

SUPREME COURT COPY

No. S095076

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD PENUNURI,

Defendant and Appellant.

LOS ANGELES COUNTY
SUPERIOR COURT

Superior Court Case
No. BA189633

SUPREME COURT
FILED

NOV 12 2014

Frank A. McGuire Clerk

Deputy

ON AUTOMATIC APPEAL
FROM A JUDGMENT AND SENTENCE OF DEATH

Superior Court of California, County of Los Angeles
The Honorable Robert W. Armstrong, Judge Presiding

APPELLANT'S REPLY BRIEF

Stephen M. Lathrop (Cal. Bar No. 126813)
Certified Appellate Law Specialist
State Bar of Cal. Board of Legal Specialization
904 Silver Spur Rd. #430, Rolling Hills Est., CA 90274
Email: stephen.lathrop@cox.net
Tel. (310) 237-1000, ext. 3; Fax (310) 237-1010

Attorney for Defendant and Appellant
RICHARD PENUNURI

DEATH PENALTY

TOPICAL INDEX

	Page
INTRODUCTION	1
ARGUMENT.	3
JURY SELECTION.	3
I. THE DISMISSAL FOR CAUSE OF PROSPECTIVE JUROR STEVEN METCALF REQUIRES REVERSAL OF THE DEATH JUDGMENT BECAUSE HE COULD FAIRLY AND IMPARTIALLY RETURN A VERDICT FOR EITHER LIFE OR DEATH.	3
GUILT PHASE.	9
II. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A FINDING THAT APPELLANT WAS A PRINCIPAL IN THE MURDERS OF BRIAN MOLINA AND MICHAEL MURILLO, REQUIRING REVERSAL OF COUNTS 4 AND 5, RESPECTIVELY.	9
III. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN FINDINGS THAT APPELLANT AGREED OR CONSPIRED TO MURDER JAIME CASTILLO AND THAT HE HAD THE SPECIFIC INTENT TO KILL CASTILLO, REQUIRING REVERSAL OF COUNT 6 (CONSPIRACY TO COMMIT MURDER).	16
IV. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN FINDINGS THAT APPELLANT EITHER PERPETRATED THE KILLING OF JAIME CASTILLO, AIDED AND ABETTED THE KILLING, OR ENTERED INTO A CONSPIRATORIAL AGREEMENT TO KILL, REQUIRING REVERSAL OF COUNT 7 (MURDER).	22
V. THE TRUE FINDING ON THE WITNESS-KILLING SPECIAL CIRCUMSTANCE MUST BE SET ASIDE FOR INSUFFICIENT EVIDENCE, THEREBY RENDERING THE DEATH JUDGMENT UNCONSTITUTIONAL.	26

A.	THE TRUE FINDING ON THE WITNESS-KILLING SPECIAL CIRCUMSTANCE MUST BE SET ASIDE FOR INSUFFICIENT EVIDENCE.	26
B.	THE INVALID WITNESS-KILLING SPECIAL CIRCUMSTANCE RENDERS APPELLANT’S SENTENCE UNCONSTITUTIONAL.	28
VI.	THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE TRUE FINDING ON THE MULTIPLE-MURDER SPECIAL CIRCUMSTANCE, REQUIRING REVERSAL OF THE DEATH JUDGMENT.	33
VII.	THE EVIDENCE IS INSUFFICIENT TO SUSTAIN APPELLANT’S CONVICTION FOR ASSAULT WITH A FIREARM ON CARLOS ARIAS, REQUIRING REVERSAL OF COUNT 3.	36
VIII.	THE TRIAL COURT PREJUDICIALLY ERRED BY DENYING THE MOTION FOR MISTRIAL AFTER THE PROSECUTOR ELICITED INADMISSIBLE TESTIMONY THAT APPELLANT WAS ACTING UNDER THE JURISDICTION OF THE MEXICAN MAFIA, THAT HE SHOWED ALLEGIANCE TO THE MEXICAN MAFIA, AND THAT HE PAID TAXES TO THE MEXICAN MAFIA, REQUIRING REVERSAL OF APPELLANT’S CONVICTIONS.	40
IX.	ARIAS’S OUT-OF-COURT STATEMENTS AND PRIOR TESTIMONY—THE VAST MAJORITY OF WHICH RESPONDENT AGREES WERE ERRONEOUSLY ADMITTED INTO EVIDENCE—REQUIRE REVERSAL OF APPELLANT’S CONVICTIONS ON COUNTS 3, 4 AND 5 BECAUSE THE STATEMENTS AND PRIOR TESTIMONY PREJUDICIALLY IMPLICATED APPELLANT IN THE ASSAULT ON ARIAS AND THE MURDER OF MOLINA AND MURILLO.	51
A.	APPELLANT HAS NOT FORFEITED THE CONFRONTATION CLAUSE CLAIM MADE IN CONNECTION WITH ARIAS’S TAPE-RECORDED STATEMENTS TO THE POLICE; ALTERNATIVELY, THE FAILURE TO RAISE THE CONFRONTATION CLAUSE OBJECTION RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL.	51

