IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. EDUARDO D. VARGAS, Defendant and Appellant.	)	Case No. S101247 (Superior Court No. 99CF0831)

AUTOMATIC APPEAL FROM THE JUDGMENT OF DEATH
OF THE SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE JOHN RYAN, JUDGE

APPELLANT'S REPLY BRIEF

RUSSELL S. BABCOCK
California State Bar No. 99130
Certified Specialist, Criminal Law
The State Bar of California Board of Legal Specialization
LAW OFFICES OF RUSSELL S. BABCOCK
1901 First Ave., Ste. 138
San Diego, California 92101
(619) 531-0887
russbab@gmail.com
Attorneys for Appellant VARGAS
By Appointment of the Court
Under the California Appellate Project, Inc.
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DEATH PENALTY

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INTRODUCTION

In this brief, appellant addresses specific contentions made in respondent's brief where it is necessary to present the issues more fully to the Court. Appellant does not reply to respondent's contentions that are adequately addressed in appellant's opening brief and supplemental brief. The absence of a response to any particular argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment, or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069,

fn. 13), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully briefed.

For the convenience of the Court, the arguments in this reply brief are numbered and correspond to the argument numbers in Appellant's Opening Brief and Respondent's Brief.

ISSUES RELATING PRIMARILY TO GUILT PHASE ERROR

I.

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF AN UNLAWFUL SEARCH AND SEIZURE IN VIOLATION OF HIS FOURTH AMENDMENT RIGHTS

A. Introduction

The trial court abused its discretion in denying appellant's motion to suppress evidence that was obtained by police during the course of an unlawful search of appellant's home in violation of his Fourth Amendment rights. (AOB 94-107.)[1] Appellant did not knowingly, intelligently, and voluntarily consent to the waiver of his Fourth Amendment protection against warrantless search and seizure as a condition to his grant of probation in an earlier, misdemeanor case. (AOB 99-103.) Consequently, all evidence procured by police as a result of their unlawful search of appellant's home should have been ruled inadmissible in accordance with the exclusionary rule. (*Mapp v. Ohio* (1961) 367 U.S. 643, 655.)

Respondent puts forward three arguments in an attempt to defeat appellant's claim: (1) substantial evidence supports the trial court's finding that appellant "voluntarily entered into his plea agreement with knowledge

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[1] "AOB" refers to Appellant's Opening Brief and "RB" refers to Respondent's Brief.

of his probation conditions," (2) "the probation search was proper under the good faith exception" to the Fourth Amendment's warrant requirement, and (3) the probation search was "conducted with [appellant's] express consent." (RB 39.) As shown below, appellant did not consent to a waiver of his Fourth Amendment rights, the good faith exception to the Fourth Amendment's warrant requirement does not apply to the police's search of appellant's home, and appellant did not consent to the police's search.

B. There Was Insufficient Evidence That Appellant Knowingly, Intelligently, and Voluntarily Consented to a Waiver of his Fourth Amendment Rights as a Condition to His Grant of Probation

Respondent alleges that appellant's "claim that he did not waive his Fourth Amendment rights as a condition of probation is meritless because he personally and specifically agreed to this condition at the sentencing hearing." (RB 44.) But respondent fails to identify any place in the record where appellant indicated he either understood that his probation would be conditioned on a waiver of his Fourth Amendment rights or consented to such a waiver. Aside from this failure to offer any evidence of appellant's consent, respondent's argument suffers from two pervasive misconceptions. First, respondent conflates appellant's change of plea proceedings with appellant's grant of probation proceedings. Second, respondent ignores the contractual nature of probation conditions. Like any contractual agreement,

a probation search condition requires both parties' consent for its terms to be enforceable. As the United States Supreme Court has held, "[W]hen the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given . . . ." (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 248-249.)

Respondent refers to appellant's waiver of the right to jury trial, the right to confront witnesses, and the privilege against self-incrimination, commonly referred to as a *Boykin-Tahl* waiver, as though waivers made by appellant during his change of plea proceeding had any bearing upon whether appellant waived other, different rights as a condition of his probation. (RB 44; See *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122, disapproved on other grounds in *Mills v. Municipal Court for San Diego Judicial Dist.* (1973) 10 Cal.3d 288.) In reference to appellant's change of plea hearing, respondent recounts how appellant "signed a written waiver of his constitutional rights under the advice of counsel, was advised orally by the trial court of these rights, and the trial court found [appellant] understood, and knowingly and intelligently waived his rights." (RB 44-45, citing 2 CT 442-443, 453-455.)[2] Similarly, at the

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The primary portions of the record pertaining to the jury trial are four

motion to suppress hearing, the trial court found that appellant entered into his plea agreement with full knowledge of the consequences of his plea. (1 RT 117-118; See also RB 42.)

Though both a *Boykin-Tahl* waiver and a probation search condition constitute waivers of federal constitutional rights, any similarity between the two ends there. Whereas a *Boykin-Tahl* waiver signifies a retrospective, one-time relinquishment of the procedural trial rights that are available to criminal defendants, a probation search condition signifies a prospective, continuing relinquishment of the constitutional protection against unreasonable searches that is available to all persons.

Respondent confuses appellant's *Boykin-Tahl* waiver with a knowing consent to a probation search and seizure condition. Appellant's plea

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bound volumes of clerk's transcript, pages 1-1,284, and 13 bound volumes of reporter's transcripts, pages 1-3,475. The four volumes of the clerk's transcript are cited as "CT" with the corresponding page and volume numbers. The 13 reporter's volumes are cited as "RT" with corresponding page and volume numbers.

In addition, the record on appeal also contains 11 bound volumes of the clerk's transcripts which are juror questionnaires and are numbered, consecutively, pages 1- 4300. They are not cited in this reply brief. Additionally, there are two bound volumes which are supplemental clerk's transcripts pertaining to additional juror questionnaires and contain pages 1-433. Moreover, the record contains one clerk's transcript from the municipal court record that is not cited in this brief. Additionally, there are two reporter's transcripts from the municipal court record that are numbered pages 1- 418 that are not cited in this brief.

agreement included a *Boykin-Tahl* waiver. (2 CT 453-455.) In exchange for appellant's guilty plea, the government reduced to a misdemeanor the charge in count one of possession of a deadly weapon in violation of former Penal Code section 12020, subdivision (a).[3] (2 CT 442, 453.) Notably, appellant's plea agreement did not contain an agreement on appellant's sentence. (2 CT 453-455.) Rather, appellant's plea agreement informed him that the possible consequences of his guilty plea included a one year sentence in the county jail. (2 CT 454.)

