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S082776

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent v. ENNIS REED, Defendant and Appellant	S082776 Los Angeles County Superior Court No. TA037369-01

SUPREME COURT
FILED

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Deputy

APPELLANT'S REPLY BRIEF

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

HONORABLE JOHN J. CHEROSKE, JUDGE

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by appointment of the
California Supreme Court

DEATH PENALTY

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

STATE CASES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

INTRODUCTION

Defendant and appellant Ennis Reed hereby replies to certain points made by respondent. Appellant believes that a further discussion of these points will be helpful to the Court in deciding the issues presented. Appellant's failure to discuss any particular point means only that he has concluded that no further discussion is necessary and should not be misconstrued as an abandonment, waiver, or concession. (*People v. Hill* (1992) 3 Cal. 4th 959, 995, footnote 3)

Because respondent extensively failed to address important facts of the case, appellant has attached an Appendix to alert the court to specific areas and facts which respondent has omitted or distorted in its brief. Many of these omissions and distortions will also be addressed in the body of this brief.

ARGUMENT

I. BY REFUSING TO GRANT APPELLANT'S MOTION TO CONTINUE THE TRIAL TO ALLOW WITNESS JOE GALINDO TO TESTIFY, THE TRIAL COURT UNREASONABLY RESTRICTED APPELLANT'S ABILITY TO PRESENT HIS DEFENSE IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AND TO PRESENT A DEFENSE, AND PRECLUDED A FAIR AND REASONABLE TRIAL REQUIRED BY DUE PROCESS AND THE EIGHTH AMENDMENT

Respondent disagrees the trial court violated appellant's federal constitutional rights under the Sixth, Eighth and Fourteenth Amendments when the court refused to grant his motion to continue the guilt phase trial to permit witness Joe Galindo to testify. (RB 20-27.) Respondent is wrong.

A. Respondent Omits Material Facts About the Motion

Respondent omits the following material facts about appellant's motion to continue the guilt phase trial. Joe Galindo was a member of the National Guard. Because Galindo was suddenly either deployed or moved to a location outside of California for training, it was impossible for the defense to serve Galindo personally. Even so, trial

counsel caused a subpoena to be properly issued and sub-served, and continued in his attempts to obtain Galindo's presence. (20CT 5650.) Shortly before trial, a National Guard colonel advised the defense investigator he believed Galindo would be made available to come to court as a witness. (20CT 5650.) The trial court made no inquiry regarding the estimated length of Galindo's deployment, nor as to any possible arrangements to secure his testimony without significantly delaying the trial.

The case proceeded to trial without Galindo's testimony that a much taller and heavier man than appellant shot Mendez and Vasquez. His testimony would have corroborated the other defense eyewitness – Slaughter – who witnessed the shooting, saw only one man, and also described a significantly taller, heavier man than appellant. Without Galindo's testimony, the prosecutor obtained a conviction on those counts. However, even without Galindo's testimony, that jury was unable to reach a verdict as to penalty, with the jury split 7 to 5 in favor of life without possibility of parole. (4RT 795-796.)

Galindo returned in time to testify at the retrial of the penalty

phase. (10CT 2845-2846; 6RT 1126-1132.) Galindo testified he had just left Tacos el Unico and returned to the front porch of his girlfriend's house down the street when he heard gunshots and saw a muzzle flash. (6RT 1127-1129.) Galindo looked back at the taco stand and saw a lone black man with his right arm up. (6RT 1128-1129, 1132-1134.) The shooter – a "stocky" man wearing dark pants, a checkered shirt worn outside his belt, and a black baseball cap – ran past him at a distance of about 53 feet. (6RT 1129-1130, 1132-1137.) Galindo – who is 6'1" tall and weighs 204 pounds – observed appellant in court and stated appellant is smaller than the man he saw, and was not the shooter at Tacos el Unico. (6RT 1130-1131.) The shooter was at least as tall as Galindo, or taller. (6RT 1132.)

Respondent omits the critical fact that, following Galindo's testimony at the penalty phase retrial, the deliberating jury inquired as to whether it could consider its doubt that appellant was guilty of one of the murders (10CT 2887), but the court refused to instruct the jury on lingering doubt. (6RT 1241-1244, 1319-1320.)[1] The jury returned a

---

[1]This is error is addressed in Appellant's Argument VII, *infra.*

verdict of death. Appellant's motion for new trial, based on the denial of the continuance, was also denied. (20CT 5643-5650; 6RT 1335-1336.) The motion alleged that the trial court violated appellant's right to a fair trial and due process when it denied him a continuance in order to present witness Joe Galindo's testimony at trial. (20CT 5644.)

Respondent omits all of the details regarding appellant's motion for new trial. (6RT 1334-1336.) Respondent omits Schmocker's argument:

> Yes, I have a comment in regards to Mr. Knowles' brief.
>
> Mr. Knowles points out that at the second penalty phase the jury did hear the testimony of Mr. Galindo and apparently found that it did not raise a residual doubt or lingering doubt in their mind. This puts us, though, in a – I think in a bit of a difficult position. The Supreme Court, having ruled on this issue of whether or not they should be instructed in regards to lingering doubt, has dictated basically that the trial courts not do so, although in this case it appears to me that it would have been appropriate to define it for them for the purpose of considering Mr. Galindo's testimony.
>
> Secondly, the problem that occurs in a retrial – and I think it's probably endemic to a retrial of a penalty phase – is the situation the jury is put in where, having not heard all of the evidence in regards to the guilt phase, they are

put in a difficult position of determining what a residual or a lingering doubt is or what it could possibly have been.

I'd ask the court to consider – seriously consider giving the defendant a new trial in regards to the guilt phase on this one – on these two counts.

(6RT 1334-1335.)

Respondent omits the trial court's ruling:

The court finds at this time that there was insufficient evidence that the jury would have a reasonable doubt, and I base that on the totality of all the other evidence, that this defendant was the person who shot both Mr. Mendez and Miss Vasquez.

The testimony from Mr. Galindo was at variance with the witness statements that he had given to the police. It was a situation where he only described a male black, six-foot-two, 190 to 200 pounds, wearing a blue or black cap, with something black in his hand running by his house. This was some time after the shots were heard. His testimony was that it was dark; it was some 53 feet away, that he did not see the man's face.

He did, however, pick out someone in a six-pack as photo number 5, and he said, "I picked him out based on the size of the person," but there was nothing to indicate that he had seen the person's face or anything further.

The conflicts were then that he evidently told the police that he saw two people, and he described the clothing of one as a checkered shirt and the other as a long black coat. That is not the testimony that he gave at the

time of his appearance here in this court.

> The court finds that the defendant's right to a fair trial was not denied. And the motion for a new trial is denied.

(6RT 1335-1336.)

Respondent also omits the court's failure to consider the second penalty phase jury's question: "If the jury agrees that 1 of the cases presented warrants the death penalty, however one of the cases contains some doubt, according to the instructions, is this sufficient for awarding [sic] death?" (10CT 2887.) The court also failed to consider his answer to that question: "I have met with the lawyers, and the answer as best we can give you is as follows: ¶ That all things considered in this case, in the context of your question, the jury still may choose which of the two penalties is appropriate in this case. ¶ *The answer is yes.* (6RT 1319-1320 [emphasis added].)

B. The Refusal to Grant Appellant a Continuance so He Could Present an Exculpatory Witness at the Guilt Phase Was Federal Constitutional Error Under *Chambers v. Mississippi* (1973) 410 U.S. 284 and *Cudjo v. Ayres* (9th Cir. 2012) 698 F.3d 752

1. The Trial Court Erred by Declining to Grant Appellant a Continuance, and Then by Refusing to Grant Him a New Guilt Trial on the Tacos el Unico Counts

This is a capital case, which requires heightened due process reliability. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 340, 105 S.Ct. 2633, 2645, 86 L.Ed.2d 231; *Beck v. Alabama* (1980) 447 U.S. 625, 637–638, 100 S.Ct. 2382, 65 L.Ed.2d 392.) Accordingly, this Court should not be so rigid as to limit review to the circumstances his trial counsel argued during his motion, especially since the trial court was already aware of the history of the case at the time it denied the continuance.

Appellant contends the trial court unreasonably denied his request for a continuance – and his motion for new trial based on that denial – under circumstances that amounted to exclusion at the guilt phase of the material exculpatory testimony of Joe Galindo regarding the misidentification of appellant as the shooter in the Tacos el Unico

incident. The trial court's refusal to grant the continuance so the defense could obtain Galindo's presence at the guilt phase, and subsequent refusal to grant a new trial on the Tacos el Unico counts was contrary to established United States Supreme Court precedent at that time: specifically *Chambers v. Mississippi, supra,* 410 U.S. 284.

Respondent disagrees the effective exclusion of Galindo's testimony at the guilt phase amounts to federal constitutional error (RB 20), but does not address appellant's argument in this regard. Instead, respondent attacks appellant's claim as simple state law error, inviting this Court to apply the more lenient state law harmless error analysis. (RB 22-27.) This Court must, however, consider appellant's federal constitutional right to present a defense.

The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment clearly guarantee a criminal defendant the right to present a defense which includes the right to present witnesses favorable to the defense. (*Taylor v. Illinois* (1988) 484 U.S. 400, 408, 108 S.Ct. 646, 652, 98 L.Ed.2d 798; *Washington v. Texas* (1967) 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019 (1976); *Chambers, supra,* 410 U.S. at

302, 93 S.Ct. at 1049.) In *Washington v. Texas*, the Court stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, *he has the right to present his own witnesses to establish a defense*. This right is a fundamental element of due process of law.

(388 U.S. at 19, 87 S.Ct. at 1923 [emphasis added].) Similarly, in *Chambers*, the Court stated "the rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers, supra*, 410 U.S. at 295–296, 93 S.Ct. at 1046. The *Chambers* Court emphasized that the denial or "significant diminution" of these rights "calls into question the ultimate integrity of the fact finding process and requires that the competing interest be closely examined." *Ibid.*

Although "[t]he right to present witnesses is of critical importance ... it is not absolute. In appropriate cases, the right must yield to other legitimate interests in the criminal trial process."

(*Chambers, supra,* 410 U.S. at 295, 93 S.Ct. at p. 1046.) Specifically, "[i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id.* at 302, 93 S.Ct. at 1049. However, these procedural and evidentiary rules of exclusion "may not be applied mechanistically to defeat the ends of justice." *Ibid.* "Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " (*United States v. Scheffer* (1998) 523 U.S. 303, 118 S.Ct. 1261, 1264, 140 L.Ed.2d 413 [quoting *Rock v. Arkansas* (1987) 483 U.S. 44, 56, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37].)

The facts of this case must be considered carefully to determine whether the constitutional right to present a defense has been violated by the exclusion of evidence. Generally, the analysis should consider whether: (1) the excluded evidence is critical to the defense; (2) the evidence bears sufficient indicia of reliability; and (3) the interest supporting exclusion of the evidence is substantially important. (See

Chambers, supra, 410 U.S. at 298–301, 93 S.Ct. at 1047–1049.)

In ruling on appellant's motion for new trial, the trial court determined Galindo's testimony would not have substantially bolstered appellant's defense theory that he was not the Tacos el Unico shooter because Galindo's statements to the police conflicted with his testimony at the second penalty phase trial and Galindo did not see the shooter's face. (6RT 1335-1336.) This was error because Galindo's testimony had substantial probative value, raised the requisite reasonable doubt regarding a "highly material" issue in the case – the identity of the shooter – and was highly necessary because appellant was convicted based on uncorroborated, unreliable and highly manipulated eyewitness identification. (See *Cudjo v. Ayres, supra,* 698 F.3d 752, 762-763.)

The trial court's ruling on the motion for new trial was error in part because it was the jury's province to resolve the conflicts in Galindo's prior statements and to determine whether Galindo's testimony was credible. United States Supreme Court precedent makes clear that questions of credibility are for the jury to decide. (See *United*

States v. Bailey (1980) 444 U.S. 394, 414, 100 S.Ct. 624, 62 L.Ed.2d 575 ["The Anglo–Saxon tradition of criminal justice embodied in the United States Constitution ... makes jurors the judges of the credibility of testimony offered by witnesses. It is for them, generally, ... to say that a particular witness spoke the truth or fabricated a cock-and-bull story."]; see also *Washington v. Texas* (1967) 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) [discussing the right to offer witness testimony to the jury].) Accordingly, the trial court erred by analyzing Galindo's credibility when determining whether to grant appellant a new trial based on the trial court's refusal to grant a reasonable continuance to obtain Galindo's testimony at the guilt phase.

2. The Error Was Not Harmless Beyond a Reasonable Doubt

Where a Sixth Amendment right to a fair trial and a Fourteenth Amendment due process violation are charged, this court must apply the *Chapman* standard of prejudice. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Accordingly, to affirm, this Court must be able to declare a belief that the error was harmless beyond a reasonable doubt. (*Ibid.*)

To do so, the court must find that "'the error complained of did not contribute to the verdict obtained'" – because it was "unimportant in relation to everything else the jury considered on the issue in question." (*People v. Flood* (1998) 18 Cal.4th 470, 494, quoting *Yates v. Evatt* (1991) 500 U.S. 391, 403.) As the United States Supreme Court held in *Sullivan v. Louisiana* (1993) 508 U.S. 275, "Harmless-error review looks . . . to the basis on which 'the jury actually rested its verdict.' [Citation.] The inquiry, in other words, 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." (*Id.* at p. 279.)

Galindo's testimony was crucial to appellant's defense on the only issue in the Tacos el Unico counts – the identity of the shooter. There was no motive for the Tacos el Unico shooting, and no physical evidence linked appellant to the crime. The prosecution case rested entirely on the testimony of Mendez and the reliability of his identification of appellant as the shooter. Two eyewitnesses, Foster Slaughter and Joe Galindo, described a much taller and heavier man

than appellant as the shooter. Mendez, the one prosecution witness, initially described a taller, heavier man as the shooter, but his description changed over time. Mendez was subjected to two suggestive identification procedures and viewed appellant sitting as the sole defendant at counsel's table at the preliminary hearing, cementing Mendez's belief that appellant was the "devil" who had killed his wife. No expert testified as to the unreliability of eyewitness identifications. In order to raise a reasonable doubt, the defense had to counter Mendez's emphatic identification of Reed as the shooter. With only Slaughter's testimony regarding the physical characteristics of the shooter, the jury could easily be swayed by Mendez's passion. A second eyewitness whose description of the fleeing shooter closely matched that of Slaughter would have added much weight to Slaughter's description.

Galindo's testimony cannot fairly be characterized as "cumulative." Galindo's testimony expanded upon Slaughter's testimony and provided additional facts not offered by any other witness. Slaughter and Galindo observed the shooter from different

angles and during different stages of the incident. Slaughter observed the shooter standing or walking at the scene of the shooting in the parking lot at the corner of Long Beach Boulevard and Glencoe, and saw him – from the back – run out of the parking lot and around the corner, to Glencoe. (3RT 569-576, 579-580.) Galindo observed the shooter from the front and side as the man fled along Glencoe in the direction of Temple Street. (6RT 1128-1129, 1136-1137; People's Exhibit 1.) These different angles and sequences gave the two witnesses distinctly different opportunities to observe the clothing of the shooter and his build. Slaughter described the man as wearing a puffy, knee-length black jacket, but he was not sure whether the jacket was zipped up. (6RT 1149-1150, 1153, 1155-1156.) Slaughter could not see the man's shirt or his upper body. (3RT 578-579.) Galindo described the shooter as wearing a checkered shirt, but he could not recall describing a jacket to the police. (6RT 1129-1130, 1132-1137.) The jurors could reasonably have inferred that when Slaughter observed him, the shooter was wearing an unzipped jacket, and that the checkered shirt did not become visible until the shooter was running away and the

jacket flapped open as he ran. The jurors could also have reasonably inferred that the jacket made more of an impression on Slaughter while the shirt made more of an impression on Galindo, due to the sequence of events and their opportunity to observe. The jurors could also have reasonably determined that two eyewitnesses who were not emotionally invested in the shooting observed and remembered details about the shooter that Mendez could not – including the fact that the shooter was much taller and heavier than appellant. These unemotional and unbiased observations undermined the reliability of Mendez's identification of appellant as the killer, and both of them were necessary to the defense.

Galindo's testimony was also crucial to the defense because it expanded upon Slaughter's somewhat equivocal description of the shooter as a man who was larger than appellant. (6RT 1150 [shooter was "thicker than [Reed] arm-wise"; shooter looked like he had been lifting weights; was "solid in the arms"]; 6RT 1149-1150; [shooter was 5'9" to 6 feet tall and weighed 190 to 200 pounds]; 6RT 1155 [but Slaughter could not see the man's shirt or his upper body].) Because

Galindo saw the man running in his direction and apparently saw the jacket blowing open as the man ran, the jury could infer that Galindo had a better opportunity to view the shooter's build than did Slaughter, whose opportunity to observe was impeded by the puffy jacket. Clearly the absence of Galindo's testimony at trial prejudiced appellant, as it clarified and bolstered Slaughter's ambiguous testimony that the perpetrator of the Mendez shooting was considerably taller and heavier than appellant.

Additionally, the fact that Galindo was a member of the National Guard might have made his testimony more credible in the eyes of the jury than that of Slaughter, who was a biker. The jury might reasonably have believed that Galindo, as a National Guardsman, was the more credible and reliable witness due to his military training. Galindo was the only defense witness who testified definitively that appellant was not the shooter. The first penalty jury did not hear Galindo's testimony and reached a stalemate; the second penalty jury eventually reached a verdict after instruction from the trial court, but had a question about whether death was still on the table.

The prosecution's case was far from compelling. Eyewitness identifications are notoriously unreliable, especially where they have been manipulated or even created by suggestive identification techniques. (See AOB pp. 76-109.) There was no physical evidence linking appellant to the Tacos el Unicos crimes.

Galindo's testimony at the guilt phase would have greatly increased the likelihood of the guilt phase jury's entertaining a reasonable doubt of defendant's guilt. That jury could not reach a penalty verdict, splitting 7 to 5 in favor of life without possibility of parole.

The trial court's refusal to grant appellant a reasonable continuance, effectively resulting in the exclusion of Galindo's testimony at the guilt trial, precludes a finding the trial court's error in denying the continuance and the motion for new trial based on that denial was harmless beyond a reasonable doubt.

C. The Trial Court Also Abused Its Discretion Under State Law in Refusing Appellant a Continuance to Obtain the Presence of a Material Witness in the Murder of Amarilis Vasquez and The Attempted Murder of Carlos Mendez

1. The State Law Standard

The decision whether or not to grant a continuance of a matter rests within the sound discretion of the trial court. (*People v. Beeler* (1995) 9 Cal.4th 953, 1003; *People v. Howard* (1992) 1 Cal.4th 1132, 1171.) The party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion. (*People v. Beeler, supra,* 9 Cal.4th at p. 1003.) Under this state law abuse of discretion standard, discretion is abused only when the court exceeds the bounds of reason, all circumstances being considered. (See *People v. Jones* (1998) 17 Cal.4th 279, 318; *People v. Froehlig* (1991) 1 Cal.App.4th 260, 265.)

Courts have emphasized that the "arbitrary and capricious" pejorative boilerplate often used in describing the abuse of discretion standard is misleading, since it implies that in every case where a court is reversed for abuse of discretion, its action is utterly irrational. "Although irrationality is beyond the legal pale it does not mark the

legal boundaries which fence in discretion." (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297.) The scope of discretion has always resided in the particular law being applied, and an action that transgresses the confines of the applicable principles of law is outside the scope of discretion and therefore an abuse of discretion. And, as a more recent case notes, a court's discretion is subject to the limitations of the legal principles governing the subject of its actions, and to reversal where no reasonable basis for the action is shown. (*People v. Jacobs* (2007) 156 Cal.App.4th 728, 738.) Thus, "a court abuses its discretion when it acts contrary to law." (*In re Anthony M.* (2007) 156 Cal.App.4th 1010, 1016.) Even in abuse of discretion cases, an appellate court may conduct an independent review where it is in as good of a position as the trial court to decide the issue. (*Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, 1024-1027.)

2. Respondent Omits all of the Proceedings Leading Up to the Request

Respondent omits all of the timeline set out at pages 48 through 57 of appellant's Opening Brief, demonstrating the defense was in

contact with witness Galindo as early as September 2, 1998, and that Galindo remained available during all of the prosecution-created delays – including protracted indecision by the District Attorney as to whether to seek the death penalty. It was not appellant's lack of due diligence that caused Galindo's absence during the guilt phase trial and first penalty trial. Appellant asks this Court to review and consider that timeline, even though his counsel did not repeat it to the trial court during the motion to continue.

3. Respondent Omits Some of the State Law Governing The Good Cause Showing for a Continuance

Respondent fails to address *Jennings v. Superior Court* (1967) 66 Cal.2d 867, which held: "The absence of a material witness for the defense ... has long been recognized as a ground for continuance ... [when] the proposed testimony [is] material and cannot be elicited from another source." (*Id.* at p. 876.) Respondent also fails to address *People v. Maddox* (1967) 67 Cal.2d 647, which held that while the trial judge has a certain amount of discretion in determining whether a continuance is appropriate, "that discretion may not be exercised in

such a manner as to deprive the defendant of a reasonable opportunity to prepare his defense." (*Id.* at p. 652). Respondent also fails to address *Ungar v. Sarafite* (1964) 376 U.S. 575, which held "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend ... an empty formality." (*Id.* at p. 589.) Respondent also omits any reference to *White v. Ragen* (1945) 324 U.S. 760, which held "it is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel." (*Id.* at p. 764.)

Respondent ignores all of the cases appellant cited in his Opening Brief where courts found error when the trial judge denied a defendant's request for a continuance for the purpose of obtaining relevant testimony from an otherwise unavailable witness. (*Jennings v. Superior Court, supra,* 66 Cal.2d 867, 876 [writ of prohibition granted when court erroneously denied four-day continuance at preliminary hearing to obtain testimony of witness who was present with defendant at crime scene and could be cross-examined about defendant's intent]; *People v. Buckey* (1972) 23 Cal.App.3d 740, 744 [error in unlawful

possession case to deny request for continuance to obtain testimony of doctor who had allegedly prescribed controlled substance]; *Bennett v. Scroggy* (6th Cir.1986) 793 F.2d 772, 774-775 [habeas corpus granted where trial judge refused to grant continuance to secure presence of witness who would testify that manslaughter victim had a reputation for violence]; *Hicks v. Wainwright* (5th Cir.1981) 633 F.2d 1146, 1148-1150 [it was error to deny continuance to obtain testimony of expert witness concerning insanity defense, notwithstanding trial court's busy schedule]; *Johnson v. Johnson* (W.D. Mich.1974) 375 F .Supp. 872, 874 [habeas corpus granted when trial judge denied continuance for out-of-state alibi witness, and prosecution had not asserted any special prejudice resulting from delay]; *United States v. Flynt* (9th Cir.1985) 756 F.2d 1352, 1359-1360 (modified on other grounds *United States v. Flynt, supra,* 764 F.2d 675) [contempt order vacated where trial court had denied defendant's request one day prior to hearing for a 30-day continuance for the purpose of obtaining psychiatric examinations and possible expert witness testimony]; *United States v. Powell* (9th Cir.1978) 587 F.2d 443, 446 [reversible error to deny continuance to secure

presence of overseas witness whose exculpatory testimony would not be cumulative.])

Respondent also ignores the overriding consideration that, while the relevant factors must be evaluated on a case-by-case basis, ultimately the question becomes "whether substantial justice will be accomplished or defeated by a granting of the motion." (*People v. Laursen* (1972) 8 Cal.3d 192, at p. 204.) Further, in order for a continuance to be warranted, the defendant need not show that the proffered testimony is "vital," only that it is material. (*Jennings v. Superior Court, supra,* 66 Cal.2d 867, at p. 876.)

Respondent relies upon *People v. Beames* (2007) 40 Cal.4th 907, 920, for the proposition that "[t]he party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion, and an order denying a continuance is seldom successfully attacked." *Beames* is distinguishable from this case, in that the continuance sought there was not to obtain a critical witness, but to conduct a survey related to a motion to change venue to demonstrate that the media coverage of the pretrial proceedings and another defendant's

just-concluded separate trial had tainted the jury pool. The Supreme Court held that, since the defendant did not actually move for a change of venue, but rather, he moved for a seven-week continuance on the eve of trial in order to explore the need for a venue change, the continuance was not justified. Here, the situation was entirely different – the defense sought to present a key witness who would testify that appellant was not the man who committed the crimes at Tacos El Unicos.

Respondent also ignores the overriding consideration that, while the relevant factors must be evaluated on a case-by-case basis, ultimately the question becomes "whether substantial justice will be accomplished or defeated by a granting of the motion." (*People v. Laursen, supra,* 8 Cal.3d 192, at p. 204.) Further, in order for a continuance to be warranted, the defendant need not show that the proffered testimony is "vital," only that it is material. (*Jennings v. Superior Court, supra,* 66 Cal.2d 867, at p. 876.)

4. Respondent's Argument

Respondent argues the trial court did not abuse his discretion by

denying appellant's motion for a continuance because:

- There was no written motion, just an oral motion made on the first day of trial;
- The only facts presented to the trial court in support of the motion were 1) Galindo was present but did not actually see the Mendez/Vasquez shooting; 2) Galindo saw a person running away from the area of the shooting; 3) Galindo had indicated to the police he could not identify the person he saw running away from the scene, and 4) Galindo gave a description which was "somewhat... inconsistent" with appellant;[2]
- Appellant's counsel made no effort to inform the court of the nature or extent of any attempts made by his investigator to locate Galindo or properly serve a subpoena;
- There no way of knowing if Galindo would ever come

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[2] These were the prosecutor's statements. Unfortunately, appellant's counsel characterized them as "accurate." (See 2RT 76.)

back or when he might come back;

- It was not the court's or the prosecution's burden to determine how long Galindo would be gone, but it was appellant's burden to demonstrate at the time the continuance was requested, that Galindo's testimony could be obtained within a reasonable time.

5. The Trial Court Abused His Discretion

At the outset, respondent argues:

> Appellant recites in length the efforts expended by his investigator in attempting to serve Galindo with a subpoena prior to trial in support of his position that he diligently sought to locate the witness and obtain his presence in court. (AOB 62-63.) However, none of these facts were presented to the trial court at the time of the continuance request but instead were argued for the first time in the motion for a new trial filed after appellant's conviction and judgment of death. (2RT 75-76; 20CT 5643-5650.) This Court's review is limited to the circumstances and the reasons presented for the continuance request. (*People v. Frye, supra*, 18 Cal.4th at p. 1013.)

(RB 23, fn. 14.)

