harmless error largely because the defendant asserted that the witnesses fabricated statements that he had never made and did not dispute the precise words used or their meaning. This Court concluded that the issue regarding the admissions boiled down to a credibility determination and that the jury had been given standard credibility instructions and had been advised to view the witnesses' testimony skeptically because one was an accomplice and the other was a felon. (See *People v. Bunyard*, *supra*, 45 Cal.3d at pp. 1224-1225.) Since *Bunyard*, this Court has found harmless the failure to give CALJIC No. 2.71.7 in cases where defendants asserted that prosecution witnesses fabricated statements that they never made. (See *People v. Wilson*, *supra*, 43 Cal.4th at p. 20; *People v. Dickey*, *supra*, 35 Cal.4th at p. 906; *People v. Pensinger*, *supra*, 52 Cal.3d at p. 1268.)

These departures from *Bemis* create an artificial distinction between misrecollections and deliberate distortions. For the reasons this Court articulated in *People v. Bemis*, *supra*, failing to give the cautionary instruction is no less prejudicial for admissions that may have been fabricated than for admissions for which the parties dispute only the precise words or their meaning. Because testimony about a defendant's pre-offense statements "affords such temptations or opportunities for unscrupulous witnesses to torture the facts or commit open perjury," the cautionary

instruction is as essential when a witness is flatly lying as when that witness may be misremembering. (*People v. Bemis*, *supra*, 33 Cal.2d at p. 399, quoting 2 Jones, Commentaries on the Law of Evidence, p. 620.) This Court should therefore reject respondent's assertion that failing to give the cautionary instruction is less prejudicial when the witness's credibility is principally at issue. Accordingly, questions over whether appellant's alleged pre-offense statements were made at all did not in any way mitigate the prejudice from the court's failure to instruct the jury with CALJIC No. 2.71.7.

Moreover, none of the witnesses who testified to appellant's alleged admissions were accomplices, so the jury was not instructed in CALJIC No. 3.18 to view their testimony with caution. In contrast, two of the three cases cited by respondent to support its argument concerned witnesses who were accomplices and were thus the subject of another cautionary instruction. (See *People v. Wilson*, 43 Cal.4th at p. 20; *People v. Bunyard*, *supra*, 45 Cal.3d at p. 1225.) Accordingly, this instructional error prejudiced appellant more than the similar error prejudiced the defendants in *Wilson* and *Bunyard*.

Lastly, this Court should reject respondent's contention that other instructions compensated for the absence of the cautionary instruction. Respondent contends that the instructional error was harmless because the court charged the jury with standard witness-credibility instructions and defense counsel challenged the credibility of witness who testified about appellant's alleged statements. The witness-credibility instructions are given in virtually every case, and defense attorneys should challenge the credibility of almost any witness who testifies to an important pre-offense admission. A trial court's failure to give CALJIC No. 2.71.7 would just

about always be harmless error if this Court were to find harmlessness based on these reasons.

In conclusion, the trial court's failure to give the cautionary instruction requires this Court to vacate appellant's first-degree-murder conviction. Appellant's purported pre-offense statements were central to the prosecution's case for intent and premeditation. It is therefore reasonably probable that appellant would not have been convicted of first degree murder if the trial court had given CALJIC No. 2.71.7, as required. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) Because, as appellant asserted in the Opening Brief (AOB 112), the instructional error violated appellant's constitutional rights, respondent has the burden of proving harmlessness beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.) It cannot do so.

* * * * *

VI

RESPONDENT'S ARGUMENTS THAT USE OF APPELLANT'S JUVENILE CONVICTION TO PROVE THE PRIOR MURDER SPECIAL CIRCUMSTANCE WAS NOT FEDERAL CONSTITUTIONAL ERROR MUST BE REJECTED BECAUSE THEY ARE BASED ON A MISUNDERSTANDING OF CONSTITUTIONAL AUTHORITY

In *Graham v. Florida* (2010) 560 U.S. 48 and *Roper v. Simmons* (2005) 543 U.S. 551, the United States Supreme Court recognized that juveniles as a group are less culpable than adults and are, therefore, constitutionally different from adults for sentencing purposes. This conclusion has been reaffirmed by recent cases in both the United States and the California Supreme Courts. Appellant showed that in light of *Roper*, *Graham,* and the cases following them, that the prior murder conviction special circumstance based upon appellant's conviction for an act committed while he was a juvenile is invalid under the Eighth and Fourteenth Amendments. (AOB 116-119.) He also demonstrated that due process and equal protection principles demand the reversal of appellant's death sentence because California law permits some, but not all, individuals who commit murder as juveniles to be eligible for the death penalty without a meaningful evaluation of the juvenile offender's level of maturity before he is convicted of murder in superior court. (AOB 119-130.)

As to appellant's argument that the Constitution categorically bars the use of a prior murder special circumstance when the crime underlying the conviction was committed when the defendant was a juvenile, respondent urges that "[a]ppellant's contention must be rejected because a prior juvenile conviction may be used as an aggravating factor to impose a death sentence." (RB 49.) Appellant shows that respondent has

fundamentally misunderstood his argument. As to appellant's due process and equal protection arguments, respondent urges that this Court's opinion in *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 567-573, requires the rejection of appellant's arguments. (RB 51-54.) Appellant shows that respondent's reliance on *Manduley* is misplaced.

A. Recent Supreme Court Case Law Confirms Appellant's Argument

Most recently, in *Miller v. Alabama* (2012) __ U.S. __, 132 S.Ct. 2455, 2464, the United States Supreme Court confirmed that juveniles must be treated categorically differently than adults. Noting that the science supporting *Roper* and *Graham* had become even more conclusive since those cases were decided, the Court in *Miller* again recognized that the diminished culpability of juveniles renders them less deserving of the most severe punishments. (*Id.* at p. 2464, fn. 5.) *Miller* concluded that even for juvenile homicide offenders, a *mandatory* sentence of life imprisonment without the possibility of parole violates the proportionality requirement of the Eighth Amendment to the United States Constitution because it requires "that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes. . . ." (*Miller, supra*, 132 S.Ct. at p. 2475.) *Miller* held that the Eighth Amendment prohibits mandatory life without parole sentences for juveniles who commit homicide, stating: ". . . *Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing." (*Ibid.*) Indeed, *Miller* further extended *Roper* and *Graham,* emphasizing that "none of what [they] said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific." (132 S.Ct. at p. 2465.)

These cases, the high court said in *Miller,* "teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult." (*Id.* at p. 2468.)

This Court has also been willing to create a categorical rule in light of the diminished culpability of juveniles as a class. The Court applied the *Roper* line of cases in *People v. Caballero* (2012) 55 Ca1.4th 262, to find that a 16 year old's sentence of 110 years to life for a nonhomicide offense violated the Eighth Amendment. Noting the high court's reliance on psychology and brain science documenting fundamental differences between juveniles and adults, this Court agreed that what these cases said about children implicated a "life-without-parole sentence imposed on a juvenile," and was therefore applicable to a term-of-years sentence that amounted to the functional equivalent of life without parole. (*Id.* at pp. 267-268.)

Contrary to *Roper, Graham, Miller,* and *Caballero,* California's death penalty scheme treats a defendant previously convicted of a murder for acts done as a juvenile the same as acts committed as an adult. However, as shown in the opening brief, such a defendant is simply not as culpable as one who committed a prior murder as an adult and permitting a special circumstance to be based on the conviction of a prior murder committed as a less culpable minor does not limit the death penalty to "those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." (*Roper, supra,* 543 U.S. at p. 568 [internal quotation marks and citation omitted].)

B. Respondent Conflates Appellant's Argument That Roper Categorically Forbids the Use of a Juvenile Murder Prior to Qualify a Defendant for the Death Penalty With an Argument He Does Not Make

Respondent asserts that appellant argues in his opening brief that his prior conviction for murder committed as a juvenile was inadmissible at appellant's penalty phase as aggravation for the jury's consideration: "[A]ppellant asks this Court to expand *Roper* and, in essence, prevent a jury from giving any weight to crimes committed as a juvenile when determining whether the death penalty is appropriate for a later murder committed as an adult." (RB 49.) This is not appellant's argument. He is not challenging the admissibility of evidence of the juvenile homicide in the penalty phase as aggravation – or the ability of a jury to weigh that evidence in selection of a penalty; rather, appellant challenges the use of his conviction for that offense as the only special circumstance to make him death eligible.

Respondent maintains that appellant has neglected "well-established sentencing considerations" which allow the jury to consider the effects of "criminal acts committed when the defendant was a juvenile" and ignores the distinction between "double sentencing for a prior crime versus taking the fact of a defendant's [juvenile] criminal history into account when determining the appropriate sentence for continued criminal behavior." (RB 49.) Respondent cites cases standing for the proposition that prior juvenile crimes can be used to punish a later crime more severely. (See RB 49-50, citing *Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, 1152 and *Witte v. United States* (1995) 515 U.S. 389.) It also cites this Court's precedent that prior juvenile crimes can be used as an aggravating factor at the penalty phase. (See RB 50-51, citing *People v. Roldan* (2005) 35

Cal.4th 646, 737 and *People v. Lucky* (1988) 45 Cal.3d 259, 296.) However, none of these cases are applicable since none reckons with appellant's argument that *Roper* forbids the use a murder conviction for an act committed while appellant was a juvenile because as a juvenile offender he was categorically less culpable than a capital defendant whose prior murder conviction occurred when he or she was an adult, and should not, therefore, be viewed as equally eligible for a death sentence.