Nevertheless, respondent incorrectly asserts that "[i]n accordance with the change-of-plea, the District Attorney submitted a sentence recommendation of informal probation that listed the terms and conditions to include 'submit to search or seizure.'" (RB 45, citing 2 CT 456.) No such nexus exists between appellant's plea agreement and the prosecution's probation recommendation. On the contrary, the significance of the two documents arises from the following discrepancy: Appellant's signature on his plea agreement evidences his consent to his *Boykin-Tahl* agreement whereas the District Attorney's unsigned, boilerplate sentence

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All references to code sections are to the California Penal Code, unless otherwise noted. The Legislature's repeal of former section 12021(a) became operative on January 1, 2012. (Stats. 2010, ch. 711, § 4 (SB 1080).)

recommendation form with a checked box labeled "Submit to Search and Seizure" does not evidence appellant's consent or even knowledge of the probation condition. (2 CT 453-456.)

Ironically, respondent's reliance on appellant's *Boykin-Tahl* waiver undermines its argument that appellant consented to a search and seizure condition to his probation. As respondent notes, the clerk's minutes indicate that the judge in appellant's misdemeanor case advised and questioned him about his *Boykin-Tahl* waiver. (RB 44-45.)

> After questioning, court finds defendant understands he is giving up his rights as stated in the Tahl form.
>
> Defendant acknowledges understanding each of the enumerated rights. . .
>
> . . . After questioning, the court finds defendant knowingly, intelligently and understandingly waives each of the above stated rights necessarily abandoned by his/her plea, that such plea is voluntary and with knowledge of the consequences thereof.

(2 CT 442-443.)

The clerk's minutes reflect the existence — if not the exact words — of a colloquy between the judge and appellant, a colloquy that included the judge's examination of appellant to see whether he understood his constitutional rights and nevertheless knowingly, intelligently, and voluntarily waived them. By contrast, no record of any kind suggests a

similar colloquy took place between the judge and appellant regarding the purported search condition to his grant of informal probation.

Although respondent claims "the trial court advised Vargas on the record of the terms of his probation," including the alleged search and seizure condition (RB 45, 47), the record reveals only checked-off boxes on a boilerplate form. (2 CT 458.) The clerk's minutes cited by respondent appear to replicate the formulaic language of the Disposition/Minute Order, thereby calling into question how accurately the language reflects what actually transpired at the proceeding. (2 CT 443, 458.) At the very least, contrary to respondent's claim, there is no finding by the judge that appellant "personally and specifically agreed" to a probation search condition. (RB 44.) The boilerplate clerk's minutes and Disposition/Minute Order are insufficient to impute to appellant either knowledge of the probation search condition or his knowing and voluntary consent to it.

Respondent misunderstands the arguments set forth in Appellant's Opening Brief when it asserts that appellant's "argument, however, is not premised on his not receiving notice of his terms and conditions of probation, but rather on his not signing the summary probation order." (RB 46.) In fact, appellant argued that "the waiver [of his Fourth Amendment right] was ineffective because the probation officer violated section 1203.12

by not furnishing appellant with the probation conditions in written form." (AOB 102.) Appellant's claim does not depend on a technical argument alleging non-compliance with a statutory rule. Rather, appellant brings to light this non-compliance to show that he was not given proper notice and as a result did not consent to the waiver of his federal constitutional rights.

Respondent also misconceives the import of *Freytes v. Superior Court* (1976) 60 Cal.App.3d 958 (*Freytes*) for the present case. Although respondent recounts the facts, reasoning, and ruling in *Freytes*, respondent draws the wrong lesson from its rationale. (RB 46-47.) The court in *Freytes* concluded that as long as the terms of a probation search condition were read to a probationer by the judge, freely discussed in open court, and agreed to by the probationer, any failure to provide the probationer with a written copy of those terms does not prejudice the probationer. (*Freytes, supra,* 60 Cal.App. at p. 962.) As respondent itself admits, the *Freytes* court found that the judge's statements implied that he gave a section 1203.12 statement to the probationer, who also "stated he understood [the terms of his probation] and agreed to abide by them." (RB 46-47, quoting *Freytes, supra,* 60 Cal.App.3d at p. 962.)

In contrast, the record in this case does not imply that the trial court furnished appellant with a section 1203.12 statement. Nor does it reflect that the probation search condition was discussed in open court. And it

does not indicate that the probation condition was agreed to by appellant. Unlike in *Freytes*, insufficient evidence supports the conclusion that appellant "unquestionably consented" to the probation search and seizure condition. (RB 47.) At the motion to suppress hearing, defense counsel emphasized that nothing indicated appellant waived his Fourth Amendment rights against unreasonable search and seizures. (1 RT 117.) In the face of this lack of evidence, the trial court relied on "the history and practice of the courts in this building" in determining that appellant was "aware of and agreed to voluntarily . . . accept the search and seizure condition." (1 RT 117-118.) Defense counsel remonstrated that the court's ruling would at least require "some evidence on the way the [probation hearing judge] normally does his pleas." (1 RT 118.) When defense counsel tried to pursue further argument, he was cut off by the trial court. (*Ibid.*)

Respondent correctly points out that the *Freytes* court concluded that the right to receive a section 1203.12 statement is statutory, not constitutional. (RB 47, citing *Freytes, supra,* 60 Cal.App.3d at p. 962.) Appellant does not claim, however, that only his rights under section 1203.12 were violated, but maintains that his rights under the Fourth Amendment were violated. Appellant points to the failure to furnish appellant with a section 1203.12 statement as evidence supporting his Fourth Amendment claim rather than as the substance of his claim. This

violation of appellant's Fourth Amendment rights cannot reasonably be characterized as "not prejudicial." (RB 47, citing *Freytes, supra,* 60 Cal.App.3d at p. 962.)