Respondent criticizes defense counsel's failure to file a written motion and points out that the motion was made on the first day of

trial. (RB 23.) Defense counsel made the motion on May 25, 1999. (2CT 456; 2RT 75-76.)

Defense counsel Schmocker was appointed very late in the proceedings and had little time to prepare for this capital trial. Appellant had been charged on April 25, 1997 (Supp. CT II, 1-2; 3RT 513), but was not arraigned until May 20, 1998, due to questions regarding his competence to stand trial; at that point he was represented by Deputy Alternate Public Defender Jerome Haig. (1RT 1-4.) By July 7, 1998, the case had been reassigned to Deputy District Attorney Rob Knowles. (1RT 11.) It was nearly two years into the proceedings when Schmocker was appointed on February 11, 1999, and the case went to trial on May 25, 1999. (2CT 456; 2RT 75-76.)

The uncertainty about obtaining the presence of Galindo at trial continued right up to the morning the trial began, when appellant's investigator, Hoffman, spoke with Lieutenant Cooks, who advised that Galindo was out of California for summer training. (19CT 5313-5314; 20CT 5650.) Cooks advised Hoffman he was not permitted to disclose Galindo's location, but said he would forward the subpoena Hoffman

had subserved on Sergeant Lettries to Galindo. (20CT 5650.) Cooks also told Hoffman he believed that Galindo would be made available to come to court as a witness. (19CT 5313-5314; 20CT 5650; 1RT 50.) Thus, it appears from the record that trial counsel had no opportunity to draft a written motion because he did not know such a motion was necessary until he was already at the courthouse, waiting for the matter to be called.

(a) The Length of Time Needed to Obtain The Witness's Testimony Was Not Excessive, And The Inconvenience or Prejudice Resulting From that Delay Would Have Been Minimal

The court's sole reason for denying the continuance was that "there's no way of knowing if [Galindo will] ever come back or when he might come back." (2RT 76.) Respondent argues:

> More importantly, based on the facts presented to the court, "there[] [was] no way of knowing if [Galindo would] ever come back or when he might come back." (2RT 76.) Contrary to appellant's argument, it was not the court's or the prosecution's burden to "determine how long Galindo would be gone." (AOB 60.) Instead, appellant had the burden of demonstrating at the time the continuance was requested, that Galindo's "testimony could be obtained within a reasonable time ...." (*People v.*

> *Howard, supra,* 1 Cal.4th at p. 1171.) Since the only information presented to the court was that Galindo had been transferred to Yugoslavia, there was no showing his attendance could have been secured within a reasonable time - or at any time. Consequently, the court acted well within its discretion when it declined to continue the trial based on Galindo's unavailability.

(RB 23-24.) The difficulty with this argument is that neither appellant nor his counsel could determine when Galindo would return from wherever he was, despite their best efforts. Furthermore, the reference to Galindo's transfer to Yugoslavia was entirely speculative. All defense counsel said on this score was "Mr. Galindo *apparently* has been transferred within his National Guard unit *perhaps* to Yugoslavia." (2RT 75: italics added.) No one but the National Guard really knew where he was and authorities from the Guard had assured the defense that Galindo *could* be made available as a witness.

Based on the above facts, it should be clear that defense counsel did his best to obtain Galindo's presence for trial, and could not obtain adequate information to determine if or when Galindo would appear. Perhaps had the court picked up the telephone and contacted the National Guard to inquire, he would have been taken more seriously

than was trial counsel. As is was, at the time counsel made the motion to continue, he could not make a "showing [Galindo's] attendance could have been secured within a reasonable time - or at any time," as respondent insists he must. (RB 24.)

Respondent ignores the fact that the prosecutor did not argue any prejudice to his case if the continuance were granted. The inconvenience or prejudice resulting from what turned out to be a two-month delay would certainly have been minimal, if any, especially in view of the prior delays caused by the prosecution and the seriousness of the charges and potential penalty appellant faced.

Respondent asserts the People had no obligation to determine how long Galindo would be gone. (RB 23.) Respondent ignores the authority appellant cited in his Opening Brief holding while the Compulsory Process clause does not guarantee the actual attendance of witnesses sought by the defense, the government must itself exercise due diligence in a good faith effort to secure the attendance of subpoenaed witnesses. As a preliminary step, it would certainly have been reasonable for the court to grant a short continuance to allow the

court or the parties to contact the National Guard to get a firm answer as to how long Galindo would be out of the area on military duty, when he would be available to testify if no special arrangements were made, and what special arrangements might be possible to make him available. While the Compulsory Process clause does not guarantee the actual attendance of witnesses sought by the defense, the government must itself exercise due diligence in a good faith effort to secure the attendance of subpoenaed witnesses. (*Maguire v. United States* (9th Cir. 1968) 396 F.2d 327, 330; *United States v. Murphy* (6th Cir. 1969) 413 F.2d 1129, 1139; *Johnson v. Johnson, supra,* 375 F.Supp. 872, 875; and see generally, Westen, Compulsory Process II, 74 Mich.L.Rev. 191, 277-81 (1975).)

Respondent ignores the fact the court misdirected its pique at appellant for the delays, but the court should not have been taking it out on appellant. Respondent ignores the fact appellant made only one motion for continuance – the motion made on the first day of trial – and it was summarily denied. All of the previous delays were either attributable to the prosecution's failure to produce discovery and

failure to decide in a timely fashion whether to seek the death penalty, or they were unavoidable due to the conflict of interest and competency issues.

A party must employ the legal means of compelling the attendance of witnesses, or present a sufficient excuse for not doing so, before being entitled to a continuance on the grounds of the witness' absence. (*People v. Collins* (1925) 195 Cal. 325, 333.) Where service is impossible or unavailing, it is an abuse of discretion to deny a continuance where a witness is amenable to process and the applicant has caused a subpoena to be properly issued and delivered to the proper officer with sufficient information so that the witness could be found. (*Ibid.*) The failure to serve a subpoena on a witness does not preclude a continuance where service is rendered impossible by the witness' sudden departure from the state (see *Loicano v. Maryland Cas. Ins. Co.* (1974) 301 So.2d 897, 901), or where attendance cannot be procured by subpoena. (*Allen v. Downing* (1840) 3 Ill. 454.)

The fact that the case had been pending for some time did not justify denying the motion to continue the trial date. Although the

police investigation of appellant began around January of 1997, appellant was not arrested and charged until April 25, 1997. (3RT 449-451, 479, 513.) It is nobody's fault that a doubt was declared as to appellant's competence to stand trial in October of 1997, that he was found incompetent to stand trial in mid-December of 1997, and that he was not found competent again until mid-April of 1998. (1CT 47, 53, 93, 95-96.) The prosecution sought a continuance of the preliminary hearing on April 28, 1998, and the preliminary hearing was not held until May 6, 1998. (1CT 98-100, 103.) The information was not filed and appellant was not arraigned until May 20, 1998. (1CT 237-243.) A defense motion for a live lineup was heard and granted on June 15, 1998. (1RT 5-10.) The delay in seeking the live lineup was not the fault of the defense, as the prosecutor had advised defense counsel Haig that he was having difficulty contacting the witnesses, and Haig could not contact them, as he did not have their addresses. (1RT 7.)

It was not appellant's fault that the District Attorney delayed for months the determination whether to seek the death penalty (1RT 4, 9, 12, 14-15, 17 [no decision until August 6, 1998]), or that the prosecution

delayed in turning over discovery. (1RT 21, 25, 27-28, 35-36, 42-43, 52-54, 62, 69 [discovery still pending from the prosecutor as of April 14, 1999].) It also was not appellant's fault that his first attorney, Haig, did not declare a conflict until the fourteenth pretrial on February 1, 1999, and that Haig's replacement, John Schmocker, was not appointed until February 11, 1999, with the trial date of May 25, 1999 set at that point. (2CT 317-319.) The continuance in question was the only continuance requested by Schmocker. Thus, the delay in bringing this matter to trial was primarily due to the District Attorney's actions and to matters beyond the control of the defense.

The fact that Schmocker could not state an exact date that Galindo would return was also beyond his control and should not be dispositive. The National Guard personnel would neither tell the investigator where Galindo was stationed, nor would they state precisely when Galindo would return; however, on May 25, 1999, Lieutenant Colonel Cooks advised the investigator that he believed Galindo would be made available to come to court as a witness. (20CT 5650.) When, on May 28, 1999, the investigator tried again to pin down

a time that Galindo would be available to testify, Private Herrera told him that neither Lieutenant Colonel Cooks nor Sergeant Letteries was available and Private Herrera did not know when they would be available. (20CT 5650.) As stated above, the court should at least have granted a short continuance to permit the parties or the court to determine Galindo's precise whereabouts and when he would be available, as opposed to denying the motion outright with no inquiry.

Further, even if there were a serious dispute about defense counsel's diligence, the continuance should still have been granted, given the rights implicated. (See *United States v. Flynt, supra,* 756 F.2d 1352, 1359-1360 [although defendant "might have exercised greater diligence than he did," the court finds "the degree of diligence to have been sufficient" because "the continuance would have served a useful purpose, granting the request would not have inconvenienced the court, the other party or any witnesses, and (defendant) has suffered severe prejudice as a result of the denial of his motion"].) Appellant faced a capital trial, with the possibility that the jury would return a verdict of death, the ultimate prejudice.

Therefore, the length of time needed to obtain Galindo's testimony was not excessive, and the inconvenience or prejudice resulting from that delay would have been minimal.

(b) Respondent Concedes, By Not Addressing, Appellant's Argument Defense Counsel Demonstrated Sufficient Diligence In Locating the Witness and Obtaining His Presence in Court

Like the prosecutor at trial, respondent does not dispute appellant's diligence in attempting to obtain Galindo's presence at trial. (See AOB pp. 62-65.) Nor does respondent address appellant's argument that, where service is impossible or unavailing, it is an abuse of discretion to deny a continuance where a witness is amenable to process and the applicant has caused a subpoena to be properly issued and delivered to the proper officer with sufficient information so that the witness could be found. (*People v. Collins* (1925) 195 Cal. 325, 333.) The failure to serve a subpoena on a witness does not preclude a continuance where service is rendered impossible by the witness' sudden departure from the state (see *Loicano v. Maryland Cas. Ins. Co.* (1974) 301 So.2d 897, 901), or where attendance cannot be procured by

subpoena. (*Allen v. Downing, supra,* 3 Ill. 454.) Respondent addresses none of the above authorities or argument.

(c) The Anticipated Substance of Galindo's Testimony Was Material and Crucial to Appellant's Defense, and Was Favorable to Appellant

The right to compulsory process permits the defendant to compel the attendance at trial of only those witnesses who have information which is material (*Jennings v. Superior Court, supra,* 66 Cal.2d 867, 876), that is, capable of affecting the outcome of the trial, and favorable to the defense. (*United States. v. Valenzuela-Bernal* (1982) 458 U.S. 858, 861, 873, 102 S.Ct. 3440, 73 L.Ed.2d 1193.)

Respondent dismisses the materiality of Galindo's testimony, falsely stating: ". . . Galindo, whose National Guard Unit had been transferred to Yugoslavia, was present but did not actually see the Mendez/Vasquez shooting . . . he saw a person running away from the area of the shooting." The prosecutor told the court that Galindo had indicated to the police that he could not identify the person he saw running away from the scene and that he gave a description which was

"somewhat... inconsistent" with appellant. (RB 23, citing 2RT 75-76.)

Respondent fails to address the standard of materiality, which reflects the overriding concern with the justice of the finding of guilt – meaning the omission must be evaluated in the context of the entire record. (*United States v. Valenzuela-Bernal, supra,* 458 U.S. 858, 868.) If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. If, on the other hand, the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt. (*Ibid.*)

The right to compulsory process permits the defendant to compel the attendance at trial of only those witnesses who have information which is material (*Jennings v. Superior Court, supra,* 66 Cal.2d 867, 876), that is, capable of affecting the outcome of the trial, and favorable to the defense. (*United States. v. Valenzuela-Bernal* (1982) 458 U.S. 858, 861, 873, 102 S.Ct. 3440, 73 L.Ed.2d 1193.)

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt.... This means that the omission must be evaluated in

> the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

(*United States v. Valenzuela-Bernal, supra,* 458 U.S. 858, at p. 868.)

Factors included in determining materiality for purposes of the right to compulsory process are the relative importance of the issue, the extent to which the issue is in dispute, the number of other witnesses who have testified on the issue, and the credibility of the witness in relation to other witnesses. (See *State v. Garza* (1985) 109 Idaho 40, 43, 704 P.2d 944.) Materiality also involves concerns that the absent witness have information that might have affected the outcome of the trial (*Com. v. Lahoud* (1985) 339 Pa. Super. 59, 66, 488 A.2d 307), or that a reasonable basis be shown to believe that the desired testimony would be both helpful and material to the defense. (*United States v. Ginsberg* (2nd Cir. 1985) 758 F.2d 823, 831.)

Judging by these standards, Galindo's testimony was not only material, it was crucial to appellant's defense. In fact, both witnesses

Slaughter and Galindo were vital to the defense case, especially since there are so many variables the jury must consider in determining the credibility of any given eyewitness. (See CALJIC No. 2.92.) Galindo was the only defense witness who testified definitively that appellant was not the shooter, but was not able to do so until *after* the first jury had returned a guilty verdict.[3] In the context of the entire case, therefore, Galindo's testimony was not cumulative of Foster Slaughter's testimony; rather, it was corroborative.

(d) The Denial was an Abuse of Discretion

Respondent acknowledges that discretion may not be exercised so as to deprive the defendant or his attorney of a reasonable opportunity to prepare (RB 22), yet substantially fails to address appellant's argument establishing the trial court's abuse of discretion here. Respondent fails to address *People v. Fontana* (1982) 139 Cal.App.3d 326, which held when a denial of a continuance impairs the

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[3] Moreover, the penalty retrial jury was instructed to accept the guilt verdict reached without the benefit of Galindo's testimony when deliberating regarding penalty, despite their doubts regarding one of the murders. (See Argument VII, *infra*.)

fundamental rights of an accused, the trial court abuses its discretion. (*Id.* at p. 333.) Respondent also fails to acknowledge that an accused has a fundamental right to present witnesses in his defense (*Chambers v. Mississippi, supra,* 410 U.S. 284, 302), or that a defendant has a due process right to present exculpatory evidence. (*Government of Virgin Islands v. Smith* (3d Cir. 1980) 615 F.2d 964, at p. 970, relying on *Chambers v. Mississippi, supra,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297.) Thus, a defendant should not be denied access to witnesses who may provide exculpatory evidence.

Respondent fails to address *Childs v. State* (1927) 146 Miss. 794, 112 So. 23, an analogous case where the defendant was accused of murder and convicted after the court refused to grant a continuance to allow the defense to locate two witnesses who would testify to the elements of self defense. (*Childs, supra,* 146 Miss. at 797, 112 So. at 23.) The *Childs* Court reversed the conviction, noting how important and vital the testimony for the defendant, opining that the testimony of the witness, who was a disinterested person, could not be considered cumulative because it would have corroborated the defendant's

testimony and that of his son. (*Id.* at 798, 112 So. 23.)

In view of the critical nature of the issue before the trial court, the materiality of the evidence to be presented, and the procedural posture of the hearing on the motion, granting the motion for continuance would have accomplished substantial justice. (*People v. Zapien* (1993) 4 Cal.4th 929, 972; *People v. Iocca* (1974) 37 Cal.App.3d at 73, 79-80.) The trial court abused its discretion in refusing a continuance to permit counsel to bring Galindo to court, and in denying even a short continuance to determine when Galindo would become available, instead of summarily denying appellant's motion for a continuance.

D. The Error is Reversible With No Showing of Prejudice

Respondent ignores the rule that a denial of a fundamental constitutional right is not excused for lack of prejudice. (*People v. Fontana, supra,* 139 Cal.App.3d 326, 334.) The erroneous denial of appellant's continuance motion violated his Sixth Amendment right to counsel, and his Fifth, Sixth and Fourteenth Amendment rights to present a defense. (*Gardner v. Barnett* (7th Cir. 1999) 175 F.3d 580; *United States v. Gallo* (6th Cir. 1985) 763 F.2d 1504; *Bennett v. Scroggy,*

supra, 793 F.2d 772.) Accordingly, even without a showing of prejudice, a new trial is warranted.

E. Even if a Showing of Prejudice is Required Here, Appellant's Conviction Must Be Reversed

In arguing lack of prejudice, respondent glosses over the fact that the only issue as to the Mendez counts was the identity of the shooter. Appellant again points out there was no motive for the Tacos el Unico shooting, and no physical evidence linking appellant to the crimes. Respondent's suggestion that Galindo's testimony would have been cumulative because "[t]he evidence of appellant's identity as to the Mendez/Vasquez shooting was established by Mendez" (RB 25) ignores the fact that appellant had a constitutional right to present his defense of misidentification. (U.S. Const. Amends. V, VI and XIV; *Gardner v. Barnett, supra,* 175 F.3d 580; *United States v. Gallo, supra,* 763 F.2d 1504; *Bennett v. Scroggy, supra,* 793 F.2d 772.)

Respondent sets out Mendez's various descriptions of the shooter and argues they were "mostly consistent" with appellant's photograph and DMV identification card information. (RB 25-26.)

Respondent also emphasizes Mendez's three "positive[] and unequivocal[]" identifications of Reed as the shooter. (RB 26.)

As previously noted, those descriptions and identifications are unreliable. Mendez observed the shooter in the dark and under extraordinarily stressful circumstances; he was traumatized and confused at the scene, and was receiving emergency medical treatment for a gunshot wound as the police questioned him; his identification was cross-racial, rendering it less reliable; suggestive identification procedures administered by the police contributed to the unreliability of Mendez's identification of appellant as the perpetrator; and multiple identification proceedings created the unacceptable risk that a false memory was created in Mendez's mind. Initially, Mendez said he was unable to remember the shooter's face, and he was impeached at trial on his multiple inconsistencies regarding the descriptions he gave.

Respondent then argues "had Galindo returned in time to testify at the guilt phase, his testimony would have had little impact in countering Mendez's identification of appellant as the shooter, even if considered together with Slaughter's testimony." (RB 26-27.)

Respondent argues specifically:

- Slaughter testified he saw the shooter while standing approximately 50 feet away but could not recognize his face. (3RT 572.)
- Galindo also observed the shooter while standing over 50 feet away, twice the distance between the shooter and Mendez, and admitted he was unable to see the shooter's face because it was "pretty dark" outside. (6RT 1129-1130.)
- Unlike Mendez, Galindo and Slaughter never had an opportunity to face the shooter and Galindo only observed the shooter running past him. (3RT 573, 575-576; 6RT 1128-1130.)
- Although Galindo and Slaughter both opined that appellant was not the shooter because the gunman was bigger or "thicker" than appellant (3RT 574; 6RT 1131-1132), this could be explained by Slaughter's own observation that the shooter was wearing a black "puffy jacket" (3RT 576-577), which could have given them the

wrong impression that the shooter was bulkier than he really was.

(RB 26-27.)

The prosecution case rested entirely on the testimony of Mendez and the reliability of his identification of appellant as the shooter. The significance of Slaughter's and Galindo's testimony lies in the size of the man they saw, not whether or not they could see or describe the shooter's face or identify the shooter from a photo spread; therefore, the first three factors respondent argues do not weigh against the prejudice to appellant of losing Galindo as a witness because the court would not grant a continuance.

For the above reasons, the error must be found to be prejudicial, and appellant's convictions as to Mendez and Vasquez must be reversed.

II. THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN APPELLANT'S CONVICTIONS FOR THE MURDER OF AMARILIS VASQUEZ AND THE ATTEMPTED MURDER OF CARLOS MENDEZ

Respondent argues there is substantial, reliable evidence sufficient to sustain appellant's convictions for the murder of Amarilis Vasquez and the attempted murder of Carlos Mendez. (RB 27-32.) Respondent improperly bases its argument on isolated bits of evidence – not the entire record – and ignores the reality that in recent years the courts and scientists have repeatedly demonstrated eyewitness identifications, under certain circumstances, are far from reliable evidence, and that there is a very real threat of misidentification and false conviction in cases where an eyewitness identification is not corroborated. Finally, in analyzing the evidence, respondent fails to mention the two compelling eyewitnesses appellant presented who described a different shooting and a much different shooter, and both of whom declared that appellant was not the person they saw shooting at Mendez and Vasquez.

A. Respondent Omits Authority Governing the Standard of Review

Respondent fails to address the following legal principles: A defendant may not be convicted of a crime if the evidence presented at trial is insufficient to persuade a rational fact finder beyond a reasonable doubt that the defendant is guilty. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, emphasis added.) "Evidence, to be 'substantial' must be 'of ponderable legal significance... reasonable in nature, credible, and of solid value.' " (*People v. Johnson* (1980) 26 Cal.3d 557, 576.)

"The test on appeal becomes whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mosher* (1969) 1 Cal.3d 379, 395.) The court does not, however, limit its review to only the evidence favorable to the respondent; the issue is resolved as to the whole record, and not isolated bits of evidence selected by the respondent. (*People v. Johnson, supra,* 26 Cal.3d at 577.) Due process mandates that the standard for evaluating the sufficiency of evidence in a criminal case is whether any rational trier of fact could find guilt

beyond a reasonable doubt. (*Jackson v. Virginia, supra,* 443 U.S. 307, 317-318; 99 S.Ct. 2781, 2788-2789.) The evidence must be substantial enough to support the finding of each essential element of the crime. (*People v. Barnes* (1986) 42 Cal.3d 284, 303.) "

Respondent omits discussing the sufficiency test for eyewitness identification. Consideration must be given to (1) the opportunity the eyewitness had to observe the assailant, (2) the lapse of time between the offense and the first identification procedure; (3) whether the initial description compares favorably with the person accused; and (4) the effect of any emotion, such as extreme fright, experienced by the witness during the encounter which might lessen the value of his later selection of the accused as the culprit. (*United States v. Smith* (9th Cir. 1977) 563 F.2d 1361, 1363.) Respondent admits, however, that where an eyewitness has been subjected to undue suggestion, the fact finder is allowed to hear and evaluate the identification testimony, unless the totality of circumstances suggests """a very substantial likelihood of irreparable misidentification.""" (*People v. Arias* (1996)13 Cal.4th 92, 168.)

B. The Evidence The Prosecution Presented Was Insufficient To Support Appellant's Convictions for the Murder of Amarilis Vasquez and the Attempted Murder of Carlos Mendez in the Tacos El Unico Shooting

The only question before the jury was the identity of the shooter. The sole incriminating evidence introduced by the prosecution against appellant was the eyewitness identification testimony of the surviving victim, Carlos Mendez, which respondent repeats in its brief. (RB 28-29.) Citing cases holding the testimony of a single eyewitness is sufficient to support a conviction, respondent concludes Mendez's identifications of appellant are sufficient to support appellant's convictions on the Tacos El Unico counts. (RB 29-30.) Respondent dismisses appellant's argument to the contrary as "nothing more than an attack on the credibility of Mendez and an improper attempt to reweigh the evidence on appeal" and insupportable because "Appellant cannot demonstrate that Mendez's testimony was inherently improbable or physically impossible."[4] (RB 30.)

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[4] Here respondent relies upon *People v. Lewis* (2001) 26 Cal.4th 334, 361; *People v. Diaz* (1992) 3 Cal.4th 495, 541; and *People v. Barnes, supra,* 42 Cal.3d 284, 303. *Lewis* had to do with the competence of a witness who

Respondent substantially fails to address appellant's argument.

1. Respondent Omits Mendez's Account of the Shooting

(a) Mendez Saw Only a Gun

Respondent fails to address the facts regarding Mendez's observations during the shooting – the observations upon which all of his subsequent descriptions and identifications depended. It was dark out, and Mendez's first awareness of a problem was Amarilis's statement, "Look at that guy - he has a big pistol." (3RT 463-464, 489.) In response to the district attorney's questions about what Mendez noticed about the man, Mendez essentially described, in detail, a pistol in a man's hand. (3RT 464-465, 469 [gun in his right hand with his right index finger in the trigger guard; gun pointed down at the ground];

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suffered from mental disorders and whose testimony was difficult to comprehend at times, pursuant to Evidence Code section 701. *Diaz* had to do with medical experts' testimony regarding lidocaine levels in the blood of the deceased. In *Barnes* the question was whether there was substantial evidence of rape by means of force or fear of immediate and unlawful bodily injury under the provisions of section 261, subdivision (2). These cases simply are not comparable to the issue here, which is the inherent unreliability of uncorroborated eyewitness identifications where the police employed suggestive identification procedures.

3RT 469, 488-489 [weapon was a pistol, not a rifle, and it was about 10 to 12 inches long].) Mendez testified that, after observing the pistol, he told his wife not to worry and started the truck. (3RT 468-470.) The pistol was pointed at them "for like, uh, three seconds," and then the shooting started. (3RT 470-472, 492.)

Respondent ignores Mendez's contradictory testimony that he did not know where the shooter was when he started shooting. (3RT 476-478; People's Exhibit 14.) Respondent ignores the fact that from the time the man walked from the corner up to the point where he started shooting, Mendez was no longer looking at him because he was starting the truck. (3RT 471.) Respondent ignores Mendez's testimony that after he was shot in the face, he did not see the shooter again. (3RT 187.) While the area was "reasonably well lit" and Mendez might have had – as respondent states, "ample opportunity to observe appellant prior to being shot" (RB 28) – Mendez indicated he did not take that opportunity to observe because he was busy trying to start his truck and was not looking at the man with the gun. (3RT 471-473, 492.)

Respondent also omits discussing Mendez's testimony that after

he was shot the first time, in the jaw, he "felt like I was dying, I was killed." (3RT 472.) He was out of "this world." (3RT 473.) When he was shot a second time, Mendez's panic increased: "I thought I was – I was, you know, close to death, so running for – because at that time, I forgot my wife, I forgot everything." (3RT 474.)

(b) Mendez's Descriptions Were Inconsistent

Respondent insists Mendez "gave consistent descriptions of the shooter on three separate occasions." (RB 28.) That simply is not true. The first description Mendez gave was of a black male wearing a black jacket. (3RT 500-501.) At the preliminary hearing Mendez testified the shooter's shirt was white. (3RT 491.) Respondent omits Mendez's trial testimony that the shooter was bald and wearing "like a black shirt – I mean T-shirt," and, "I don't remember pretty well." (3RT 489-490.) When the district attorney sought on redirect to clarify Mendez's cross-examination answer, Mendez responded: "You know, I really, you know, that was seconds, so I used, so, as I'm saying, I was close to death . . I really, you know, didn't have time to look at him, you know, you know, like a couple minutes and look, you know, what he, how is

he dressing or what the color race or like...." (3RT 497.)