This Court has not addressed appellant's argument that *Roper* and the cases following it require the rejection of a murder conviction for acts done while the defendant is a juvenile as the sole basis for death eligibility. Appellant recognizes this Court has held that *Roper v. Simmons* "says nothing about the propriety of permitting a capital sentencing jury, trying an adult defendant, to consider the defendant's prior violent conduct committed as a juvenile." (*People v. Bivert* (2011) 52 Cal.4th 96, 122.) In distinguishing *Roper v. Simmons,* this Court explained that *Roper* "spoke only to the question of punishment for juvenile offenses, while defendant's challenge is to the admissibility of evidence, not the imposition of punishment." (*Id.* at p. 122, quoting *People v. Bramit* (2009) 46 Ca1.4th 1221, 1239.) Rejecting the claim, this Court noted that in Bivert's case evidence of murders committed while the defendant was a juvenile was admitted pursuant to section 190.3, factor (b), and then observed that California has long permitted the admission of evidence in the penalty phase of violent conduct committed as a juvenile to be introduced in aggravation to "enable the jury to make an individualized assessment of the character and history of ... [the] defendant to determine the nature of the punishment to be imposed." (*Id.* at p. 123, citing *People v. Grant* (1988) 45 Cal.3d 829, 851.)

It does not follow from *Bivens*' holding that *Roper* does not implicate the admissibilty of a prior murder committed while the defendant was a juvenile, that this same prior may also be used as the sole *death eligibility* factor. (Appellant's juvenile act was the sole factor that made him death eligible in this case). The death eligibility aspect of California's death penalty law is distinct from the law governing the selection of penalty for those who are determined death eligible. As appellant pointed out in his opening brief, the death penalty must be limited to "those offenders who commit a narrow category of the most serious crimes" and whose "extreme culpability makes them the most deserving of execution." (*Roper*, *supra,* 543 U.S. at p. 560, quoting *Atkins v. Virginia* (2002) 536 U.S. 304, 319.) "This principle is implemented throughout the capital sentencing process" where "[s]tates must give narrow and precise definition to the aggravating factors that can result in a capital sentence." (*Ibid*, citing *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429 (plurality opinion).) The requisite narrowing in California is accomplished in its entirety by the special circumstances set out in Penal Code section 190.2. As this Court has explained: "[U]nder our death penalty law, ... the section 190.2 'special circumstances' perform the same constitutionally 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 468.)

As *Bacigalupo* also noted, the aggravating and mitigating factors delineated in Penal Code section 190.3 play no role in the determination of death eligibility. (*People v. Bacigalupo*, *supra*, 6 Cal.4th at p. 464.) Rather, the section 190.3 factors guide the jury's deliberations at the penalty selection phase where what is important "... is an *individualized*

determination on the basis of the character of the individual and the circumstances of the crime." (*Zant v. Stephens* (1983) 462 U.S. 862, 878, italics in original.) The death eligibility stage and the penalty selection stage are not the same, and, as *Zant* pointed out, although a death penalty statute must "circumscribe the class of persons eligible for the death penalty the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death." (*Id.* at p. 878.) If a capital defendant comes within the category of persons eligible for the death penalty, the sentencer can consider "a myriad of factors" in selecting the appropriate punishment. (*People v. Bacigalupo, supra*, 6 Cal.4th at p. 466, citing *California v. Ramos* (1983) 463 U.S. 992, 1008.) Thus, during the penalty selection process of a capital case, the jury "may consider evidence of the 'general type long considered by sentencing authorities' in other criminal cases, such as ... the defendant's criminal record." (*Ibid*, citing *Barclay v. Florida* (1983) 463 U.S. 939, 956.)

Thus, even if a prior murder committed by a juvenile is admissible as aggravating evidence, that same murder may not be used to put the defendant in pool of murderers eligible for the death penalty if the Constitution forbids it. Appellant has shown that the Constitution does indeed forbid it, for reasons explained in the opening brief. As such, use of the prior murder special circumstance violates appellant's right to be free of cruel and unusual punishment, guaranteed by the Eighth Amendment. The finding of death eligibility must be set aside, and appellant's death penalty reversed.

Finally, appellant notes that respondent asserts that *Graham v. Florida* (2010) 560 U.S. 48, does not apply in this case because appellant

"was not sentenced to life without parole for [his] prior homicide." (RB 51.) Respondent has mis-cited the record. The abstract of judgment, admitted at appellant's trial, clearly shows appellant sentenced to life without the possibility of parole for the juvenile murder. (3 CT 454.) Moreover, respondent's mistaken observation about appellant's sentence shows that it has misunderstood appellant's use of *Graham* in his argument. Appellant used the reasoning in *Graham* to show that a juvenile murder conviction may not serve, as it did in appellant's case, as the only factor that made him eligible for the death penalty. (AOB 118-119.) Appellant's argument holds irrespective of what his sentence was for the prior murder.

C. Respondent's Reliance on *Manduley* is Misplaced

Respondent asserts that appellant's argument that "decisions determining whether minors are amenable to juvenile court treatment 'run afoul of federal constitutional due process requirements'" (RB 52-53) was rejected by *Manduley v. Superior Court*, *supra*, 27 Cal.4th at pp. 565-566. *Manduley*, at the pages cited by respondent, stands for a proposition that appellant does not dispute, i.e., that a statue which authorizes "discretionary direct filing in a criminal court [of juvenile cases] by the prosecutor ... does not require ... procedural protections [demanded by the due process clause], because it does not involve a judicial determination but rather constitutes an executive charging function, which does not implicate the right to procedural due process and a hearing." (*Id.* at p. 566.) As such, the system of prosecutorial discretion in the selection of juveniles for adult court does not violate the due process clause – something which appellant does not here dispute. Appellant equally agrees with respondent's assertion (RB pp. 53-54) that *Manduley* stands for the proposition that there is no equal protection violation in the procedure whereby the prosecution assigns

some, but not all, juveniles to adult court – since juveniles are not subject to differing transfer procedures.

However, respondent does nothing to address the crux of appellant's argument, i.e., that a due process and equal protection violation arises in the use of the prior conviction for a juvenile crime to render the defendant eligible for the death penalty. As appellant showed in his opening brief, current transfer procedures allow for a presumption of unfitness (in juvenile court) or direct filing in adult court (by the prosecution) without examination of the individualized psycho-social development considerations related to the young offender's level of maturity. (AOB 122-125.) As unobjectionable as this might be for the prior proceeding, when the resulting conviction is used to establish death eligibility, the procedure contradicts the Supreme Court's rationale in *Roper* that juveniles are different and require a distinct consideration under the law. Juvenile crime may not serve as a death-eligibility factor where the juvenile's culpability, maturity, or capacity for treatment and consideration as an adult were never individually considered. As appellant explicitly argued in his brief, *Manduley* does not control these circumstances. (See AOB 127-128.)

The Arizona case *State v. Davolt* (2004) 84 P.3d 456 is a useful guide for this Court. In *Davolt*, the Arizona Supreme Court held that juveniles automatically waived to adult court without an individualized hearing in juvenile court could not be charged with a capital crime. While *Davolt* preceded *Roper*, its rationale is relevant. *Davolt* addressed Arizona's automatic transfer statute, which waived any juvenile older than fourteen charged with first degree murder to adult court without the benefit of a hearing. The *Davolt* court first recognized that the Eighth Amendment prohibits punishment that is disproportionate to the crime. (*Id.* at p. 479,

citing *Atkins v. Virginia*, *supra*, 536 U.S. at p. 311.) At the time *Davolt* was decided, *Stanford v. Kentucky* (1989) 492 U.S. 361, 393, instructed that the death penalty was not, per se, a disproportionate punishment for sixteen-year-old children, but, nevertheless, as *Davolt* recognized, *Stanford* required a proportionality analysis comparing of the gravity of the offense -- understood to include not only the injury caused, but also the defendant's culpability -- with the harshness of the penalty. (*Davolt*, *supra*, 84 P.3d at p. 480, quoting *Stanford*, *supra*, 492 U.S. at p. 393.) The *Davolt* court reasoned that the capital statutes upheld in the Supreme Court's death cases all provided for an "individualized assessment" of the juvenile's relative culpability. (*Ibid.*) For example, in *Stanford* itself, the statutory scheme at issue satisfied the constitutional mandate for individualized consideration in part because it required a juvenile transfer hearing that provided for a consideration of that individual's maturity and moral responsibility as a pre-condition for trial as an adult. (*Stanford*, *supra*, 492 U.S. at pp. 375-376.) The *Davolt* court concluded that Arizona's automatic waiver statute was constitutionally lacking because it failed to provide for an individualized culpability determination. (*Davolt*, *supra*, 84 P.3d at p. 481 ["Because no assessment of Davolt's maturity was made before trial, we cannot determine whether he possessed the requisite responsibility and culpability to be constitutionally eligible for the death penalty."] The same result follows in California. An individualized assessment requirement must be applied as a prerequisite to juvenile murder convictions offered as death-eligibility factors.

It is clear that in the wake of *Roper*, a juvenile must receive special individualized consideration based on his or her status – if the state wishes to use the resulting conviction to establish death eligibility. The Supreme

Court said as much in *Kent v. United States* (1966) 383 U.S. 541, holding that "[i]t is clear beyond dispute that the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile," and then listing factors that should guide a juvenile judge's transfer decision, including consideration of the juveniles rehabilitative prospects and his or her maturity. (*Id.* at pp. 556, 566-567.) *Kent* provides the foundation that a judicial officer should actually weigh and pass upon an individual juvenile's culpability before a juvenile conviction may be used as an eligibility factor. This case, coupled with *Roper*, establish that juveniles should receive special status-based consideration if the subsequent convictions are to be used to establish death eligibility.

Under California's current transfer procedures no such required consideration exists and thus due process principles are violated. Equally, although as *Manduley* teaches there is no equal protection issue in a system which give the prosecution discretion to charge a juvenile as an adult (27 Cal.4th 537, 570-571), it offends constitutional notions of equal protection for the state to later use as the foundation for a death sentence a conviction in adult court that could just as easily have been an adjudication in juvenile court without future death eligibility repercussions.