B.	ARIAS’S STATEMENTS TO LUKE BISSONNETTE WERE NOT ADMISSIBLE AS SPONTANEOUS STATEMENTS.	56
C.	RESPONDENT AGREES THAT ADMISSION OF ARIAS’S TESTIMONIAL OUT-OF-COURT STATEMENTS MADE TO THE POLICE AND ADMISSION OF HIS PRIOR TESTIMONY AT THE DELALOZA TRIAL VIOLATED APPELLANT’S CONSTITUTIONAL RIGHT TO CONFRONTATION.	59
D.	RESPONDENT AGREES THAT ARIAS’S PRIOR TESTIMONY AT THE DELALOZA TRIAL AND HIS OUT-OF-COURT STATEMENTS TO THE POLICE WERE NOT PROPERLY OFFERED FOR ANY NONHEARSAY PURPOSE.	60
E.	THE JURY’S CONSIDERATION OF ARIAS’S OUT-OF-COURT STATEMENTS AND PRIOR TESTIMONY REQUIRE REVERSAL OF APPELLANT’S CONVICTIONS ON COUNTS 3, 4 AND 5.	61
X.	ALEJANDRO DELALOZA’S STATEMENTS TO THE POLICE—WHICH RESPONDENT AGREES WERE ERRONEOUSLY ADMITTED INTO EVIDENCE—REQUIRE REVERSAL OF APPELLANT’S CONVICTIONS ON COUNTS 1, 2, 4 AND 5 BECAUSE THE STATEMENTS PREJUDICIALLY IMPLICATED APPELLANT IN THE RALPHS PARKING LOT INCIDENT AND THE MURDER OF MOLINA AND MURILLO.	68
XI.	IN CONNECTION WITH ALEJANDRO DELALOZA’S STATEMENTS, THE TRIAL COURT PREJUDICIALLY ERRED BY FAILING TO INSTRUCT THE JURY ON THE RULES RELATING TO ACCOMPLICE TESTIMONY, THEREBY LOWERING THE PROSECUTION’S BURDEN OF PROOF AND REQUIRING REVERSAL OF COUNTS 1, 2, 4 AND 5.	73
XII.	THE JUDGE’S REMARKS IN THE PRESENCE OF THE JURY—VOUCHING FOR THE TRUTH OF THE PROSECUTION’S EVIDENCE AND INTERPRETING THE EVIDENCE IN A MANNER FAVORABLE TO THE PROSECUTION—REQUIRES REVERSAL OF APPELLANT’S CONVICTIONS.	83

A.	THE FORFEITURE RULE DOES NOT APPLY BECAUSE THE JUDICIAL MISCONDUCT AROSE DURING A FORCED 402 HEARING IN THE PRESENCE OF THE JURY, PLACING DEFENSE COUNSEL IN AN UNTENABLE POSITION AND RELIEVING HIM OF A DUTY TO OBJECT.	83
B.	RESPONDENT IMPLICITLY CONCEDES THAT DEFENSE COUNSEL’S FAILURE TO OBJECT RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL.	85
C.	THE JUDGE ENGAGED IN PREJUDICIAL MISCONDUCT BY HOLDING THE 402 HEARING IN THE PRESENCE OF THE JURY, BY VOUCHING FOR THE TRUTH OF THE PROSECUTION’S EVIDENCE, BY INTERPRETING THE EVIDENCE FOR THE JURY IN A MANNER FAVORABLE TO THE PROSECUTION (AND THUS USURPING THE JURY’S ESSENTIAL FACT-FINDING FUNCTION), AND BY CREATING THE IMPRESSION THAT HE WAS ALLYING HIMSELF WITH THE PROSECUTION.	85
XIII.	THE TRIAL COURT’S INSTRUCTIONS TO THE GUILT-PHASE JURY IN THE LANGUAGE OF CALJIC NO. 17.41.1–THE DISAPPROVED “JUROR SNITCH” INSTRUCTION–REQUIRES REVERSAL OF APPELLANT’S CONVICTIONS.	95
XIV.	THE CUMULATIVE EFFECT OF THE GUILT PHASE ERRORS REQUIRES REVERSAL OF APPELLANT’S CONVICTIONS.	97
	PENALTY PHASE AND SENTENCING.	100
XV.	APPELLANT’S EXCLUSION FROM THE PENALTY PHASE CLOSING ARGUMENTS PURPORTEDLY RELATING TO CODEFENDANT CASTRO–WHICH INCLUDED ARGUMENT BY THE PROSECUTOR AND COUNSEL FOR CODEFENDANT CASTRO IMPLICATING APPELLANT–AND APPELLANT’S EXCLUSION DURING THE TRIAL COURT’S INSTRUCTIONS RELATING THERETO, REQUIRE REVERSAL OF THE DEATH JUDGMENT.	100
A.	INTRODUCTION.	100