Respondent does not address Mendez's testimony he had never seen the shooter before the attack, but when shown a photographic line-up four months later, he insisted the shooter looked the same as the photograph he picked out (3RT 483), and the person he picked out of a live line-up was the person he had seen in the photographic line-up. (3RT 49.) When quizzed about whether the shooter had any facial hair, Mendez equivocated until he returned to the subject of the man's baldness, which Mendez affirmed was the primary characteristic he noticed, "and his eyes." (3RT 494-495.) Mendez had never before mentioned the shooter's eyes, and he had told police on the night of the shooting the killer had "short black hair." (3RT 505.) At some unspecified time, Mendez described the gunman to the police as being 5'11" and between 150 and 180 pounds, and bald.[5] (3RT 494.)

Respondent omits Mendez's testimony, when challenged about

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[5] Respondent fails to note that the early descriptions Mendez gave were very similar to the descriptions given by the two defense witnesses, Foster Slaughter and Galindo, of a man much larger than appellant. (See AOB pp. 23-24, 68-69, 71, 74 and 92-94.)

the clothing description, he was afraid and his opportunity to observe the shooter was brief, he did not pay attention to the clothes, but he insisted he saw the shooter's face and the gun. (3RT 492.)

2. Respondent Ignores Most of the Facts Regarding the Suggestive Identification Procedures

As evidence of the reliability of Mendez's identification of appellant as the perpetrator of the Tacos El Unico crimes, respondent argues "Mendez positively identified appellant as the shooter in two separate lineups" and then positively identified appellant at the preliminary hearing and the trial. (RB 29.) Respondent omits discussion of most of the facts demonstrating the suggestiveness of the identification procedures. (See AOB pp. 82-107.)

More than four months after the shootings, Detective Paiz showed Mendez a series of six photographs at the police station. (3RT 461,479-480, 483; People's Exhibit 8.) The only bald individual in the lineup was appellant, in photo #6, and he was wearing a white T-shirt. (People's Exhibit 8.) Mendez immediately picked out photo #6. (3RT 480.) Respondent disagrees the photo-spread was in any way

suggestive because appellant was the only bald man and the only person wearing a white T-shirt. (RB 30-31.) Instead, respondent nonsensically argues that because Mendez early on "described the shooter to Detective Paiz as having short black hair and wearing a black jacket," Mendez's choice of the one individual who was bald and dressed in white clothing in the display "further increases the reliability of Mendez's positive identification." (RB 30.) This argument ignores (1) the evolution of Mendez's descriptions of the shooter, and (2) the authorities finding such a lineup technique unduly suggestive. (See, e.g., *United States v. Wade* (1967) 388 U.S. 218, 232-233.)

(a) The Evolution of Mendez's Descriptions

Immediately after the shooting, Mendez described the shooter to police as a "male black with a black jacket." (3RT 499, 501.) Later that night Mendez described the shooter in two separate interviews as a black male about 5'8" to 5'11" in height, 20 to 25 years old, clean shaven, short black hair, wearing a black jacket and black pants" (3RT 505), and as a male black adult, 25 years old, wearing black pants and a black jacket, clean shaven, with short hair, 5'11", 150 to 180 pounds, with a

medium complexion. (3RT 581-582.)

These first descriptions were closer to the descriptions Slaughter gave the police at the time of the shooting – a male black in a black jacket and black pants, around 5'8" to 5'11" tall, black hair, between 150 and 180 pounds (3RT 494, 501, 505; 5RT 1027) – than the shorter, skinny bald guy in a white T-shirt Mendez described much later and identified as the shooter at the preliminary hearing and at trial. (1CT 181-183, 191-192; 3RT 490, 494-495, 497; 5RT 1025-1027.) By the time of the photographic lineup, however, appellant was the suspect, and he did not fit the early descriptions Mendez had given to the police. By the time of the live lineup, Mendez had already seen appellant at the preliminary hearing. (3RT 481-482, 484.) That does not make Mendez's selection of appellant "more reliable" - that indicates the police were looking for a way to get Mendez to identify appellant, and one way was to put a photograph of the bald appellant wearing a white T-shirt among an array of men who were not bald.

Tracking Mendez's descriptions, the shooter morphed from a tall, solidly built man with black hair, wearing black clothing, to a short,

skinny bald man wearing a white T-shirt. This transformation occurred with the assistance of the suggestive photographic lineup, where Mendez made a very positive identification, selecting the one individual who had a bald head. (3RT 480; People's Exhibit 8.) The shooter's baldness was the one consistent descriptor given by Mendez. (See 3RT 489-491, 494-495; 5RT 1025; 1027; 6RT 1200-1201.) Especially in light of the testimony of two other eyewitnesses that the shooter was a tall, heavy-set man who was not appellant (3RT 588-589; 6RT 1130-1132), Mendez's identification of appellant as the shooter is unreliable.

(b) The Authorities Do Not Support Respondent

The authorities respondent cites do not support respondent's argument. *People v. Gonzalez* (2006) 38 Cal.4th 932, addressed a trial court's finding a photographic lineup was not impermissibly suggestive, using a deferential standard of review. [6] (*Id.* at p. 943.) The

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[6] There was no motion to suppress the identifications in this case, and the defense failed to present expert testimony on eyewitness identifications.

photographic lineup contained photographs of six different persons, including Gonzalez. Gonzalez claimed at trial that the lineup was impermissibly suggestive because (1) he was the only one wearing "gang-type" clothing, (2) he "ha[d] a droopy eye in the photo," and (3) his photograph was discolored. This Court concluded:

> Here, nothing in the lineup suggested that the witness should select defendant. As the trial court found, nothing about defendant's clothing suggested his photograph should be selected. We cannot discern any significant distinctiveness about defendant's eye. In any event, none of the witnesses described the gunman as having a distinctive eye, so any distinctiveness in the photograph would not suggest the witness should select that photograph. Moreover, "it would be virtually impossible to find five others who had" a similar eye "and who also sufficiently resembled defendant in other respects." (*Ibid.*) Finally, any discoloration in defendant's photograph would not suggest it should be selected.

(*Ibid.*)

Gonzales is factually distinguishable from this case in that the color of Gonzales's clothing combined with baldness is not what distinguished him from the other five men in the lineup. While the *Gonzales* Court could not see anything distinctive about the defendant's eye, clearly in appellant's case he is the only individual in the lineup

with a bald head, and it would not have been difficult to find another person or persons with bald heads to place in the lineup so that appellant would not have been the only such individual.

A year and a half after Mendez viewed the suggestive photographic lineup, and after having seen appellant sitting with his lawyer at the preliminary hearing, Mendez viewed appellant in a live lineup. (3RT 481-482, 484.) Appellant was the only person in common between the photographic six-pack and the live lineup. This is a suggestive factor that should never be permitted to occur. (See *Foster v. California* (1969) 394 U.S. 440, 441-443; 89 S.Ct. 1127, 1128-1129; See P. Wall, Eye-Witness Identification in Criminal Cases 74—77 (1965).) Respondent omits Mendez's testimony that at the live lineup he picked the man he had previously seen in the photograph. (3RT 493-494.) Mendez also testified that he could identify appellant in court because appellant's face was the same face he saw in the photograph. (3RT 495.) In other words, after viewing the suggestive photographic lineup, Mendez admitted to subsequently identifying appellant because he had previously seen his photograph in the suggestive six-pack. That

is not substantial, credible evidence, especially in the absence of any physical evidence linking appellant to the shooting, no corroboration of Mendez's identification of appellant by another eyewitness, and the testimony of two other eyewitnesses who insisted appellant was not the man they saw doing the shooting and running from the scene.

3. Respondent Substantially Fails to Address Appellant's Argument Mendez's Identification of Appellant as the Shooter Is Not Substantial, Credible Evidence

Respondent dismisses appellant's detailed argument regarding the unreliability of uncorroborated eyewitness testimony as the basis for a conviction – especially in a capital case – instead offering the conclusory statement that "the testimony of a single eyewitness is sufficient to support a conviction." (RB 29-32.) Rather than repeat his argument here, appellant refers this Court to pages 82-108 of his Opening Brief.

Respondent criticizes the authorities appellant cites, but does not address in any way the key authorities discussing the lack of reliability of such testimony – especially where uncorroborated – such as *United*

States v. Wade, supra, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933, 18 L.Ed.2d 1149; *United States v. Smith, supra,* 563 F.2d 1361, 1365, and *Jackson v. Fogg* (2d Cir.1978) 589 F.2d 108, 112. Even the United States Supreme Court has recognized the dangers of mistaken identification and the risk of fatal errors when – as in this case – the witness' opportunity for observation was insubstantial, and his susceptibility to suggestion great. (*United States v. Wade, supra,* 388 U.S. 218, 228-229, 87 S.Ct. 1926, 1933, 18 L.Ed.2d 1149.)

This was a stranger identification, based solely upon a single brief observation under extraordinarily stressful conditions. Respondent makes no attempt to counter the extensive research on the reliability problems of eyewitness identification appellant has pointed out in his Opening Brief, or the problems that arise when juries are not given access to that information to aid their fact-finding tasks and to disabuse them of myths about the reliability of eyewitness testimony. (See *United States v. Brown* (D.C.Cir.1972) 461 F.2d 134, 145-146, fn. 1 (conc. & dis. opn.).) Appellant's arguments, therefore, do not constitute an improper attack on Mendez's credibility or an improper

re-weighing of the trial evidence. Rather, appellant has established that Mendez's uncorroborated eyewitness testimony, under the circumstances of this case, and in light of recent scientific research that courts have recognized as legitimate and troubling, is not substantial, credible, reliable evidence sufficient to support appellant's convictions of the Tacos el Unico crimes.

Respondent also ignores the fact appellant falls into that class of defendants who cannot benefit from DNA evidence to exonerate him in the event of a mistaken identification, as there was no DNA evidence left at the scene of the Mendez shooting by the shooter; indeed, there was *no* evidence other than Mendez's faulty identification linking appellant to the crime.

Respondent dismisses, without discussing, the report the California Commission on the Fair Administration of Justice issued in 2006. (RB 29; see discussion at pages 87-89 of Appellant's Opening Brief.) This Court should consider the Commission's concern that "the risk of wrongful conviction in eyewitness identification cases exists in California, as elsewhere in the country, and that reforms to reduce the

risk of misidentification should be immediately implemented in California. (*Id.* at p. 3.)

4. Respondent Ignores the Fact Other Witnesses With Greater Opportunity to Observe Described A Different Shooter, and a Different Shooting

Respondent entirely ignores the testimony of the two eyewitnesses – Foster Slaughter and Joe Martin Galindo – who were not under the terrible stress suffered by Mendez, and who had greater opportunity to observe the Tacos el Unico shooting. Both men testified a man much larger than appellant shot Mendez and Vasquez. The circumstances and observations of Slaughter and Galindo have been thoroughly described in the AOB and in the previous argument and need not be repeated here. Suffice to say that both men were in a better emotional and physical position to make an accurate eye witness identification than was Mendez. Both Slaughter and Galindo described a very different perpetrator than Mendez.

5. Conclusion

Appellant's conviction for the attempted murder of Mendez and the murder of Vasquez rested entirely upon the uncorroborated

testimony of Mendez. No weapon was recovered, no fingerprints were found, there were no surveillance videotapes, and there was no DNA to link appellant to the shooting. In light of the developments in the science of eyewitness identification since the late 1970's, Mendez's testimony is not substantial, credible evidence sufficient to sustain appellant's convictions for the murder of Amarilis Vasquez and the attempted murder of Carlos Mendez. Furthermore, the trial court's error in refusing to grant a continuance deprived appellant of important testimony that would have tended to undermine Mendez's identification.[7] Because the penalty of death is qualitatively different from any other sentence, a greater degree of reliability is required in imposing it than was afforded in this case. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

The convictions must be reversed, and the death penalty vacated.

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[7] See AOB, Argument I.

III. THE EVIDENCE IS INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS FOR THE MURDER OF PAUL MORELAND AND THE ATTEMPTED MURDER OF ROY FRADUIE

Respondent argues there is substantial, reliable evidence sufficient to sustain appellant's convictions for the murder of Moreland and the attempted murder of Fraduie. (RB 32-34.) As in the case of the Tacos El Unicos crimes, respondent improperly bases its argument on isolated bits of evidence – not the entire record – and ignores the reality that in recent years the courts and scientists have repeatedly demonstrated eyewitness identifications, under certain circumstances, are far from reliable evidence, and that there is a very real threat of misidentification and false conviction in cases where an eyewitness identification is not corroborated.

Fraduie's unreliable identification of appellant as the shooter, linked with discovery of the murder weapon in a house to which appellant had no apparent connection, is insufficient evidence to support Reed's convictions for the murder of Moreland and attempted murder of Fraduie. No reasonable jury could find this evidence reliable

enough to conclude beyond a reasonable doubt that appellant was the perpetrator.

A. Respondent Omits Authority Governing the Standard of Review

Appellant incorporates by reference as though fully set forth here his discussion of the relevant standard of review set forth in Argument IV.A., *ante*.)

B. Respondent Omits All of the Relevant Facts Establishing The Deficiency

1. Respondent Omits Facts Pertinent to the Shooting

Like the case against appellant for the murder of Amarilis Vasquez, the evidence appellant was the perpetrator in the Moreland/Fraduie case rests on the uncorroborated testimony of another victim, Roy Fraduie. Fraduie's identification was at least as unreliable as that of Mendez because of Fraduie's intoxication and his unexplained reluctance to report the incident to authorities.

Respondent asserts appellant's arguments are based upon "minor inconsistencies" in the record. (RB 34.) They are not.

Respondent omits the fact that Fraduie *never* reported the

shooting to the police and ignores the events leading up to Fraduie's eventual selection of appellant in suggestive lineup proceedings. The shooting occurred on November 22, 1996. The police located Fraduie five months after the shooting, at which time *Fraduie was unable to describe the man he saw holding the gun*. On April 18, 1997, the police showed Fraduie a suggestive photographic lineup with six men displayed, and he selected appellant.[8] Then on May 6, 1998, Fraduie saw appellant at the preliminary hearing. Finally on July 14, 1998, Fraduie picked appellant out of a live lineup. The scenario of events leading to Fraduie's identification of appellant completely undermine the reliability of his identification.

Respondent notes the prosecution's attempt to bolster Fraduie's identification testimony with evidence the murder weapon was found in a closet in the duplex outside of which a group of approximately ten

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[8] Appellant incorporates by reference his discussion of the suggestiveness of the photo lineup in Argument II, *supra*, sections 3 through 5. The lineup was presented by Detective Paiz – the lead detective in this case – and there is no record of what was said during this identification procedure.

to fifteen men had been standing just prior to the shooting. (RB 33-34.) Moreland testified the gun the man was holding "looked like" People's Exhibit 5 – determined through ballistics testing to be the murder weapon. However, no one testified appellant had ever been inside of that duplex or had any connection with the gun. (See 3RT 355-362, 364-370.)

Respondent omits all of the evidence of Fraduie's extreme level of intoxication at the time of the shooting. Fraduie testified that he and Paul Moreland had "a few drinks" over the six or seven hours prior to the shooting. (3RT 371-373.) While Fraduie admitted to drinking Olde English 800 Malt liquor "half of a day," he was impeached with his preliminary hearing testimony he was drinking all day. (3RT 393-394, 398.) Fraduie admitted he drank until nearly 11 p.m., and felt the effects of the alcohol "somewhat." (3RT 398-399.) While at first Fraduie denied being under the influence of any other drugs that night, he later admitted he had "smoked a little weed." (3RT 399.) Moreland's autopsy revealed that he had ingested alcohol, cocaine and phencyclidine (PCP) in the hours preceding his death. (3RT 546-549.)

Respondent omits the fact the shooting occurred around 11 or 11:30 at night. (3RT 374.) Respondent ignores Fraduie's testimony there were about ten men standing in a fenced yard in between two duplexes – not in front of a duplex, as respondent asserts. (See RB 33; 3RT 373-376, 389-391; People's Exhibit 6.) Respondent refers to "multiple street lamps illuminating the location" (RB 33); however, there were only two – one street lamp down the street from the duplex and another light standard on the other side of Glencoe. (3RT 394-397; People's Exhibit 1.) Respondent omits mention of Fraduie's testimony he had never seen the man holding the rifle before (3RT 374-375, 391), and Fraduie did not know that man or any of the other men standing in front of the duplex. (3RT 375, 391.)

Respondent deceptively suggests Fraduie testified he saw appellant fire a gun. (RB 33.) The truth is Fraduie testified he heard, but did not see, a gun being fired. (3RT 377 ["Q. Did you see it or just hear it? A. I heard it."].) Fraduie also did not see Moreland being shot; he simply saw a man, standing among several men, holding a gun before the gunfire broke out, after Fraduie and Moreland had walked

past them.

Respondent omits Fraduie's admission he did not see the man bring the gun down: "No, I didn't pay no attention. I wasn't trying to see when he was bringing it down. I was trying to get out of dodge." (3RT 378.) They were already past the duplex when Fraduie heard, but did not see, the rifle fired. (3RT 377.) Asked how he knew the man shot up into the air, Fraduie testified: "Cause it didn't hit nothing. Because he shot up in the air, and then he brought it down and start shooting. Then he start shooting at us. We had start[ed] running." (3RT 377-378.)

Respondent ignores Fraduie's testimony that he and Moreland were initially on the same side of the street as the duplex. (3RT 378.) When the shooting began and they started running, Fraduie and Moreland were about one house down from the duplex. (3RT 379.) Fraduie ran on a diagonal to the corner, then down the right side of the sidewalk on Temple, across the street from the duplex and around the corner, down Temple to Greenleaf. (3RT 378-380.) He hopped the gate "where they grow flowers and stuff," and ran all the way down to Long

Beach and Artesia where he saw another friend, who gave him a ride back to his uncle's house. (3RT 378.) Moreland ran the opposite direction down Temple. (3RT 378, 380.) After Fraduie started running, he never looked back at Moreland. (3RT 380-381.) Fraduie did not actually see Moreland being shot; he only saw a man holding a gun. (3RT 392.)

2. Respondent Ignores Fraduie's Evolving Descriptions of the Shooter

Respondent omits discussion of the facts pertaining to Fraduie's evolving descriptions of the shooter, dismissing them as "improper attempts to reweigh the evidence on appeal." (RB 34.) The issue is whether the evidence is substantial and reliable, and for that reason facts demonstrating insubstantiality and unreliability must be treated as relevant and should be addressed by respondent.

Fraduie did not call the police after the shooting, and did not have any contact with the police for several months until Detective Paiz located and interviewed him. (3RT 382-384, 391, 399-400.) In that initial meeting, Fraduie was unable to describe the shooter. (3RT

391-392.) Fraduie testified that he "couldn't tell them right at the present moment, because my mind was like blurry." (3RT 392.)

Despite his inability to describe the shooter to the police months after the event, at trial – years after the shooting – Fraduie testified very specifically that the person "had low cut hair, about a little shorter than mine," "like a quo vadis" and "like an east coast haircut, real low" - meaning "real short." (3RT 392-393.) At trial Fraduie described the person with the gun as a black man, whose complexion was "in between colors, about my complexion, but a little – about a lighter shade – about a shade dark." (3RT 394.) The man with the gun did not have any facial hair, and was not wearing a hat. (3RT 397.) Fraduie could not remember the man's clothing. (3RT 397.) These details emerged only after Fraduie had been shown a photo lineup in which appellant was the only individual with very short hair, and after Fraduie had opportunities to view appellant at the preliminary hearing and in a live lineup. (1CT 139; 3RT 392-393, 511-512.) Respondent fails to discuss any of these facts.

3. The Suggestive Identification Procedures

Respondent ignores all of the details regarding the suggestive identification procedures, effectively conceding that the procedures were suggestive.[9] (*People v. Bouzas* (1991) 53 Cal.3d 467, 480 ["The People apparently concede" an argument "they simply ignored . . . in their brief and at oral argument"]; *California School Employees Assn. v. Santee School Dist.* (1982) 129 Cal.App.3d 785, 787 ["the district apparently concedes by its failure to address this issue in its appellate brief..."].) On April 18, 1997, five months after the shooting, Detective Paiz took Fraduie to the Compton Police station, gave him an admonition, and showed him a photographic lineup. The interview was not recorded. (3RT 384-386, 393, 511; People's Exhibits 8 and 10.) Fraduie selected appellant's photograph, #6, as the shooter. (3RT 385-386; People's Exhibit 8.) Fraduie testified it took him about 10 minutes to select the photo of appellant. (3RT 386-387.) Fraduie denied

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[9] Respondent's entire summary is: "Fraduie later positively identified appellant as the shooter in two separate occasions [sic], first in a photographic lineup at the police station and subsequently in a live lineup at the jail." (RB 33.)

any confusion, but admitted that he did not recognize Reed immediately. (3RT 387.) Fraduie testified he studied the photographs "for a minute" and "for a little while." (3RT 387.) Fraduie told Detective Paiz, "That's him" and pointed to photograph #6. (3RT 389, 393.) Appellant was the only person in the photographic display with short hair. Everyone else had longer hair. (3RT 393; People's Exhibit 8.)

On May 16, 1998, Fraduie saw appellant at the preliminary hearing. (1CT 139.)

Several months later, on July 14, 1998, Fraduie observed a live lineup at the jail with Detective Paiz and the prosecutor. (3RT 387, 401, 511-512.) Fraduie testified that appellant was in the lineup with two other men,[10] and Fraduie identified him as the man who had the gun that night. (3RT 387-388; People's Exhibit 9.) This time it did not take "two seconds" to pick appellant out of the lineup. (3RT 388.) Like Mendez, Fraduie testified that at the live lineup he saw the person he had seen in the photographic array, and had previously seen in court

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Detective Paiz testified that there were six people in the live lineup. (3RT 511-512.)

during the preliminary hearing. (3RT 393.) Fraduie indicated on a form that the suspect was #1, and signed and dated it July 14, 1998. (3RT 401-402; People's Exhibit 11.)

4. Fraduie's Identification of Appellant as the Shooter Is Not Substantial, Credible Evidence

Respondent dismisses appellant's detailed argument regarding the unreliability of uncorroborated eyewitness testimony as the basis for a conviction – especially in a capital case – without addressing any of it. (RB 32-34.) Rather than repeat his argument here, appellant refers this Court to pages 76-109 of his Opening Brief.

Even the United States Supreme Court has recognized the dangers of mistaken identification and the risk of fatal errors when – as in this case – the witness' opportunity for observation was insubstantial, and his susceptibility to suggestion great. (*United States v. Wade, supra*, 388 U.S. 218, 228-229, 87 S.Ct. 1926, 1933, 18 L.Ed.2d 1149.)

This was a stranger identification, based solely upon a single brief observation under extraordinarily stressful conditions.

Respondent makes no attempt to counter the extensive research on the reliability problems of eyewitness identification appellant has pointed out in his Opening Brief, or the problems that arise when juries are not given access to that information to aid their fact-finding tasks and to disabuse them of myths about the reliability of eyewitness testimony.[11] (See *United States v. Brown* (D.C.Cir.1972) 461 F.2d 134, 145-146, fn. 1 (conc. & dis. opn.).) Appellant's arguments, therefore, do not constitute an improper attack on Fraduie's credibility or an improper re-weighing of the trial evidence. Rather, appellant has established that Fraduie's uncorroborated eyewitness testimony, under the circumstances of this case, and in light of recent scientific research that courts have recognized as legitimate and troubling, is not substantial, credible, reliable evidence sufficient to support appellant's convictions of the Moreland murder and Fraduie attempted murder counts.

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[11] Appellant's attorney failed to present an expert on eyewitness identification.

5. The Evidence Was Insufficient to Establish That The Murder Weapon Was Ever In Appellant's Possession; Therefore, the Location of the Weapon Coupled With Fraduie's Testimony Identifying Appellant as the Man With the Gun is Insufficient to Support Appellant's Conviction

(a) Facts Relied Upon by the Prosecutor Purportedly Connecting the Murder Weapon to Appellant

Respondent dismisses - without addressing - appellant's arguments regarding the lack of evidence to connect appellant to the murder weapon. (RB 33-34.) Instead, respondent again distorts the facts, asserting "appellant returned to the scene of the shooting the very next day" that the police "recovered the murder weapon inside a house near where Fraduie had seen appellant standing with the rifle over his shoulder just before the shooting." (RB 33.) Respondent inaccurately concludes: "Thus, Fraduie's identification of appellant was corroborated because he identified a person who was connected to the area where the shooting occurred and the murder weapon was found in a house with appellant's companion at the time the F.I. card was completed." (RB 33-34.)

The facts are that roughly 24 hours after the Moreland/Fraduie shooting, a police officer contacted appellant on the street near 1315 East Glencoe. (3RT 416, 418.) The officer did not enter any building there, and he could not remember who else was present. (3RT 417-418.) The officer filled out an F.I. card, on which he wrote that he had contacted a person named Ennis Reed, and that a man named McLaine was with him. (3RT 413, 416; People's Exhibit 12.)

At around 11:00 or 11:30 that same night, officers chased a man named Chico McLaine into a duplex just slightly northwest of the spot on Glencoe Street where Moreland's body was found. (3RT 355-358; People's Exhibit 1; People's Exhibit 6.) A second man, not appellant, was found in the house but not arrested. (3RT 356-357, 367.) An officer found in a hall closet the rifle later determined to be the murder weapon in the Moreland case. (3RT 357-358, 364-365.) The rifle, the clip and the ammunition had no fingerprints on them. (3RT 368.) Nobody made any attempt to determine who lived at the duplex where the rifle was found. (3RT 370.)

Like respondent, the prosecutor argued the rifle was "physical

evidence [that] tends to support what Mr. Fraduie said about the events of that night." (4RT 651.) The prosecutor also argued: "The defendant was there the next day. You have the F.I. card. You know it's him." (4RT 652.) "It's the same guy. The defendant had a gun. No one else did."[12] (4RT 652-653.) The prosecutor's argument was false.

(b) No Evidence Connected the Gun to Appellant

Respondent makes no attempt to address the cases appellant discussed at pages 127-132 of his Opening Brief as to what constitutes sufficient evidence of constructive possession. Existing authority does not support the inferential leaps respondent asks this Court to take.