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VII

THE TRIAL COMMITTED REVERSIBLE ERROR BY REFUSING TO USE ANY WRITTEN QUESTIONNAIRE, AND THEN RUSHING THROUGH A DISORGANIZED AND CONSTITUTIONALLY DEFICIENT ORAL QUESTIONING. THE RESULT, *INTER ALIA*, WAS THE SEATING OF A JUROR WHO WAS NEVER DEATH-QUALIFIED

Respondent has characterized this claim as simply the denial of "individually sequestered voir dire." (RB 54.) While that was a small part of the claim, respondent misses the thrust of appellant's argument: the *overall constitutional deficiency* of the trial court's voir dire. The trial court began by refusing appellant's several requests to use a jury questionnaire. (A-1 RT 48, 64, 84.) While that decision, in itself, was within the trial court's discretion, once it refused written questions, the court then became obligated to ensure that its own oral voir dire was constitutionally sufficient. (*Morgan v. Illinois* (1992) 504 U.S. 719.) In that, the trial court failed.

After the court refused the jury questionnaire, appellant also objected several times to the manner of the oral voir dire. The first objection was to the unreasonably fast pace of the questioning, which made it impossible for counsel (and, as it later became clear, the court itself) to keep track of the responses. Counsel also objected to the court's superficial leading questions and lack of follow-up. Each of appellant's objections was overruled. (1 RT 330-331, 347.) In the end, neither the trial court nor the parties discovered the many errors that resulted from this carelessly-conducted, disorganized, and truncated voir dire.

While this Court extends wide latitude to trial courts in carrying out voir dire, it has never endorsed, nor should it, the type of perfunctory, haphazard, and unduly hasty voir dire that the trial court conducted in this case. The trial court's insistence on a deficient process that fell far below

constitutional standards was apparently a reflection of its belief that this was "not an overwhelming case for murder" (A-1 RT 84), and that the safeguards normally employed in a capital case were simply unnecessary "in a case like this." (A-1 RT 84.) The resultant abbreviated questioning and careless manner led to reversible, constitutional error.

A. The Trial Court's Insistence on Conducting Jury Selection Without a Questionnaire and Without a Carefully-Planned, Uniformly Structured Process for Voir Dire Led to the Seating of a Juror Who Was Never Death-Qualified

The United States Supreme Court has established that on voir dire in a capital case the trial court must, *upon defendant's request*, inquire into each prospective juror's views on capital punishment. (*Morgan v. Illinois* (1992) 504 U.S. 719, 726.) That did not happen in this case, despite the trial court's specific assurances that it would conduct a "full voir dire on the death penalty issue." (A-1 RT 48.) Contrary to respondent's assertion that this claim has been forfeited (RB 60), appellant has preserved the issue for appeal. Appellant requested a jury questionnaire which included detailed inquiries on the death penalty. When that was denied, appellant objected several times to the rushed and inadequate manner in which the trial court conducted voir dire.

1. Appellant's Request for Written Questions Was Denied

Appellant asked the trial court three times to use a written juror questionnaire with voir dire. The proffered questionnaire included a five and one half-page section that covered the topic of capital punishment in detail. (2 CT 307-311.) The first time appellant raised the subject of the questionnaire, the judge said he was "inclined to just do the voir dire myself," because he did not find written questions "especially helpful." (A-

1 RT 48-49.) However, the judge assured counsel that he would do "a full voir dire on the death penalty issue." (*Ibid.*) Two months later counsel raised the issue again but the court gave no response. (A-1 RT 64.) Appellant asked a third time shortly before trial, when the judge was reviewing his plan for voir dire. He confirmed he would "talk to each juror individually" about their views on the death penalty:

> And we just go right down the row to get their opinions on the death penalty and whether or not they believe they can make a decision on this case based on what they see and hear here in the courtroom.

(A-1 RT 80-81.) The trial court added that if the parties had "any questions you want asked, you could put them in writing and submit them to me in advance of the voir dire, and I'll be happy to consider them." (*Id.* at p. 83.) In response, appellant reminded the court that he had already submitted written questions for the court's consideration: "We requested a questionnaire I got for you." (*Ibid.*) Again, the trial court rejected appellant's written questions and, this time, explained why:

> I think my own feeling is that the questionnaire *in a case like this is not necessary.* I think that we'll be able to cover the issue of [12] – *particularly in light of the fact that the People are of the opinion that – that the case if not an overwhelming case for murder* . . . .

(*Id.* at p. 84, emphasis added.) Despite counsel's argument that his questionnaire had been specifically tailored to appellant's case, approved by both sides, and used successfully in another capital trial, the court would not agree to the questions. Appellant objected. (*Ibid.*)

The trial court's reason for rejecting the questionnaire is telling: in

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[12] The judge did not complete his thought, but it is apparent that the issue he was referencing was the issue of the death penalty.

the court's opinion a questionnaire was unnecessary "*in a case like this*" because this case did not even present an "overwhelming case for murder." (*Ibid.*) The trial court's casual attitude about the seriousness of appellant's case apparently grew out of statements the prosecutor had made pretrial.[13] While the trial court may have had good reason to believe this case would end in a manslaughter verdict, as the co-defendant's had, and that would mean there would be no penalty trial, the court still had a constitutional duty to conduct a thorough and complete voir dire, as though there *would be* a penalty trial. Appellant was entitled to all of the usual protections offered capital defendants in a capital case including a constitutionally adequate voir dire – not the slip-shod, perfunctory process, carried out in just seven hours[14] by the trial court here.

If the trial court had simply agreed to use appellant's written questions (2 CT 292-314), the errors resulting from its inadequate oral voir dire would have been avoided. Use of the questionnaire would have guaranteed, at the very least, that each prospective juror would be asked the

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[13] During a pretrial conference, the prosecutor stated that his office had debated whether it was appropriate to seek the death penalty in a case like this "where the defendant doesn't appear to be the shooter." (A-1 RT 42.) The defense also alluded to the co-defendant's conviction of manslaughter for the killing of the same victim in this case. (A-1 RT 77.) Judge Perry opined that appellant's case might also result in a manslaughter verdict, in which case they could "all go home" after the guilt trial. (A-1 RT 79.) While it was reasonable for the trial court to believe this case would never get to a penalty phase, that belief did not justify the court's slip-shod, perfunctory and rushed handling of the voir dire.

[14] On the first day, jury selection went from 9:28 a.m., through 4:00 p.m., with one hour and 45 minutes for breaks. (2 CT 352-352.) On the second day it went from 9:28 a.m. until noon, with a 15-minute break. (2 CT 354.) The entire jury selection process took just under seven hours.

relevant death qualification questions. (See questions 69 through 84 of the questionnaire, 2 CT 307-311.) Panelists' written responses would have then enabled the court and the parties to identify persons whose views would make it difficult or impossible for them to impartially follow the court's instructions. At a minimum, the written responses would have identified panelists who needed additional follow-up questioning.

For example, appellant's written question number 75 [g] asked panelists whether they believed that "background information about a defendant is something relevant to the jury's possible consideration of penalty." (2 CT 310.) Panelists who responded "no" to this question, could have then been further questioned about that view. It was important for each panelist to understand that mitigation evidence *included* background information about the defendant, and that this was something the law required them to consider before deciding on the penalty. With only the trial court's abbreviated explanation as a guide,[15] panelists had no way of fully understanding their duties as capital jurors, unless they happened to ask the court pertinent questions on their own. (See, e.g., 2 RT 519-520 [panelist volunteered that he would not give mitigating evidence any weight if the case involved a second murder conviction].)

Without a written questionnaire to use as a guide, the trial court conducted the death qualification process without knowing anything at all about any of the panelists, except that they had passed the hardship

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[15] The trial told the panelists that mitigating evidence was "evidence of the positive things, the good things in the defendant's life and background." (1 RT 292.) The trial court never explained that mitigation could also include *difficult circumstances* in a defendant's background, which were not necessarily "positive things" or "good things."

process.[16] The trial court offered panelists a very brief oral description of four categories, but they had nothing in writing to which they could refer – no individual handout or any type of chart or board to review in the courtroom.[17] Almost as soon as the trial court's death qualification process was underway, appellant's counsel posed several more objections to the court's manner of voir dire. (1 RT 330-331; 347.)

2. Appellant Requested a More Meaningful, Thorough, and Slower-Paced Voir Dire

As appellant explained in his Opening Brief, the trial court's death qualification process relied almost exclusively on panelists categorizing themselves into one of four categories, which the court had only orally described for them. (AOB 133-136.) The court had defined "category four" as persons who could "keep an open mind," consider the aggravating and mitigating evidence, and "vote for death, if so persuaded, or for life, if so persuaded." (1 RT 300.) As soon as the process began, the first thirteen panelists all quickly concluded they belonged in "category four." (See 1 RT 303-321.) In most cases, after the panelist selected a number, the trial court simply confirmed the choice without any further questioning. With the first

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[16] The entire voir dire of the first panel of 70 prospective jurors was completed in 4-1/2 hours, divided into four areas of questioning: hardship questions (1 RT 271-282); death qualification questions (1 RT 289-351); group questions about arrests, victims, law enforcement, gangs and prison visiting (1 RT 352-456); and general background information questions. (1 RT 457-477.) The voir dire of the second panel of 40 prospective jurors was completed in less than 2-1/2 hours, following the same pattern. (2 RT 491-501; 506-534; 538-559; 2 RT 561-570.)

[17] The court did use a display board later on in the process, which listed general voir dire topics, such as occupation, education, marital status, etc. The court asked panelists to respond to each of the topics listed on the board. (See 1 RT 456 [court refers to board and listed topics].)

thirteen panelists all having responded in the same manner, in almost rote fashion, the trial court took notice and commented on the record. (1 RT 317-318 ["Now, I am getting a lot of fours here. There is nothing wrong with telling me I am a one, two or three;[18] do you understand?"].) It was not initially apparent that, for many panelists, their on-the-spot selection of a number would constitute the entire death qualification process. That only became apparent later on, when the trial court began dismissing groups of panelists who had selected categories one and three. (1 RT 349.)[19]

Shortly after voir dire began, appellant's counsel objected to the process. (1 RT 330.) Counsel complained that the trial court was going "too fast" for anyone to follow along with the responses. Counsel described the process as "meaningless," because panelists were expected to retain the definitions of the numerical categories in their memory after hearing them only once, prior to the morning recess. In addition, counsel objected to the court's failure to delve into the issue of the death penalty with sufficient

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[18] The trial court defined the other three categories as follows: One: "people that don't believe in the death penalty" (1 RT 297); two: "strong proponents of the death penalty" who "would always vote for death, eye for an eye. *If someone took a life, then that person should pay for it with his life*" (1 RT 298); and three: people who believed in the death penalty, but could not vote for even if they felt it was appropriate. (1 RT 298.)