Respondent also suggests that appellant "waived" his claim on appeal because he did not object to any terms of his probation. (RB 47, citing *People v. Welch* (1993) 5 Cal.4th 228, 234-235 (*Welch*).) To begin with, the term "waiver" must be distinguished from the term "forfeiture." Whereas "waiver" refers to a person's intentional, express relinquishment of a right or privilege, "forfeiture" refers to the procedural bar that results from the failure to timely assert a right or privilege. (*In re Sheena K.* (2007) 40 Cal. 4th 875, 880, n. 1., citing *United States v. Olano* (1993) 507 U.S. 725, 733.) This Court has held that a defendant who fails to object to the unreasonableness of probation conditions in the trial court forfeits that claim on appeal. (*Welch, supra,* 5 Cal. 4th at pp. 235-237.) In *Welch*, the probationer challenged a probation condition on the ground that it impermissibly regulated non-criminal conduct that was not reasonably related to the crime of which he had been convicted. (*Welch, supra,* 5 Cal. 4th at p. 232.)

Appellant, on the other hand, challenges not the unreasonableness or over-breadth of the alleged probation search and seizure condition, but the fact that he had knowledge of and consented to the condition. As this Court

has recognized, for the procedural principle of forfeiture to apply, "[t]he parties must, of course, be given a reasonable opportunity to present any relevant argument and evidence." (*Welch, supra,* 5 Cal. 4th at p. 235.) Unless appellant had been given adequate opportunity to object to the imposition of the probation search condition, he cannot have forfeited or waived his Fourth Amendment rights.

In his concurring opinion in *Welch*, Justice Arabian distinguished the obligatory, "rigorous procedure" for imposing probation in felony cases from the discretionary, less stringent procedure for imposing probation in misdemeanor cases.

> While the statutory scheme in felony cases incorporates numerous safeguards preserving the defendant's ability to contest an objectionable probationary condition in a timely manner, the less exacting provisions applicable to misdemeanors may as a practical matter reduce or eliminate any meaningful notice or opportunity to object. Since a finding of waiver presumes constitutionally sound procedures, the rule announced today should not preclude a challenge on appeal or collateral attack in the absence of such notice and opportunity.

(*Welch, supra,* 5 Cal. 4th at p. 239 (conc. opn. of Arabian, J.).) The majority in *Welch* likewise recognized the difference between the statutory schemes for imposing probation in felony and in misdemeanor convictions. (*Id.* at p. 234.) Even in misdemeanor cases, however, a probationer is entitled "to notice and [an] opportunity to present

information on conditions." (*Ibid.*) Nothing in the record suggests that appellant's misdemeanor probation hearing comported with the rigorous procedures required by due process.

Even if appellant can be said to have forfeited his right to challenge his probation search condition, this Court still has discretion to review appellant's claim. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) As this Court has emphasized, "appellate courts typically have engaged in discretionary review only when a forfeited claim involves an important issue of constitutional law or a substantial right." (*In re Sheena K, supra,* 40 Cal. 4th at p. 887.) The Fourth Amendment secures fundamental liberty interests and therefore protects substantial rights under the federal constitution, this Court should consider appellant's claim even if it is deemed forfeited.

Finally, respondent adduces testimony by Detective Kennedy at the suppression hearing that appellant "affirmed his personal knowledge and understanding of his probation terms and conditions" when appellant affirmed that he was subject to search and seizure. (RB 45.) Any statement by appellant over a year after his grant of probation is irrelevant to determining whether or not appellant knowingly, intelligently, and voluntarily consented to the probation search condition at the time he was placed on informal probation.

C. The Good Faith Exception Does Not Apply to the Evidence Obtained as a Result of the Unlawful Search of Appellant

Respondent argues that "even if [appellant's] search condition was invalid, the search was lawful because the officers acted under the good faith exception to the exclusionary rule established in *United States v. Leon* (1985) 468 U.S. 897." (RB 47.) In *United States v. Leon*, the United States Supreme Court held that when police act under an invalid search warrant that is unsupported by probable cause, the exclusionary rule does not apply if the police acted "in objectively reasonable reliance" on the warrant. (*United States v. Leon, supra,* 468 U.S. at p. 922.) The *Leon* court did not, however, hold that an officer's good faith reliance on an unlawful search warrant made the resulting search lawful. The Fourth Amendment forbids unreasonable intrusions by the government into the privacy of one's person, house, papers, or effects. Once the government conducts an unlawful search or seizure, a violation of the Fourth Amendment "is fully accomplished." (*United States v. Calandra* (1974) 414 U.S. 338, 354.) The exclusionary rule does not serve as a remedy that cures this invasion of a person's privacy, but instead serves as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." (*United States v. Leon, supra,* 468 U.S. at p. 906, quoting

United States v. Calandra, supra, 414 U.S. at p. 348.) Thus the question here is not whether the police's search was lawful, but whether the exclusionary rule should apply.

Although officers in this case relied on "faxed copies of court orders indicating that Vargas was on probation and subject to a search and seizure condition" (RB 47, citing 1 RT 92-93), the so-called "good faith" exception to the exclusionary rule has only been applied by the United States Supreme Court in three narrowly defined circumstances. According to the high court, suppression of the fruits of an unlawful search is not required if the evidence was seized in objectively reasonable reliance upon a facially valid search warrant (*United States v. Leon* (1984) 468 U.S. 897), objectively reasonable reliance upon a facially valid statute later determined to be unconstitutional (*Illinois v. Krull* (1987) 480 U.S. 340), or objectively reasonable reliance upon what subsequently turns out to be false information in a computer database created and maintained by court clerks (*Arizona v. Evans* (1995) 514 U.S. 1). (See, generally, *People v. Willis* (2002) 28 Cal.4th 22.) All of these rulings dealt with the police's reliance on a warrant or information concerning a warrant.

The police officers in appellant's case, on the other hand, relied on a probation search condition. One court of appeal has extended the high court's ruling in *Arizona v. Evans* to cover probation search conditions

stored and maintained by court personnel. (*People v. Downing* (1995) 33 Cal.App.4th 1641, 1650-1656.) Another court of appeal, however, has ruled that the exclusionary rule applies to a police officer's reliance on incorrect information concerning a probationer's search waiver supplied by a probation officer. (*People v. Howard* (1984) 162 Cal.App.3d 8, 18-21.) This court should not follow *Downing* because it overextends the rule devised in *Arizona v. Evans*. In that case, the high court noted that the "*Leon* framework supports a categorical exception to the exclusionary rule for clerical errors of court employees. [Citations.]." (*Arizona v. Evans, supra,* 514 U.S. at p. 16.)