As appellant argued more fully in his Opening Brief, the mere fact that the defendant is present near a weapon does not establish possession. (See *People v. Land* (1994) 30 Cal.App.4th 220, 223-224, and cases cited therein [receipt of stolen property]; *People v. Glass* (1975) 44 Cal.App.3d 772, 777 [possession of a controlled substance].) There is

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Trial counsel failed to object to the prosecutor's inaccurate portrayal. (4RT 652-653.)

no substantial evidence in the record to establish or support an inference that appellant exercised control, or the right to control, the rifle found in the duplex. Respondent ignores that no witness testified to seeing appellant in the duplex where the rifle was found. No witness established any connection between appellant and the duplex, other than he was standing on the street near the duplex. The evidence offered by the prosecutor could not establish that appellant ever exercised control of, or the right to control, the weapon. (See, e.g., CALJIC No. 12.44.) Therefore, the evidence that appellant was in the vicinity of the duplex where the weapon was found, and that the man standing next to him at the time the F.I. card was filled out happened to be chased into that duplex on the same evening, does not establish any connection between appellant and the premises where the murder weapon was found, or the weapon itself. Likewise, no inference can reasonably be drawn that the evidence of the rifle corroborates Fraduie's identification of appellant as the shooter – and yet that is precisely the inference the prosecutor asked the jury to draw, and respondent asks this Court to draw. (4RT 651-653.)

6. On the State of This Record, the Lack of Evidence Requires Reversal

Respondent omits discussion of *People v. Blakeslee* (1969) 2 Cal.App.3d 831, in which the Court of Appeal overturned a murder conviction based upon circumstantial evidence that was more substantial than that presented here. (See full discussion at pages 129-131 of Appellant's Opening Brief.) The *Blakeslee* Court noted that one factor relevant to the question of whether the evidence was sufficient to inspire confidence in the defendant's guilt was "the absence of evidence we would normally expect to find in a murder prosecution based upon circumstantial evidence. The absence of evidence ... may have as great an impact on the substantiality of a case as any which is produced, for the absence of evidence which would normally be forthcoming can undermine the solidity of the proof relied on to support a finding of guilt." (*Id.* at p. 839.) In particular, the Court noted that among the evidence that would be considered "central to the charge of murder" would be "evidence to establish a connection between a murder weapon and the defendant, either tangible evidence

such as fingerprints, palm prints, or powder burns, or testimonial evidence linking the defendant in some manner to a weapon, which evidence we do not have." (*Id.* at pp. 838- 840.)

In the Moreland killing, there is evidence of a murder weapon, and evidence linking the bullets that killed Moreland to that weapon.[13] The problem respondent ignores is that there is no substantial, credible evidence linking *appellant* to that weapon. There were no fingerprints, palm prints or powder burns. The weapon was found in a residence to which appellant was not connected, such that he could be said to have constructive possession of the weapon found in the closet of that residence.[14] There is only testimony by Fraduie that he briefly glimpsed a man he initially could not describe – whom he later identified as appellant only after multiple suggestive identification procedures – standing in a group of men, holding a gun that *looked like* the gun designated as People's Exhibit 5. (3RT 376.) There is no

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[13] There was, however, a dispute as to the chain of custody of the shell casings presented as evidence in the Moreland case. (See 3RT 551-556.)

[14] See discussion in section IV.5.(b), *supra*.

eyewitness to the shooting itself. There is no eyewitness who testified that appellant fired the gun. There is no circumstantial evidence from which the jury could infer motive for this shooting. There is no evidence of flight that would support a finding of consciousness of guilt. (See *People v. Vu* (2006) 143 Cal.App.4th 1009, 1030.)

Respondent also ignores appellant's argument his conviction has less evidence to support it than did the defendant's conviction in *People v. Trevino* (1985) 39 Cal.3d 667. In that case, this Court held there was no evidence of a motive for murder on the part of the defendant, who was a friend of the victim; the conviction rested entirely on an equivocal eyewitness identification and a fingerprint from the defendant in the victim's apartment, where he had previously been a guest. (*Id.* at pp. 667, 676, 696-697.) Here, the evidence of motive was even weaker, as there was no relationship between appellant and Moreland or Fraduie that might have provided a motive, and no evidence of any other motive, such as robbery. There was no physical evidence whatsoever to link appellant to the shooting. All the prosecution could offer was an identification made by a witness who

was a stranger to appellant, who was drunk and high on drugs, had little opportunity to observe the man he saw holding a gun, at night, illuminated only by a nearby streetlight, standing in a group of men, did not volunteer his observations to the authorities, and was repeatedly subjected to suggestive identification procedures.

A reasonable jury could not find beyond a reasonable doubt that the circumstantial evidence proved defendant's guilt.[15] The convictions must be reversed, and the death penalty vacated.

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Because each of the cases is so weak individually, it is highly likely that, had the Tacos el Unicos case and the Moreland/Fraduie case been tried separately, the jury would not have returned guilty verdicts in either case. Unfortunately, trial counsel failed to move to sever them.

IV. APPELLANT ESTABLISHED A PRIMA FACIE CLAIM OF RACIAL DISCRIMINATION DURING VOIR DIRE OF THE GUILT PHASE JURY, ENTITLING HIM TO A REVERSAL

Respondent disagrees there was *Wheeler/Batson* error. (RB 34-44.) Respondent is wrong.

A. Respondent Omits Governing Law

Respondent omits some of the law governing *Wheeler/Batson* error. A prosecutor's use of peremptory challenges to strike prospective jurors because of their race or gender violates both the federal and state constitutions, specifically the equal protection clause of the Fifth and Fourteenth Amendments to the United States Constitution, and violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, § 16 of the California Constitution.[16] (*Batson v. Kentucky* (1986) 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69; *J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 130-131, 128 L.Ed.2d 89, 114 S.Ct. 1419; *People v. Wheeler* (1978) 22

16

In *Powers v. Ohio* (1991) 499 U.S. 400, 402, the United States Supreme Court eliminated the requirement that the defendant and the stricken juror be of the same race.

Cal.3d 258, 276-277, *People v. Griffin* (2004) 33 Cal.4th 536, 553.)

Respondent fails to address some of the cases the United States Supreme Court decided subsequent to 1999 – the year appellant was convicted -- that clarify the duties of trial and state appellate courts in assessing *"Wheeler/Batson"* motions, most notably *Miller-El v. Dretke* (2005) 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196. Respondent also ignores *United States v. Collins* (9th Cir. 2009) 551 F.3d 914, 919, which held that a prima facie showing for a challenge based on an impermissible ground is a burden of production, not a burden of persuasion. (*Ibid.*)

B. Respondent Omits or Distorts Material Facts

During guilt phase jury selection, the first eighteen jurors to go into the jury box were Gladys Beard [Seat #1], a Caucasian female; Juror number 5645 [Seat #2], a Caucasian female; Juror number 1450 [Seat #3], an Asian/Filipino male; Corinne Tate [Seat #4], a Caucasian female; Juror number 2801 [Seat #5], a Caucasian male; Juror number 6761 [Seat #6], an African-American female; Janice Clark [Seat #7], an African-American female; Jacqueline Wilson [Seat #8], a Caucasian

female; Kevin Wees [Seat #9], a Caucasian male; Bert Abron [Seat #10], an African-American male; Juror number 1923 [Seat #11], an Hispanic male; Billie Lawrence [Seat #12], an African-American female; Nickey Wright [Seat #13], an African-American male, Mary Cole [Seat #14], an African-American female, Betzaida Campizta [Seat #15], an Hispanic female; Juror number 0744 [Seat #16], a Caucasian female, David Wilcox [Seat #17], a Caucasian male; and Juror number 9937 [Seat #18], a Caucasian male. (3CT 692, 1016; 1772; 1808; 1823; 1861; 1879; 2149; 2275; 2311; 2438; 2528; 2546; 2565; 2601, 2619, 2673; Supplemental CT III 99; 2RT 276-277.)

During the first round of peremptory challenges, the prosecutor excused Corinne Tate [Caucasian female], Bert Abron [African-American male], Billie Lawrence [African-American female], Betzaida Camptiza [Hispanic female], and Janice Clark [African-American female]. (4CT 1014; 7CT 1808, 1861, 1879; 9CT 2438; Supplemental CT III 103-105; 2RT 290-292.) During the second round of peremptory challenges, the prosecutor excused Bruno Blanco [Hispanic male], Nickey Wright [African-American male], and Mary Cole [African-

American female]. (3CT 692; 7CT 1772; 8CT 2185; Supplemental CT III 107; 2RT 296.)

After the *Wheeler* objection was heard and denied for failure to demonstrate a *prima facie* case, the prosecutor exercised peremptory challenges against two more African-American women - LaShawn Stringer and Annie Fortson. (7CT 2003-2005; 9CT 2363-2365; 2RT 308, 314.)

Respondent omits the following facts. Of the twelve jurors originally seated on the guilt phase jury, three were African-American, five were Caucasian, one was Hispanic, and three were Asian/other. (9CT 2528, 2546, 2565, 2583; 10CT 2601, 2619, 2637, 2655, 2673, 2691, 2709, 2727; Supp. CT III 196.) Just before the guilt phase jury was instructed, one of the African-American juror s, juror number 4 [8060], was replaced by an Hispanic juror, [5838]. (2CT 474; 10CT 2746; Supp. CT III, 196; 3RT 598-600.)

C. Appellant Made a Prima Facie Case that the Prosecutor Was Exercising Peremptory Challenges to Remove Prospective Jurors on the Basis of Group Bias

1. Respondent Concedes The Trial Court Erred in Applying the Wrong Standard For Determining a Prima Facie Case

Respondent concedes the trial court applied an incorrect standard in determining appellant had failed to make a *prima facie* case. (RB 37-38.) Respondent agrees that when this Court confronts a pre-*Johnson* trial court finding of no *prima facie* case, and the record does not show application of the correct legal standard, this Court must review the record independently to apply the Supreme Court's standard and resolve the legal question whether the record supports an inference that the prosecutor excused a juror on a prohibited discriminatory basis. (RB 38; see *People v. Bonilla* (2008) 41 Cal.4th 313, 341, citing *People v. Bell* (2007) 40 Cal.4th 582, 596; accord, *People v. Williams* (2006) 40 Cal.4th 287, 310.) This means appellate courts may not apply a deferential standard of review to a trial court's factual findings, which had only to satisfy a "substantial evidence" requirement. (See *People v. Huggins* (2006) 38 Cal.4th 175, 227-228; *People v. Avila* (2006) 38 Cal.4th 491, 541.)

Respondent fails to acknowledge that appellant is not required to establish a "pattern" of exclusion of members of a cognizable group. The state and federal constitutions are violated by the improperly-motivated removal of even a single juror belonging to a cognizable group. (*People v. Bell, supra,* 40 Cal.4th 582, 598, fn. 3.)

2. Appellant Made a *Prima Facie* Showing of Discriminatory Purpose

By producing evidence sufficient to permit the trial judge to draw an inference that discrimination occurred, appellant made a *prima facie* showing the prosecutor was exercising peremptory challenges to remove prospective jurors solely on the basis of group bias. (*Id.* at p. 2417.) The trial court's error in applying the "strong likelihood" standard requires that the *prima facie* case be reevaluated. (*Ibid.*)

(a) The Presence of Two African-Americans on The Jury That Decided the Guilt Phase is Irrelevant To this Court's Inquiry

Respondent argues, first, that "the presence of three blacks on the jury is an indication that the prosecutor's peremptory challenges were not based on race discrimination." (RB 38-39.) This "factual" assertion

is inaccurate. Of the 42 African-American panel members, three were seated as jurors, but only two deliberated on the jury – Juror No. 6 and Juror No. 4.[17] (1CT 196; 9CT 2583; 10CT 2619; 3RT 594-600.)

Respondent relies upon *People v. Lewis* (2008) 43 Cal.4th 415, 480, *People v. Huggins* (2006) 38 Cal.4th 491, 556, and *People v. Avila* (2006) 38 Cal.4th 491, 556, in support of this argument. Neither *Lewis* nor *Huggins* concerned a trial court's failure to find a *prima facie* showing, but instead addressed third-stage *Batson* issues, where this Court evaluated the prosecutor's stated reasons for exercising the peremptory challenges. *Lewis* and *Huggins*, therefore, are irrelevant to this Court's determination whether appellant made a *prima facie* showing of discriminatory purpose.

Avila, while somewhat more complicated, also does not support respondent's position. In that case, three co-defendants were tried on capital murder charges. During jury selection, defendant Richard Avila

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17

On June 22, 1999, just before the jury was instructed, Juror No. 4 – an African-American woman – was replaced by the first alternate, an Hispanic male. (2CT 474; 3RT 598-600.)

made a series of *Wheeler* motions challenging the prosecutor's use of peremptory challenges against African-American and Hispanic prospective jurors. Co-defendant Johnny Avila joined in some of Richard's motions. Co-defendant Spradlin also made one motion under *Wheeler*, in which Johnny Avila joined. The trial court denied each motion. (*People v. Avila, supra*, 38 Cal. 4th 491, 540.)

First, the *Avila* Court's discussion of the number of African-Americans ultimately seated on the jury must be read in the context of the *Avila* Court's holding that, when a party makes a *Wheeler* motion claiming discriminatory use of peremptory challenges to prospective jurors, the issue is not whether there is a pattern of systematic exclusion; rather, the issue is whether a *particular* prospective juror has been challenged because of group bias. (*People* v. *Avila, supra*, 38 Cal.4th 491, 549.) To say that any racial animus on the part of the prosecutor is somehow "cured," negated or excused by the subsequent seating of a couple of African-American jurors on the jury would eviscerate the rights of the African-American jurors challenged prior to the *Batson/Wheeler* motion. (*United States v. Battle* (8th Cir.1987) 836

F.2d 1084, 1086 ["[W]e emphasize that under *Batson,* the striking of a single African-American juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors."].) Moreover, a prosecutor who intentionally discriminates against a prospective juror on the basis of race can find no refuge in having accepted other venirepersons of that race for the jury. (See *Lancaster* v. *Adams* (6th Cir.2003) 324 F.3d 423, 434 [Where purposeful discrimination has occurred, to conclude that the subsequent selection of an African-American juror can somehow purge the taint of a prosecutor's impermissible use of a peremptory strike to exclude a venire member on the basis of race confounds the central teachings of *Batson*], cert. denied, ---U.S. ----, 124 S.Ct. 535, 157 L.Ed.2d 409 (2003); accord, *Holloway v. Horn* (3d Cir. 2004) 355 F.3d 707, 720.)

Second, it should be obvious that the trial court could not have known an African-American juror would ultimately deliberate on appellant's jury at the time the court was called upon to determine whether appellant had made an adequate *prima facie* showing of group

bias. The presence of an African-American on the jury was not a factor the trial court could have considered at the time the court ruled on appellant's *Batson/Wheeler* objection. Therefore, the ultimate composition of the jury as sworn should not be permitted to defeat appellant's claim.

When a trial court denies a *Wheeler* motion without finding a *prima facie* case of group bias, as happened in this case, the reviewing court considers the entire record of voir dire to evaluate the trial court's ruling. (*People v. Howard, supra,* 1 Cal.4th 1132, 1155; *People v. Sanders* (1990) 51 Cal.3d 471, 498.) The appellate court's review of a finding of no *prima facie* case is not limited to the argument of counsel upon bringing the *Batson/Wheeler* motion because other circumstances might *support* the finding of a *prima facie* case in retrospect. (*People v. Howard, supra,* 1 Cal.4th 1132, at p. 1155.) Indeed, *Wheeler* emphasized that such rulings require trial judges to consider "all the circumstances of the case" (*People v. Wheeler, supra,* 22 Cal.3d 258, at 280) and call upon judges' "'powers of observation, their understanding of trial techniques, and their broad judicial experience.'" (*People v. Bittaker* (1989) 48 Cal.3d

1046, 1092, quoting *People v. Wheeler, supra,* 22 Cal.3d 258, at 281.) Some courts, however, seem to have conflated the first and third stages of *Batson/Wheeler* hearings in finding the ultimate composition of the jury is relevant to a first-stage *Batson/Wheeler* analysis, and instead of using the facts to support a finding of a *prima facie* case in retrospect per *Howard,* they have used such facts to justify the prosecutor's peremptory challenges. Respondent urges this erroneous approach. Appellant asks this Court not to adopt that approach for the reasons stated above.

(b) Respondent Entirely Fails to Address the Statistical Analysis Supporting Appellant's Argument That The Prosecutor Demonstrated Group Bias In Exercising Peremptory Challenges To African-American Venirepersons

Respondent does not fully address the record in its discussion of the prosecutor's challenges to the African-American prospective jurors. (RB 39-44.) Respondent avoids a complete discussion of the facts by failing to address appellant's analysis of the statistical disparity that demonstrates group bias in this case, focusing instead on the individual

characteristics of the veniremen the prosecutor excused.

Group bias may be demonstrated by a showing that a party "has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his [or her] peremptories against the group." (*People v. Wheeler, supra,* 22 Cal.3d 258, at 280.) The jury venire panel for the guilt phase in this case consisted of a total of 122 people, including 42 African-Americans [35% of the total panel]; 49 Caucasians [40% of the total panel]; 16 Hispanics [13% of the total panel]; and 15 Asians or other race [12% of the total panel]. (2CT 434-449, 458-461.) Of the 42 African-American panel members, two were seated as jurors, but only one deliberated on the jury – Juror No. 6. (1CT 196; 9CT 2583; 10CT 2619; 3RT 594-600.) There were no African-American alternate jurors. (See 1CT 196.) At the time the *Wheeler* objection was made, the prosecutor had exercised a total of eight peremptory challenges (2RT 290-297), and had used his peremptory strikes overall to exclude 6 of the eligible African-American venire members, or roughly 15% of the total eligible African-American venire members and 75% of his peremptory strikes

exercised to that point. By contrast, the prosecution used only three of his peremptory challenges overall to remove Caucasian venire members, or roughly 6% of the total Caucasian venire members. Of the twelve jurors who decided the guilt phase, one, or 6% was African-American; six, or 50%, were Caucasian; two, or 12.5%, were Hispanic; and three, or 25%, were Asian or other.

Although African-Americans were 35% of the total panel, they were only 6% of the seated jury, and although Caucasians were just 40 % of the total panel, they were 50% of the jury who decided the case. "Happenstance is unlikely to produce this disparity." (*Miller-El v. Cockrell*, 537 U.S. 322, at p. 342, 123 S.Ct. 1029.) More recently, the Ninth Circuit has held that, because a defendant need not establish a prima facie case by a preponderance of the evidence, but need only raise an inference of discrimination, "a defendant can make a prima facie showing based on a statistical disparity alone." (*Williams v. Runnells* (9th Cir. 2006) 432 F.3d 1102, 1107.) Thus, in *Williams v. Runnells, supra*, the Ninth Circuit observed that the defendant had made a *prima facie* case by showing that the prosecutor had used three

of his first four peremptory challenges to strike African-American prospective jurors, where there were only four African-Americans on the panel.[18] (*Ibid.*)

The Ninth Circuit regularly finds a *prima facie* case when the prosecution strikes two or more minority prospective jurors, and leaves a lesser number of, or no, minority prospective jurors on the jury. (See *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209 [*prima facie* case when prosecution struck all three African-American prospective jurors)]; *Stubbs v. Gomez* (9th Cir. 1999) 189 F.3d 1099 [prima facie case when prosecutor struck all three African-American jurors]; *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 698 [prosecutor struck the only two Hispanics].)

18

The penalty phase retrial jury selection proceedings in this case, during which no *Wheeler* objection was raised, indicate unfettered bias on the part of the prosecutor. That panel consisted of 162 individuals: 56 Blacks (35 %); 54 Caucasians (33 %); 26 Asians/other (16 %), and 26 Hispanics (16 %). Ten of the first eleven peremptory challenges by the prosecutor to the penalty phase panelists were to Blacks – that is over 90 %. Three Blacks sat on the jury, comprising 25% of the jury, where Blacks were 35% of the venire. By contrast, eight Caucasians sat on the jury, comprising 67% of the jury, where Caucasians were only 33 % of the venire.

Other circuit courts are in accord. (See *United States v. (James Lamont) Johnson* (8th Cir. 1989) 873 F.2d 1137, 1139 ["inference" of discrimination where prosecution "struck black veniremen at a disproportionate rate and struck Blacks who did not respond during voir dire but did not strike Caucasians who similarly did not respond"]; *United States v. Chalan* (10th Cir. 1989) 812 F.2d 1302, 1312 [*prima facie* case where government struck three of four Indians for cause, and then struck last Indian peremptorily; "If all the jurors of a defendant's race are excluded from the jury, we believe that there is a substantial risk that the government excluded the jurors because of their race."].)

The fact that there was one African-American on appellant's jury in no way undercuts his claim that he was deprived of a jury of his peers. "That one black served on the jury, while a significant fact that may be considered as circumstantial evidence, does not itself bar a finding of racial discrimination." (*Bui v. Haley* (4th Cir. 2003) 321 F.3d 1304, 1318; see also *People v. Davis* (2009) 46 Cal.4th 539, 583.)

Thus, the record as a whole strongly supports a *prima facie* finding under *Batson* and *Wheeler*, and the trial court erred by denying

appellant's motion.

(c) When the Prosecutor Has Not Stated His Reasons for Challenging Minority Jurors, An Appellate Court Should Not be Permitted to Affirm the Judgment Based on Speculation Regarding Nondiscriminatory Reasons the Prosecutor Might Have Relied On to Challenge the Jurors

Instead of taking the approach that upholds the intent of *Batson* and *Wheeler,* respondent advocates for a myopic approach that isolates the characteristics of individual veniremen and justifies challenges by speculating as to reasons a prosecutor might have utilized at the third stage of a *Batson/Wheeler* hearing.

Respondent speculates the prosecutor *might have* excused prospective juror Abron due to Abron's brother's "bad" or "negative" experience with law enforcement (RB 39), and Abron's unexplained role in a 1992 hung jury. (RB 40.) Respondent also cites prospective juror Lawrence's hesitation over the death penalty (RB 40-41), and prospective Juror Clark's husband's conviction of a drug offense in 1977, despite Clark's opinion her husband had been treated fairly. (RB 41-42.) Respondent asserts prospective juror Wright was "personally

familiar" with Tacos el Unicos, the scene of one of the murders in this case, so the prosecutor "*could have*" reasonably concluded Wright might be biased in evaluating the evidence related to the Mendez counts. (RB 42.) Respondent also points to Wright's comment in his questionnaire "that a defendant in a criminal case had to prove his innocence," concluding a "disagreement as to the burden of proof in a criminal trial" *could have* been a concern for the prosecutor. (RB 42.) Respondent cites prospective juror Cole's husband's arrest for an unspecified crime (RB 42), and Cole's ownership of a firearm. (RB 43.)

This Court has held that when a defendant argues on appeal that the trial court erred in failing to find a *prima facie* case of group bias, the appellate court must examine the entire record of voir dire for evidence to support the trial court's ruling, and will affirm where the record suggests possible nondiscriminatory grounds upon which the prosecutor might reasonably have challenged the jurors in question. (E.g., *People v. Howard, supra,* 1 Cal.4th 1132, 1155; *People v. Guerra* (2006) 37 Cal.4th 1067, 1101.) Respondent engages in just such an examination of the record in appellant's case, listing nondiscriminatory reasons why

the prosecutor *might* have challenged the minority jurors. (RB 39-43.) However, in *Johnson v. California* (2005) 545 U.S. 162 [125 S.Ct. 2410, 162 L.Ed.2d 129] and *Miller-El v. Dretke, supra,* 545 U.S. 231 [125 S.Ct. 2317, 162 L.Ed.2d 196] – the United States Supreme Court made it clear that this approach violates the United States Constitution.

In *Johnson* the Supreme Court stated: "The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." (*Johnson v. California, supra,* 545 U.S. at p. 172 [citation omitted].) Immediately after making this statement the Supreme Court quoted *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090 ['[I]t does not matter that the prosecutor might have had good reasons... [w]hat matters is the real reason they were stricken' (emphasis deleted)] and *Holloway v. Horn, supra,* 355 F.3d 707, 725 [speculation 'does not aid our inquiry into the reasons the prosecutor actually harbored' for a peremptory strike]."

(*Johnson v. California, supra,* 545 U.S. at p. 172.)

In *Paulino,* the trial court offered, *sua sponte,* "its speculation as to why the prosecutor may have struck the five potential jurors in question" and found no *prima facie* case. (*Id.* at pp. 1089-1090.) The Ninth Circuit found that the trial court's conjuring of possible reasons to challenge the jurors was no substitute for the prosecutor's actual reasons for exercising the challenges. (*Id.* at p. 1090.) In *Holloway,* the state defended the challenge of a juror by looking at the transcript of the voir dire for information that might have motivated the challenge beyond the reasons stated in the record. (*Holloway v. Horn, supra,* 355 F.3d at p. 725.) The Third Circuit ruled that when the prosecutor stated his reasons, review focuses solely on the reasons stated. (*Ibid.*) *Johnson, Paulino* and *Holloway* prohibit a court from scouring the record for possible reasons for a challenge when the prosecutor has stated no such reasons, and from scouring the record for additional reasons for a challenge when the prosecutor has stated his reasons. (Accord, *People v. Harris* (2013) 57 Cal.4th 804, 863-891; Lui, J., concurring opn.)

Miller-El v. Dretke, supra, 545 U.S. 231 [125 S.Ct 2317, 162 L.Ed.2d

196] also demonstrates that the California practice of having the appellate court scour the record for reasons that might have justified the disputed peremptory challenges violates the United States Constitution. There, the United States Supreme Court held it is the obligation of the prosecutor to state the reasons for the challenge, and that a "*Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." (*Id.* at p. 252.) *Miller-El* did not address error in a ruling a defendant had not shown a *prima facie* case -- the first step of a *Batson* analysis – but rather the reasons for the challenges – step two of a *Batson* analysis. However, *Miller-El*'s rationale applies to a case in which error occurs at the first step. The important thing at all stages of a *Batson* analysis is the prosecutor's actual reasons for the challenge, not possibly valid reasons that appear in the record without any showing that the prosecutor actually relied on them.

California's practice of scouring the record for possible

nondiscriminatory reasons the prosecutor might have used as a basis for challenging the jurors, and affirming the conviction based on these reasons when the trial court erroneously fails to find that the defendant has stated a *prima facie* case, is contrary to *Johnson, Miller-El, Paulino* and *Holloway*. Under the California practice, the appellate court does not know why the prosecutor challenged the jurors, but attributes to the prosecutor reasons that the evidence *might* support. *Johnson*, however, mandates that the determinative fact is the prosecutor's *actual* reason for exercising the challenges, not the appellate court's speculation about the prosecutor's reasons.

The Ninth Circuit has held that the California practice, when reviewing a trial court ruling finding no *prima facie* case of discrimination, of seeing "whether the record could support race-neutral grounds for the prosecutor's peremptory challenges" is improper under *Johnson* and *Miller-El* and does not adequately protect a defendant's right under the equal protection clause of the Fourteenth Amendment. (*Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1108.) In light of *Runnels*, this Court must reject respondent's argument

offering up speculation as to the prosecutor's reasons for challenging the minority jurors.