[19] Not a single person in the first group of 70 panelists chose category two, which the court had defined as persons who believed that "if someone took a life, then that person should pay for it with his life." (1 RT 298.) The proper definition was persons who would always vote for the death penalty in cases of *first degree murder with special circumstances*. The trial court's broad definition included anyone who "took a life." Not surprisingly then, no one in the first panel considered themselves a "two." In the second panel, one person admitted to being a "two" (2 RT 515), and shortly thereafter another panelist followed suit. (2 RT 520.)

depth:

> MR. MEYERS: For the record, I just want to object *to the manner in which this court is conducting this voir dire.*
> THE COURT: All right.
> MR. MEYERS: *It is too fast. I can't follow it.* You are asking, "Are you number one, two, three, four." *It is just meaningless* except your definition *that is recorded in memory before we took a break. I think you have to delve into these individuals a little more in-depth.*

(1 RT 330, emphasis added.) The trial court overruled each of appellant's objections and assured counsel that the pace of the questioning was appropriate:

> THE COURT: I must tell you, I disagree with you. This last juror said she was number one and said why she is a number one. She could never vote for death. I don't think you need anything more from this juror on this point.[20] *I am very comfortable with the way this voir dire is going* but your objection is noted for the record.

(1 RT 331, emphasis added.) Shortly thereafter, when the trial court dismissed all panelists who said they belonged in group one or three, appellant objected again. Counsel argued that the trial court was making no effort to rehabilitate any of the scrupled panelists, but was simply confirming "with the leading question, 'You couldn't impose the death penalty,'" . . . so that "all they had to do is say, 'That is right.'" (1 RT 347.) That objection was also denied. (1 RT 349.)

While the trial court may have felt "comfortable" with the pace and

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[20] While the panelist referenced by the trial court had indeed said she could *never* vote for the death penalty, and therefore was properly excused by the court, the trial court did not always seek or obtain that type of response. See argument E, below.

conduct of the voir dire (1 RT 330), it is clear now that the pace was too fast for the trial court as well. It appears that everyone, including the court itself, lost track of which panelists had been questioned about the death penalty and which had not. The trial court had assured counsel that it would individually question each panelist to obtain his or her views on the death penalty, but in its haste, it failed to discover that several panelists had not been questioned at all on this issue. *At least three prospective jurors were not asked a single question about the death penalty.*

3. The Trial Court Neglected To Ask Three Panelists Any Questions About the Death Penalty, Including Seated Juror No. 10

Appellant's objections to the manner in which the trial court was conducting the voir dire were well-founded. Since most panelists who categorized themselves had heard the category definitions only once, it was unreasonable for the court to expect that they could retain those definitions in memory and then properly categorize themselves in any sort of meaningful way. Just as significantly, even if the panelists' responses were reasonably informed and accurate, the process was proceeding so swiftly, that the most counsel could expect to retain would be a numerical notation. Given the fast pace, it simply was not possible for appellant's counsel to keep track of whether further questioning was needed, what those additional questions should be, and whether the trial court would, or did, eventually ask the appropriate follow-up questions on its own. Given the pace of the questioning, it was not reasonably possible for appellant's counsel to keep track of that type of information, while simultaneously listening to and keeping track of what was taking place with the next panelist being questioned, just seconds later.

It is also apparent from the questions posed and the manner in which

the trial court conducted the voir dire, that the trial court was not following any particular organized script, but was simply improvising as it went along.[21] While this Court had never required the use of a script, in this case it is clear that the trial court's failure to use a more systematic and careful approach resulted in serious oversights, including errors of constitutional proportions. In *People v. Heard* (2003) 31 Cal.4th 946, this Court properly acknowledged that, unlike many other duties which a trial judge is called on to perform, "the conduct of voir dire in a death penalty case is an activity that is particularly susceptible to careful planning and successful completion." (*Id.* at p. 966.) With so many available resources to assist trial courts in this process, including the written questionnaire that appellant offered to the trial court here, there simply was no excuse for the trial court to ignore the "well-established principles and protocols pertaining to the death-qualification of a capital jury." (*Id.* at p. 967.)

In the present case, in the trial court's haste to complete jury selection in a single day (see A-1 RT 85), *it neglected to ask three panelists any questions at all about their views on the death penalty.* These three panelists were prospective juror Nos. 5234, 5802 and 5613, all of whom were part of the second group of panelists. (2 CT 350-351; 2 RT 540-544.) The death qualification process took place immediately after the hardship excusals. During this segment none of these three panelists were asked to place themselves in one of the four "death qualification" categories, or in any other manner indicate their views on the death penalty. (2 RT 502-

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[21] The category definitions which the trial court gave to the first panel of prospective jurors on the first day, were different from the definitions given to the second panel on the next morning. (Compare 1 RT 297-300 with 2 RT 511-512.)

534.) The trial court's only individual questioning of these three panelists took place in the next segment of voir dire,[22] which had nothing to do with the death penalty. In the end, none was asked a single question about his or her views on the death penalty or his or her ability to follow the law in a capital case. One of those prospective jurors, No. 5613, eventually became seated Juror No. 10 on appellant's jury. Unbeknownst to either the trial court or the parties, this panelist became a sworn juror *without ever having been asked a single question regarding her views on the death penalty.*

Respondent does not dispute the truth of this claim, and candidly admits that while "most jurors indicated their feelings about the death penalty," Juror No. 10 "did not state to which category she belonged" (RB 60) or "specifically state her views on the death penalty." (RB 62.) The reason Juror No. 10 never shared her views on the death penalty, or placed herself in a numerical category, was simple: she was never asked.

Although respondent admits this took place, respondent's position is that the trial court's voir dire was nevertheless sufficient because Juror No. 10 "was questioned by the court, and had every opportunity to state her beliefs one way or another." (*Ibid.*) Respondent apparently argues that if Juror No. 10 *had believed* she should be removed for cause then she could have volunteered that information on her own without ever being directly questioned at all about her views. Respondent argues that even though some jurors were not questioned at all about the death penalty, the voir dire was nonetheless adequate. Respondent quotes from the trial court's

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[22] See 2 RT 541-542; 550-551; 568 [individual questioning of Prospective Juror No. 5234]; 2 RT 540, 547, 554-555, 566 [individual questioning of Prospective Juror No. 5802]; and 2 RT 543-544, 552-553, 558, 562-564 [individual questioning of Prospective Juror No. 5613].

statement to the entire venire that the court needed "jurors who can consider all the evidence. . . and . . .who are able to vote for death or able to vote for life depending upon what the evidence proves to them." (RB 60, quoting 2 RT 511.) Respondent argues that this explanation from the trial court was sufficient for letting prospective jurors know "that they must tell their thoughts on the death penalty." (RB 61.) According to respondent's argument, because the panelists were put on notice that jurors who held certain views could not sit, it was their responsibility to disqualify themselves, without ever being asked about their views. Respondent's position is not supported by the law. (*People v. Wilson* (2008) 44 Cal.4th 758, 779 [trial courts must "engage in a conscientious attempt to determine a prospective juror's views regarding capital punishment" to protect defendant's right to a fair trial and an impartial jury].)

While respondent is correct that Juror No. 10 was "questioned by the court," those questions had only to do with her connections to law enforcement (2 RT 543-544), her brother's arrest for a purse-snatching incident (2 RT 552-553), and visiting her brother in prison. (2 RT 558.) Other than that, Juror No. 10 only responded to the general voir dire questions, the "items [listed] on the board" (1 RT 456), such as her residence, occupation, marital status, education, previous jury service, gun ownership, etc. (2 RT 562-563.) At no time was Juror No. 10 asked to state her position on the death penalty, or in any other manner asked to comment about her ability to fairly apply capital sentencing law.

Respondent argues that the trial court's "questioning was thorough enough to discern whether a potential juror was death-qualified," (RB 58) but fails to explain how that could have been accomplished in the case of Juror No. 10. Respondent's argument is baffling in light of its own

admission that Juror No. 10 was never questioned at all about the death penalty. It simply was not possible for the trial court, or the parties, to conclude anything at all about Juror No. 10's views on the death penalty under the circumstances. Nor is it possible, on appeal, for this Court to find that Juror No. 10 was "death-qualified" by the trial court, as respondent so boldly contends.

Respondent cites *People v. Robinson* (2005) 37 Cal.4th 592 [*Robinson*], and *People v. Carter* (2005) 36 Cal.4th 1215 [*Carter*], for the proposition that a trial court has "great latitude" in deciding what questions to ask during voir dire, and that unless the voir dire is "so inadequate that the resulting trial was fundamentally unfair, the manner in which voir dire is conducted is not a basis for reversal." (*Carter, supra*, 36 Cal.4th at p. 1250.) Appellant has no quarrel with these principles, and himself relies on these cases for the position that he is entitled to a new penalty trial because the voir dire conducted in *this* case was indeed so inadequate that his trial was fundamentally unfair.

In both *Robinson* and *Carter*, this Court had good reason for finding that the trial court had adequately fulfilled its duties during voir dire. In *Robinson*, the trial court asked each panelist to complete a 20-page jury questionnaire. Five and one-half pages of the questionnaire probed each prospective juror's attitude concerning the death penalty. After those responses had been collected, the trial court then conducted further voir dire examination of each prospective juror. Each was asked whether he or she wished to change any response set forth in the written questionnaire, and any person who failed to respond to a written inquiry or who gave ambiguous, conflicting, or otherwise problematic answers to those inquiries was questioned further. (*Robinson, supra,* 37 Cal.4th at pp. 614-616.)