B.	RESPONDENT’S WAIVER ARGUMENT FAILS BECAUSE THE RECORD DOES NOT SUPPORT A KNOWING AND INTELLIGENT WAVIER OF APPELLANT’S RIGHT TO PERSONAL PRESENCE AT TRIAL.	101
C.	REVERSAL OF THE DEATH VERDICT IS REQUIRED BECAUSE APPELLANT WAS PREJUDICIALLY DENIED THE RIGHT TO BE PRESENT AT CRITICAL STAGES OF HIS JOINT TRIAL WITH CODEFENDANT CASTRO.	105
XVI.	THE PENALTY INSTRUCTIONS AND THE TRIAL PROCESS – WHEREBY CLOSING ARGUMENTS OF COUNSEL AND JURY INSTRUCTIONS PURPORTEDLY RELATING TO CASTRO WERE GIVEN IN APPELLANT’S ABSENCE AND IN THE MIDST OF PENALTY PHASE DELIBERATIONS – DENIED APPELLANT THE CONSTITUTIONAL RIGHT TO AN INDIVIDUALIZED SENTENCING DETERMINATION, REQUIRING REVERSAL OF THE DEATH JUDGMENT.	109
XVII.	THE TESTIMONY OF PROSECUTION WITNESSES JAVIER CASTILLO AND LINDA CASTILLO THAT APPELLANT SHOULD BE SENTENCED TO DEATH REQUIRES REVERSAL OF THE DEATH JUDGMENT.	114
A.	INTRODUCTION.	114
B.	THE FORFEITURE RULE SHOULD NOT APPLY HERE BECAUSE THE TRIAL COURT OVERRULED DEFENSE COUNSEL’S OBJECTION TO THIS LINE OF QUESTIONING.	114
C.	RESPONDENT DOES NOT ADDRESS THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.	115
D.	THE TESTIMONY OF JAVIER CASTILLO AND LINDA CASTILLO THAT APPELLANT SHOULD BE SENTENCED TO DEATH REQUIRES REVERSAL OF THE DEATH JUDGMENT.	116

XVIII. ADMISSION OF EVIDENCE IN AGGRAVATION OF A
PURPORTED ASSAULT WITH A FIREARM ON JASON UZEL
REQUIRES REVERSAL OF THE DEATH JUDGMENT
BECAUSE THE EVIDENCE IS WOEFULLY INSUFFICIENT
TO SUSTAIN A FINDING THAT APPELLANT PERPETRATED
THE ASSAULT... 119

XIX. IN VIEW OF THE ADMISSION OF PRIOR VIOLENT CRIMES
EVIDENCE IN AGGRAVATION, THE TRIAL COURT’S
INSTRUCTION THAT THE PROSECUTION HAD NO
BURDEN OF PROOF AT THE PENALTY PHASE REQUIRES
REVERSAL OF THE DEATH JUDGMENT. 124

XX. CALIFORNIA’S DEATH PENALTY STATUTE, AS
INTERPRETED BY THIS COURT AND APPLIED AT
APPELLANT’S TRIAL, VIOLATES THE UNITED STATES
CONSTITUTION.. 126

XXI. THE ERRORS IN BOTH THE GUILT AND PENALTY PHASES
OF TRIAL, INDIVIDUALLY AND CUMULATIVELY, OR IN
ANY COMBINATION THEREOF, REQUIRE REVERSAL OF
THE DEATH JUDGMENT. 128

CONCLUSION 131

CERTIFICATE OF COMPLIANCE..... 131

///

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>Beck v. Alabama</i> (1980) 447 U.S. 625.	9
<i>Booth v. Maryland</i> (1987) 482 U.S. 496.	116, 117
<i>Bracy v. Gramley</i> (1997) 520 U.S. 899.	91
<i>Brown v. Sanders</i> (2006) 546 U.S. 212.	passim
<i>Bruton v. United States</i> (1968) 391 U.S. 123.	71
<i>Caldwell v. Mississippi</i> (1985) 472 U.S. 320.	128, 130
<i>Carter v. Kentucky</i> (1981) 450 U.S. 288.	110
<i>Chambers v. Mississippi</i> (1973) 410 U.S. 284.	98, 129
<i>Chapman v. California</i> (1967) 386 U.S. 18.	passim
<i>Darden v. Wainwright</i> (1986) 477 U.S. 168.	47
<i>Davis v. Washington</i> (2006) 547 U.S. 813.	59, 60
<i>Delaware v. Van Arsdall</i> (1986) 475 U.S. 673.	62, 64, 69