The violation of appellant's Fourth Amendment rights did not result from a clerical error, but from a deprivation of his due process rights to have his right against unreasonable search and seizures waived only upon his knowing, voluntary, and intelligent consent.

D. Appellant Did Not Consent to the Search

Respondent argues that appellant consented to the search of his home. (RB 48.) "It is irrelevant whether the underlying search condition was valid because [appellant] directly told the officers that he was on probation and subject to a search condition." (RB 48, citing 1 RT 84-85.) According to respondent, the officers' reliance on appellant's statement was reasonable because "[t]here was no indication that [appellant] was

incapable of truthfully relaying his probation terms to the officers." (RB 48.) Respondent then cites the declaration against interests exception to the hearsay rule in section 1230 of the California Code of Evidence as support for this claim, but does not provide any authority for relying on state evidentiary rules in the context of Fourth Amendment search and seizure law. (RB 48.)

Appellant also cites the case of *In re Jeremy G.* (1998) 65 Cal.App.4th 553. In *In re Jeremy G.*, police arrived at a juvenile's home afer receiving a complaint of marijuana sales. (*Id.* at p. 556.) When police asked the juvenile whether he was subject to a probation search condition, the juvenile mistakenly answered, "Yes. For weapons." (*Ibid.*) Police then searched the house and discovered guns, drugs, and paraphernalia. (*Ibid.*) The Court of Appeal concluded that the police reasonably relied on the juvenile's representation that he was searchable. (*Id.* at p. 556.) In doing so, the court wrongly extended the holding of the high court in *Arizona v. Evans*. Whereas a police officer's reliance on a computerized database containing arrest warrant information that is maintained by the courts is objectively reasonable, his reliance on a juvenile's opinion about the existence and scope of a probation search condition is not.

All of the United States Supreme Court cases carving out the good faith exception to the exclusionary mandate that the investigating officer

have an "objectively reasonable reliance" on inaccurate information. No other court has followed the *In re Jeremy G.* court. In this case, appellant had just been roused from sleep by police officers who invaded his home and immediately pinned him to his bed. (1 RT 104-105.) Under the circumstances, it was not objectively reasonably for the police officers to rely on appellant's own opinion about his probation conditions.

E. The Trial Court's Erroneous Admission of Evidence Unlawfully Seized in Violation of Appellant's Fourth Amendment Rights Was Not Harmless Beyond a Reasonable Doubt

Respondent argues that the trial court's erroneous denial of appellant's motion to suppress constituted harmless error because appellant "would still have been convicted of all charges even assuming the trial court had suppressed the gun and gang evidence collected from his home on April 2, 1999, at the time of the probation search." (RB 49.) Respondent claims that appellant's "possession of the murder weapon was not the only evidence tying him to Jesse's Murder [*sic*] and related charges." (RB 49.) On the contrary, respondent continues, appellant's "palm print, location of stolen property, and the abundance of gang evidence" shows that the admission of unlawfully seized evidence resulting from the warrantless intrusion into appellant's home constituted harmless error. (RB 50.)

Respondent has not sustained its burden to prove beyond a reasonable doubt that the erroneous admission of unlawfully seized

evidence did not contribute to appellant's guilty verdicts. (*Chapman v. California* (1966) 386 U.S. 18, 24.) In discussing the "overwhelming evidence presented at trial" (RB 50), respondent sidesteps the onerous burden it must bear under *Chapman*. The high court's holding in *Chapman* requires a reviewing court to assess the effect a trial error had on the actual jury that considered the evidence at trial, regardless of the weight of other evidence.

> [The inquiry under *Chapman*] is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered — no matter how inescapable the findings to support that verdict might be — would violate the jury-trial guarantee.

(*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, original italics.) Instead of complying with the *Chapman* harmless error standard, respondent distracts the court with other evidence that was presented at trial, other evidence whose consideration by the jury is not under consideration here.

The government has not provided substantial evidence that the admission of the .38 caliber Lorcin pistol and numerous items containing alleged gang-related graffiti did not contribute to appellant's guilty verdicts.

At trial, the prosecution argued that appellant must have been the shooter because he possessed the gun that shot Muro, even though evidence showed at least five other people were present at the time of the Muro homicide. (AOB 104; 7 RT 1808; 10 RT 2675.)

F. Conclusion

The police's warrantless search of appellant's home violated the Fourth Amendment because appellant did not knowingly, intelligently, and voluntarily consent to the probation search condition. Moreover, appellant did not consent to a waiver of his Fourth Amendment rights, the good faith exception to the Fourth Amendment's warrant requirement does not apply to the police's search of appellant's home, and appellant did not consent to the police's search. Respondent has not shown beyond a reasonable doubt that the pistol and other personal belongings recovered from appellant's home did not contribute to his guilty verdict. Consequently, this Court should uphold appellant's motion to suppress, exclude the unlawfully recovered evidence, and remand appellant's case for a new trial.

Even if this Court rejects this argument, appellant's death sentence must be reversed. The prosecution cannot prove beyond a reasonable doubt that this error — the admission into evidence of the Lorcin gun and appellant's personal belongings allegedly covered with gang-related graffiti — did not contribute to appellant's death sentence. (See *Chapman v.*

California, supra, 386 U.S. at p. 24; see also *People v. Brown* (1988) 46 Cal.3d 432, 447-449 (*Brown*); *People v. Gonzalez* (2006) 38 Cal.4th 932, 961; *People v. Prince* (2007) 40 Cal.4th 1179, 1299-1300.) A capital penalty jury is charged with rendering "an individualized, normative determination . . . whether [a criminal defendant] should live or die." (*Brown, supra,* 46 Cal.3d at p. 448, original italics.) When reviewing the effect the erroneous admission of evidence in violation of appellant's Fourth Amendment rights had on the penalty phase of a capital trial, this Court should consider whether the death sentence "actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279, original italics.)