Finally, the trial court asked each prospective juror a series of four questions concerning his or her attitude regarding the death penalty.[23] The thorough process employed by the trial court in *Robinson* guaranteed that each and every panelist would be questioned about their views on the death penalty. Moreover, there was no evidence that any of them had been inadvertently overlooked or excluded from the process.

Similarly, in *Carter, supra*, the trial court conducted the initial group voir dire of prospective jurors. It then allowed each side to conduct 60 minutes of questioning for the first 20 panelists, and 30 minutes each for the remaining groups of nine panelists. Unlike the voir dire in appellant's case, the parties in *Carter* played a major role in the process.[24] On appeal, Carter

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[23] The trial judge in *Robinson,* asked all prospective jurors in open court these four questions: (1) "Do you have such conscientious objections to the death penalty that, regardless of the evidence in this case, you would refuse to vote for murder in the first degree merely to avoid the death penalty issue?" (2) "Do you have such conscientious objections to the death penalty that, regardless of the evidence in this case, you would automatically vote for a verdict of not true as to any special circumstance alleged merely to avoid the death penalty issue?" (3) "Do you have such conscientious objections to the death penalty that, should we get to the penalty phase of this trial, and regardless of what the evidence is in this case you would automatically vote for a verdict of life imprisonment without the possibility of parole and never vote for the death penalty?" (4) "Do you have such conscientious opinions regarding the death penalty that, should we get to the penalty phase of this trial, and regardless of what the evidence is, you would always vote for death and never vote for life imprisonment without the possibility of parole?" (37 Cal. 4th 592, 616, fn. 12.)

[24] Here, the trial court only allowed additional questions after all of the voir dire had been completed. (1 RT 477; 2 RT 571.) For this last-minute questioning to have been meaningful, the parties would have needed reasonable time to take notes and prepare questions, while voir dire was proceeding. The trial court's rapid-fire pace made this impossible. The trial

(continued...)

argued that the time restrictions resulted in a denial of meaningful voir dire. In rejecting that claim, this Court pointed out that the *Carter* jury selection had taken place over a period of eight court days, "a period of time hardly indicative of an unduly rapid proceeding." (*People v. Carter, supra*, 36 Cal. 4th at p. 1252; see also *Uttecht v. Brown* (2007) 551 U.S. 1, 10 [jury selection spanned more than two weeks and death qualification process took eleven days].) In stark contrast to the jury selection in *Carter*, appellant's jury selection took *just seven hours*, from beginning to end, and all of it was conducted by the trial court.

In appellant's case, there were no jury questionnaires upon which the court and the parties could rely in the event one or more prospective jurors had been overlooked. While the trial court had expressed its *intention* to conduct a "full voir dire" of each and every panelist, in fact that did not happen. The trial court's process was so hurried and perfunctory that neither the court nor the parties ever realized that some panelists had been missed. The trial court should have realized that the system it was depending on was not working. Not only did appellant's counsel object to the speed and superficiality of the process, but the trial judge himself admitted "having trouble" keeping track of which panelists he had actually questioned, after some had been excused. (See, e.g., 2 RT 547 [trial court asks the panel if he's missed anyone: "Anybody else? I'm sorry. *And I'm having trouble because we lost so many jurors here.*"], [emphasis added].) At another time, one of the panelists spoke up, and told the judge that a whole group of prospective jurors had been overlooked for questioning. (1 RT 381-382

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[24](...continued)
court's "comfort" with the pace was obviously misplaced.

[panelist tells judge, "Your honor, you skipped us"; judge asks, "I skipped you guys?" When panelist confirmed that he had, the judge responded, "Thank you for telling us."].) Clearly, the trial court needed to slow down.

Respondent's reliance on either *Robinson* or *Carter* to support a trial court's discretion to conduct voir dire in this manner is clearly misplaced. The jury selection in this case was not carried out in a careful, methodical way over a period of eight days, as was true in *Carter*. Here, it took just seven *hours*, and the fast pace caused the trial court to lose track of who had been questioned, and on which topics they had been questioned. Twice the trial court acknowledged on the record that it was having trouble keeping up. The record now reveals that in fact the trial court was having more difficulty than it, or anyone else, fully realized.

Applying this Court's reasoning from *Carter* and *Robinson,* it is apparent that appellant's death sentence must be reversed. His penalty phase trial was rendered fundamentally unfair as a result of the trial court's refusal to conduct voir dire in a manner that guaranteed each panelist would be fully questioned about his or her views on the death penalty. The trial court assured counsel it would do this (see A-1 RT 49), but it obviously failed. By first refusing to use a questionnaire, which would have guaranteed that each panelist answered death-qualifying questions, and then insisting on conducting voir dire as it did and on its own, the trial court must be held accountable for the serious constitutional errors which resulted from its own neglect. While a trial judge must have discretion in the questioning of prospective jurors during voir dire, that discretion is not without limit.

> [W]ith the heightened authority of the trial court in the conduct of voir dire . . . goes an *increased responsibility* to

> assure that the process is meaningful and sufficient to its purpose of ferreting out bias and prejudice on the part of prospective jurors.

(*People v. Mello* (2002) 97 Cal. App. 4th 511, 516, quoting *People v. Taylor* (1992) 5 Cal.App.4th 1299, 1314.). The trial court's handling of the voir dire in this case, over appellant's objection, requires reversal of appellant's death sentence.

4. Appellant's Claim Is Not Forfeited

Respondent argues that appellant has forfeited this claim for appeal because appellant did not object during jury selection to the seating of this potentially disqualified juror. (RB 60.) Respondent also argues that appellant did not preserve this issue for appeal because he did not use a peremptory challenge to remove Juror No. 10, and still had peremptory challenges remaining when he accepted the jury. (RB 60-61.) These claims are also meritless. In *People v. Pearson* (2013) 56 Cal. 4th 393, cert. denied, 134 S. Ct. 198 (U.S. 2013), this Court recently confirmed that exhausting peremptory challenges is not necessary to preview this issue:

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

(*Id.* at p. 411, quoting *People v. Bolden* (2002) 29 Cal.4th 515, 537-538, emphasis added.) Not only did the inadequate voir dire make it impossible for appellant to intelligently exercise any challenges to the seating of Juror No. 10, appellant's counsel immediately objected to the *speed* at which the trial court was proceeding with the death qualification process. It was this

undue haste that most hampered appellant's ability to discover the problem.

Counsel specifically complained that the trial court was going "too fast" for counsel to follow the process. He also complained that the court's numerical categories were "meaningless" because panelists were expected to retain those definitions in memory after hearing them only once. Counsel also objected to the court's failure to delve into the issue with sufficient depth. All of these objections were on point. As in *People v. Cash* (2002) 28 Cal.4th 703, 723, because the "trial court's error makes it impossible for [this Court] to determine from the record whether any of the individuals who were ultimately seated as jurors held [a] disqualifying view," the error cannot be dismissed as harmless. (*Morgan v. Illinois, supra*, 504 U.S. at p. 739.) Appellant is entitled to a new penalty trial which includes a voir dire in which he is able to identify those jurors whose views on capital punishment would disqualify them as jurors. Appellant's death sentence must be reversed.

B. The Trial Court's Wholly Inadequate Voir Dire Led to the Seating of Six Jurors Whom the Court Deemed Death-Qualified After Answering Only Superficial Leading Questions

While seated Juror No. 10 was never asked a single question about the death penalty, and therefore could not possibly be considered a "death-qualified" juror, even those panelists who were addressed individually did not receive the type of careful screening on the issue of the death penalty required under the Fourteenth Amendment. Appellant has already discussed the deficiencies of the trial court's system for numerically categorizing prospective jurors. Not only were the definitions inaccurate, panelists could not reasonably be expected to remember the definitions, or properly apply them, without more probing follow-up questions from the

court. (See AOB 133-140; 153-166.)

In addition, appellant argued in the opening brief that numerous panelists became seated jurors without ever having been adequately questioned about their views on the death penalty. By way of example, appellant quoted portions of the voir dire of four such seated jurors. (AOB 164-166 [re seated Juror Nos. 2, 5, 6 and 11].) Respondent's brief ignores this issue as well as these specific examples, and simply argues that "the trial court's questioning was thorough enough to discern whether a potential juror was death-qualified." (RB 58.) However, as discussed above and in appellant's opening brief, the record demonstrates that the trial court was not at all "thorough" in its handling of the death-qualification process of appellant's jury.

As a result of this wholly deficient process, a total of six seated jurors – Juror Nos. 1, 2, 3, 5, 6 and 11 – were all deemed death-qualified by the trial court after each had simply assigned themselves a number and then expressed general agreement with the concept of "weighing" or "considering" all of the evidence before reaching a verdict. The United States Supreme Court has made clear that questions which simply obtain agreement from a prospective juror that he or she will "give both sides a fair trial," "follow the court's instructions on the law," or " be fair and impartial," (*Morgan v. Illinois, supra*, 504 U.S. at pp. 723-724) are too general to meet Fourteenth Amendment standards for death-qualifying a capital jury:

> It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective

> jurors function under such misconception. The risk that such jurors may have been empaneled in this case and "infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized." [Citation omitted.]

(*Id.* at pp. 735-736.) In appellant's case it was precisely this type of general questioning, often posed as leading questions, that caused the trial court to conclude that these six seated jurors had been properly death-qualified, when in fact the questioning was so superficial that an intelligent decision about their qualifications simply could not be made.

The trial court had already expressed its opinion that this case did not appear to be "an overwhelming case for murder," and that appellant's proposed jury questionnaires were unnecessary "in a case like this." (A-1 RT 84.) That opinion obviously affected the trial court's view of the death qualification process. Spending precious court time thoroughly questioning panelists about their views on the death penalty made little sense, at least from the trial court's perspective, if there was a strong possibility the case would end with a manslaughter conviction, an outcome both the prosecutor and the trial court had discussed. (A-1 RT 79 ["And then if it comes out voluntary manslaughter, we're done. And we just all go home."].)