<i>Depetris v. Kuykendall</i> (9th Cir. 2001) 239 F.3d 1057.	66, 123
<i>Donnelly v. DeChristoforo</i> (1974) 416 U.S. 637.	97
<i>Douglas v. Alabama</i> (1965) 380 U.S. 415.	115
<i>Dunn v. United States</i> (1932) 284 U.S. 390.	96
<i>Estelle v. McGuire</i> (1991) 502 U.S. 62.	113
<i>Ford v. Wainwright</i> (1986) 477 U.S. 399.	9
<i>Gamache v. California</i> (2010) 562 U.S. __ [131 S.Ct. 591, 593]..	62
<i>Gardner v. Florida</i> (1977) 430 U.S. 349.	9
<i>Greer v. Miller</i> (1987) 483 U.S. 756.	97
<i>Herring v. New York</i> (1975) 422 U.S. 853.	105
<i>Horning v. District of Columbia</i> (1920) 254 U.S. 135.	96
<i>In re Murchison</i> (1955) 349 U.S. 133.	91
<i>Jackson v. Denno</i> (1974) 378 U.S. 368.	94

<i>Jackson v. Virginia</i> (1979) 443 U.S. 307.	15, 21, 25, 39
<i>Lockett v. Ohio</i> (1978) 438 U.S. 586.	109, 111
<i>Lockhart v. McCree</i> (1986) 476 U.S. 162.	6
<i>Moran v. Burbine</i> (1986) 475 U.S. 412.	102
<i>Neder v. United States</i> (1999) 527 U.S. 1.	62
<i>Ohio v. Roberts</i> (1980) 448 U.S. 56..	53
<i>Payne v. Tennessee</i> (1991) 501 U.S. 808.	116, 117
<i>Riggins v. Nevada</i> (1992) 504 U.S. 127.	108
<i>Rosemond v. United States</i> (2014) 572 U.S. __ [134 S.Ct. 1240, 1248]..	23
<i>Ross v. Oklahoma</i> (1988) 487 U.S. 81.	8
<i>Sandstrom v. Montana</i> (1979) 442 U.S. 510.	110
<i>Strickland v. Washington</i> (1984) 466 U.S. 668.	85, 115
<i>Sullivan v. Louisiana</i> (1993) 508 U.S. 275.	67, 72, 82, 94, 99

<i>Turner v. Louisiana</i> (1965) 379 U.S. 466.	91
<i>United States v. Olano</i> (1993) 507 U.S. 725.	101
<i>United States v. Sacerio</i> (5th Cir. 1992) 952 F.2d 860.	28
<i>United States v. Thomas</i> (2nd Cir. 1997) 116 F.3d 606.	96
<i>Uttecht v. Brown</i> (2007) 551 U.S. 1.	7
<i>Wainwright v. Witt</i> (1985) 469 U.S. 412.	5
<i>White v. Illinois</i> (1992) 502 U.S. 346.	53
<i>Witherspoon v. Illinois</i> (1968) 391 U.S. 510.	6, 7
<i>Woodson v. North Carolina</i> (1976) 428 U.S. 280.	9, 111
<i>Yates v. Evatt</i> (1991) 500 U.S. 391.	81, 125
State Cases	
<i>Alvarado v. Superior Court</i> (2000) 23 Cal.4th 1121.	46
<i>Eramdjian v. Interstate Bakery Corp.</i> (1957) 153 Cal.App.2d 590.....	25, 38
<i>In re Gustavo M.</i> (1989) 214 Cal.App.3d 1485.....	11

<i>In re Horton</i> (1991) 54 Cal.3d 82.....	103
<i>In re Sheena K.</i> (2007) 40 Cal.4th 875.	101
<i>Jameson v. Tully</i> (1918) 178 Cal. 380.....	93
<i>Kuhn v. Department of General Services</i> (1994) 22 Cal.App.4th 1627.	12, 25
<i>Louis & Diederich, Inc. v. Cambridge European Imports, Inc.</i> (1987) 189 Cal.App.3d 1574.....	12, 25
<i>Miller v. Superior Court</i> (2002) 101 Cal.App.4th 728.	78
<i>People People v. Johnson</i> (1980) 26 Cal.3d 557.....	11
<i>People v. Abbaszadeh</i> (2003) 106 Cal.App.4th 642.	84
<i>People v. Albertson</i> (1944) 23 Cal.2d 550.....	47
<i>People v. Allen</i> (1978) 77 Cal.App.3d 924.....	49
<i>People v. Alvarez</i> (2002) 27 Cal.4th 1161.	111, 117
<i>People v. Anderson</i> (1968) 70 Cal.2d 15.....	10
<i>People v. Banks</i> (1970) 2 Cal.3d 127.....	89