Appellant's death sentence was not "surely unattributable" to the admission of the poisonous fruits of the unlawful search — the Lorcin gun and appellant's personal belongings allegedly covered with graffiti. Appellant's possession of the gun allegedly used to shoot Jesse Muro constituted the only piece of evidence corroborating Laura Espinoza's testimony that appellant acknowledged he shot Muro. Co-defendants Eloy Gonzalez and Miller were convicted of murder in separate trials and received life without the possibility of parole and 50 years to life imprisonment, respectively. (See *People v. Miller* Cal.App. 4 Dist., March 22, 2004, as mod. April 21, 2004, No. G029025 [nonpub. opn.].)

Accordingly, the jury's determination that appellant was the shooter contributed to its decision to sentence appellant to death. There is a reasonable possibility that if neither the Lorcin gun nor appellant's graffiti-covered personal belongings had been introduced at trial, at least one juror would have refused to impose the death penalty. (See *Brown, supra*, 46 Cal.3d at p. 448.) As a result, the erroneous admission of the fruits of the police's unlawful search of appellant's home violated his rights to due process of law and to be free from cruel and unusual punishment and was not harmless beyond a reasonable doubt. (U.S. Const., 4th, 5th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 17, 24.) His death sentence must accordingly be reversed.

II.

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTIONS IN COUNTS SEVEN AND TWELVE[4] FOR ACTIVE PARTICIPATION IN A CRIMINAL STREET GANG (§ 186.22, SUBDIVISION (A))

A. Introduction

In Appellant's Opening Brief, appellant showed that the prosecution did not present sufficient evidence that appellant was an "active participant" in a criminal street gang, as required by section 186.22, subdivision (a). (AOB 108- 121.) In reviewing a conviction for sufficient evidence, this Court must examine the entire record, not just individual pieces of evidence favorable to the prosecution, and conclude that substantial evidence supports each element of the substantive offense. (*People v. Johnson* (1980) 26 Cal.3d 557, 577.) On this appeal, it is not enough for respondent to point to some evidence in support of the verdict because "[n]ot every

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[4] Appellant's Opening Brief refers to Count 11 as the substantive gang offense. As respondent points out, the information filed by the prosecution on March 10, 2000 charged appellant with violating the substantive street terrorism offense on March 30, 1999 in count seven and on April 1, 1999 in count twelve. (RB 50, fn. 1, citing 1 CT 41-46.) Appellant was subsequently convicted of the crimes charged in both counts. (3 CT 800, 813.) The argument offered by appellant in Appellant's Opening Brief applies equally to both substantive gang offense charges and respondent has addressed both convictions. Appellant here replies to respondent's arguments regarding both substantive gang offenses. Thus, the issue is fully joined.

surface conflict of evidence remains substantial in the light of other facts." (*Ibid.*, quoting *People v. Bassett* (1968) 69 Cal.2d 122, 138.) Substantial evidence "reasonably inspires confidence." (*People v. Morris* (1988) 46 Cal.3d 1, 19, overruled in part on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 545 & fn. 5). In this case, the evidence at most showed that appellant associated with gang members. Thus, appellant's conviction of the substantive offense of street terrorism in counts seven and twelve is not supported by substantial evidence.

Respondent argues that "there is substantial evidence that [appellant] was a Southside gang member that [*sic*] committed crimes with other Southside gang members." (RB 51.) In support, respondent claims that appellant's nickname appeared on a gang roster (RB 55), appellant had "gang inspired" tattoos (RB 56), appellant's personal belongings contained graffiti "indicative of gang mentality and culture" (RB 56), and appellant used "common gang terminology" in jail correspondence (RB 57). Additionally, respondent concludes that "the fact Eloy Gonzalez, a seasoned gang member, was committing numerous crimes with Miller and [appellant] supports the conclusion that all three of them were active Southside gang members." (RB 57). The evidence adduced by respondent supports rather than contradicts appellant's claim that there was insufficient evidence for any rational trier of fact to find appellant guilty of the

substantive street gang crimes.

B. Evidence of Appellant's Affiliation Does Not Constitute Evidence of Appellant's Active Participation

As respondent notes, the substantive crime of street terrorism consists of three elements: (1) active participation in a criminal street gang, (2) knowledge that the gang's members have engaged in a pattern of criminal gang activity, and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. (RB 53, citing *People v. Albillar* (2010) 51 Cal. 4th 47, 56 (*Albillar*).) To satisfy the active participation requirement of section 186.22, subdivision (a), a defendant's "involvement with a criminal street gang" must be "more than nominal or passive." (*People v. Castenada* (2000) 23 Cal.4th 743, 747).

This Court has observed that "section 186.22(a) imposes criminal liability not for lawful association, but only when a defendant 'actively participates' in a criminal street gang while also aiding and abetting a felony offense committed by the gang's members." (*People v. Castenada, supra*, 23 Cal.4th at pp. 750-751.) In arriving at this interpretation, this Court distinguished between "active" and "nominal" membership or participation in an association. (*Id.* at p. 752, quoting *Scales v. United States* (1961) 367 U.S. 203, 233.) The due process clause of the Fifth

Amendment to the federal Constitution proscribes assigning "criminal liability to the expression of sympathy with an alleged criminal enterprise, unaccompanied by any significant action taken in its support or any commitment to undertake such action." (*Scales v. United States, supra,* 367 U.S. at p. 228.) This Court concluded that the "phrase 'actively participates' reflected the Legislature's recognition that criminal liability attaching to membership in a criminal organization must be founded on concepts of personal guilt required by due process." (*Albillar, supra,* 51 Cal. 4th at p. 55.) Accordingly, "active participation" must be done with "knowledge that the gang's members engage in criminal gang activity." (*Castenada, supra,* 23 Cal. 4th at p. 749; § 186.22, subd. (a).) Moreover, active participation "must be shown at or reasonably near the time of the crime." (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509.)

Appellant again points out that evidence of a person's fantasies of being part of a criminal underworld is not proscribed by law. The prosecution in this case — including testimony provided by its own gang expert — did not provide any evidence of appellant's active participation in a street gang. The evidence presented in this case differs from the kinds of evidence typically found to constitute substantial evidence of active participation in a gang. For example, the court of appeal found sufficient evidence of a defendant's active participation in a street gang from a

defendant's admitting association with a gang, being encountered by police on several occasions in the company of known gang members, being observed wearing a gang's color, stating that he would comply with a fellow gang member's request, and his previous involvement in the crimes of car theft and attempted robbery. (*In re Jose P.* (2003) 106 Cal.App.4th 458, 467-468.) No similar evidence was presented in appellant's case.