The following excerpts, which constitute the entire death qualification process for each of the six jurors listed below, demonstrate that the trial court did not "assure that the process [was] meaningful and sufficient to its purpose of ferreting out bias and prejudice on the part of prospective jurors." (*People v. Taylor, supra*, 5 Cal.App.4th at p. 1314.)

1. Seated Juror No. 1

The trial court asked prospective juror No. 5940, who eventually became seated Juror No. 1, what he thought when he heard that he might

have to consider the death penalty. The panelist replied that he had been "on cases of this nature before." (1 RT 303.) After having gleaned no other information at all from this panelist, the trial court immediately responded:

> THE COURT: *So you would consider yourself, what, to be a category four person, somebody that can look at the evidence?*
> PROSPECTIVE JUROR NO. 5940: Yes.
> THE COURT: And make a decision only after you have seen the mitigating and aggravating evidence; is that right?
> PROSPECTIVE JUROR NO. 5940: Right.

(*Ibid.*)

Those two leading questions constituted this panelist's entire death-qualification voir dire. The trial court deemed him death-qualified simply because he agreed with the court's assessment that he could "look at the evidence" and he could "make a decision" after seeing the evidence. Even if the trial court believed that this panelist had ever served on another capital jury, that did not make him qualified *ipso facto* to serve on appellant's case.

This juror's agreement that he would look at the evidence and make a decision afterward did not preclude the possibility that he would nevertheless always vote for the death penalty in cases of first degree murder with special circumstance, or in cases where more than one murder conviction had been established. The trial court's abbreviated, superficial leading questions in no way guaranteed that appellant would be "sentenced to death by a jury empanelled in compliance with the Fourteenth Amendment." (*Morgan v. Illinois, supra*, 504 U.S. at p. 739; *People v. Cash, supra*, 28 Cal.4th at p. 723.)

2. Seated Juror No. 2

As soon as the trial court called on prospective juror No. 9942, and

even before the court posed a single question, this panelist simply stated: "I believe I am a number four. I can also weigh all the evidence and I am an open-minded person." (1 RT 329-330.) The trial court simply responded, "All right," and moved on to the next panelist. Without any further probing, the trial court was satisfied that this panelist had passed a "full voir dire on the death penalty issue." (A-1 RT 48-49.) This panelist eventually became seated Juror No. 2. (2 RT 585.)

3. Seated Juror No. 3

The trial court questioned prospective juror No. 6495, who later became seated Juror No. 3, in an almost identical manner. The entire death qualification process for this panelist involved just a single question from the court, after the panelist placed himself in category four:

> THE COURT: You believe you could consider the evidence on both sides and make a decision appropriately?
> PROSPECTIVE JUROR NO. 6495: Yes, sir.

(1 RT 339.) Once again, this brief interchange did not constitute a satisfactory death-qualification voir dire. A prospective juror who simply agrees to consider all the evidence before making a decision, has not offered any assurance that he would not also vote for the death penalty in every case of first degree murder with special circumstances. That decision could be made in every case, even after "considering" all of the evidence. This panelist, who became a seated juror, was never asked to consider this critical question, much less the question of whether he would consider death to be the only appropriate punishment when the defendant had been convicted of another murder, as was true here.

Had the trial court questioned the panelists by using appellant's proposed jury questionnaire, the sixteen questions posed by appellant on

pages 17 through 21 of the questionnaire (2 CT 307-311) would have covered numerous aspects of the panelists' views on the death penalty, including the types of situations in which a panelist might conclude that death was the only appropriate penalty. Appellant's proposed questions were of the type referenced throughout this Court's decisions, where the trial court's manner of voir dire has been upheld. (See, e.g., *People v. Robinson, supra*, 37 Cal.4th at pp. 614-616, *People v. Carter, supra*, 36 Cal.4th at p. 1252; *People v. Avila* (2006) 38 Cal.4th 491, 531 [voir dire "included . . . expansive and detailed questions on capital punishment and gave jurors the clear opportunity to disclose views. . . so strong as to disqualify them for duty on a death penalty case."].) This Court has never endorsed the type of perfunctory, abbreviated voir dire that was conducted in this case.

4. Seated Juror No. 5

The trial court questioned prospective juror No. 8667 follows:

> THE COURT: Juror No. 8667?
> PROSPECTIVE JUROR NO. 8667: I think I am a number four, your honor.
> THE COURT: Okay, why?
> PROSPECTIVE JUROR NO. 8667: Because I think I am flexible. I could weigh all the evidence.

(1 RT 324.) Without any further questioning on the death penalty, the trial court considered this panelist to be death-qualified and eventually he/she became seated Juror No. 5. (2 RT 585.) It was just moments after this brief interchange that appellant's counsel posed his objection to the lack of "meaningful" questioning and the failure to ask "in-depth" questions of the panelists. (1 RT 330.) That objection, as noted previously, was overruled. .

5. Seated Juror No. 6

Prospective juror No. 1780 was examined as follows:

THE COURT: Good morning.
PROSPECTIVE JUROR NO. 1780: I feel that I am a four.
THE COURT: All right.
PROSPECTIVE JUROR NO. 1780: I am open-minded and I do make decisions on my job every day.
THE COURT: And you could consider the good and the bad evidence?
PROSPECTIVE JUROR NO. 1780: Yes.
THE COURT: And make a decision accordingly?
PROSPECTIVE JUROR NO. 1780: Yes.

(1 RT 328.) Without any other questioning about her views on capital punishment, this panelist became sworn Juror No. 6. (2 RT 585.)

6. Seated Juror No. 11

An equally cursory process was used with prospective juror No. 2148, who became seated Juror No.11 (2 RT 585):

THE COURT: Do you think you would be able to consider all the mitigating evidence and all the aggravating evidence and to weigh them and to make a decision?
PROSPECTIVE JUROR NO. 2148: Yes, I believe I could do that.
THE COURT: [Stating, not asking] So you would consider yourself what I would call a category four person. [No response; end of inquiry.]

(2 RT 517.)

The death qualification process is meant to identify jurors who held beliefs which would make it impossible for them to fairly and impartially carry out the law with respect to application of the death penalty. This Court has recognized that "[w]hen *voir dire* is inadequate, the defense is denied information upon which to intelligently exercise both its challenges for cause and its peremptory challenges." (*People v. Bolden* (2002) 29 Cal. 4th 515, 537.) Here, the manner in which the trial court conducted voir dire made it impossible for appellant to actually identify those jurors who,

despite their personal belief in their own fairness or "open-mindedness," would actually be unwilling to consider such factors as sympathy, appellant's background, or other mitigating evidence which appellant might present in the penalty phase.

The four-category self-assessment procedure employed by the trial court to death-qualify appellant's jury not only included erroneous definitions, but relied almost exclusively on jurors being able to accurately assess whether they held views which would substantially impair their ability to sit on the case. In short, Judge Perry's cursory and inadequate voir dire and his refusal to ask the kinds of questions designed to elicit disqualifying biases, deprived appellant of his right to fully question jurors in the areas that would enable him to effectively exercise his challenges for cause and denied him his right to an impartial jury under *Witherspoon* and *Witt*.[25] (See *Morgan v. Illinois, supra*, 504 U.S. at pp. 729-731.) Ultimately, the trial court's superficial and haphazard voir dire resulted in a jury that was not death qualified, in violation of appellant's right to a fair and impartial jury, a fair trial and a reliable penalty determination under the United States Constitution and its state counterparts. (U.S. Const., 6th, 8th & 14th Amends.)

Respondent's reliance on *People v. Hernandez* (2003) 30 Cal.4th 835, for the proposition that a "perfunctory" or "cursory" voir dire does not result in constitutional error because trial counsel may ask follow-up questions, is completely misplaced. First, unlike appellant here, the defendant in *Hernandez* never objected to the procedure being employed by

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[25] *Witherspoon v. Illinois* (1968) 391 U.S. 510; *Wainwright v. Witt* (1985) 469 U.S. 412.

the trial court. Second, and most importantly, in *Hernandez*, the trial court conducted a *thorough examination of each prospective juror regarding his or her views on the death penalty*, something that did not happen in appellant's case. *Hernandez* thus supports appellant's position that the trial court must assure proper questioning of each prospective juror on the issue of the death penalty, when the defendant has requested that these questions be asked. That happened in *Hernandez,* but did not happen here. In *Hernandez*, this Court described the proper procedure:

> Following a procedure recommended by this court in *Hovey v. Superior Court* [citation omitted], the court questioned the jurors individually and in sequestration. *After asking prospective jurors to describe their views on the death penalty, the court asked whether they would automatically convict defendant so they could get to the penalty stage or would automatically find the special circumstance allegations not true to avoid the question of penalty; whether they would in every case vote to impose the death penalty or would in every case vote to impose a sentence of life without possibility of parole; and whether they had moral, religious, or philosophical beliefs that would impair their ability to decide the case*. Counsel were then permitted to ask follow-up questions. There was no constitutional violation in this procedure.

(*People v. Hernandez, supra*, 30 Cal. 4th at p. 856 (emphasis added), disapproved on another ground in *People v. Riccardi* (2012) 54 Cal. 4th 758, 824.) Had the trial court followed the procedure outlined in *People v. Hernandez, supra, People v. Robinson, supra,* or *People v. Carter*, all of which were cited by respondent, the serious oversights that rendered the voir dire in this case inadequate could have been avoided.

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C. The Trial Court's Refusal To Use the Questionnaire, or to Orally Propound the Questions Appellant Requested, Deprived Appellant of His Right to Inquire About the Effect of More Than One Murder Conviction on Panelists' Ability to be Fair and Impartial

Appellant has also objected to the trial court's failure on voir dire to determine whether any prospective juror would vote invariably for the death penalty in cases where the defendant had been convicted of more than one murder. (See AOB 156.) Respondent has not addressed this error anywhere in its response. Once again, had the trial court simply honored appellant's request to use the jury questionnaire, this problem would have been avoided. Appellant's proffered question number 83 asked each panelist:

> Do you feel that the state should put to death everyone who:
> A. Kills another human being? Yes __ No __
> B. Is convicted of murder? Yes __ No __
> C. Is convicted of more than one murder? Yes __ No __

(2 CT 311.) In refusing to use the questionnaire, or to ask this particular question, the trial court rejected the most direct and reliable way of determining each panelist's view on this important subject. Although the trial judge had agreed to consider any "questions you want asked," if the questions were "in writing" and submitted to him in advance (A-1 RT 83), none of these questions propounded by appellant were ever asked.