<i>People v. Benavides</i> (2005) 35 Cal.4th 69.	117
<i>People v. Berti</i> (1960) 178 Cal.App.2d 872.....	12, 25
<i>People v. Bonin</i> (1988) 46 Cal.3d 659.....	43
<i>People v. Bonner</i> (2000) 80 Cal.App.4th 759.	28
<i>People v. Bouzas</i> (1991) 53 Cal.3d 467.....	passim
<i>People v. Bradford</i> (1997) 15 Cal.4th 1229.	106
<i>People v. Brown</i> (2003) 31 Cal.4th 518.	58
<i>People v. Bryant, Smith & Wheeler</i> (August 25, 2014, S049596) __ Cal.4th __ [Slip Opn. p. 39].	103
<i>People v. Castaneda</i> (2011) 51 Cal.4th 1292.	28
<i>People v. Chiu</i> (June 2, 2014, S202724) __ Cal.4th __.	23
<i>People v. Coffman and Marlow</i> (2004) 34 Cal.4th 1.	74, 75
<i>People v. Conner</i> (1983) 34 Cal.3d 141.....	14, 38
<i>People v. Cooks</i> (1983) 141 Cal.App.3d 224.....	20

<i>People v. Cortez</i> (1998) 18 Cal.4th 1223.	16, 17, 19, 20
<i>People v. Cowan</i> (2010) 50 Cal.4th 401.	116, 118, 124
<i>People v. Cox</i> (1991) 53 Cal.3d 618.....	111
<i>People v. Cox</i> (1999) 20 Cal.4th 9362.	48
<i>People v. Cudjo</i> (1993) 6 Cal.4th 585.	56
<i>People v. Dagnino</i> (1978) 80 Cal.App.3d 981.....	105
<i>People v. Daniels</i> (1991) 52 Cal.3d 815.....	121
<i>People v. Diaz</i> (1951) 105 Cal.App.2d 690.....	115
<i>People v. Elwood</i> (1988) 199 Cal.App.3d 1365..	11
<i>People v. Engelman</i> (2002) 28 Cal.4th 436.....	95
<i>People v. Ervin</i> (2000) 22 Cal.4th 48.	109
<i>People v. Fain</i> (1983) 34 Cal.3d 350.....	36
<i>People v. Farmer</i> (1989) 47 Cal.3d 888.....	57

<i>People v. Fonseca</i> (1995) 36 Cal.App.4th 631.	88, 89
<i>People v. Fosselman</i> (1983) 33 Cal.3d 572.	56, 122
<i>People v. Frazier</i> (2001) 89 Cal.App.4th 30.	122
<i>People v. Frierson</i> (1985) 39 Cal.3d 803.	104
<i>People v. Guiton</i> (1993) 4 Cal.4th 1116.	76
<i>People v. Gutierrez</i> (2000) 78 Cal.App.4th 170.	58
<i>People v. Guzman</i> (1988) 45 Cal.3d 915.	66
<i>People v. Hall</i> (1927) 87 Cal.App. 634.	36, 37
<i>People v. Hamilton</i> (1989) 48 Cal.3d 1142.	84
<i>People v. Harris</i> (2013) 57 Cal.4th 804.	52
<i>People v. Heard</i> (2003) 31 Cal.4th 946.	8, 58
<i>People v. Hill</i> (1992) 3 Cal.4th 959.	2
<i>People v. Hill</i> (1998) 17 Cal.4th 800.	84

<i>People v. Holloway</i> (2004) 33 Cal.4th 96.	46
<i>People v. Jackson</i> (2014) 58 Cal.4th 724.	62
<i>People v. Johnson</i> (1993) 6 Cal.4th 1.	102, 105
<i>People v. Johnson</i> (2004) 121 Cal.App.4th 1409.	55
<i>People v. Jones</i> (2003) 29 Cal.4th 1229.	106
<i>People v. Jurado</i> (2006) 38 Cal.4th 72.	16, 19, 20, 28
<i>People v. Kitchens</i> (1956) 46 Cal.2d 260.	54
<i>People v. Lanphear</i> (1984) 36 Cal.3d 163.	108
<i>People v. Ledesma</i> (2006) 39 Cal.4th 641.	29, 34
<i>People v. Leonard</i> (2007) 40 Cal.4th 1370.	108
<i>People v. Lewis</i> (2006) 39 Cal.4th 970.	52
<i>People v. Lewis</i> (2008) 43 Cal.4th 415.	61, 109, 124
<i>People v. Lopez</i> (1999) 71 Cal.App.4th 1550.	88

<i>People v. Majors</i> (1998) 18 Cal.4th 385.	55
<i>People v. Marquez</i> (2000) 78 Cal.App.4th 1302.	13, 14
<i>People v. Marshall</i> (1997) 13 Cal.4th 799.	33, 47
<i>People v. Martinez</i> (1986) 188 Cal.App.3d 19.	122
<i>People v. Martinez</i> (2009) 47 Cal.4th 399.	6
<i>People v. Mayfield</i> (1997) 14 Cal.4th 668.	91, 103
<i>People v. Miranda</i> (1987) 44 Cal.3d 57.	77
<i>People v. Morante</i> (1999) 20 Cal.4th 403.	20, 48
<i>People v. Mower</i> (2002) 28 Cal.4th 457.	62, 96
<i>People v. Naverrette</i> (2010) 181 Cal.App.4th 828.	49
<i>People v. Osband</i> (1996) 13 Cal.4th 622.	46
<i>People v. Ozuna</i> (1963) 213 Cal.App.2d 338.	49
<i>People v. Parrish</i> (1948) 87 Cal.App.2d 853.	28