Respondent asserts that the evidence showed that appellant's "participation in Southside was more than nominal or passive, and that he did more than merely associate with gang members or aspire to be a Southside gang member." (RB 54.) In support, respondent identifies "the presence of [appellant's] moniker on the roster outside of Miller's home as indicative of his membership in the Southside gang." (RB 55, citing 8 RT 2110.) But respondent does not produce any authority that holds the presence of a person's purported nickname on a gang roster provides sufficient evidence of street gang membership, let alone active participation in a street gang.

Respondent also argues that appellant's "gang-inspired tattoos" reveal that he "publicly subscribed to the gang lifestyle." (RB 56.) Nevertheless, as respondent admits, none of appellant's tattoos established his affiliation with, let alone his membership in, the Southside gang. In explanation, respondent cites Officer Blair's testimony that gang members

no longer get gang-specific tattoos because they want to evade detection by police. (RB 56, citing 8 RT 2094.) In other words, respondent in effect argues that the appellant's lack of Southside-specific gang tattoos shows that he was a member of the Southside criminal street gang.

Respondent continues that "[a]ny further doubt as to [appellant's] gang allegiance could be put to rest by the graffiti riddled throughout his belongings." (RB 56.) Since appellant's drawings "glorified guns and violence" and "embodied the overall fatalistic view on life" adopted by gang members, respondent contends, these writings prove appellant's membership in the Southside gang. (*Ibid.*) Moreover, appellant "injected himself into these gang inspired drawings" and included himself on a Southside roster. (*Ibid.*) All of these drawings kept inside appellant's home only testify to his self-conception and aspiration, not to his active participation in a criminal street gang.

Respondent cites no authority in which a person's presence on a roster identified as such by a gang expert constituted sufficient evidence to show current, active participation in a street gang. Respondent argues that the prosecution's gang expert Officer Blair believed appellant to be a gang member. (RB 54, citing 8 RT 2129.) But the primary reason for Officer Blair's belief that appellant was an active participant of Southside were the numerous drawings found at appellant's home, Miller's home, and the hotel

room where the co-defendants were staying at the time of their arrests. (8 RT 2100-2128.) In spite of Officer Blair's over ten years of experience following the activities and members of gangs, he had never come across appellant's name or saw his alleged gang nickname on a gang roster. (AOB 115; 8 RT 2080, 2194, 2146.) No evidence was presented at trial that appellant was actually accepted by others as a member of the Southside gang. Even Laura Espinoza and Amor Gonzales testified that appellant was from "nowhere," which in street parlance means he did not belong to any criminal street gang. (AOB 112, citing 7 RT 1841, 1964.)

The use of slang also used by gangs – but also commonly used by others not in gangs – in appellant's jail correspondence with Miller and Eloy Gonzalez shows little more than appellant's awareness of the slang used by others from his neighborhood. (RB 57.)

Respondent faults appellant for arguing that he had no documented history of gang membership (AOB 112-113), no personal knowledge exclusive to a gang member (AOB 113-114), and no specific tattoos linking him to a specific gang (AOB 114). (RB 53-54.) According to respondent, "[n]one of these factors are necessary for the substantive offense of active gang participation." (RB 54.) Appellant did not review these instances as though they were necessary "factors" in finding a criminal defendant to have actively participated in a criminal street gang. On the contrary,

appellant sought to show that the evidence against appellant does not compare to those situations in which appellate courts have sustained jury convictions for the substantive offense of active participation in a criminal street gang.

C. Evidence of Appellant's Participation in a Crime with a Gang Member Does Not Constitute Evidence that Appellant Himself Was a Gang Member

Respondent relies on Eloy Gonzalez's documented gang membership to try to show appellant's active participation in the Southside gang. (RB 54.) Respondent argues that Eloy Gonzalez was a veteran Southside gang member. (RB 54, 57.) Appellant and Miller, respondent continues, were present with Eloy Gonzalez at the robbery of Hill, the attempted robbery of Wilson, the robbery of Matthews, and Muro's homicide. (RB 57.) Moreover, according to Officer Blair, gang members commit crimes with other gang members because they know they can rely on them. (RB 57.) Therefore, respondent concludes, "the fact Eloy Gonzalez, a seasoned gang member, was committing numerous crimes with Miller and [appellant] supports the conclusion that all three of them were active Southside gang members." (RB 57.)

But respondent's premises, even if accepted as true, do not support its conclusion. Respondent makes the logical mistake of "illicit conversion." The formal fallacy of illicit conversion occurs when one

claims that the reverse of a true, universal affirmative statement is also necessarily true. Thus, if the statement "All S are P" is true, it does not follow that "All P are S" is also true. In respondent's argument, even if one accepts as true the statement that "All gang members are persons who commit crimes with other gang members," it does not follow that "All persons who commit crimes with gang members are themselves gang members." Respondent's conclusion would be valid only if gang members exclusively committed crimes with other gang members. But neither Officer Blair's expert testimony nor empirical evidence supports this assumption.

D. Conclusion

Appellant's convictions in counts seven and twelve on the substantive street terrorism offenses are not supported by substantial evidence. At most, the prosecution presented evidence that appellant fantasized about being involved in a street gang, was aware of the common symbols and signs of gang culture, and used street slang when communicating with his friends. Respondent cites no evidence that other persons believed appellant to be a member of the Southside gang. And respondent cites no authority finding that drawings on a person's possessions constitutes substantial evidence in support of a conviction for the substantive offense of street terrorism. This Court must accordingly

reverse appellant's convictions in counts seven and twelve.

Since there is a "reasonable possibility" that appellant received the death sentence because of appellant's alleged active participation in a gang, this Court should also reverse appellant's death sentence. (See *People v. Brown, supra,* 46 Cal.3d at pp. 447-449; *People v. Prince, supra,* 40 Cal.4th at pp. 1299-1300 [finding equivalence of *Brown* "reasonable possibility" standard and *Chapman* harmless beyond a "reasonable doubt" standard for purposes of determining whether guilt phase error affected penalty phase].) Even if this Court were to conclude that appellant's convictions for the substantive gang offenses were supported by sufficient evidence, that evidence is far from overwhelming. Respondent has not disproved the "reasonable possibility" that appellant's death sentence resulted from the jury's conclusion that appellant actively participated in a gang and that his involvement in the Muro shooting was gang-related. Thus even if this Court concludes that substantial evidence supports appellant's convictions for the substantive gang allegations, his death sentence should be reversed.