Another reason to reject respondent's argument is the inconsistency in the way this Court scours the record when a defendant contends the trial court erred in failing to find a *prima facie* case of discrimination. As stated above, when a defendant challenges a trial court's ruling finding that the defendant failed to make a *prima facie* case of discrimination, this Court has required California appellate courts to search the entire record and to affirm if the record contains any evidence showing some reason why a prosecutor might challenge the juror in question. But in conducting this review, this Court has established a rule that requires the appellate courts to ignore relevant and important evidence bearing on whether the prosecutor's challenges of minority jurors were based on discrimination. This important evidence relates to comparative juror analysis -- seeing whether the prosecutor challenged non-minority jurors who shared the same characteristics that the appellate court concludes might have motivated the prosecutor to challenge the minority jurors.

This Court has held that comparative juror analysis does not apply to the review of whether the trial court erred in finding there was no *prima facie* case of discrimination. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1295; But see, *People v. Harris, supra,* 57 Cal.4th 804, 859-863; Kennard, J., concurring opinion [repudiating former position that comparative analysis was inappropriate at first level *Batson-Wheeler* challenge: "'Wisdom too often never comes, and so one ought not to reject it merely because it comes late.'"]) The Court explained that the rationale for this result is that "it is not necessary or appropriate for us to speculate as to the reasons that may have motivated the prosecutor's challenges." (*Ibid.*) Yet when the Court upholds a trial court's finding that there was no *prima facie* case by searching the record for reasons that might have prompted the prosecutor's challenges, it does nothing other than "speculate as to the reasons that may have motivated the prosecutor's challenges." (*Ibid.*) This is a double standard. When reviewing a trial court's ruling resolving a challenge at the *prima facie* case stage, the Court speculates in order to come up with nondiscriminatory reasons that might have motivated the prosecutor's

challenges. But the Court has refused, on the ground of speculation, to determine if the prosecutor failed to exercise challenges to non-minority jurors who shared these characteristics. This practice violates consistency and fairness and renders California case law inconsistent with the United States Supreme Court's holding in *Johnson*.

(d) Respondent Dismisses Appellant's Comparative Analysis of the Challenged Veniremen and the Seated Jurors Without Addressing It

Respondent dismisses, without addressing, appellant's comparative analysis of the challenged veniremen and the seated jurors. (RB 44.)

In addition to the statistical showing that supports an inference of improper motive in the prosecution's exercise of peremptory challenges, side-by-side comparisons of some African-American venire panelists who were struck and non-African-American panelists allowed to serve provide further evidence supporting appellant's claim that the trial court erred in failing to find a prima facie case. (*Miller-El v. Dretke, supra*, 545 U.S. 231, 232,125 S.Ct. 2317, 2319.) If a prosecutor's

proffered reason for striking a African-American panelist applies just as well to an otherwise-similar non-African-American who is permitted to serve, that is evidence tending to prove purposeful discrimination. (Cf. *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 147 [in employment discrimination cases, "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive"]). Because the entire record may be considered in reviewing a finding of no *prima facie* case (*People v. Howard, supra*, 1 Cal.4th 1132, 1155; *People v. Sanders, supra*, 51 Cal.3d 471, 498), such a comparison is relevant here. (*People v. Harris, supra*, 57 Cal.4th 804, 863-891; Lui, J., concurring opn.)

(i) Characteristics of The Challenged Veniremen

Appellant has set forth extensive description of the comparative attributes of the challenge African-American jurors at AOB pp. 143-150, and will not repeat them here. Suffice to say that respondent does not accept first-stage *Batson-Wheeler* comparative analysis and has

consequently not addressed appellant's argument.

(ii) Comparison of Challenged Panelists with Non-African-American Jurors

Again, appellant has provided an extensive comparison of characteristics between struck and non-struck jurors in the AOB at pp. 150-154, and will not repeat the details here. Suffice to say that there were many similar answers and characteristics which suggest a racially discriminatory intent in the striking of the six African-American jurors. Because respondent does not accept first stage comparative analysis, respondent has not seriously addressed appellant's argument.

Citing *People v. Taylor* (2010) 48 Cal.4th 574, 616-617 and *People v. Williams, supra,* 40 Cal.4th 287, 312-313, respondent argues California courts have rejected comparative analysis at the first stage of a *Batson/Wheeler* analysis. (RB 44.) Respondent's argument is contrary to federal law and this Court should reject it. (*Miller-El v. Dretke, supra,* 545 U.S. 231, 232,125 S.Ct. 2317, 2319; cf. *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 147 [in employment discrimination cases, "[p]roof that the defendant's explanation is unworthy of credence

is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive"]).

D. This Court Must Reverse Appellant's Conviction

The trial court may have believed no *prima facie* case was established because three African-Americans remained in the panel at the time of the challenges. However, the fact that some African-Americans remained on the panel does not establish that others were not improperly excluded. A single discriminatory exclusion violates a defendant's right to a representative jury. (*People v. Fuentes* (1991) 54 Cal.3d 707, 716, fn. 4.) Had the trial court instead considered the factors discussed in *Wheeler* and *Batson*, it would have found an inference that the prosecutor used that practice to exclude the venire-persons from the petit jury on account of their race. (*Johnson, supra,* 545 U.S. 162, 125 S.Ct. 2410, 2416-2417.)

Considering all of the evidence of the relevant circumstances, it is apparent that a *prima facie* showing was made and that the prosecutor should have been compelled to state his reasons for excluding minorities. The trial court abdicated its duties under *Wheeler* and

Batson by denying the motion without requiring the prosecutor to explain his challenges. (See *People v. Snow* (1987) 44 Cal.3d 216, 226, and *People v. Hall* (1983) 35 Cal.3d 161, 168.)

As stated in the AOB, the net effect of the trial court's error was a jury that included one African-American woman, two jurors who believed a criminal defendant must prove his innocence, and from which most of appellant's peers who were eligible for jury service had been peremptorily eliminated. The trial court's failure to find a *prima facie* case regarding the prosecutor's peremptory challenge of prospective jurors Abron, Clark, Lawrence, Cole, and/or Wright was prejudicial error. The court made its ruling during a time when the standard applied in California courts for finding a *prima facie* case was impermissibly high. Because the improper dismissal of even one prospective juror who is otherwise fit to serve is reversible error *per se*, appellant is entitled to a new trial.

V. THE VERSION OF CALJIC NO. 2.92 GIVEN IN THIS CASE VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS, TO MEANINGFULLY PRESENT A DEFENSE, TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AND TO RELIABLE GUILT AND PENALTY VERDICTS, WHERE APPELLANT'S CONVICTION DEPENDED UPON UNCORROBORATED EYEWITNESS IDENTIFICATIONS

Respondent disagrees that the trial court erred by giving an incomplete version of CALJIC 2.92. Respondent is wrong. The court's striking of the two requested phrases was reversible error.

A. The Language on Prior Contacts and Capacity to Make an Identification Were Necessary to the Defense Case and Should Not Have Been Stricken

Respondent glosses over the central fact that appellant was convicted of two separate crimes solely upon uncorroborated eyewitness identifications rendered by a single victim to each crime who were strangers to the perpetrator, who had very limited opportunity to observe under stressful conditions, and – in the Moreland and Fraduie shooting – a witness who was intoxicated.

1. Prior Contacts Language

Citing *People v. Burney* (2009) 47 Cal.4th 203, 246, respondent argues the court properly omitted the two disputed factors from

CALJIC No. 2.92 because they were "not supported by substantial evidence." (RB 47.) *Burney* is not particularly helpful here because it does not address CALJIC No. 2.92. The use note for CALJIC No. 2.92 states, "[t]his instruction (or a comparable one) should be given when requested in a case in which identification is a crucial issue *and there is no substantial corroborative evidence. (People v. Wright* [1988], 45 Cal.3d 1126, 1143, 248 Cal.Rptr. 600, 609, 755 P.2d 1049, 1059 (1988).)" (CALJIC No. 2.92 [emphasis in original].) There is no question whether 2.92 was supported by substantial evidence, because the accuracy and reliability of the eyewitness identifications were key to the prosecution case. The language at issue was "[w]hether the witness had prior contacts with the alleged perpetrator." (See CALJIC No. 2.92.)

Respondent argues, "[i]n the absence of any evidence, let alone substantial evidence, of prior contact with appellant, the trial court did not err in striking the "prior contacts" factor from CALJIC No. 2.92." (RB 47.) The flaw in this argument is that a defendant is not required to prove the eyewitness had prior contact with the perpetrator in order to justify giving that part of CALJIC No. 2.92. The phase only

addresses "whether" the witness had prior contacts – in other words, whether the witness did or did not have prior contacts – not that a witness affirmatively can establish a prior relationship with the perpetrator. That part of the instruction is therefore appropriately given where the evidence does not indicate any relationship between the witness and the perpetrator. The prosecutor did not oppose leaving the language in the instruction. (3RT 559-560.) The court arbitrarily refused to give it.

In *Wright,* the Supreme Court held CALJIC No. 2.92 "should be given ... in a case in which identification is a crucial issue...." (*People v. Wright, supra,* 45 Cal.3d at p. 1144.) Respondent refers to the omitted portions of 2.92 "pinpoint" instructions (RB 49), but that designation is not quite accurate. This Court has generally approved giving standard instructions concerning eyewitness identification factors, and both of the omitted factors were included in the standard instruction. (*Ibid.*; see *People v. Martinez* (1987) 191 Cal.App.3d 1372, 1383.)

On closing, defense counsel argued to the jury the eyewitness identifications were inherently unreliable in view of the conflicting

eyewitness identification testimony, the conditions under which the witnesses observed the perpetrator, and the suggestive identification procedures. (4RT 672-685.) Defense counsel also argued Fraduie had been drinking all day, had taken drugs, and did not see anyone fire a weapon. (4RT 672-674.) Defense counsel failed to mention the lack of prior contacts, or that the witnesses were strangers to the people they identified as the perpetrators. Thus, the jury was never asked to consider the lack of prior contacts, whether by way of a jury instruction or argument by counsel.

Alternatively – and particularly as to the Moreland/Fraduie counts – Fraduie or Mendez might have identified appellant, not because the identification was correct, but because they may have seen appellant around the neighborhood and not realized that was why they recognized him when shown his photograph. The evidence suggests appellant knew people in the neighborhood where Moreland was shot, and he spent time there. (See 3RT 376, 416, 418.) Fraduie was in the same neighborhood or vicinity over time, as his friend Moreland lived and worked in the area (3RT 374, 391), and it appears that Mendez and

his wife shopped in that neighborhood for food when they were at work. (3RT 461-462.) There is a real possibility Fraudie or Mendez recognized appellant from those other occasions and did not consciously recall seeing him. The jury, therefore, needed to be instructed about "prior contacts" to account for this possibility. The fact there was no "evidence" of prior contacts, or that the witnesses did not "recall" prior contacts does not diminish the necessity for the instruction. It is altogether possible the witnesses had seen appellant before in the neighborhood and picked the only familiar face in the lineup. This is another reason why the jury should have been instructed in this language.

The language defense counsel requested was standard language routinely included in CALJIC No. 2.92, not a modification. The rejected factors were warranted by the evidence. Therefore, the trial court abused its discretion and improperly struck this part of the instruction.

2. The Incapacity Language

Respondent dismisses appellant's argument regarding witness incapacity, arguing "there was no evidence presented at trial that

Fraduie lacked capacity to make an eyewitness identification." (RB 48.) The part of the instruction the court refused to give was the language, "The witness' capacity to make an identification." (CALJIC No. 2.92.) It seems self evident that intoxication will affect a person's "capacity to make an identification." For that reason, the trial court's ruling was arbitrary and counter to common understanding.

Respondent minimizes the extent of Fraduie's intoxication, arguing "Fraduie was fully capable of careful observations and well-aware of his surroundings as evidence by his detailed description of the shooting incident." (3RT 372-399.) Fradiue testified he spent the evening with his friend Paul Moreland, starting at about 5 that afternoon, and had "a few drinks" at his uncle's house. (3RT 371-373.) Fraduie could not recall how many drinks they had, and he denied that he and Moreland had consumed any drugs. (3RT 373.) On cross examination, however, Fraduie admitted to drinking Olde English 800 Malt liquor "half a day," on the day of the shooting. Moreover, he was impeached with his preliminary hearing testimony that he was drinking all day. (3RT 393-394, 398.) Fraduie drank until nearly 11

p.m., and felt the effects of the alcohol "somewhat." (3RT 398-399.) While at first Fraduie denied being under the influence of drugs that night, he later admitted he had "smoked a little weed." (3RT 399.) Moreover, Moreland's autopsy revealed that he had ingested alcohol, cocaine and phencyclidine (PCP) in the hours preceding his death. (3RT 546-549.) This evidence supports an inference Fraduie, who spent many hours leading up to the murder in Moreland's presence, consumed more alcohol and drugs than he admitted. Given this evidence of Fraduie's level of intoxication, the jury could reasonably have drawn negative inferences as to his capacity to perceive, recall and identify the shooter.

Respondent argues, "[a]side from Fraduie's own testimony that he had been drinking prior to the shooting, there was no other evidence presented to support an argument that Fraduie lacked any legal capacity to identify the shooter." (RB 48.) Since it is unclear what respondent means by "legal capacity," it is necessary to discuss here what "capacity" means. If a witness does not have the mental capacity to observe and remember, the witness does not have "personal

knowledge" in the sense of Evidence Code section 702. Respondent ignores the requirement that a witness have the mental capacity to perceive, recollect and testify and that this *distinct* requirement is subsumed in the requirement of Evidence Code section 702 that the witness have personal knowledge. (*People v. Anderson* (2001) 25 Cal.4th 543, 573.) The capacity to perceive, recollect and testify to the events to which a witness is testifying is a condition for the admissibility of the witness' testimony on any particular matter. (*People v. Lewis, supra,* 26 Cal.4th 334, 356.) "Thus, an alleged incapacity to observe correctly or to remember correctly goes to the issue of personal knowledge under [Evidence Code] section 702." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 458, n. 3.) Rather than automatically excluding the testimony of an impaired witness (District of *Columbia v. Armes* (1882) 107 U.S. 519, 521-522, 27 L.Ed. 618, 2 S.Ct. 840), ". . . the question to be determined is whether the proposed witness's mental derangement or defect is such that he was deprived of the ability to perceive the event about which he is to testify or is deprived of the ability to recollect and communicate with reference thereto." (*People v. McCaughan* (1957) 49

Cal.2d 409, 420.) A witness must have the ability to perceive, recollect and testify and if he or she does not have that capacity, the witness's mere presence on the scene means nothing. No matter how appellant's trial attorney characterized his capacity argument, the fact remains that the defense raised a triable issue of fact regarding both Fraduie's and Mendez's capacity to perceive and recall what happened during each of the murders.

There is no question Fraduie was heavily intoxicated during the events to which he testified. The intoxication of a witness at the time of the events concerning which he testifies bears on his capacity for accurate observation and correct memory, and must be considered by a jury in determining his credibility. (*Farrell L. v. Superior Court* (1988) 203 Cal.App.3d 521, 528-529; *People v. Samuels* (2005) 36 Cal.4th 96, 116; *People v. Singh* (1937) 19 Cal.App.2d 128, 129 [evidence of witness intoxication admissible to show witness' capacity to recollect]; Evid. Code section 780].) Because Fraduie was so extremely intoxicated, there was an issue regarding his capacity to testify, and the court should have instructed the jury regarding capacity in the context of

eyewitness identification.

The trial court, therefore, erred by failing to include the requested language on capacity when instructing the jury per CALJIC No. 2.92.

B. The Court's Error was Prejudicial

Respondent argues any error in rejecting the standard language requested by defense counsel was harmless because trial counsel's argument filled in any instructional gap and there was "strong evidence . . . that heighted [sic] the credibility of the eyewitness testimony." (RB 49-50.) More specifically, respondent argues "both Mendez and Fraduie provided multiple descriptions of the shooter from their own recollection which matched appellant's appearance at the time, identified appellant out of both photographic and live lineups, and were highly confident of their identifications." (RB 50.) As appellant has previously explained, "recollection" is highly malleable, and the photographic and live lineups in this case were so suggestive as to render the identifications unreliable. Respondent also ignores the fact, while appellant's attorney challenged the accuracy of the

eyewitness identifications in his opening statement, cross-examinations and closing argument, he failed to call an expert on eyewitness identifications. He also failed to mention the apparent lack of prior contacts between the witnesses and appellant, or conversely the possibility that the identifications were based on unconscious recollections of seeing appellant previously in the neighborhood. In his closing argument, the prosecutor did not acknowledge any difficulty with the eyewitness identifications made by Mendez and Fraduie. Rather, he argued there was no connection between the surviving victims and the defendant, and that because there was no prior contact, the witnesses had no reason to be untruthful. (4RT 634.) Furthermore, the prosecutor repeatedly argued the jury should use "common sense" to evaluate the eyewitness testimony – often relying upon the very myths about the ability of witnesses to perceive and recall an expert might have rebutted. (4RT 642-643 [stress would help the witness remember, use "common sense"]; 643-645 [the prosecutor's unsupported speech regarding the difference between "the ability to recognize" and "the ability to describe"]; 637-638, 645, 648 [the certainty

expressed by the witnesses as to their identifications of appellant]; 685-686 [use common sense].) The error was not harmless, but permitted the prosecutor to exploit a significant weakness in the defense case – the failure to call an expert. (*People v. Watson* (1956) 46 Cal.2d at p. 836.)

Key to the prejudicial nature of this error is the extensive research showing the certainty of a witness is easily manipulated by a variety of factors that have nothing to do with accuracy. (See, e.g., Amy L. Bradfield, Gary L. Wells & Elizabeth A. Olsen, *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. Applied Psychol. 112 (2002); Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitness Distorts Their Reports of the Witnessing Experience,* 83 J. Applied Psychol. 360 (1998).) At the same time, research also shows that fact-finders place a disproportionate weight on the confidence of the witness in their analysis of the witness' reliability. (Siegfried Ludwig Sporer, *Eyewitness Identification Accuracy, Confidence, and Decision Times in Simultaneous and Sequential Lineups,* 78 J. Applied Psychol. 22, 23 (1993); see also Penrod & Cutler, Witness Confidence,

supra, at 819 [reporting a mock-jury finding that "nearly four out of five mistaken identifications are believed"]; Gary L. Wells, *How Adequate Is Human Intuition for Judging Eyewitness Testimony, in Eyewitness Testimony*, Psychological Perspectives, 256, 271 (Gary L. Wells, Elizabeth Loftus, eds., 1984). Thus, the "confidence" respondent cites is a factor proving how prejudicial this instructional error was in the context of this case, not a factor supporting a finding of harmless error.

Because the trial court excised vital portions of the eyewitness identification factors from the instruction, appellant was placed at a disadvantage when it came time for the jury to consider the accuracy and reliability of the eyewitness identifications. Even in the absence of argument by counsel, the jury would have been prompted to consider whether the eyewitnesses were reliable given, among other weakening factors, the witness's belief they had never seen the perpetrator(s) before, and in at least one case, the eyewitness's ability to observe was significantly compromised by his state of intoxication. In a case where the only evidence supporting the convictions was eyewitness identifications, this was necessarily prejudicial. The version of CALJIC

No. 2.92 given in this case violated appellant's rights to due process, to meaningfully present a defense, to the effective assistance of counsel, and to reliable guilt and penalty verdicts, as protected by the federal and California constitutions, where appellant's conviction depended upon uncorroborated eyewitness identifications. (U.S. Const., Fifth, Sixth and Fourteenth Amends.) Appellant's convictions must therefore be reversed.

VI. THE TRIAL COURT'S FAILURE TO MAINTAIN COURTROOM DECORUM BY CONTROLLING WITNESS MENDEZ'S OUTBURSTS WAS PREJUDICIAL ERROR

Respondent denies the trial court prejudicially failed to maintain courtroom decorum by failing to control Mendez's outbursts in front of the jury, mischaracterizing the issue as an evidentiary one. (RB 50-57.) Respondent is wrong.

The prosecution called Carlos Mendez as a witness in both the guilt phase and in the penalty phase retrial. (3RT 459-497; 5RT 1002-1029.) Thirteen times during his guilt phase testimony, and three times during the penalty retrial, Mendez called appellant "that devil" (3RT 464-465, 470-473, 476, 479; 5RT 1007-1008, 1017.) He added more

emotion to his penalty retrial testimony by stating, in reference to the shooting of his wife that "even a dog can't be killed this way." (5RT 1029.)

A. Respondent Fails to Address the Applicable Federal Cases Guaranteeing a Criminal Defendant the Right to A Fair and Impartial Trial and Imposing Upon a Trial Judge the Duty to Maintain Proper Decorum and An Appropriate Atmosphere in the Courtroom

Respondent fails to address the authorities appellant cited in his Opening Brief establishing a violation of federal due process where the accused does not receive a trial by an impartial jury free from outside influences because the trial court failed to meet its duty to maintain the order and dignity of the judicial process and to prevent improper influences from reaching the jury. Among the authorities respondent ignores are the United States Constitution, Sixth and Fourteenth Amendments; *Sheppard v. Maxwell* (1966) 384 U.S. 333, 362; *United States v. Young* (1985) 470 U.S. 1, 10; and *Murphy v. Florida* (1975) 421 U.S. 794, 799; *Chambers v. Florida* (1940) 309 U.S. 227, 236-237.

B. Respondent Has Mischaracterized the Issue as One of Evidentiary Error, and The Error Arising From the Trial Court's Violation of its Independent Duty to Maintain Courtroom Decorum is Not Forfeited For Failure to Object

Respondent argues "objections to evidence on the specific grounds asserted must be made or the objection is forfeited." (RB 55.) Appellant has not raised an issue of evidentiary error here; the issue is spectator or witness misconduct and the trial court's failure to meet its independent duty to make sure "public sentiment" toward a defendant not be expressed in the courtroom in such a manner so as to influence the jury. (*People v. Slocum* (1975) 52 Cal.App.3d 867, 883.)

Respondent cites no authority holding a defendant in a criminal case – and particularly in a capital murder case – is required to object to a trial court's failure to control his courtroom in order to preserve the issue for appeal. According to the Standards of Judicial Administration recommended by the Judicial Council, adopted by the Judicial Council pursuant to the authority contained in section 6, article VI of the California Constitution, a court has an affirmative duty to prohibit witnesses from creating bias by their conduct and to ensure that fact-

finders' decisions are not influenced by biases. This would include a *sua sponte* duty to prohibit witnesses or victims from improperly influencing a jury to decide a case through their emotional outbursts.

More specifically, "the rule that an appellate court will not consider points not raised at trial does not apply to '[a] matter involving the public interest or the due administration of justice." (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 315, p. 326.) The issue of bias of any kind involves both a public interest and concern for the due administration of justice. (See, e.g., *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 244, 248 [disapproved on other grounds in *People v. Freeman* (2010) 47 Cal.4th 993]; *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 462.) The same rule should apply to a trial court's failure to control a witness, where the same concerns are of equal or greater magnitude.

Nor was appellant required to raise specific federal constitutional claims at trial in this context, as respondent argues. (RB 55.) Again, this is not an evidentiary issue, but an issue of an unfair trial due in part to the trial court's failure to control his courtroom.

C. Appellant Was Deprived of His Right to a Fair Trial by Mendez's Outbursts

Respondent substantially fails to address appellant's argument, instead twisting the facts and the law and minimizing Mendez's outbursts and the effect they had on the jury. (RB 55-57.) Instead of addressing the authorities appellant cited in his Opening Brief, respondent cites Penal Code section 1044[19] and asserts, "[t]he trial court has the broad discretion to control the proceedings during trial 'with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.'"

Ignoring appellant's discussion of *Rodriguez v. State* (Fla.App. 1983) 433 So.2d 1273 – a case very similar to this one – respondent argues Mendez was "understandably emotional" and so his conduct, and the court's failure to control it, was not error. (RB 56.) That is not the case. No matter how "understandable" a witness' or victim's

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19

That section provides: "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

emotions might be, the court must still control the witness to ensure a fair trial.

In *Rodriguez,* the victim's widow was unable to make an identification, but at trial – like Mendez in this case – the widow shouted epithets and interspersed her testimony with impassioned, hostile statements directed at the defendant. The *Rodriguez* court reversed, finding the widow's misconduct engendered sympathy for her plight and antagonism for the defendant, depriving him of a fair trial. The court held these outbursts, while "understandable," were extremely prejudicial. (*Rodriguez v. State, supra,* 433 So.2d at 1276.) A similar display of emotion, hostility, impassioned statements and shouted epithets occurred here: Mendez angrily and repeatedly called appellant "that devil" and garnered sympathy for his dead wife by emoting, "even a dog can't be killed this way." (3RT 464-465, 470-473, 476, 479; 5RT 1007-1008, 1017; 1029.)

Respondent also ignores appellant's discussion of *Fuselier v State* (Miss. 1985) 468 So 2d 45, a prosecution for capital murder, where the victim's daughter sat at counsel's table, openly displaying emotion

during the proceedings. The Court reversed the conviction, finding the daughter's conduct might have lead to a verdict based on vengeance and sympathy as opposed to a reasoned application law to facts. (*Fuselier v State, supra,* 468 So 2d 45, 52-53.)

The same principle applies here. Appellant was on trial for his life, and Mendez's emotional outbursts and identification of appellant as "that devil" could only taint a trial where the sole issue was whether appellant was the person who shot Mendez and killed his wife. The unfair and prejudicial emotional emphasis served to overshadow the facts.[20] Thus, it can fairly be said that Mendez's "understandably emotional" conduct in front of the jury cannot be justified; it should have been controlled by the trial court; and it was error of constitutional magnitude for the court to permit Mendez to call

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20

Respondent fails to address *State v. Stewart* (1982) 278 S.C. 296 [295 S.E.2d 627, 629-631], certiorari denied 459 U.S. 828, 74 L.Ed.2d 65, 103 S.Ct. 64; *Price v. State* (1979) 149 Ga.App. 397 [254 S.E.2d 512, 513-514]; *Walker v. State* (1974) 32 Ga.App. 476, 208 S.E.2d 350; *State v. Gevrez* (1944) 61 Ariz. 296, 148 P.2d 829, 832-833; and *Glenn v. State* (1949) 205 Ga. 32, 52 S.E.2d 319, 321-322, all of which appellant cited in his Opening Brief.

appellant "that devil" more than a dozen times during the proceedings.