<i>People v. Perry</i> (2006) 38 Cal.4th 302.	106
<i>People v. Pitts</i> (1990) 223 Cal.App.3d 606.	84
<i>People v. Pope</i> (1979) 23 Cal.3d 412.	55
<i>People v. Raley</i> (1992) 2 Cal.4th 870.	57
<i>People v. Redmond</i> (1969) 71 Cal.2d 745.	11
<i>People v. Reyes</i> (1974) 12 Cal.3d 486.	11, 12, 15
<i>People v. Rich</i> (1988) 45 Cal.3d 1036.	43, 44
<i>People v. Robertson</i> (1989) 48 Cal.3d 18.	64, 102, 106, 107, 113
<i>People v. Roder</i> (1983) 33 Cal.3d 491.	66
<i>People v. Rodriguez</i> (1999) 20 Cal.4th 1.	36
<i>People v. Rubalcava</i> (1988) 200 Cal.App.3d 295.	105
<i>People v. Saffold</i> (2005) 127 Cal.App.4th 979.	54
<i>People v. Sakarias</i> (2000) 22 Cal.4th 596.	67

<i>People v. Sam</i> (1969) 71 Cal.2d 194.....	93
<i>People v. Samarjian</i> (1966) 240 Cal.App.2d 13.....	39
<i>People v. Santos</i> (2007) 147 Cal.App.4th 965.	103, 106
<i>People v. Schiers</i> (1971) 19 Cal.App.3d 102.....	49
<i>People v. Schmeck</i> (2005) 37 Cal.4th 240.	126
<i>People v. Scott</i> (1978) 21 Cal.3d 284.....	93
<i>People v. Simon</i> (2001) 25 Cal.4th 1082.	101
<i>People v. Sisavath</i> (2004) 118 Cal.App.4th 1396.	54
<i>People v. Smithey</i> (1999) 20 Cal.4th 936.....	48, 95
<i>People v. Song</i> (2004) 124 Cal.App.4th 973.	54
<i>People v. Stanley</i> (1995) 10 Cal.4th 764.	25
<i>People v. Stein</i> (1979) 94 Cal.App.3d 235.....	25, 39
<i>People v. Stewart</i> (2004) 33 Cal.4th 425.	4, 5, 7, 47

<i>People v. Sturm</i> (2006) 37 Cal.4th 1218.	84, 94, 99
<i>People v. Swain</i> (1996) 12 Cal.4th 593.	19
<i>People v. Tatge</i> (1963) 219 Cal.App.2d 430.....	25
<i>People v. Taylor</i> (2001) 26 Cal.4th 1155.	111
<i>People v. Thomas</i> (2005) 130 Cal.App.4th 1202.	54
<i>People v. Turner</i> (1990) 50 Cal.3d 668.....	54, 93
<i>People v. Virgil</i> (2011) 51 Cal.4th 1210.	103
<i>People v. Williams</i> (1997) 16 Cal.4th 635.	80
<i>People v. Woodberty</i> (1970) 10 Cal.App.3d 695.....	45
<i>People v. Wright</i> (1990) 52 Cal.3d 367.....	105
<i>People v. Younger</i> (2000) 84 Cal.App.4th 1360.	123
<i>People v. Zemavasky</i> (1942) 20 Cal.2d 56.....	115
<i>Reese v. Smith</i> (1937) 9 Cal.2d 324.....	25, 39

<i>Weiner v. Fleischman</i> (1991) 54 Cal.3d 476.....	64
--	----

Statutes, Constitutions and Rules

CALJIC No. 3.10.....	77
CALJIC No. 3.11.....	77
CALJIC No. 3.12.....	77
CALJIC No. 3.13.....	77
CALJIC No. 3.18.....	74
CALJIC No. 8.88.....	129
CALJIC No. 17.41.1.....	95, 96
Evid. Code, § 310, subd. (a).....	89
Evid. Code, § 312.....	91
Evid. Code, § 1200, subd. (a).....	61
Evid. Code, § 1230.....	68
Pen. Code, § 187, subd. (a).....	73
Pen. Code, § 190.2, subd. (a)(3).....	34
Pen. Code, § 190.3, subd. (a).....	29, 31
Pen. Code, § 211.....	73
Pen. Code, § 245, subd. (a)(2).....	36, 119
Pen. Code, § 977, subd. (b)(1).....	102, 104
Pen. Code, § 1111.....	74, 75, 77

Pen. Code, § 1259..... 95
U.S. Const. 5th, 6th, 8th & 14th Amends..... passim

///

No. S095076

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD PENUNURI,

Defendant and Appellant.