III.

THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION FOR THE ROBBERY OF SIMON CRUZ CHARGED IN COUNT FOUR BECAUSE THERE IS INSUFFICIENT EVIDENCE THAT APPELLANT WAS ONE OF THE PERPETRATORS OR OTHERWISE INVOLVED IN THE ROBBERY

A. Introduction

The prosecution presented insufficient evidence to support appellant's conviction for the robbery of Simon Cruz charged in count four. (AOB 122-126.) Whereas Cruz never saw and therefore never identified the men who robbed him, witnesses Nannie Marshall and Robert Philips each identified the same person — who was unconnected to appellant or his co-defendants — standing outside the apartment complex where Cruz was robbed. (AOB 123-125.) Moreover, all four co-defendants — Eloy Gonzales, Miller, Laura Espinoza, and appellant — had access to the Nissan Maxima where police later discovered Cruz's wallet. (AOB 125-126.) Thus appellant's conviction was based on insufficient evidence in violation of the California and United States Constitutions and must be reversed.

Respondent argues that "[t]he jury could reasonably find from Amor Gonzales's testimony, the circumstances of the robbery as described by Cruz, and the location of Cruz's wallet that [appellant] was one of the

perpetrators." (RB 62.) But Amor Gonzales's testimony as an accomplice was not sufficiently corroborated. At most, her testimony shows that appellant was in the area when the Cruz robbery occurred. Moreover, Cruz only heard the voices of his assailants, but never saw them. And police discovered Cruz's wallet in a car occupied by four other people. The prosecution did not introduce any substantial evidence at trial indicating that appellant participated in the Cruz robbery.

B. When Applying the Standard for Sufficiency of the Evidence, an Appellate Court Must Assess the Entire Record, Not Just Evidence Favorable to the Prosecution

Though an appellate court must review the evidence before the jury in the light most favorable to the prosecution (*People v. Pearson* (2012) 53 Cal.4th 306, 319), it nevertheless must examine the entire record — not just isolated pieces of evidence favorable to the prosecution — and determine whether substantial evidence exists for each essential element of the crime (*People v. Johnson, supra,* 26 Cal.3d at p. 577). It is not enough for the prosecution to adduce some evidence in support of the verdict because "[n]ot every surface conflict of evidence remains substantial in the light of other facts." (*Ibid.*, quoting *People v. Bassett, supra,* 69 Cal.2d at p. 138.) Yet respondent focuses on the testimony of Amor Gonzales (7 RT 1784-1908) and Cruz (5 RT 1388-1415), without mentioning the testimony of either Marshall (10 RT 2550-2576) or Philips (10 RT 2535-2549), both

of whom implicate someone other than appellant in the Cruz robbery.

C. Amor Gonzales's Accomplice Testimony Was Not Corroborated

According to respondent, Amor Gonzales testified that while she and Eloy Gonzalez smoked methamphetamine in the car, Miller and appellant crossed Main Street. (RB 61.) When they returned a few minutes later, one of them was carrying a wallet. (*Ibid.*) But the testimony cited by respondent does not support this claim. Amor Gonzales only testified that Miller and appellant walked across the street and later returned. (7 RT 1796.) When the prosecution tried to refresh her recollection with notes from her interview by police, Amor Gonzales did not remember telling police that either Miller or appellant held a wallet. (7 RT 1797-1798.)

Even assuming Amor Gonzales's testimony regarding Miller and appellant's crossing the street and returning with a wallet were true, her testimony is not sufficiently corroborated. The trial court, the prosecution, and defense counsel agreed that, as a matter of law, Amor Gonzales was an accomplice to the Cruz robbery. (9 RT 2390-2393.) Accordingly, the trial court instructed the jury that because Amor Gonzales and Espinoza were accomplices to the robbery, their testimony must be corroborated by other evidence. (2 CT 749-750; CALJIC No. 3.12; CALJIC No. 3.13; CALJIC No. 3.14; CALJIC No. 3.16.) Section 1111 states in relevant part,

> A conviction cannot be had upon the testimony of an

> accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

(§ 1111.)

Evidence showing the defendant's presence at the time the crime was committed and his opportunity to commit the crime do not constitute sufficient corroboration of accomplice testimony. (See *People v. Robinson* (1964) 61 Cal.2d 373, 398-400.)

Although courts have held that the possession of stolen goods shortly after the commission of a crime is sufficient corroboration of an accomplice's testimony (*People v. Gilbert* (1964) 231 Cal.App.2d 364, 369), Cruz's wallet was not found in appellant's possession. Instead, police found Cruz's wallet at around 12:40 a.m. under the driver's seat where Espinoza had been sitting. (6 RT 1588, 1593.) Even though appellant occupied the car that evening, his mere presence in the car does not constitute sufficient evidence to corroborate Amor Gonzales's testimony that she saw Miller or appellant return to the car with a wallet.

D. Cruz Did Not Identify Appellant as One of the Robbers

As respondent's summary of Cruz's testimony shows, Cruz testified that he never directly saw who robbed him (5 RT 1404, 1399, 1397, 1396.)

When asked on direct examination, Cruz could not give a general description of the person who put a gun to the back of his head because he never saw the gunman's face. (5 RT 1404-1407.) He only heard the voices of two men, whom he identified as Hispanic because they spoke Spanish without a foreign accent. (5 RT 1396-1397, 1404-1406.) Cruz claimed to have seen the gun in his peripheral vision (5 RT 1415), and later told police officer Paul Curvo that it was a small, black revolver. (5 RT 1427.)

Curvo testified that at one point Cruz turned around to look at the gunman, who pointed the gun in his face "and told him to look straight ahead and not to look at him." (5 RT 1419.) Though Cruz denied giving police a description of the gunman's clothing (5 RT 1412), Curvo testified that Cruz described the gunman as wearing a red bandana and a red, Pendleton shirt. (5 RT 1419, 1431-1432.) Nonetheless, Cruz told Curvo he would not be able to recognize the gunman. (5 RT 1419.)