D. Mendez's Outbursts Were Prejudicial

Again mischaracterizing the issue by referring to "inadmissible evidence," and citing cases inapplicable to the issue appellant has raised, respondent argues "any error in failing to control Mendez's emotional outbursts was harmless." (RB 57.) Respondent is wrong.

First, respondent does not address the correct standard for assessing prejudice. Where a Sixth Amendment right to a fair trial and a Fourteenth Amendment due process violation is charged, this court must apply the *Chapman* standard of prejudice. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Accordingly, to affirm, this Court must be able to declare a belief that the error was harmless beyond a reasonable doubt. (*Ibid.*) To do so, the court must find that "'the error complained of did not contribute to the verdict obtained'" – because it was "unimportant in relation to everything else the jury considered on the issue in question." (*People v. Flood* (1998) 18 Cal.4th 470, 494, quoting *Yates v. Evatt* (1991) 500 U.S. 391, 403.) As the United States Supreme Court held in *Sullivan v. Louisiana* (1993) 508 U.S. 275, "Harmless-error

review looks . . . to the basis on which 'the jury actually rested its verdict.' [Citation.] The inquiry, in other words, 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." (*Id.* at p. 279, original italics.)

The court's failure to control Mendez's outbursts and admonish the jury was not harmless beyond a reasonable doubt. Respondent claims "Mendez's use of the term 'devil' did not tell the jurors anything they could not easily surmise for themselves" and again urges this Court consider Mendez's "understandably" emotional state. (RB 57.) Respondent's argument misses the point and ignores the cases appellant cited in his briefing holding that even "understandable" emotion must be controlled in the courtroom. (See AOB pp. 164-166.) Respondent fails to address the evidence of the jurors' uncertainty over appellant's involvement in the Tacos el Unico shooting. (6RT 1317-1320, see AOB, Arg. VII.) Respondent fails to address the second penalty jury's apparent doubt in Mendez's conflicting and inconclusive

testimony and Galindo's unequivocal testimony the shooter was a much larger man than appellant. (6RT 1129-1131.) It cannot be said beyond a reasonable doubt that Mendez's outbursts did not tip the scales in favor of the prosecution.[21]

VII. THE PENALTY PHASE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT REFUSED TO GIVE A LINGERING DOUBT INSTRUCTION, FAILED TO RESPOND ADEQUATELY TO THE JURY'S QUESTION INDICATING IT HAD A LINGERING DOUBT AS TO THE MULTIPLE MURDER SPECIAL CIRCUMSTANCE, AND BECAUSE THE COURT'S INSTRUCTION IN RESPONSE TO THE JURY'S QUESTION DIRECTED A VERDICT OF DEATH, IN VIOLATION OF STATE LAW AND THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Respondent disagrees the penalty phase judgment requires reversal because the trial court erroneously refused to give a lingering doubt instruction, failed to respond adequately to the jury's question indicating it had a lingering doubt as to the multiple murder special circumstance, and because the court's instruction in response to the jury's question directed a verdict of death. (RB 58-72.) Respondent is

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21

Respondent fails to respond to any of appellant's prejudice arguments at pages 167-169 of appellant's Opening Brief.

wrong.

A. Respondent Omits Material Facts

Respondent omits the following facts: Prior to ruling on the defense request for jury instructions, the court remarked: "I have not found any cases that deal with that, this lingering doubt business. . . .It just seems to me – Well, I'll keep my opinions to myself about having separate juries hear the case and then talk to them about lingering doubt that they don't know anything about because they didn't decide the defendant's innocence or guilt, but the law says that's what you are allowed to do. And that ought to confuse everybody, I think." (6RT 1238-1239.) Without further elaboration, the court declined to give defense instructions "A" and "C." (6RT 1243-1244.)

The instructions were refused despite the facts 1) there were significant weaknesses in the identifications of the perpetrator[22]; 2) the original jury was unable to reach a penalty verdict, splitting 7-5 for life; 3) the penalty retrial jury was hearing the case anew; and 4) the penalty

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22

See detailed discussion in appellant's Opening Brief, Arguments I and II.

retrial jury heard a new defense identification witness whose testimony was not heard by the first jury. Nothing in the instructions given informed the jury it could consider lingering doubt, as was evidenced by the jury's question: "If the jury agrees that one of the cases presented warrants the death penalty, however one of the cases contains some doubt, according to the instructions, is this sufficient for awarding death?" (10CT 2887; 6RT 1316.)

The retrial jury was then instructed the guilty verdicts had been determined by the first jury. The instruction was: "The defendant has been found guilty of murder in the first degree. The allegation that the murder was committed under a special circumstance has been specifically [sic] found to be true." (6RT 1303.)

Respondent omits part of the court's instruction to the jury:

THE COURT: Your question is as follows:

> "If the jury agrees that one of the cases presented warrants the death penalty, however, one of the cases contains some doubt, according to the instructions, is this sufficient for awarding death?"
>
> I have met with the lawyers, and the answer as best we can give you is as follows:

That all things considered in this case, in the context of your question, the jury still may choose which of the two penalties is appropriate in this case.

The answer is yes.

Does that answer your question?

THE FOREPERSON: I believe so.

THE COURT: All right. Thank you.

(20CT 5638; 6RT 1319-1320 [emphasis added].)

Respondent omits the prosecutor's closing argument. The heart of the prosecution's penalty phase case was to condemn appellant for being "a predator killer, who kills for the enjoyment, for the excitement of it." (6RT 1251-1252, 1278-1279.) The prosecutor argued that another jury had already found beyond a reasonable doubt that appellant had committed both murders. (6RT 1255.) The prosecutor argued:

> . . . there were two witnesses who testified in this area of residual doubt. The first witness was a man named Galindo, Joe Galindo. And he was across the street and down the block slightly when he saw – well, he heard a shooting,[23] and then he saw a black male apparently run

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[23] Here the prosecutor misstated Galindo's testimony. Galindo testified

by. And his description of the black male is different from how you would generally describe the defendant.

(6RT 1255-1256.) Nobody ever informed the penalty retrial jury that the guilt phase jury never heard Galindo's testimony.

B. The Trial Court Erred In Denying Appellant's Lingering Doubt Instruction

Respondent concedes doubts as to a capital defendant's guilt may be considered as mitigation in fixing the penalty. (RB 66.) However, respondent deceptively argues the very facts that made an instruction on lingering doubt necessary to a fair penalty retrial in this case as rendering the instruction unnecessary, distorting the record. Respondent argues, "[T]he evidence presented at the penalty retrial by appellant regarding the Mendez/Vasquez shooting exceeded the evidence he presented at the guilt phase. Appellant was able to present even more evidence of lingering doubt through Galindo's testimony, which was unavailable at the time of the guilt phase trial." (RB 65.) That is true, but respondent omits the fact the second penalty phase

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that he *did* see the shooting, in that he saw a man with his arm raised and a muzzle flash. (6RT 1127-1129.)

jury was unaware that Galindo did not testify at the first penalty phase trial – information which would have contributed significantly to a lingering doubt finding by the second penalty phase jury, had it only known the truth.

Respondent attacks appellant's reliance on *People v. Cox* (1991) 53 Cal.3d 618 as dictum. (RB 66-67.) In so doing, respondent cites several cases that say, essentially, a trial court is not required to instruct a jury that lingering doubt is a factor to consider.[24] Those cases, however, did not involve penalty phase retrials with new juries and substantially different evidence at the penalty phase than was presented at the guilt phase, nor did they involve a question from the jury expressing concern over lingering doubt. (10CT 2887 ["If the jury agrees that one of the cases presented warrants the death penalty, however, one of the cases contains some doubt, according to the instructions, is this sufficient for

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24

Respondent cites *People v. Avila, supra,* 38 Cal.4th at p. 615; *People v. Boyer* (2006) 38 Cal.4th at pp. 487-488; *People v. Huggins* (2006) 38 Cal.4th at p. 251; *People v. Harris* (2005) 37 Cal.4th 310, 359; *People v. Gray* (2005) 37 Cal.4th 168, 231-233; *People v. Ward* (2005) 36 Cal.4th 186, 219-221; *People v. Panah* (2005) 35 Cal.4th 395, 497; and *People v. Valdez* (2004) 32 Cal.4th 73, 129, fn. 28.)

awarding death?"].) This Court has not held a lingering doubt instruction is *never* required under any circumstances. Rather, in *People v. Ward, supra*, 36 Cal.4th 186, this Court stated, referring to the *Cox* decision:

> We have since held, however, that such an instruction is *generally* unnecessary where, as here, the court instructs in the standard terms of section 190.3, factors (a) and (k). (*People v. Hines* (1997) 15 Cal.4th 997, 1068, 64 Cal.Rptr.2d 594, 938 P.2d 388.)

(*Id.* at p. 220 [emphasis added].)

This was an unusual case where the court was required to give a properly formulated lingering doubt instruction based on the evidence, and on the jury's expressed confusion over the significance of lingering doubt. (*People v. Cox, supra*, at p. 678, fn. 20; see also *People v. Thompson* (1988) 45 Cal.3d 86, 124, cert. den. (1988) 488 U.S. 960, 102 L.Ed.2d 392, 109 S.Ct. 404 [recognizing propriety of appropriately phrased instruction to consider lingering doubt regarding a defendant's intent to kill in deciding penalty]; *People v. Kaurish* (1990) 52 Cal.3d 648, 705-706 [rejecting claim that court should have given defense instruction where court's instruction that jurors "could

consider lingering doubt of defendant's guilt to be a factor in mitigation" was sufficient].)

Respondent asserts appellant has "put forward no basis in law, fact or logic which would distinguish the instant case. . ." from any other death penalty case. (RB 67.) In fact, appellant's case is distinguishable from any case where the evidence presented to the guilt phase jury and the evidence presented to a new penalty phase jury was significantly different. It was for this reason the evidence warranted the residual doubt instruction – the penalty jury heard a different case, and so it was fundamentally unfair to tell the penalty jury the guilt phase jury had already decided appellant's guilt beyond a reasonable doubt and not to tell the penalty jury there was a new witness in the mix.

The jury's question regarding lingering doubt ["If the jury agrees that one of the cases presented warrants the death penalty, however, one of the cases contains some doubt, according to the instructions, is this sufficient for awarding death?"] also required an adequate instruction on lingering doubt, which was not forthcoming.

Respondent claims "[t]o the contrary, the jury's question demonstrated it was well aware of the mitigating value of lingering doubt because the inquiry was whether the existence of lingering doubt on the Mendez/Vasquez shooting would automatically preclude a verdict of death." (RB 66.) Appellant disagrees with respondent's interpretation of the jury's question. If the question is ambiguous, then the conviction should be reversed because a man's life is at stake, and no man should be put to death when the penalty phase jury was not fully instructed on the significance of lingering doubt.

The identity of the person (or persons) who killed Vasquez and Moreland and attempted to kill Mendez and Fraduie was the only contested question at the guilt phase. As appellant argued at trial, and continues to argue on appeal, the evidence was insufficient to prove that he was the gunman in either case. The possibility of lingering doubt was a circumstance of the capital crimes that could be considered by the jury under both Penal Code section 190.3, subdivisions (a) and (k). While the penalty jury did not decide appellant's guilt, it was presented with evidence concerning the facts and circumstances of the

murders. Respondent ignores appellant's citation to *People v. Gonzalez* (1990) 51 Cal.3d 1179, where this Court indicated a jury determining penalty only, if given the pertinent information regarding the homicide, may weigh any residual doubt about the convictions in its penalty deliberations. (*Id.* at pp. 1234-1236.) Respondent also fails to address *People v. DeSantis* (1992) 2 Cal.4th 1198, cert. den. (1993) 508 U.S. 917, 124 L.Ed.2d 268, 113 S.Ct. 2361 in this context. *DeSantis* held a residual doubt instruction was proper in a penalty retrial. (*Id.* at p. 1239.)

Respondent fails to address how the prosecution's own penalty phase evidence provided a basis for residual doubt as to appellant's guilt. Respondent ignores the following facts: The only evidence linking appellant to the shootings was the significantly flawed eyewitness identifications by Mendez and Fraudie, both of whom were strangers to appellant, and both of whom made their identification under circumstances well known to lead to false identification. Both shootings occurred after dark, and were completely unexpected and out of context. Fraduie was intoxicated at the time of the event.

Mendez was in shock at having been shot in the face and leg, and upon learning that his wife had been killed. Significant time passed between the crimes and the witnesses being presented with the initial, suggestive, photo lineup.[25]

Respondent also ignores the key facts undermining the prosecution case. Defense witnesses Slaughter and Galindo testified to a much taller and heavier man who shot Mendez and his wife. After observing appellant standing up in court, Galindo emphatically stated that appellant was not the shooter.[26]

Lingering doubt, therefore, was the centerpiece of appellant's penalty defense. His attorney urged the jury to consider such doubt as mitigation. (6RT 1285-1293.) The instructions the defense requested were appropriately drafted to address overall lingering doubt as to appellant's guilt. (Contrast *People v. Cox, supra,* 53 Cal.3d at pp. 675-677 [requested instruction erroneously directed that the jury consider

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See detailed discussion in appellant's AOB, Arguments I and II and in the present Reply, *supra.*

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The jury was not informed Galindo had not testified at the guilt phase.

lingering doubt regarding the nature of his participation rather than his guilt].)[27] Nothing in the instructions informed the jury it was permitted to consider residual doubt, and the jurors' question – "If the jury agrees that one of the cases presented warrants the death penalty, however, one of the cases contains some doubt, according to the instructions, is this sufficient for awarding death?" – indicates that the jury did not understand that residual doubt could be weighed in mitigation. Trial counsel's argument on lingering doubt was insufficient to overcome the trial court's error in refusing to instruct the jury on lingering doubt. Respondent fails to address *Boyde v. California* (1990) 494 U.S. 370, 383-384, or *Hitchcock v. Dugger* (1987) 481 U.S. 393, 397-399, which support appellant's position his trial attorney's argument on lingering doubt was insufficient to overcome the trial court's error in refusing to instruct the jury on lingering doubt. As the United States Supreme

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In requesting the instructions, defense counsel cited three cases: *People v. Morris* (1991) 53 Cal.3d 152, 218-219; *People v. Thompson, supra,* 45 Cal.3d 86, 134; and *People v. Arias, supra,* 13 Cal.4th 92, 183. (10CT 2881, 2883; 6RT 1241-1242.) These references provided adequate and accurate authority for appellant's request.

Court noted in *Boyde, supra,* instructions, not argument by counsel, guide jury deliberations:

> [A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation] and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.

(*Boyde v. California, supra,* 494 U.S. at 384 [addressing prosecutorial misstatements of the law].) In short, a residual doubt instruction was necessary in this case, and the trial court erred in denying appellant's instruction.

The trial court's refusal to give the lingering doubt instruction was not only an error under state law, but it also violated appellant's federal constitutional rights to due process, equal protection, a fair trial, and a reliable and non-arbitrary penalty determination under the Sixth, Eighth and Fourteenth Amendments. A liberty interest created by state law is protected against arbitrary deprivation under the Fourteenth Amendment. (*Hewitt v. Helms* (1983) 459 U.S. 460, 466, 74 L.Ed.2d 675, 103 S.Ct. 864; see also *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346

[defendant has state-created right that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion].) California law mandates lingering doubt be considered, when offered, as mitigation. (*People v. Terry* (1964) 61 Cal.2d 137, at pp. 145-147) and that appropriately written instructions on lingering doubt be given. (*People v. Cox, supra,* at p. 678, fn. 20; *People v. Thompson, supra,* 45 Cal.3d at p. 134.) The refusal of the trial court to give appellant's lingering doubt instruction deprived him of his state-created liberty interest not to be sentenced to death by a jury that did not consider lingering doubt as a basis for a lesser sentence. The arbitrary failure of the trial court to abide by state law constituted a denial of due process under the federal constitution. (*Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 [failure of judge to follow state capital sentencing procedures for weighing aggravating and mitigating circumstances was a denial of due process under Fourteenth Amendment].) Moreover, the denial to appellant of a state-created right granted to other capital defendants violated the equal protection clause of the Fourteenth Amendment. (See *Myers v. Ylst* (9th Cir. 1990)

897 F.2d 417, 425, cert. den. (1991) 498 U.S. 879, 112 L.Ed.2d 172, 11 S.Ct. 202 [state court's retroactive application of jury selection rule to one defendant but not to another violated the federal equal protection clause].) The rejection of appellant's lingering doubt instruction was erroneous under both state and federal law and requires reversal of his death sentence.

C. The Trial Court's Instruction to the Jury Following Its Inquiry Deprived Reed of His Right to Have the Jury Consider and Give Full Effect to Its Doubt as to One Count

1. The Court Was Required to Give a Lingering Doubt Instruction Under the Circumstances of this Case, Because, During Deliberations, The Jurors Requested Instruction on their Doubt as to Whether Appellant Committed One of the Murders

Respondent disagrees the jury request for instruction on their doubt as to whether appellant committed one of the murders required a lingering doubt instruction. (RB 67-69.)

(a) The Issue is Not Forfeited

Although conceding "the trial court in this case did not give the exact agreed-upon wording of the instruction," respondent argues the

issue is waived because defense counsel participated in the formulation of the response and "affirmatively approved of the response ultimately given." (RB 67.) Without citing to the record, respondent claims defense counsel "essentially agreed to the substance of the given instruction." (RB 67.) There is nothing in the record to support this statement. The court omitted the crucial words counsel had agreed upon, "whatever doubt you may have on one of the murders," and added the word "yes" despite the agreement of both the prosecutor and defense counsel that it was improper to tell the jury "yes." (6RT 1317-1320.)

(b) The Court's Response Was Inadequate

Respondent sets out the law governing a trial court's duty to help the jury understand the legal principles it is asked to apply, but concludes elaboration upon the original instructions is not necessarily required.[28] (RB 68.) The trial court here agreed to elaborate upon the

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Here respondent cites *People v. Smithey* (1999) 20 Cal.4th 936, 985, for the proposition "a trial court's decision as to what information is sufficient to satisfy the jury's request for information is reviewed for abuse of discretion." At the place cited, *Smithey* addressed a jury's

original instructions; however, the court omitted the crucial words counsel had agreed upon – "whatever doubt you may have on one of the murders" – and added the word "yes," despite the prosecutor's and defense counsel's clearly expressed concern it was improper to tell the jury "yes." (6RT 1319-1320.) The issue here is whether the instruction the court gave – clearly deviating from the instruction agreed upon by both parties – was inadequate and misleading to the jury. It was both.

Respondent argues there was no abuse of discretion in the instruction because the "court's response to the jury's question was legally correct." (RB 68-69.) That was not the People's position at trial. Both counsel agreed that "yes" was not an appropriate response. (6RT

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question about verdict forms, not instructions. This Court held "[t]he court reasonably concluded that the jury was uncertain whether and under what circumstances it should complete some or all of the special circumstance verdict forms. The court's explanation was clear and correct. It was clear to the jury that the court's explanation of the verdict forms did not purport to be a complete reinstruction on the special circumstances. The court reasonably declined to instruct further on the issue, particularly in light of the foreperson's indication that the jury no longer was confused." (*Ibid.*) Here, the trial court did not inquire to determine whether the jury was still confused after giving an instruction both parties had agreed was incorrect, even when the jurors requested readback of Foster Slaughter's testimony, indicating the jury's doubt. (10CT 2885; 6RT 1324.)

1317-1319 [The prosecutor: "I think legally the answer to the question is yes they can, but telling them yes they can, I fear what – that that will be telling them how they should vote. [¶] And that's why I made the suggestion that we tell them, 'All things considered, *including whatever doubt you may have on one of the murders*, all things considered, you can choose one or the other.'" [Emphasis added.])

Principles of appellate review bar respondent from advancing on appeal an argument it did not advance in the trial court. (*Perez v. Grajales* (2008) 169 Cal.App.4th 580, 591-592 [arguments raised for the first time on appeal are forfeited]); *Saville v. Sierra College* (2006) 133 Cal.App.4th 857, 872 [under the "theory of the trial doctrine," a party is "not permitted to change [its] position and adopt a new and different theory on appeal']; *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181 ["[j]udicial estoppel prevents a party from asserting a position ... that is contrary to a position previously taken in the same or some earlier proceeding '].) These principles compel that this Court disregard respondent's new position that omitting the crucial phrase addressing "doubt" and adding the word "yes" was

correct.

The jury's request could not have been a clearer indication the jury had a lingering doubt about one of the murders, as defense counsel noted in requesting that the jury be instructed the answer to their question was "no" and that they should consider lingering doubt as a circumstance in mitigation. (6RT 1317.)

In response to the jury's question, the court failed to give the instruction agreed upon by counsel that the jurors could consider whatever doubt they might have on one of the murders, and instead instructed them that yes, they could impose the death sentence despite their doubt as to appellant's culpability for one of the two murders. This was clearly error.

2. The Error Was Prejudicial

Respondent does not address appellant's contention the error deprived him of due process, his right to present a defense, and his right to assistance of counsel. (See AOB pp. 189-193.)

D. The Penalty Phase Judgment Must Be Reversed Because The Court's Instruction That the Jury Was "Not Here to Determine [Appellant's] Guilt Or Innocence" And The Court's Response to The Jury's Lingering Doubt Question Directed a Verdict of Death, In Violation of State Law and the Fifth, Sixth, Eighth, and Fourteenth Amendments

Despite respondent's objection at trial to the defective answer the court gave to the jury's lingering doubt inquiry on the ground it would direct a verdict of death, on appeal respondent disagrees the court directed a verdict of death. (RB 69-70.) Respondent relies solely upon this Court's decision in *People v. DeSantis, supra,* 2 Cal.4th 1198, cert. den. (1993) 508 U.S. 917.

1. Respondent Ignores Crucial Facts Peculiar to This Case That Render the Judgment of Death Unfair

Respondent ignores one of the essential problems with this case: the guilt and penalty juries heard materially different evidence, but the penalty jury was never informed of this fact. The penalty jury could not make an accurate penalty determination that included a full assessment of all of the facts bearing upon a lingering doubt appellant committed one of the murders. In spite of this fundamental problem,

the trial court instructed the jury appellant's guilt was "conclusively presumed" (5RT 943) and "conclusively proven." (6RT 1232.) When during deliberation, the jurors asked a question revealing that some or all in fact had lingering doubt, the trial court's answer further closed the door to the jury's consideration of lingering doubt as mitigation. (6RT 1319-1320.) The trial court's instructions to the penalty retrial jury, taken together, effectively directed a verdict of death for appellant.

More specifically, respondent ignores the facts that the penalty retrial jury was the only jury to hear the crucial eyewitness testimony of Joe Galindo, whose unavailability (due to his National Guard service) had been the subject of an unsuccessful motion to continue the guilt phase of the trial.[29] (6RT 1126-1137.) Joe Galindo emphatically testified appellant was not the person who shot and killed Amarilis Vasquez, corroborating and expanding Foster Slaughter's testimony the

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See Argument I in appellant's Opening Brief regarding the trial court's error in refusing to grant a continuance to obtain Galindo's testimony for the guilt phase of trial.

man who shot Vasquez was much taller and heavier than appellant.[30] (6RT 1130-1131.) The penalty retrial jury asked, "If the jury agrees that one of the cases presented warrants the death penalty, however one of the cases contains some doubt, according to the instructions, is this sufficient for awarding death?" (10CT 2887; 20 CT 5638; 6RT 1316.) The court instructed the jury, essentially, the answer to their question was "Yes." (6RT 1319-1320.)

Respondent also omits the following facts: When the jury first returned with a verdict of death and the court polled the jury, Juror number 1 said death was not her verdict. (20CT 5638; 6RT 1320-1322.) The court told the jurors to go back into deliberations. (20CT 5639; 6RT 1322.) At 10:55 a.m., the jury resumed deliberations. (20CT 5639.) At 11:30 a.m., the jury requested readback of Foster Slaughter's testimony, and continued to work until 11:55 a.m. (10CT 2885; 20CT 5639; 6RT 1323.) Following the lunch break, the jury began deliberating again at 1:40 p.m., at which point it announced it no longer needed the

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See detailed discussion of the crucial nature of Galindo's testimony in Argument I of appellant's Opening Brief at pp. 65-70.

readback. (10CT 2886; 20CT 5639; 6RT 1324.) At 1:50 p.m., the court went on the record and stated that, just before the noon hour, the foreperson had submitted a note requesting Foster Slaughter's testimony, but before the testimony could be read back, the court received another note stating, "We don't need the transcript re-read." (10CT 2886; 6RT 1324.) The court offered to bring the jury out to explore the issue, but counsel declined. (6RT 1324-1325.) At 1:55 p.m., the jury informed the court that it had reached a verdict. (20CT 5639.) At 2:10 p.m., the jury returned to the courtroom with its unanimous verdict for death. (20CT 5639; 6RT 1325-1327.)

The trial court committed fundamental constitutional error by invading the province of the jury as arbiter of penalty in a capital case. The jury was foreclosed from considering appellant's primary penalty defense, lingering doubt.

2. The Trial Court Erroneously Directed a Verdict in Favor of Death

DeSantis does not foreclose appellant's argument the trial court directed a verdict for death. *DeSantis* is distinguishable on its facts.

(a) DeSantis is Distinguishable From This Case

In *DeSantis*, as in this case, the jury deadlocked at the penalty phase and a second jury was impaneled. That jury fixed the penalty at death. This Court ruled, as to the penalty phase instructions and the prosecutor's argument, the court and prosecutor merely reminded the jury that defendant's guilt was to be conclusively presumed as a matter of law. This Court further held guilt may be conclusively presumed, and yet as a moral question the penalty phase jurors could personally retain some lingering doubt about whether the defendant in fact killed the victim. This Court further held the defendant was not entitled to a jury instruction on lingering doubt, even though the jury making the penalty determination was a different jury from the one that determined guilt. The key difference between *DeSantis* and this case is that in *DeSantis* the defendant was allowed to present evidence at the penalty trial so as to virtually retry the guilt phase.

More specifically, at the second penalty trial in *DeSantis*, the court gave the defendant wide latitude to introduce evidence of the circumstances of the crime. The defendant recalled numerous

witnesses from the guilt phase to raise doubts about the reliability of their inculpatory testimony, and challenged the accuracy of prosecution witnesses' testimony on cross-examination. Over the prosecutor's objection, the trial court permitted the defendant to spend much time challenging the reliability of the surviving victim's identification of him. Thus, the penalty phase jury was well aware of the nuances of the case. (*Id.* at p. 1236.)

Here, although the jury heard the testimony of Galindo – who had not testified at the guilt phase – the jury did not know the guilt phase jury and first penalty phase jury had *not* heard Galindo's critically important testimony that appellant was not the shooter in the Tacos el Unicos murder. Thus, appellant's penalty phase jury was deprived of information crucial to its lingering doubt determination. So, unlike the *DeSantis* case, the court in appellant's case removed the lingering doubt question from the jury through a combination of failing to inform the second penalty phase jury that the first penalty phase jury had not heard Galindo's testimony, and the faulty jury instructions discussed above.