LOS ANGELES COUNTY
SUPERIOR COURT

Superior Court Case
No. BA189633

**ON AUTOMATIC APPEAL
FROM A JUDGMENT AND SENTENCE OF DEATH**

Superior Court of California, County of Los Angeles
The Honorable Robert W. Armstrong, Judge Presiding

APPELLANT'S REPLY BRIEF

INTRODUCTION

Appellant Richard Penunuri respectfully submits this reply to respondent's brief. Appellant replies to contentions by respondent that necessitate an answer in order to present the issues fully to this Court. Appellant does not reply to arguments that are adequately addressed in his opening brief. The absence of a

reply to any particular argument, sub-argument or allegation made by respondent, or of a reassertion of any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects his view that the issue has been adequately presented and the positions of the parties fully joined.

///

ARGUMENT

JURY SELECTION

I.

THE DISMISSAL FOR CAUSE OF PROSPECTIVE JUROR STEVEN METCALF REQUIRES REVERSAL OF THE DEATH JUDGMENT BECAUSE HE COULD FAIRLY AND IMPARTIALLY RETURN A VERDICT FOR EITHER LIFE OR DEATH.

Appellant explained in his opening brief that Prospective Juror Steven Metcalf stated that he could follow the law, he could return a verdict of death in an appropriate case, and his personal views of capital punishment, including religious beliefs, would not prevent or substantially impair his ability to return a verdict of death. (Appellant's Opening Brief ("AOB") 65-90.)

Respondent agrees that counsel's failure to object to Metcalf's removal did not forfeit the claim. (Respondent's Brief ("RB") 28; *People v. Cleveland* (2004) 32 11 Cal.4th 704, 734-735.)

Respondent argues that substantial evidence supports the trial court's implicit finding that Metcalf could not fairly consider the death penalty as a sentencing option. (RB 24-32.) Respondent is mistaken. Metcalf's written responses to the questionnaire, and his responses during voir dire, reveal that he could fairly and impartially decide the case and return a verdict for either life or death. (CT 8:2169-2184; RT 7:713-752.)

Metcalf stated in the questionnaire that his view of the death penalty was “in flux—away from its use” (CT 8:2181), and that over the past decade he was “[l]ess likely to be in favor” of the death penalty. (CT 8:2182.) But Metcalf affirmed he would fairly apply the law and would not automatically vote for life in prison. (CT 8:2181.)

During voir dire, Metcalf equivocated, stating he “should probably” be included in the group of people that could not return a verdict of death. (RT 7:722.) But moments later when asked for a show of hands from anyone unable to apply the law and return either a verdict of death and/or life, Metcalf did not raise his hand, implicitly affirming he could fairly apply the law and return a verdict of death in an appropriate case. (RT 7:721-723.)

Metcalf’s single equivocal response during voir dire, as noted in the preceding paragraph, does not provide substantial evidence of impairment because both before and after that response he continued to affirm that he could fairly apply the law and return a verdict of death. (CT 8:2169-2184; RT 7:713-752.)

The moving party bears “the burden of demonstrating to the trial court that the [*Witt*] standard [is] satisfied as to each of the challenged jurors.” (*People v. Stewart* (2004) 33 Cal.4th 425, 445.) “As with any other trial situation where an adversary wishes to exclude a juror because of bias, . . . it is the adversary

seeking exclusion who must demonstrate through questioning that the potential juror lacks impartiality It is then the trial judge's duty to determine whether the challenge is proper." (*Wainwright v. Witt* (1985) 469 U.S. 412, 423.)

To the extent that Metcalf's single equivocal response during voir dire suggested a need for individual voir dire and/or further questioning of him, the prosecutor's failure to engage Metcalf in voir dire shows that the prosecution failed to meet its burden of demonstrating to the trial court that the *Witt* standard was satisfied. (See *People v. Stewart, supra*, 33 Cal.4th at p. 445 [moving party bears the burden of demonstrating to the trial court that the *Witt* standard is satisfied as to each of the challenged jurors]; *Wainwright v. Witt, supra*, 469 U.S. at p. 423.)

Respondent argues substantial evidence supports the trial court's removal order because "Metcalf clearly expressed strong beliefs against the death penalty." (RB 29.) Respondent is mistaken. Although Metcalf's personal view of the death penalty was "in flux—away from its use" (CT 8:2181), he consistently expressed an ability to follow the court's instructions on capital punishment and apply the law, regardless of his personal views. (CT 8:2180-2182.) In fact, when asked whether he "entertain[ed] such a conscientious opinion concerning the death penalty that you would automatically in every case vote for a verdict of life

imprisonment without the possibility of parole and under no circumstances vote for a verdict of death?,” Metcalf responded, “I don’t think so.” (CT 8:2181.)