This Court and others have recognized that the fact of a second murder conviction can have a powerful affect on a juror's ability to fairly consider both penalties in a capital case. (See e.g., *People v. Vieira* (2005) 35 Cal. 4th 264, 286 [multiple murder is an aggravating circumstance likely to be of great significance to prospective jurors]; *People v. Cash, supra,* 28 Cal.4th at p. 721[same]; *State v. Biegenwald* (N.J. 1991) 594 A.2d 172, 186

["knowing a defendant had killed before could cause an otherwise fair-minded person to disregard evidence offered in support of mitigating factors;] D. Baldus, G. Woodworth & C. Pulaski, *Equal Justice and the Death Penalty* 318-320 (1990) [reporting probability that death sentence will be imposed increased by 520 percent for each prior murder conviction].)

The obvious and well-documented power of a prior murder conviction to negatively impact a jury was not lost on the trial court. In a pretrial conference it ruled that evidence of appellant's prior murder conviction would not be revealed to the jury until after it had reached a verdict in the guilt phase of the trial. (1-A RT 77-78.) The trial court appropriately understood that the jury's knowledge of this prior conviction might well cause the jury to prejudge the guilt phase evidence and deprive appellant of his right to a fair guilt phase trial. However, the trial court failed to consider the impact of this evidence on the jury's penalty determination. For that reason, prospective jurors should have been asked, in general terms, whether a second murder conviction would cause them to vote, in all cases, for the death penalty.

In *People v. Carasi* (2008) 44 Cal. 4th 1263, this Court recognized that questioning each panelist *individually* about whether their penalty decision would be unduly influenced by the fact of a second murder might not be required if panelists were given another opportunity to consider that possibility. The Court noted that if the trial court initially instructs all panelists that the case involved a second murder, then at the time panelists provided answers to general death qualification questions, their answers would be given with the fact of a second murder already in mind. (*Id.* at p. 1287.) However, since the trial court in the instant case appropriately ruled

that the evidence of appellant's prior murder conviction should be kept from the jury until after the guilt decision (A-1 RT 77-78), panelists needed to be questioned, in general terms about their views of the appropriate penalty under various circumstances. Using the questionnaire, or reading the questions from it in open court to the prospective jurors, would have avoided the problem of telling panelists *directly* about the prior conviction, without compromising appellant's ability to learn how that fact might affect a panelist's ability to fairly judge this case. (See 2 CT 311 [question 83 C].)

Instead, in its voir dire, the trial court never addressed the topic of a second murder conviction, except when the topic just happened to arise on its own, during the questioning of prospective juror No. 0416.[26] (2 RT 519.) This brief interchange demonstrates very clearly what the cases and treatises on this subject have already documented: that jurors who believe they can fairly apply capital sentencing law often change their mind, sometimes dramatically, when presented with the circumstances of more than one murder conviction.

During the death-qualification segment, prospective juror No. 0416 volunteered the following information, without ever having been asked a question by the court:

> I would give great weight to mitigating factors and I would be inclined to give, even greater weight if this was a first or only offense, first or only murder. On the other hand, if it was a man like your example that caught four, I'd nail him.

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[26] This Court should note prospective juror No. 0416 was originally referred to as No. 4538 in the first version of the reporter's transcript. However, following record correction, 2 RT pages 519, 520, 532 and 533 were all corrected to reflect that certain references to prospective juror No. 4538 were to be changed to prospective juror No. 0416.

(2 RT 519.) Prospective juror No. 0416 was referring to an example the trial court had just given moments before, during a discussion with previous prospective juror No. 7691.[27] As it happened, No. 7691 was the only panelist who had identified himself as a "category two," automatic for the death penalty. In an apparent attempt to rehabilitate this panelist, the trial court gave the example of a man "convicted of killing four women on four different occasions." (2 RT 515-516.) Despite the number of murders, many jurors in that case rejected the death penalty after considering the mitigating evidence. While that example did not sway panelist No. 7691, it apparently *did have an impact* on one of the next panelists, No. 0416.

Initially, this panelist reported unequivocally that he would give "great weight to mitigating factors." However, he immediately modified that view by conceding that if the case involved more than one murder, as in the court's example, he would give *no weight to mitigating factors*. (2 RT 520.) While this panelist was later excused, as he should have been (2 RT 532), discovering his disqualification cannot be credited to the trial court's carefully-conducted voir dire. Rather, his disqualification only became evident because of an utterly serendipitous interchange initiated by the panelist himself, as a result of the trial court's attempt to rehabilitate the previous juror – the only juror who had identified himself as an automatic-

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[27] Prospective juror No. 7691 was the only panelist who admitted to being in "category two." After saying he was "for the death penalty" but did not think he could be fair because he would "strongly vote for it, " the trial court tried to rehabilitate him. (2 RT 515.) The court described a recent case with four victims. Although jurors believed they could vote for death, after hearing mitigating evidence most decided against the death penalty. (2 RT 516.) Still, No. 7691 agreed he was in "category two" because he would not consider mitigating evidence. (2 RT 516.)

death penalty juror. But for that exchange, panelist No. 0416 would have never considered, *much less revealed*, his disqualifying bias. The trial court would have simply accepted his initial, and quite emphatic, statement that he would give "great weight" to mitigating evidence.

This example demonstrates why it was so critically important for the trial court to spend more time with each panelist, exploring their feelings about the death penalty, particularly when the case involved a prior murder. While many panelists immediately categorized themselves as "fours" (people who would consider all of the evidence before making a decision), many of those same panelists might well have retracted their position, as did No. 0416, had they been queried about multiple murder convictions. The fact that only one other panelist, out of 110 prospective jurors, categorized himself as a "two" suggests that there were likely many others who should have been so categorized but were never discovered because of the trial court's superficial voir dire.

This example also demonstrates that it was critical to appellant's ability to select an impartial jury that he be permitted to identify jurors who could not fairly decide his case if they became aware of his prior murder conviction. The only special circumstance alleged in this case was his prior conviction for murder arising out of his involvement in a 1991 robbery-murder when he was still a juvenile. (See Argument VI, *infra*.) This was similar to the situation in *People v. Cash, supra,* 28 Cal.4th 703. In that case the defendant had killed his grandparents prior to being charged with capital murder. Cash sought to inquire during voir dire whether prospective jurors would vote automatically for the death penalty if the defendant had previously committed another murder. The trial court did not permit such an inquiry because the prior murders had not been expressly alleged in the

charging document.

On appeal, this Court held that the disallowance of the inquiry was reversible error. This Court confirmed that a prior murder was "a fact likely to be of great significant to prospective jurors," and that the trial court should have allowed voir dire on the subject.

> [T]he trial court created a risk that a juror who would automatically vote to impose the death penalty on a defendant who had previously committed murder was empanelled and acted on those views, thereby violating defendant's due process right to an impartial jury. (See *Morgan v. Illinois* [Citation.].) The trial court's restriction of voir dire "leads us to doubt" that defendant "was sentenced to death by a jury empanelled in compliance with the Fourteenth Amendment."

(*People v. Cash, supra*, 28 Cal.4th at p. 723.)

The trial court herein repeatedly made clear that it would be handling the entire voir dire on its own, that it would individually question every panelist on the death penalty, and that appellant's input would only be solicited at the conclusion of the entire process for each panel. In fact, this is how the trial court proceeded. The trial court did not ask the parties if they had "any follow-up questions or challenges for cause" until the very end of the general voir dire questions, long after the panelists had been deemed death-qualified by the trial court. (1 RT 477; 2 RT 571.)

It is impossible to determine from this record whether any of the persons who were ultimately seated as jurors in this case held the disqualifying view that mitigating evidence would be of no value, or that the death penalty was the only appropriate penalty, in the case of a defendant who had committed more than one murder. Under those circumstances, where it cannot be determined the effect of the error, the trial court's error in refusing to pose this question to appellant's jurors

"cannot be dismissed as harmless." Reversal of appellant's death judgment is required. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 739; *People v. Cash*, *supra*, 28 Cal.4th at p. 723.)

D. The Trial Court's Insistence on its Own Manner of Voir Deprived Appellant of His Right to Identify Jurors Whose Opinion of Gangs Would Disqualify Them From Jury Service

As with the death qualification questions, the trial court's general voir dire often relied entirely on the prospective jurors themselves coming forward with information, rather than making the specific, and necessary, inquiries. This flawed procedure was most apparent in the court's general questioning with respect to gangs and gang membership. Once again, had the trial court been willing to use appellant's juror questionnaire, this area would have been satisfactorily explored. The questionnaire included a series of questions about panelists' contact with gangs, and whether gang membership might affect a juror's ability to serve on this case. (See 2 CT 312, questions 85-87.) However, the trial court's refusal to use the questionnaire meant that appellant was entirely dependent upon the rushed and haphazard process that the trial court employed. As with the rest of the jury selection process, the trial court was only comfortable with handling the matter entirely on its own:

> The normal voir dire I do on gangs is I ask if anybody's heard of these particular gangs. And I then ask, does anybody know anybody who's a gang member? Have they had any good or bad experiences with people that they thought were gang members? And then I will ask everyone about their feelings. If they're already in a neighborhood where there's gang activity, what their concerns are. I will also make the point that just because someone may be a gang member does not mean that they've committed a crime. And I will also ask if the fact that the victim may have been a gang member if

> anybody feels it's okay to shoot somebody who's a gang member. So I try to be balanced on that, but we'll spend some time with it.

(1-A RT 81-82.) Had the trial court actually carried out the voir dire that it described for the parties ahead of time, appellant would likely have been satisfied with the process. However, the description did not match what actually took place.