Respondent argues that "as in *DeSantis*, appellant's counsel repeatedly conceded during the closing arguments that appellant had already been found guilty of the murders and that he was there just to ask the jury 'not to kill him.' (6RT 1280-1281.)" This is not a fair comparison, given the circumstances of appellant's case. Appellant's counsel had little choice but to argue as he did, as the trial court had repeatedly ruled against him on instructional issues, and he could not tell this second jury what the first jury had not heard.

Finally the *DeSantis* Court expressly did not decide "whether in another case a lingering doubt instruction of some type might be proper." (*Id.* at p. 1239.) This is that case.

(b) Respondent Substantially Fails to Address Appellant's Argument

Respondent substantially fails to address appellant's argument.

While respondent cites *People v. Gay* (2008) 42 Cal.4th 1195 (RB 72), respondent does not discuss the significance of that case to appellant's death penalty judgment. In *Gay*, this Court found erroneous an instruction which told the jury at the penalty retrial that

it had been "conclusively proven" by the prior jury's verdict that the defendant had shot and killed the victim, which was in conflict with the trial court's later instruction permitting the jury to consider lingering doubt. (*Id.* at p. 1224.) The error is even more egregious here, in that no instruction told the jury that it was appropriate to consider lingering doubt at all.[31] As in *Gay*, nothing in the record suggests that the jury understood how to weigh the evidence that was admitted. (*Id.* at p. 1225.) Instead, the record suggests quite plainly that the jury was confused: The jurors interrupted deliberations to request clarification from the trial court, but could not ask for clarification on lingering doubt as did the jurors in *Gay*; the jury considering appellant's penalty had not heard that instruction. Even so, the jury's question clearly indicated that there was doubt as to one crime. (10CT 2887; 20 CT 5638; 6RT 1316.)

The trial court's response to this jury's question was less

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Trial counsel argued lingering doubt (6RT 1285-1293), but the jury was also instructed in the language of CALJIC No. 1.02 that the arguments of counsel are not evidence, and are overridden by the court's instructions. (10CT 2852; 6RT 1297.)

adequate than the response by the judge in *Gay*, who simply re-read the lingering doubt instruction and told the jury it was clear enough, despite evidence to the contrary from the jury. (*Id.* at p. 1226; see generally *Bollenbach v. United States* (1946) 326 U.S. 607, 612-613, 66 S.Ct. 402, 90 L.Ed. 350 ["When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy"].) In appellant's case, the trial court sought the views of counsel, but then largely disregarded the agreed-upon language, particularly the crucial word, "doubt." Again, the prosecutor acknowledged that telling the jury "yes" in response to its question would be tantamount to a directed verdict. (6RT 1318-1319.) The trial court's instruction had the very effect that so concerned the prosecutor. The error is clear.

As appellant argued in his Opening Brief, the court's instructions left no room for the jury to consider potentially mitigating facts – specifically, residual doubt that appellant was the shooter in one of the incidents. (See AOB pp. 170-214.) Consideration of lingering doubt was decisively removed from the case, and the evidence supporting that doubt was characterized as irrelevant to the jury's sentencing

decision. The jury was told that (1) a critical aspect of the penalty phase defense – lingering doubt – was entirely foreclosed to appellant by the decision of the prior jury and could not be considered; and (2) the jury could impose a sentence of death despite its belief that one of the cases "containe[d] some doubt."

The penalty judgment must be reversed because the instructions violated state law as well as appellant's right to a fair sentencing hearing and a reliable penalty phase determination, as guaranteed by the Fifth, Eighth and Fourteenth Amendments. Because respondent cannot prove the error harmless beyond a reasonable doubt, the penalty judgment must be reversed.

E. The Trial Court Erred in Failing to Inform the Retrial Penalty Jury that Galindo Had Not Testified Before the Original Jury, Which Found Reed Guilty of Both Murders but Failed to Reach A Penalty, Voting 7-5 in Favor of Life

Respondent disagrees that the trial court erred in failing to inform the retrial penalty jury Galindo had not testified before the original jury, which found appellant guilty of both murders but failed to reach a penalty, voting 7-5 in favor of life. (RB 71-72.) Respondent

is wrong.

1. The Issue is Not Forfeited

Respondent contends this issue is forfeited because appellant was required to request a "pinpoint" instruction. (RB 71.) This issue does not involve instructional error, so respondent's argument is irrelevant.

2. Respondent Substantially Fails to Address Plaintiff's Argument The Exclusion of This Information Violated Due Process

(a) The Fact of the Prior Jury's Deadlock

Respondent simply asserts, without explanation, that appellant has failed to provide any compelling reason to deviate from the reasoning of *People v. Hawkins* (1995) 10 Cal.4th 920 and other cases holding "the fact of a first jury's deadlock, or its numerical vote, is irrelevant to the issues before the jury on a penalty retrial." (RB 71.)

Appellant has provided a compelling reason for disclosure of this information in his case. Due process requires it. As appellant explained in his Opening Brief, a violation of the United States Constitution may occur whenever the procedures by which a state

determines whether the death penalty should be imposed on a defendant results in an unfair hearing, or unfair proceedings. (*People v. Crovedi* (1966) 65 Cal.2d 199, 205.) Sentencing procedures should not create "a substantial risk that the [death penalty will] be inflicted in an arbitrary and capricious manner." (*Gregg v. Georgia* (1976) 428 U.S. 153, at p. 188, 96 S.Ct. 2909, at p. 2932, 49 L.Ed.2d 913.) The Eighth and Fourteenth Amendments require that the jury not be precluded from considering any mitigating factors offered to show a basis for a sentence less than death. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604.)

This Court's holding in *Hawkins* that a first jury's deadlock or its numerical vote is irrelevant in a penalty retrial does not apply in the context of the individualized consideration of appellant's case, because the new jury was asked to determine penalty based on the prior jury's guilt determinations, and was doing so with new defense evidence as to the weakest portion of the prosecution's case – i.e., identification of the perpetrator.

This information should have been part of the lingering doubt equation for the penalty jury in appellant's case – because of his

individual circumstances – as a mitigating factor. (*People v. Gay, supra,* 42 Cal.4th 1195, 1218.) The defendant is entitled to adduce evidence to show his possible innocence of the crimes of which he has been convicted (*People v. Terry, supra,* 61 Cal.2d 137, 145) and argue his possible innocence to the jury as a factor in mitigation. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1252.)

There appears to be a conflict in the courts as to what "lingering doubt" is. In *Franklin v. Lynaugh* (1988), 487 U.S. 164, the United States Supreme Court held that "lingering doubts are not over any aspect of petitioner's "'character,' 'record,' or a 'circumstance of the offense.'" (*Franklin v. Lynaugh* (1988) 487 U.S. 164, at p. 174.) Justice O'Connor concurred that "'[r]esidual doubt' is not a fact about the defendant or the circumstances of the crime." (*Franklin v. Lynaugh, supra,* 487 U.S. 164, at p. 188.) At the same time, the high Court has held a capital defendant cannot be restricted to proof of statutory mitigating factors. (*Hitchcock v. Dugger, supra,* 481 U.S. 393, 398-399, 107 S.Ct. 1821, 95 L.Ed.2d 347.) This Court has recognized that, while a capital defendant has no federal constitutional right to have the jury consider lingering

doubt as to guilt in choosing the appropriate penalty, he has a statutory right to have a jury consider it. (*People v. Gay, supra,* 42 Cal.4th 1195, 1220.)

Respondent ignores the fact that any limitation by the state as to what mitigating circumstances can be argued is prohibited by the Eighth and Fourteenth Amendments. (*Lockett v. Ohio, supra,* 438 U.S. 586, 604-605; *Penry v. Lynaugh* (1989) 492 U.S. 302; *Eddings v. Oklahoma* (1982) 455 U.S. 104.) Respondent also ignores California Penal Code section 190.3, which provides "evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence."

(b) Respondent Substantially Fails to Address Appellant's Argument That The Fact Galindo Did Not Testify Before The Guilt Phase Jury and Still Hung on the Penalty is a Mitigating Factor

Respondent dismisses appellant's argument regarding the failure to inform the second penalty phase jury that Galindo did not testify at the guilt phase as (1) irrelevant and (2) forfeited because appellant's counsel failed to elicit the information during Galindo's testimony. (RB

72.)

As to trial counsel's failure to elicit from Galindo the fact he did not testify at the first trial, it is highly likely any attempt to do that would have been ended upon the prosecutor's objection the information was irrelevant. If trial counsel was ineffective for failing to elicit the information, then that is an issue to be pursued on habeas.

The judgment of death must be reversed.

VIII. THE COURT COERCED A VERDICT AT THE PENALTY PHASE RETRIAL WHEN IT RECEIVED A VERDICT, DISCOVERED DURING THE POLLING OF THE JURY THAT THE VERDICT WAS NOT UNANIMOUS, AND SENT THE JURORS BACK TO DELIBERATE WITHOUT PROPER INSTRUCTIONS AND ADMONITIONS

Respondent disagrees that the court coerced a verdict at the penalty phase retrial when it received the jury's verdict for death and discovered in polling the jury that the verdict was not unanimous, and then sent the jury back for more deliberations. (RB 72-76.) Again, respondent ignores the facts and distorts the law.

A. The Issue is Not Forfeited

Respondent argues the issue is forfeited for defense counsel's

failure to object. (RB 73-75.) The cases upon which respondent relies do not support respondent's arguments.

Respondent cites *People v. Wright* (1990) 52 Cal.3d 367, 415. In that case defense counsel failed to object to the court's failure to poll a juror for an indication of his agreement with the verdict. The court deemed the polling error waived. (*Ibid.*) All of the other cases respondent relies upon for its waiver argument also have to do with polling errors. (RB 73.) The error appellant raises is jury coercion, not polling error. Appellant has not forfeited the issue.

B. Appellant Has Not Raised Polling Error

Respondent argues about "polling error." (RB 74-75.) Appellant has not raised an issue of error in the manner in which the jury was polled.

C. The Verdict Was Coerced

1. Respondent's Contentions

Respondent denies the verdict was coerced. (RB 75-76.) Respondent contends appellant's argument is based on a faulty assumption that Juror No. 1 was the single holdout juror against a

death verdict, and that since the court stopped the individual polling after Juror No. 6, it is impossible from the record to determine how many other jurors had second thoughts about their death verdict. (RB 75.) Respondent speculates "it is equally possible that Juror No. 1 was not a hold-out juror, but simply wanted to reassure herself about the momentous life and death decision she was making by discussing the matter one more time" and concludes the jury, including Juror No. 1, was fully aware of the unanimity rule because of the jury instructions they were given, and the jury is presumed to have followed the court's instructions. (RB 75-76.)

2. Respondent Substantially Fails to Address Appellant's Argument

Respondent, having mistaken appellant's argument as having something to do with polling the jury, substantially fails to address the jury coercion argument. Appellant refers this Court to his Opening Brief at pages 215-217 for the standards to be followed when a trial court is confronted with the possibility of a hung jury.

The question is whether the trial court pressured the jury to reach

a verdict when it sent the jury back with the comment: "It appears we do not have a unanimous verdict. I'm going to return the verdict form to you and ask that the jurors go back into deliberations, please. Thank you." (6RT 1322; *People v. Proctor* (1994) 4 Cal.4th 499, 539.)

Respondent does not address the need for additional jury instructions upon returning a jury to deliberations, arguing instead that standard jury instructions given prior to the start of deliberations suffice. (RB 75-76.) In this vein, respondent ignores appellant's citation to *People v. Keenan* (1988) 46 Cal.3d 478, 534; *United States v. Mason* (9th Cir. 1981) 658 F.2d 1263, 1268; *People v. Gainer* (1977) 19 Cal. 3d 835, 852[32]; or *People v. Wattier* (1996) 51 Cal. App. 4th 948, 956 – cases that speak to the issue of jury coercion during deliberations. The court failed to caution the jury in this case – it simply sent the jury back for more deliberations.

Respondent ignores the fact that, instead of exploring the issue

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This Court has since reexamined *Gainer* in *People v. Valdez* (2012) 55 Cal.4th 82, holding separate admonitions to majority and minority jurors after they declared impasse did not improperly encourage the minority to acquiesce. (*Id.* at pp. 162-163.)

whether the jurors believed further deliberations would be helpful, or giving the necessary instructions to avoid pressure on the holdout juror or jurors, the court simply sent the jurors back without comment, clearly implying that a verdict *must* be reached. Respondent ignores appellant's discussion of *People v. Wattier, supra,* 51 Cal.App.4th 948. (See Appellant's Opening Brief at pp. 216-217.)

Here, the court gave no cautionary instructions tailored to problems during deliberations. The judge merely stated the verdict must be unanimous, then returned the used verdict forms to the jury and told it to continue its deliberations. (6RT 1322.)

Respondent's speculation about whether or not Juror No. 1 was the only holdout or undecided juror is irrelevant. The foreman presumably would not have notified the court of the verdict had the foreman not believed the verdict was unanimous. The apparent holdout juror went back to the jury room under pressure to acquiesce to the jurors who had chosen death. (See *People v. Gregory* (1989) 184 Ill.App.3d 676, 682 [Jury coercion found where, after a perfunctory sidebar with both counsel, the judge reminded the jury his previous

instructions were that its verdict upon any charge "must be unanimous," then returned the used verdict forms to the jury and asked it to continue its deliberations].)

Because the court in this case failed to give the jury *any* instructions whatsoever upon learning that they had reached a deadlock, the holdout juror could only surmise that she would eventually have to submit to the pressure of the majority to reach a verdict of death. This jury had already been directed to return a verdict of death without considering their doubts about the validity of one of the convictions. The error was compounded in that the court instructed the jury in the language of CALJIC 17.41.1, which pointedly tells each juror that he or she is not guaranteed privacy or secrecy. That instruction assured the holdout juror that her words might be used against her and that candor in the jury room could be punished, further inhibiting speech and free discourse in a forum where "free and uninhibited discourse" was most needed. (*Attridge v. Cencorp* (2nd Cir. 1987) 836 F.2d 113, 116.) Respondent addresses none of these points. Given the requirement of heightened reliability in capital cases,

Appellant's sentence must be reversed.

IX. THE TRIAL COURT ERRED BY REFUSING APPELLANT'S PINPOINT INSTRUCTIONS THAT THE LAW DOES NOT HAVE A PREFERENCE FOR THE PUNISHMENT OF DEATH AND THE JURY COULD NOT CONSIDER THE DETERRENT OR NONDETERRENT EFFECT OF THE DEATH PENALTY OR THE MONETARY COSTS TO THE STATE

Respondent disagrees the trial court erred by refusing appellant's pinpoint instruction that the law does not have a preference for the death penalty and that the jury could not consider the deterrent or nondeterrent effect of the death penalty or the monetary costs to the state. Respondent contends both of these instructions have repeatedly been rejected by this Court. (RB 76-77.)

Appellant stands by his arguments as set forth in his Opening Brief, and wishes to preserve them for federal review.

X. THE PROVISION OF CALJIC 17.41.1 VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND TRIAL BY A FAIR AND IMPARTIAL JURY AND REQUIRES REVERSAL

Respondent disagrees the trial court erred by instructing the guilt and penalty retrial juries in the language of CALJIC 17.41.1. (RB 77-78.) Respondent argues appellant's contention is foreclosed by this Court's

"express holding to the contrary" in *People v. Engelman* (2002) 28 Cal.4th 436. (RB 77.)

Respondent argues appellant forfeited his challenge by failing to object to the instruction at trial. No forfeiture will be found where the court's instruction was an incorrect statement of the law, or the instructional error affected the defendant's substantial rights. (*People v. Mason* (2013) 218 Cal.App.4th 818, 823; § 1259 ["appellate court may ... review any instruction given, ... even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"].) Because the instruction was incorrect and misleading, and because there is risk that the instruction was misunderstood or that it was used by as a tool for browbeating the holdout juror in this capital case, the error affected appellant's substantial rights. Appellant has not forfeited his right to assert this instructional error on appeal.

In *People v. Engelman* (2002) 28 Cal.4th 436, this Court disapproved CALJIC No. 17.41.1, but also concluded that its provision does not violate the federal constitution. Appellant's trial took place

before *Engelman* was decided.

Appellant maintains his position that instructing the juries in his case in the language of CALJIC 17.41.1 violated his rights under the Sixth and Fourteenth Amendments and therefore raises the issue here in order for the Court to reconsider its decision in *Engelman* and to preserve the error for review in federal court. (See AOB, pp. 226-229.)

XI. APPELLANT'S RETRIAL AFTER THE ORIGINAL JURY FAILED TO REACH A PENALTY VERDICT VIOLATED HIS FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR JURY TRIAL, RELIABLE PENALTY DETERMINATIONS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Respondent contends appellant's arguments regarding the retrial of the penalty phase have already been decided by the courts and should be rejected. (RB 78.)

Appellant maintains that California's death penalty scheme is an anomaly and is contrary to the "evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 101.) The penalty retrial following the hung jury violated

appellant's federal constitutional rights to a fair jury trial, reliable penalty determinations, freedom from cruel and unusual punishment, due process and equal protection as guaranteed by the Sixth, Eighth and Fourteenth Amendments of the United States Constitution as well as state constitutional protections in article I, sections 1, 7, 15, 16, and 17 of the California Constitution.

If this Court will not reverse appellant's death penalty judgment on this basis, appellant wishes to preserve the issue for the federal courts.

XII. THE PROVISION OF CALJIC NO. 8.85, WHICH INCLUDED INAPPLICABLE FACTORS AND FAILED TO SPECIFY WHICH FACTORS COULD BE MITIGATING ONLY, VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND REQUIRES REVERSAL OF THE PENALTY JUDGMENT

Respondent disagrees the trial court erred by instructing the penalty phase jury in the language of CALJIC No. 8.85. (RB 79.)

Appellant wishes to preserve this issue for federal review should this Court reject it, and for that reason stands by the argument he presented at pages 235 through 243 of his Opening Brief.

XIII. THE PROVISION OF CALJIC NO. 8.88 DEFINING THE NATURE AND SCOPE OF THE JURY'S SENTENCING DECISION, VIOLATED APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION AND REQUIRES REVERSAL OF THE PENALTY JUDGMENT

Respondent disagrees the trial court's concluding instruction in this case, CALJIC No. 8.88, was constitutionally flawed, citing authorities previously rejecting the issue. (RB 79-81.)

Appellant recognizes that this Court has rejected similar challenges to CALJIC No. 8.88 (see, e.g., *People v. Coffman* (2004) 34 Cal.4th 1, 124), but nevertheless has raised the issue here in order for the Court to reconsider those decisions and to preserve it for federal review.

XIV. THE SPECIAL CIRCUMSTANCE OF MULTIPLE-MURDER FAILS TO NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY AND THUS VIOLATES THE EIGHTH AMENDMENT

Respondent argues "this Court has repeatedly rejected similar Eighth Amendment challenges to the multiple murder special circumstance in the past," and appellant "offers no compelling reason requiring reconsideration of this issue," so appellant's claim should be

rejected. (RB 81.) Otherwise, respondent fails to address appellant's arguments. As appellant explained in his Opening Brief, he raises the issue here in order for this Court to reconsider its previous decisions and to preserve the claim for federal review.

Appellant, therefore, stands by the arguments he made in his Opening Brief, and respondent's brief does not require any further elaboration, since it does not address the substance of appellant's brief.

XV. CALIFORNIA'S CRIMINAL JUSTICE SYSTEM IS TOO UNRELIABLE TO ALLOW THE IRREVOCABLE PENALTY OF DEATH TO BE IMPOSED

Respondent disagrees that California's criminal justice system is too unreliable to allow the death penalty to be imposed. (RB 81-82.)

As appellant explained in his Opening Brief, he raises the issue here in order for this Court to reconsider its previous decisions and to preserve the claim for federal review.

Appellant, therefore, stands by the arguments he made in his Opening Brief, and respondent's brief does not require any further elaboration, since it does not address the substance of appellant's brief.

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

Appellant has presented these arguments in an abbreviated fashion sufficient to alert this Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system. (See AOB pages 276-311.)

Should this Court reject these claims, appellant wishes to preserve them for federal review.

XVII. THE METHOD OF EXECUTION EMPLOYED IN CALIFORNIA VIOLATES THE FOURTEENTH AMENDMENT'S GUARANTEE OF PROCEDURAL DUE PROCESS AND THE EIGHTH AMENDMENT'S PROHIBITION UPON CRUEL AND UNUSUAL PUNISHMENTS

Respondent contends appellant's challenge to the method of execution is not cognizable on appeal because such a claim does not affect the validity of the judgment. (RB 85.)

While appellant recognizes that this Court has rejected similar Eighth Amendment challenges to the California's execution procedures

(see, e.g., *People v. Samayoa* (1997) 15 Cal.4th 795, 863), he respectfully requests reconsideration and also raises the issue here to preserve it for federal review.

XVIII. REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF THE ERRORS

Respondent disagrees with appellant's assessment of the cumulative error. Respondent contends there was no error, and, to the extent there was error, appellant has failed to demonstrate prejudice. Respondent also argues that, whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (RB 86.)

Respondent fails to address the substance of appellant's argument. Rather than repeat the argument here, appellant refers this Court to pages 322-325 of his Opening Brief. The combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

CONCLUSION

As appellant has demonstrated, his prosecution was infected by fundamental error. Appellant's convictions and death penalty must be reversed.

Dated: December 16, 2013

Respectfully submitted,

GAIL HARPER
Attorney for Appellant
ENNIS REED

CERTIFICATE OF WORD COUNT

I, Gail Harper, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 34,197 words, excluding the tables, this certificate, and any attachments. This document was prepared in WordPerfect X3, and this is the word count generated by the program for this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California, on December 16, 2013.

GAIL HARPER
Attorney for Appellant

APPENDIX

RESPONDENT'S OMISSIONS AND DISTORTIONS OF FACT

A. THE MURDER OF AMARILIS VASQUEZ AND ATTEMPTED MURDER OF CARLOS MENDEZ

1. Respondent Omits Material Facts About the Shooting

Respondent omits the following facts.

Mendez testified the man approaching his truck with the pistol was walking "a little slow." (3RT 468-469.) According to Mendez, the weapon was about 10 to 12 inches long. (3RT 469, 488-489.) The man stood, pointing the pistol at Mendez and his wife for three seconds, and then, without saying anything, started shooting. (3RT 470-472, 492.)

It was dark out when the shooting took place except for a light in the parking lot and some street lights. (3RT 489-490.)

Mendez testified in a contradictory fashion the shooter was both about 22 feet away from the truck when he started shooting, and Mendez did not know where the man was when he started shooting. (3RT 476-478; People's Exhibit 14.)

Mendez testified that from the time the man walked from the

corner up to the point where he started shooting, Mendez was no longer looking at him because Mendez was starting the truck. (3RT 471.) Mendez was not looking at the man when he started shooting; but he heard a "big noise" and the window broke and Mendez was shot in the right cheek. (3RT 472-473, 492.) Amarilis did not react or say anything when shot. (3RT 473.) Because Mendez was trying to escape, he did not see what had happened to his wife. (3RT 473.) He moved about 15 feet away from the truck, screaming and yelling. (3RT 474.) When Mendez returned to the truck, he saw only the passenger-side window was broken. (3RT 478.)

Mendez testified his state of mind immediately after witnessing his wife being shot and being shot himself was "out of this world, close to death," and he felt dead and was crying. (3RT 493.)

2. Respondent Distorts What Mendez Told the Police

Immediately after the shooting, Mendez described the shooter to police as a "male black with a black jacket." (3RT 499, 501.) Later that night Mendez described the shooter in two separate interviews with

Detective Paiz as a black male about 5'8" to 5'11" in height, 20 to 25 years old, clean shaven, short black hair, wearing a black jacket and black pants" (3RT 505), and as a male black adult, 25 years old, wearing black pants and a black jacket, clean shaven, with short hair, 5'11", 150 to 180 pounds, with a medium complexion. (3RT 581-582.)

The admonition Detective Paiz gave Mendez before showing him the photographic lineup was in English – not Spanish. (3RT 479-480.)

Reed was the only bald individual in the photo-lineup. (3RT 480.) Mendez testified the most distinctive thing about the man with the gun was his bald head. (3RT 490.)

Respondent states Mendez: "described the gunman at trial as an African-American man, having a shaved bald head and a "5 o'clock shadow" or light beard, and wearing a black t-shirt." (RB 2-4.) To the contrary, Mendez testified he remembered what the man was wearing at the time of the shooting, but when asked what that was, he said, "Uh, you know, I really – I remember really his face. You know. But the clothing that he was wearing, you know, I didn't put the attention right away, because at that time when you got scared, you know, you

see their – or his face. You know. But he was wearing like a black . . . T-shirt." (3RT 490.) When asked if the shooter was wearing a black T-shirt, Mendez said: "Like a – a – I really – I can't remember pretty well, but I remember his – his face." (3RT 490.) At trial, Mendez was impeached with his preliminary hearing testimony that the man was wearing a white shirt. (3RT 491.) When asked again what the man was wearing, Mendez explained he had been "close to death," and only saw the man's face and the pistol; he "didn't have time to look at him." (3RT 497.) Mendez also testified he saw the gunman for several seconds. (3RT 491-492.) Mendez testified he did not "put attention with his clothes, because . .. I was afraid, so I saw his face and the gun." (3RT 492.)

At trial Mendez testified he remembered the shooter's shaved bald head and the man's eyes. (3RT 494-495, 497.) On cross-examination Mendez testified he could not remember whether the shooter had a beard or a mustache, then he testified the man did not have a beard or a mustache. (3RT 495.)

Mendez picked a photograph from the lineup, and then he saw

in the live lineup the man he had seen in the photographic lineup. (3RT 493-494.) Mendez testified he could identify Reed in court because Reed's face is the same face he saw *in the photograph.* (3RT 495.) Mendez is Hispanic; the shooter was black. (3RT 495.)

3. The Coroner's Testimony

Respondent incorrectly states Amarilis was shot twice in the head. (RB 4.) There was only a single gunshot, with an entry wound and exit wound. (3RT 544-545.) Dr. Chinwah could not estimate the distance of the firearm from the person who was shot because there was an intervening object (the glass) between the muzzle of the gun and the skin. (3RT 545-546.) The fatal bullet was traveling from right to left, slightly front to back and downward. (3RT 546.)