Respondent’s emphasis on Metcalf’s personal views of the death penalty is misplaced because Metcalf repeatedly stated he would fairly apply the law and impose a sentence of death in an appropriate case, demonstrating a willingness to temporarily set aside his own beliefs in deference to the rule of law. Metcalf was *not* firmly opposed to the death penalty (CT 8:2181-2182), but even if he had been that alone would not have been a basis to exclude him from appellant’s jury. (*People v. Martinez* (2009) 47 Cal.4th 399, 427.)

It is important to remember that *not all who oppose the death penalty are subject to removal for cause in capital cases*; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

(*Lockhart v. McCree* (1986) 476 U.S. 162, 176, italics added.)

In effect, when those opposed to capital punishment are excluded from the venire, the state “crosse[s] the line of neutrality” and “produce[s] a jury uncommonly willing to condemn a man to die,” thereby violating the Sixth and Fourteenth Amendments. (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 520-521.) “[A] sentence of death cannot be carried out if the jury imposing or recommending it was chosen by excluding veniremen for cause simply because

they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.” (*Id.* at p. 522 [fn. omitted].)

As the high court has made clear, a prospective juror’s personal views concerning the death penalty do not necessarily afford a basis for excusing the juror for bias.

. . . . Because “[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State,” . . . [it follows that] “a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty.”

(*Uttecht v. Brown* (2007) 551 U.S. 1, 6, citing *Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 522-523, fn. 21.)

Respondent also points to the deference owed to the trial court’s implicit finding of substantial impairment, stating that ““a trial judge who observes and speaks with a prospective juror and hears that person’s responses . . . gleans valuable information that simply does not appear on the record.”” (RB 32, citing *People v. Stewart*, *supra*, 33 Cal.4th at p. 451.) Respondent’s argument is misplaced because here the record shows that Metcalf could apply the law and return a death verdict in an appropriate case; the trial court also never spoke with Metcalf, entirely failing to question him during voir dire. (See RT 713-752; *Uttecht v. Brown*, *supra*, 551 U.S. at p. 19 [“The need to defer to the trial court’s

ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment."].)

The trial court exceeded its discretion in excusing Metcalf because his responses to the questionnaire, and his responses during voir dire, do not support reasonable grounds for a finding of substantial impairment. (Cf. *People v. Heard* (2003) 31 Cal.4th 946, 966; *Ross v. Oklahoma* (1988) 487 U.S. 81, 88.)

Reversal of the death judgment is required.

///

GUILT PHASE

II.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A FINDING THAT APPELLANT WAS A PRINCIPAL IN THE MURDERS OF BRIAN MOLINA AND MICHAEL MURILLO, REQUIRING REVERSAL OF COUNTS 4 AND 5, RESPECTIVELY.

Appellant explained in his opening brief that his convictions for the first-degree murders of Brian Molina and Michael Murillo (counts 4 and 5, respectively) should be reversed for insufficient evidence that he perpetrated the killings. (AOB 91-106.) Although appellant was in the vicinity of the residence on Hornell Street hours before the murders, the gunman was never positively identified. (AOB 95-106.) The verdicts rested on testimony and circumstances revealing a suspicion that appellant was involved in the killings, which is insufficient to sustain the verdicts on appeal. (AOB 94-106.)

The standard of review for sufficiency of the evidence is applied in a capital case *with greater scrutiny*, a matter respondent does not dispute. (AOB 93; RB 32-38; see *Beck v. Alabama* (1980) 447 U.S. 625, 627-646 [recognizing a heightened reliability requirement in the guilt phase of a capital trial]; *Gardner v. Florida* (1977) 430 U.S. 349, 357 [death is different, which requires greater scrutiny of capital guilt determinations]; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Ford v. Wainwright* (1986) 477 U.S. 399, 411.)

Respondent argues that there is sufficient evidence of premeditation and deliberation, applying the factors set forth in *People v. Anderson* (1968) 70 Cal.2d 15. (RB 34-35, 38-39.) Respondent misconstrues appellant's argument. Appellant asserts there is insufficient evidence identifying him as the gunman who killed Molina and Murillo, not that the unidentified gunman lacked premeditation and deliberation. (AOB 94-106.)

Luke Bissonette saw appellant earlier on Hornell Street hours before the murders, and so when he heard the gunshots and looked out the window of the Goodhue Street residence he thought to himself, "fucking Dozer" (i.e., appellant). (RT 10:1189-1192.) Aside from Luke's admitted consumption of drugs, impairing his ability to accurately observe the events (RT 10:1232-1233, 1237-1238), Luke never saw the gunman; he only saw the face of a person running away. (RT 10:1059-1066.) In the two seconds that he saw the person's face, Luke could not tell what the person was wearing because it was too dark outside. (RT 10:1059-1066.) Luke had seen appellant earlier that night, and thus assumed the person running away was appellant. (RT 10:1059-1066.)

Respondent argues that Luke's eyewitness identification of appellant constitutes substantial evidence in support of the verdicts because weaknesses in the identification testimony of a witness is to be evaluated by the jury, not the