Although the initial questions posed to the first jurors were reasonably adequate, the process quickly deteriorated into the same types of short-handed, meaningless interchanges that plagued the rest of the voir dire. Questioning that started as "[I]f the evidence persuades you that Mr. Salazar was a member of one of these gangs so-called, is that going to be enough just of itself to vote guilty?" (1 RT 429), soon ended up as, "Do you know anybody in a gang?" (1 RT 444.) If a juror said they did not, the trial court was satisfied that they held no disqualifying attitudes. However, simply asking panel members if they knew anyone in a gang, was obviously not sufficient for determining, even as a preliminary matter, whether a particular juror might hold view about gangs or gangmembers which would make it impossible for appellant, an admitted gang member, to receive a fair trial.

Knowing a gang member personally might have little bearing on whether that person would harbor disqualifying biases against a criminal defendant who belongs to a street gang. In fact, the opposite may be true. Persons who only know gang members from what they have seen or heard in the news might be among the most biased, and least able to treat gang-related cases fairly. Appellant had a right to have this area of inquiry – how panelists felt about gangs and gang-related activity – explored in much

greater detail than the trial court was willing to indulge. The trial court gave short shrift to these, and many other, topics that directly affected appellant's case. Again, appellant preserved this issue by asking the court to use the jury questionnaire, by asking the trial court to slow down the process so that appellant could keep track of what was going on, and by objecting to the superficial manner of the voir dire, that did not inquire about panelists' views with any degree of depth.

The manner in which the trial court conducted the voir dire in appellant's case deprived appellant of his state and federal right to a fair and impartial jury in both the guilt and penalty phases of the trial, his state and federal right to due process and his right to a reliable guilt and penalty determination. (U.S. Const., 5th, 6th, 8th, 14th Amends.; Cal. Const., art. I, §§ 1, 7, 15, 16, 17.) The trial court's abuse of discretion in failing to conduct a constitutionally adequate voir dire has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution. Appellant is entitled to a new guilt and penalty trial.

E. The Trial Court's Inadequate Voir Dire Led to the Improper Removal for Cause of a Prospective Juror Who Merely Stated His Personal Opposition to the Death Penalty

Appellant objected to the trial court's removal for cause of a prospective juror who merely stated his opposition to capital punishment, without more. (See AOB 157.) As with most of the problems raised by appellant regarding the jury selection process, respondent's brief does not address this critical flaw in the voir dire at all. Once again, had the trial court used appellant's written questionnaire, every panelist would have been thoroughly examined about their view of the death penalty and whether their opposition to capital punishment made it impossible for them

to serve as jurors in this case. The trial court rejected this more complete and organized process, in favor of the far more abbreviate process which simply required panelists to categorize themselves with one of the four numerical categories. In the opening brief, appellant explains why those category descriptions were deficient. (AOB 132-140; 157-166.) In addition, the court's short-hand method often failed to scratch beneath the surface to discover whether the juror actually held a disqualifying view.

For example, initially the court defined category one as "people who do not believe in the death penalty." (1 RT 297.) While many who categorized themselves as "a one" [against the death penalty] were later asked to confirm that they could never vote for the death penalty under any circumstances, in at least one case a juror was excused simply on the basis of the following voir dire:

> THE COURT: Our next juror, your name, sir?
> PROSPECTIVE JUROR NO. 8759: 8759.
> THE COURT: Juror No. 8759?
> PROSPECTIVE JUROR NO. 8759: My vote is not for the death penalty.
> THE COURT: I am sorry?
> PROSPECTIVE JUROR NO. 8759: My vote is not for the death penalty. *I don't believe in the death penalty.*
> THE COURT: *That is what we want to know, okay.*

(2 RT 529-530, emphasis added.) After only this brief exchange, the trial court moved on to question the next juror. Later, without going back to inquire further of prospective juror No. 8759, the trial court added him to a group of panelists who would be excused because their "views on the death penalty would substantially impair their ability to be jurors in this case." (2 RT 532.)

The trial court's removal for cause of prospective juror No. 8759 simply because he did not believe in the death penalty, without more, requires reversal of appellant's death sentence. (*Wainwright v. Witt, supra*, 469 U.S. at p. 424; *Witherspoon v. Illinois* (1968)391 U.S. 510; *People v. Stewart* (2004) 33 Cal.4th 425. While prospective juror No. 8759 may have felt that he could not impose the death penalty under any circumstances, he was never asked that question, and was simply excused based on his statement that he did not *believe* in the death penalty. (2 RT 533.) His unsolicited statement, "my vote is not for the death penalty," as well as the court's response, "I am sorry," suggested there may have been some confusion. However, the juror's only response was that he did not believe in the death penalty, an insufficient ground for his excusal for cause. Follow-up questioning "was essential to assess whether the juror could overcome personal reservations and properly weigh and consider the aggravating and mitigating factors." (*People v. Avila, supra*, 38 Cal.4th at p. 530, citing, *People v. Stewart, supra*, 33 Cal.4th at p. 447.)

As this Court explained in *People v. Stewart, supra*, 33 Cal.4th at p. 446, the mere fact a prospective juror states a personal opposition to the death penalty does not permit the court to automatically disqualify him from the jury. Even jurors who firmly believe that the death penalty is wrong may serve as capital jurors "so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1983) 476 U.S. 162, 176.) Similarly, in *People v. Wilson* (2008) 44 Cal. 4th 758, 785-86, this Court held: "Neither *Witherspoon* nor *Witt*, . . . nor any of our cases, requires that jurors be automatically excused if they merely express personal opposition to the death penalty. The real question is whether the juror's attitude will "

'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " (*Id.*, citing *People v. Kaurish* (1990) 52 Cal.3d 648, 699, quoting *Wainwright v. Witt, supra,* 469 U.S. at p. 424, fn. omitted.)

While trial counsel did not pose an objection to the removal of this panelist, trial counsel had no way of knowing at the time No. 8759 responded to the trial court's inquiry, that the court would later be including this juror in a larger group of panelists who were removed for cause. The trial court gave no indication at the time of the first exchange, that it considered No. 8759's belief about the death penalty to be a disqualifying view. It was not until this panelist was removed, as part of a larger group, that appellant would have been on notice of the court's position. By then, there was little opportunity to process what had taken place. This is precisely why the jury questionnaire should have been used. Having written responses from each panelist in hand prior to the voir dire, would have enabled the parties, as well as the trial court, to prepare for any necessary follow-up questions. The trial court's method provided insufficient notice to appellant that a particular panelist's responses would later trigger the trial court's removal of that panelist for cause.

Appellant objected to the trial court's decision to dispense with written questions; he also objected to the court's insistence on proceeding through voir dire so quickly that it was simply not possible to make intelligent decisions about panelists' individual qualifications. As this Court pointed out in *People v. Heard* (2003) 31 Cal.4th 946, unlike other tasks required of the trial court that call for quick and difficult decisions under unexpected circumstances, "the conduct of voir dire in a death penalty case is an activity that is particularly susceptible to careful planning

and successful completion." (*Id.* at p. 966.) Appellant repeatedly asked the trial court to simply use the prepared questions that had been specifically tailored for this case and approved by both sides. The result was the removal of a prospective juror simply because he did not "believe" in the death penalty. That decision requires automatic reversal of appellant's death sentence:

> In view of the extremely serious consequence – an automatic reversal of any ensuing death penalty judgment – that results from a trial court's error in improperly excluding a prospective juror for cause during the death-qualification stage of jury selection, we expect a trial court to make a special effort to be apprised of and to follow the well-established principles and protocols pertaining to the death-qualification of a capital jury. *As the present case demonstrates, an inadequate or incomplete examination of potential jurors can have disastrous consequences as to the validity of a judgment.* The error that occurred in this case – introducing a fatal flaw that tainted the outcome of the penalty phase even before the jury was sworn – *underscores the need for trial courts to proceed with special care and clarity in conducting voir dire in death penalty trials.*

(*People v. Heard, supra*, 31 Cal. 4th at pp. 966-967, emphasis added.) Appellant's death sentence must be reversed.

CONCLUSION

For all of the foregoing reasons and those stated in appellant's opening brief, appellant requests that this Court reverse his conviction and death sentence.

Dated: December 23, 2013

Respectfully submitted,
MICHAEL J. HERSEK
State Public Defender

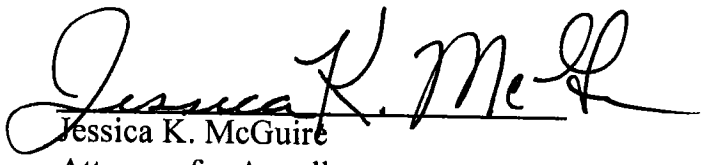
Jessica K. McGuire
Assistant State Public Defender

Ellen J. Eggers
Deputy State Public Defender

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630 (b)(2)

I, Jessica K. McGuire, am the Deputy State Public Defender assigned to represent appellant Magdaleno Salazar in this automatic appeal. I have conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 30,755 words in length excluding the tables and this certificate.

Dated: December 23, 2013



Jessica K. McGuire
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Magdaleno Salazar**
Case Number: **Supreme Court No. Crim. S077524**
Superior Court No. BA 081564

I Saundra Alvarez, declare that I am over 18 years of age, a citizen of the United States, and not a party to the within cause; my business address is 770 L Street, Suite 1000, Sacramento, California 95814. I served a copy of the following document(s):

APPELLANT'S REPLY BRIEF

by enclosing them in an envelope and
/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
/ **X** / **placing** the envelope for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelope was addressed and mailed on December 23, 2013, as follows:

Mr. Magdaleno Salazar
PO Box P-34200
San Quentin State Prison
San Quentin, CA 94974

Ryan Smith
Attorney General's Office
300 S. Spring Street, 5th Floor
Los Angeles, CA 90013

Los Angeles Superior Court
Clerk of Appeals
210 W. Temple Street, Room M-3
Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 23, 2013, at Sacramento, California.

Saundra Alvarez