4. The Police Investigation

Officer Childs arrived at the scene around 8:15 p.m. (3RT 449-451, 457.) The sun was down. (3RT 457.) Mendez was excited because his wife had been shot. (3RT 452, 458-459.)

Respondent omits part of Officer Lewis' interview with Mendez at Tacos el Unico that evening, before Mendez was taken to the

hospital. (See RB 3, fn. 3, citing 3RT 498-499.) Lewis testified Mendez was "very, very upset, crying," he was bleeding, and the paramedics had not worked on him. (3RT 500.) This was the only time Officer Lewis talked to Mendez. (3RT 502.)

At the time Paiz interviewed Mendez at the hospital, Paiz did not know if Mendez had been notified of his wife's death. (3RT 504.) Paiz wrote down Mendez's description of the shooter, and later typed up the description in his report. (3RT 504-505.)[1]

Respondent omits the fact Reed is 5'6" tall and weighs 130 pounds. (1CT 2 [arrest warrant in confidential envelope].)

B. THE MURDER OF PAUL MORELAND AND ATTEMPTED MURDER OF ROY FRADUIE

1. The Shooting

Respondent omits Fraduie's admission on cross to drinking Olde

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Respondent omits Detective Paiz's testimony on cross-examination that he interviewed Mendez the evening after the shooting at Martin Luther King emergency room. At that time Mendez gave Detective Paiz a description of the gunman as between 5'8" to 5'11" in height. (3RT 515.) Mendez did not give a weight as part of the description. (3RT 515.)

English 800 Malt liquor "half a day," on the day of the shooting, and Fraduie's impeachment with his preliminary hearing testimony he was drinking all day, until nearly 11 p.m.. (3RT 393-394, 398-399.)

Respondent omits Fraduie's testimony that at first the man had the butt of the rifle on his shoulder, holding the trigger guard with his right hand, that part of the stock with the frame area or the back end of the barrel resting on his right shoulder, pointing it backwards behind his head. (3RT 376-377.) As they walked by the man said something directly to Moreland, but Fraduie could not hear what he said. (3RT 377.) Fraduie and Moreland were already past the duplex when Fraduie heard, *but did not see*, the rifle fired. (3RT 377.) Asked how he knew the man shot up into the air, Fraduie testified: "Cause it didn't hit nothing. Because he shot up in the air, and then he brought it down and start shooting. Then he start shooting at us. We had start running." (3RT 377-378.) Fraduie testified he did not see the man bring the gun down. "No, I didn't pay no attention. I wasn't trying to see when he was bringing it down. I was trying to get out of dodge." (3RT 378.)

After Fraduie started running, he never looked back at Moreland. (3RT 380-381.) Fraduie did not actually see Moreland get shot; he just saw a man holding a gun. (3RT 392.) After the shot in the air, there was one shot at Fraduie, and then Fraduie heard three or four more shots after about two or three minutes of silence. (3RT 381.)

Although Fraduie testified he got a ride back to his uncle's house that night and his cousin went to tell Moreland's father Moreland had been killed (3RT 399), respondent asserts "Fraduie did not contact the police about the shooting because he did not know whether Moreland had been killed." (RB 7.) Respondent omits Fraduie's admission he "knew [Moreland] probably got shot." (3RT 400.) Fraduie did not have any contact with the police for several months after the shooting. (3RT 399-400.)

2. Fraduie's Statements to the Police

Respondent omits all of the following facts: Fraduie was unable to describe the shooter when Detective Paiz first interviewed him in April of 1997. (3RT 383-384; 391-392.) Despite his inability to describe the shooter to police, at trial Fraduie testified the person "had low cut

hair, about a little shorter than mine," "like a quo vadis" and "like an east coast haircut, real low" – meaning "real short." (3RT 392-393.) At trial Fraduie described the person with the gun as a black man, whose complexion was "in between colors, about my complexion, but a little – about a lighter shade – about a shade dark." (3RT 394.) The man with the gun did not have any facial hair, and was not wearing a hat. (3RT 397.) Fraduie could not remember the man's clothing. (3RT 397.)

3. The Photographic and Live Lineups

Fraduie denied any confusion, but admitted he did not recognize Reed immediately. (3RT 387.)

Fraduie testified that at the live lineup he saw the person he had seen in the photographic array. (3RT 393.

4. The Police Investigation

Respondent notes investigators saw a motion-activated security light directly over the body (RB 8), but omits the fact Officer Betor did not notice the light going on and off while he was there. (3RT 363, 407.) Detective Branscomb offered his opinion the place where Moreland was lying was "well lit," but he did not know how well-lit the

intersection was. (3RT 409.)

5. The Chico McLaine Incident

Respondent obscures the fact it was approximately 24 hours after the Moreland shooting – and in an unrelated matter – that Officer Betor and other officers chased Chico McLaine into a duplex just slightly northwest of the homicide scene on Glencoe Street where Moreland's body had been found. (See RB 9; 3RT 355-358; People's Exhibit 1; People's Exhibit 6.) Lieutenant Wright was the first to enter the building, and Officer Betor followed to see Lieutenant Wright detaining McLaine in the living room of the house. (3RT 356, 367.) Once inside, Officer Betor began checking the rooms for other people, and he found one other man inside.[2] (3RT 356.) The man was not arrested. (3RT 357.) After clearing the house of people, Officer Betor

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[2] The police report Officer Betor prepared following the incident does not mention anything about anyone other than Chico McLaine being in the house. (3RT 365-366.) Lieutenant Wright brought that "mistake" to Officer Betor's attention during the last couple of months before trial. (3RT 367.) Officer Betor did not know if the second man was taken to the police station. (3RT 366.) Neither man was identified by the police as Reed.

found the rifle and magazine noted in the record. (3RT 357-358, 364.) Officer Betor did not have any idea whether the gun or the people in the house had anything to do with the homicide. (3RT 358.) Officer Betor booked the gun and the clip into evidence, and eventually the gun and casings were sent to the Sheriff's lab to determine if the casing matched. (3RT 358-360; People's Exhibit 5.) Officer Betor held the rifle, the clip and the ammunition for fingerprint analysis. (3RT 368.) Officer Betor did not make any attempt to determine who lived at the duplex. (3RT 370.)

6. Officer Pollard and the F.I. Card

Officer Pollard did not enter a building when he stopped Reed to fill out the F.I. card, and he could not remember who else was present. (See RB 8; 3RT 417-418.) Officer Pollard filled the card out based on the information Reed gave him or what was on his California Identification card. (3RT 414-415.) Officer Pollard noted that Reed weighed 122 pounds. (3RT 419.)

7. Detective Paiz's Investigation

Detective Paiz was never at the scene on the night of the

Moreland murder, but he later assumed responsibility for investigating the case. (3RT 508.) Detective Paiz found Fraduie by walking around the streets, asking people who were in the area. First he got a nickname, and then he asked people who that person was. Eventually he got an address, and he contacted Fraduie the same day. (3RT 508-509.) Although respondent notes Detective Paiz's first contact with Fraduie was at Fraduie's grandmother's house in Bellflower, respondent omits the facts Detective Paiz could not remember the street or the date - or even the month of that first meeting.[3] (3RT 514.) Detective Paiz did not prepare a report regarding that contact. (3RT 514-515.) Detective Paiz did not take a photographic six-pack with him to the house, but told Fraduie to come to the police station to view one. (3RT 514.)

8. The Coroner's Testimony

Respondent omits the fact Dr. Chinwah could not determine the

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[3] Respondent states, "In April 1997, Detective Paiz contacted Fradiue at his grandmother's house in Bellflower. (3RT 392, 513-514.)" There is no indication in the pages cited that Paiz first contacted Fraduie in April of 1997.

order in which the nine wounds were inflicted to Moreland. (3RT 547.) Bullet fragments were recovered from Moreland's chest area, abdomen and the left forearm. (3RT 540.)

The autopsy revealed Moreland had ingested alcohol, cocaine and phencyclidine (PCP) in the hours preceding his death, contradicting Fraduie's story. (3RT 546-549.)

9. The Bullet Hole in the Street Sign

Respondent omits some of the facts regarding the bullet hole in the street sign. At the prosecutor's request, during trial Detective Paiz went to the scene of the Moreland murder and observed a bullet hole in the no-parking sign. (3RT 532-533.) Detective Paiz testified he could tell the bullet hole in the sign was not recent because it was rusty. (3RT 534.) On cross, Detective Paiz admitted the prosecutor located the bullet hole the same day the prosecutor asked him to look at the sign and directed Detective Paiz to photograph it. (3RT 534.)

C. THE JOINT INVESTIGATION OF THE VASQUEZ AND MORELAND MURDERS

Respondent omits the following facts: Paiz transported both Fraduie and Mendez to the live lineup. (3RT 511.) Fraduie and

Mendez were separated when the sheriffs brought out the six people in the lineup. (3RT 511-512.) Paiz testified "they were separated from everyone in front at both ends of the chairs." (3RT 512.)

D. DEFENSE CASE

Respondent omits the fact Foster Slaughter worked for the City of Long Beach. (RB 11-12; see 3RT 564-565.)

Respondent distorts Slaughter's testimony about what he saw. Mendez was jumping up and down outside of the truck near the gate of the taco stand, and the shooter was standing *"way in back of the pickup truck,"* on the other side of the truck in back of the bed, shooting at Mendez towards Long Beach Boulevard. (3RT 569-572.) Slaughter heard three or four shots, got the women closer to the Zodiac building, and then looked over and saw the shooter firing at Mendez. (3RT 579-580.)

About 10 to 15 seconds passed between the time Slaughter first heard the gunshots and the time he saw the man with the gun behind the pickup truck. (3RT 572-573.)

Respondent omits much of Slaughter's description of the shooter.

The man was wearing blue jeans. (3RT 573.) The hat was not flat and did not have a brim or any lettering on it. (3RT 578.) It was not a baseball cap, but a hat that came down to the man's eyebrows and covered part of his ears. (3RT 578.) The man's hair stuck out under the hat. (3RT 578.) The shooter had a "natural" or a Jheri curl, not a close haircut or a shaved head. (3RT 577, 580.) The man had no facial hair, just sideburns that were "normal." (3RT 580.) It was difficult for Slaughter to estimate the shooter's weight because the shooter was wearing a bulky black coat. (3RT 574, 578.) Slaughter could not see the man's shirt or his upper body. (3RT 578-579.) The coat appeared to be zipped up. (3RT 579.) Slaughter is 6'3," and at the time of the incident weighed 192 pounds. (3RT 573.) Slaughter only saw the shooter's face from the side. (3RT 574.)

Reed was asked to stand up in court, and Slaughter testified Reed looked different from the man who was doing the shooting, as the shooter was "thicker than him in arm-wise," or the shooter looked like he had been lifting weights, and was solid in the arms. (3RT 574.)

What was *not* included in the defense case was the testimony of

Joe Martin Galindo, whom the defense could not call as a witness because Galindo was in an undisclosed place performing his military duties, and because Judge Cheroske refused to continue the trial to accommodate the defense. Galindo described the shooter as "stocky" (6RT 1129-1130, 1132-1137) and at least as tall as the 6'1" tall Galindo, or taller (6RT 1131-1132), and insisted the 5'6", 130-pound bald Reed was not the shooter at Tacos el Unico. (6RT 1130-1131.) Galindo's testimony largely corroborated Slaughter's testimony and description of a man who stood 6'1" and weighed 190 pounds (3RT 588-589), and the earliest descriptions given by Mendez of a black man who was about 5'8" to 5'11" in height with short black hair (3RT 505), weighing 150 to 180 pounds. (3RT 581-582.)

E. REBUTTAL

Respondent omits crucial testimony of Officer Roller.

Officer Roller did not show his police report with the abbreviated description of the shooter to Slaughter after Officer Roller prepared it. (3RT 588.)

Officer Roller denied Slaughter told him the shooter weighed 190

pounds, but when shown a follow-up report with a suspect description, Officer Roller could not remember where he got the description, but it said: "male black with black hair, unknown color eyes, six-foot-one, 190 pounds, age 30, close-cut hairstyle, medium complexion." (3RT 588-589.)

F. PENALTY PHASE

1. PROSECUTION CASE

(a) The Vasquez Murder

Respondent omits the following material facts.

Mendez testified for the first time at the penalty phase retrial that he told the man not to shoot, offering him the truck or money; but then Mendez immediately contradicted himself, testifying the window on his wife's side of the car was up and he did not say anything to the man, but just gestured at him. (5RT 1013-1014.) Mendez did not hear the man say anything, and other than raising the gun, the man did not make any gestures. (5RT 1014.) Then the man started firing. (5RT 1015.)

Respondent omits Mendez's testimony on cross-examination the

shooting was traumatic, he was under a lot of stress that night, he felt "out of this world," and everything happened very fast. (5RT 1024.) The first thing he saw was the gun; he saw the shooter's face and the pistol. (5RT 1024.) Mendez also testified he did not really have time to see what the shooter was wearing, never looked to see what the shooter was wearing, and saw only the face and the pistol. (5RT 1024-1026.) Mendez felt he was close to death, and did not have time to see, explaining, "You just try to ... go away from that place." (5RT 1025.) He could not describe the shooter's clothes. (5RT 1025.) At first Mendez denied describing the shooter as 5 feet 11 inches and 150 to 180 pounds, and then admitted perhaps he did. (5RT 1026-1027.) Mendez complained that at the time of the shooting the "police asking too many questions and too many people." (5RT 1027.) Mendez testified the shooter was a "skinny, skinny guy," a bald guy; Mendez claimed he remembered the man's face exactly and the gun. (5RT 1025, 1027.)

(b) The Moreland Murder

Respondent omits the fact that, contrary to his guilt phase testimony, Fraduie testified he and Moreland got together at around

noon.[4] (5RT 1044, 1055.) Fraduie denied using PCP that day, and testified if Moreland smoked PCP that day, he did not see him do it. (5RT 1055-1056.)

Fraduie identified Reed in court as the man standing by the fence with the gun, although Fraduie admitted he did not pay much attention to that man. (5RT 1049, 1058.) Fraduie had never seen the man with the gun before, and could not describe what the man was wearing. (5RT 1057, 1063.) When the shooter spoke to Moreland, they did not stop, and there was no argument. (5RT 1057.) They heard a gunshot up in the air and Fraduie told Moreland, "Come on, man, let's start walking fast." (5RT 1050.) They started to run, then Fraduie looked back and the shooting started. (5RT 1050.)

Respondent omits the contradictions in Fraduie's testimony. At the penalty phase Fraduie testified he looked back and "seen him come down bringing the gun down" and that was when he told Moreland to start running. (5RT 1051.) At the guilt phase Fraduie testified he did

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[4] During the guilt phase he testified they first got together at about 5 that afternoon. (3RT 372-373.)

not see Reed bring the gun down. "No, I didn't pay no attention. I wasn't trying to see when he was bringing it down. I was trying to get out of dodge." (3RT 378.)

Respondent omits Fraduie's admission the first time he had ever told anybody about Moreland slumping down as he ran was his testimony at the penalty phase. (5RT 1060.)

Respondent omits Fraduie's contradictory testimony about the number and timing of gunshots. At the penalty phase Fraduie testified he heard one shot in the air, and then four more shots, and then there was a gap of five or ten seconds between the first group of shots and the second group of shots. (5RT 1053.) At the guilt phase Fraduie testified the three or four additional shots occurred after about two or three minutes of silence. (5RT 381.)

Respondent also omits Fraduie's contradictory testimony about whether or not he and Moreland ran after the shooting started. First he testified he and Moreland continued walking down the street, and heard a gunshot and then ran. (5RT 1058.) Later Fraduie changed his testimony: "Naw, we started jogging. We didn't run." (5RT 1060.)

Respondent also omits Fraduie's testimony that after he got to the nursery, he heard three or four more gunshots. (5RT 1059-1060; RT 1062.) The second gunshot hit the pole as Fraduie was turning the corner. (5RT 1061-1062.)

Respondent omits all of Fraduie's testimony about the rifle. Fraduie said the rifle presented in court was similar to the rifle he saw the night of the shooting. (5RT 1063.) He did not see a handgun. (5RT 1063.) When asked to describe the rifle, Fraduie testified "What I'm gon' do? Stand there and look at the gun and try to get all the details about it? Shit, you crazy. I don't know." (5RT 1063-1064.) The rifle did not have a bayonet or a strap on it. (5RT 1064.)

Respondent omits Fraduie's admission he had "started to" drink before his testimony. (5RT 1063.)

Respondent omits the contradictions in Darby's testimony. At the penalty phase Darby testified he heard four gunshots, then there was a pause for a minute or two. (5RT 1037, 1040.) At the guilt phase Darby had testified there was a gap of five to ten seconds. (3RT 524-525.) Contrary to his guilt phase testimony, Darby stated he looked

outside after the shooting and saw just the body in the driveway. (5RT 1041.) Darby did not go outside and did not call the police. (5RT 1040-1041.)

Respondent omits the discrepancies in Detective Piaz's testimony. (RB 16.) Regarding the bullet hole in the signpost, Detective Piaz offered his opinion that "based on the metal of the signpost" the bullet was moving in a southern direction. (5RT 1067.) At the guilt phase Detective Paiz had testified the bullet was moving in a "southwesterly" direction. (3RT 533-534; People's Exhibits 18-A and 18-B.) Respondent omits Detective Paiz's testimony he could tell the bullet hole in the sign was not recent because it was rusty, and his admission he had no way of telling how old the bullet hole was. (5RT 1067-1068.) The signpost is on the southwest corner of the street, between the driveway area of that house and the corner. (5RT 1068-1069.) Detective Paiz did not try to line up the Glencoe duplex area with the signpost area. (5RT 1069.)

Respondent entirely omits Officer Betor's penalty phase testimony about chasing Chico McLaine into a house in the same

general area 24 hours after the Moreland murder, and his new claim he was the first officer inside. (5RT 1080-1081, 1083; People's Exhibit 6.) At the guilt phase Betor testified Lieutenant Wright was the first in. (3RT 356.) Respondent also omits Betor's testimony that once he was in the building, he began checking the rooms and he found one other person inside besides the suspect they were chasing – a male. (5RT 1081.) This person was never linked to Reed in any way.

Respondent omits the facts that Moreland's blood alcohol level tested at 0.07 percent, and if the levels of PCP, cocaine and alcohol in his blood were close to the level of his intoxication at the time of his death, Moreland would have had some impairment of judgment and reaction time and coordination. (5RT 1112-1113.) Respondent also omits the following facts. The alcohol and phencyclidine and cocaine had separately intoxicating effects. (5RT 1113.) Phencyclidine causes stimulation of the sympathetic nervous system and can cause people to be excited. (5RT 1113.) It can affect their judgment and behavior in various ways. (5RT 1113.) PCP can stay in a person's system for hours or days. (5RT 1114.) Moreland had to have consumed the cocaine less

than four hours before his death. (5RT 1115.)

2. DEFENSE

Respondent omits the following facts:

Joe Martin Galindo testified he saw a muzzle flash in addition to hearing gunshots. (6RT 1127-1129.) He returned to his porch in time to see the shooter running toward him. (6RT 1128-1129.) Galindo disavowed a statement appearing in Officer Childs' police report to the effect that Galindo saw two men running from the parking lot. (6RT 1133-1134.) The man with the gun was alone. (6RT 1132-1134.) After running past Galindo, the man ran around the side of the house on the Northwest corner of Glencoe and Temple. (6RT 1135-1136.)

The shooter ran past Galindo at a distance of about 53 feet, and Galindo saw he was "stocky" and was wearing dark colored pants, a checkered shirt worn outside his belt, and a black baseball cap. (6RT 1129-1130, 1132-1137.) Galindo could not recall telling a police officer the shooter was wearing a long, black jacket, although a police report indicated Galindo had included such a jacket in his description. (6RT 1134.)

Respondent minimizes the differences between Reed and the shooter Galindo saw at Tacos el Unico, and the certainty with which Galindo expressed his belief the prosecutor had the wrong person. (See RB 17-18.) Not only did Galindo state Reed is smaller than the man he saw; he declared Reed was not the shooter at Tacos el Unico. (6RT 1130-1131.)

Respondent minimizes the stresses and trauma Reed experienced growing up. Reed was the youngest of four children, but his siblings were by another father, James Harris, who died. (6RT 1217.) His parents' relationship was strained in part because his father did not work and was unfaithful to Beatrice. (6RT 1218-1220.) They separated before Reed was two years old because the senior Ennis Reed had fathered a child by another woman. (6RT 1218.) Reed and his father did not have a father-son relationship; although Reed's father would call and promise to come see him or to give him one thing or another, he never kept his word. (6RT 1218.)

Respondent also minimizes the trauma Reed experienced through his mother, Beatrice. (RB 18.) Although Beatrice was not

abusive, she was not as close to Reed as she was to her daughters. (6RT 1219.) In addition to being hospitalized when she was seven months pregnant with Reed, Beatrice was given outpatient treatment for another 60 days. (6RT 1220.) Beatrice has suffered from untreated, recurring periods of depression since then. (6RT 1220-1221.)

Ms. Churchill continued to see Reed as he grew up, usually at his home. (6RT 1225.) At home, Reed was very quiet, but when they were alone he would talk with her and he had a pleasant demeanor. (6RT 1226.) Reed was always a clean person, and he kept his room neat and clean, unlike his siblings. (6RT 1226.) No one ever had to tell Reed to wash his clothes or to clean up his room. (6RT 1226-1227.)

When Reed was in his teens he spent some time at a juvenile camp, and Ms. Churchill took Beatrice there at least twice to visit him. (6RT 1225-1226.)

Once Reed was out of his teens, he was considerate toward Ms. Churchill. (6RT 1227.) He would drop by her house in Fullerton and unfailingly ask if there was anything he could do for her, like clean up her backyard or do some heavy labor. (6RT 1227.) He was always a

very, very considerate person. (6RT 1227.) Ms. Churchill has never witnessed any uncontrolled periods of anger or problems with Reed's temper, or other behavior problems. (6RT 1227.) He has always been quiet or withdrawn. (6RT 1227.) When Ms. Churchill was with him, Reed was a fine, personable young man. (6RT 1228.)

Respondent omits the details of Reed's learning disability and downplays the magnitude of his failure in school. (RB 18.) Reed attended Our Lady of Victory elementary school in Compton. (6RT 1222-1224, 1227.) In kindergarten and the first three grades, Reed would not pay attention. (6RT 1222.) He would lose his train of thought and fail to respond to his teachers. (6RT 1222.) Reed's aunt, Ms. Churchill, discussed his problems with his mother, and they tried to get him tested through the Compton School District. (6RT 1225.) Although the school district agreed to test Reed, he was never formally tested for learning disabilities. (6RT 1225.) He was always an outsider. (6RT 1222.)

Reed's mother, Beatrice, enrolled him in the Sheenway School – a private, independent, nonprofit college preparatory school – as a

seventh-grader, hoping he would get more attention there, but that did not seem to help. (6RT 1160-1161, 1169, 1222.) He only lasted there about a year. (6RT 1160.) The school tested Reed in order to plan his educational program, giving him a series of questions to answer. (6RT 1165; Defense Exhibit D.) Reed's response to the question, "Why is education important?" was "You to it have." When asked to respond orally, he said, "So I can live on my own." (6RT 1165.) The second question was: "Why am I important." He wrote: "I important." (6RT 1165-1166.) The third question was: "Why is my mother important?" He wrote: "Yes, because is my mother." (6RT 1166.) When asked to respond orally, he said: "She helps me in whatever I need help in." (6RT 1166.) The last question was: "The following are things I want to accomplish in school." He wrote: "To be better." He also said, "To learn," but he could not write that. He said, "To learn, and to get a job in computer, in sports." (6RT 1166.)

Reed was not performing to his grade level, but Ms. Sheen felt he wanted to, so she discussed his performance with Beatrice. (6RT 1167.) The school required that the parents participate, but Beatrice was

unresponsive, so the school placed her on probation because it was "very difficult . . . to . . . establish some type of rapport with her as to the importance of Ennis' education." (6RT 1167.) Beatrice would call but would not attend meetings, and Reed had no visible support system. (6RT 1167-1168.) Beatrice would occasionally come to the school, but not as requested, and she refused to participate in parenting classes. (6RT 1168.)

Reed was assigned homework every night, but he failed to complete his assignments. (6RT 1170-1171.) He would sometimes come to school early and try to get his homework done with help from the staff, but he was frequently absent and tardy. (6RT 1171.)

Initially Reed was really interested in school, and he was really eager, but he progressively became disinterested and failed his classes. (6RT 1171.) He would give his teachers a hard time, and then he was suspended, and ultimately expelled to home study, which required parental participation. He failed. (6RT 1171-1172.)

Reed exhibited behavior disorders. (6RT 1172.) In the second half of the school year he was offensive to the teachers, attempted to

fight, and was disrespectful to the girls, and "really disrespectful to himself." (6RT 1172.) Reed was not getting support at home to see him through his rough times. (6RT 1172.) Beatrice did not even complete the enrollment forms, did not complete the form for Reed's records from previous schools, and did not contribute to the regular screening. (6RT 1173.) Parents were required to pay the tuition and do volunteer work, but Beatrice did not pay all of the tuition. (6RT 1174.) The students were required to wear uniforms, but Reed was constantly out of uniform, which was disruptive. (6RT 1174-1175.) Reed's mother did not provide him with the proper uniform and clothing, or PE equipment. (6RT 1175.)

Reed stayed at the Sheenway School for one year, performing scholastically below the 7th grade level. (6RT 1168-1169.) Because Reed performed at a 3rd or 4th grade level, he was not promoted to the 8th grade, and the school requested he attend summer school. (6RT 1169-1170; Defense Exhibit E.) Reed failed to attend, and dropped out of school altogether when he was 13 or 14. (6RT 1224-1225.)

3. REBUTTAL

Respondent omits Mendez's testimony the shooter had a shaved bald head and was not wearing a hat or a jacket of any kind. (6RT 1200-1201.) The man was wearing a T-shirt and pants, but Mendez could not remember the color. (6RT 1201.) In the seconds he had to observe the shooter, Mendez saw only the man's face and the pistol. (6RT 1201.) But when interviewed at the scene of the shooting, Mendez said the shooter wore a black jacket, and Mendez described the direction in which the man ran. (6RT 1187-1189, 1191.)

Although respondent describes Officer Childs' testimony that on the night of the shooting Joe Galindo described two suspects, respondent omits Galindo's denial he said any such thing to Childs. (6RT 1133-1134, 1205-1207.)

CERTIFICATE OF MAILING

I hereby certify that I mailed a true copy of the foregoing to the following persons at the following addresses on the 16th day of December, 2013:

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Executed under penalty of perjury at San Francisco, California, this 16th day of December, 2013.

_____

GAIL HARPER