The police found a .38-caliber Lorcin semi-automatic handgun at appellant's home. (1 RT 210.) Though police found a Pendleton shirt at appellant's apartment, Cruz did not identify any of appellant's clothing as that worn by the gunman. (7 RT 1775-1776.) Other than Cruz's inference that his assailants were Hispanic, none of Cruz's testimony tied appellant to the commission of the robbery.

E. Marshall and Roberts Both Identified Someone Other Than Appellant Near the Apartment Complex Where Cruz Claimed to Have Been Robbed

Respondent does not mention the testimony of Marshall, the manager of Cruz's apartment complex. The same evening Cruz was robbed, Marshall was driving out of the apartment complex when three men blocked her exit. (10 RT 2553.) She honked her horn at them, got out of her car, and stood about six feet away as she asked them to move. (10 RT 2553, 2564.) One of the men had a red bandana, a long ponytail, and a red, button-down plaid shirt. (10 RT 2553-2554.) He was muscular, about five foot ten, 25 years old, and had a moustache. (10 RT 2554-2556.) One of the other men was bald. (10 RT 2557.)

Marshall returned to her apartment about half an hour later (10 RT 2559.) Within five or ten minutes of her return, Cruz knocked on her apartment door. (10 RT 2570.) He told her he had been robbed by a man with a red bandana covering his face. (10 RT 2560.) When police later showed her a photographic lineup, she identified another man — not appellant — who looked similar to the man in the red, Pendleton shirt. (10 RT 2563-2564.)

Philips also saw a group of Hispanic men standing outside the gate of the apartment complex between 5:30 p.m. and 6:00 p.m. (10 RT 2535.) He remembers one of the men who wore "distinctive clothing," including a

long-sleeved, button down, checkered "red flannel shirt with a red bandana." (10 RT 2537-2538.) The man also had a "frizzy ponytail." (10 RT 2539.) He later picked out the same man as Marshall from a photographic lineup, describing the man as similar to the man in the red flannel shirt. (10 RT 2545.) Appellant had a shaved head at the time of the Cruz robbery. (12 RT 3019.)

F. Conclusion

Since no substantial evidence supports appellant's conviction for the robbery of Cruz, this Court must reverse appellant's conviction on count four. Even if this Court were to conclude appellant's conviction for the Cruz robbery is supported by legally sufficient evidence, this Court must reverse appellant's death sentence because appellant's conviction on count four undermined his right to a reliable guilt and penalty phase determinations in his capital case in violation of the Eighth and Fourteenth Amendments and the California Constitution. (U.S. Const., 8th & 14th Amends.; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; Cal. Const., art. I, §§ 7, 15, & 17.) There is a reasonable possibility that if appellant had not been convicted of the Cruz robbery with insufficient evidence, the jurors would not have made the normative determination that appellant deserved the death sentence. (*People v. Brown, supra*, 46 Cal.3d at pp. 447-449.)

IV.

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDINGS IN COUNTS ONE AND TWO THAT APPELLANT PERSONALLY DISCHARGED A FIREARM (FORMER § 12022.53(D))[5]

A. Introduction

In Appellant's Opening Brief, appellant established that the evidence was insufficient to support the jury's findings in counts one and two that appellant's personal use and discharge of a firearm that caused Muro's death in violation of former section 12022.53, subdivision (d). (AOB 127-133.) These true findings go to the heart of appellant's challenge of his death sentence. Outside the presence of the jury, the prosecution declared that it would not pursue the death penalty unless the jury returned true findings on the firearm enhancement. (AOB 128.) Consequently, since the jury's true findings are not supported by sufficient evidence, this Court must dismiss the enhancements, dismiss appellant's death sentence, and instead impose a sentence of life without the possibility of parole.

Respondent claims that substantial evidence supports the jury's conclusion that appellant "personally and intentionally fired the gun" that

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The Legislature's repeal of former section 12022.53, subdivision (d),became operative on January 1, 2012. (Stats 2010, ch. 711, § 4 (SB 1080).)

caused Muro's death. (RB 63.) According to respondent, appellant's challenge to the sufficiency of the evidence amounts to asking this Court "to improperly substitute its evaluations of the credibility of the witnesses for that of the trier of fact." (RB 65, citing *People v. Koontz* (2002) 27 Cal.4th 1041, 1078.) Appellant does not ask this Court to evaluate the credibility of witnesses, but instead to examine all of the evidence, not just isolated pieces of evidence favorable to the prosecution. Matthew Stukkie did not identify appellant as the shooter (AOB 129-130), Amor Gonzales and Laura Espinoza did not see appellant fire the gun that caused Muro's death (AOB 130-131), and a latent palm print did not place appellant at the scene of the crime (AOB 131-132).

B. Matthew Stukkie Did Not Identify Appellant as the Shooter

Matthew Stukkie was the only witness present at the Muro homicide to testify at trial. (AOB 129-130; 5 RT 1471-1516.) As direct evidence of the shooter's identity, Stukkie's testimony alone would have provided sufficient proof that appellant personally discharged a firearm. (Evid. Code § 411 [providing that the direct evidence of one witness suffices to prove any fact].) At trial, however, Stukkie neither identified nor described in detail who fired the gun that killed Muro. (AOB 129; 5 RT 1471-1516.) Though he remembered one of the assailants wore a red Pendleton-style shirt (5 RT 1509), Stukkie did not identify any of appellant's clothes as

ones worn by any of the assailants (7 RT 1775-1776). (AOB 130.)

Respondent does not address Stukkie's failure to identify appellant.

C. Amor Gonzales and Laura Espinoza Did Not See Appellant Fire the Gun

By contrast, co-defendants Amor Gonzales and Laura Espinoza did not see who discharged the firearm that killed Muro. (AOB 13-131; 7 RT 1784-1906; 8 RT 1929-2059.) Instead, as respondent recounts, they only testified about their observations concerning appellant's, Eloy Gonzalez's, and Miller's demeanor and statements when they returned to the car. (RB 63-64.) All three men left the car at the same time and crossed the street, heading toward Stukkie and Muro. (RB 63-64.) Any one of these men could have been the person who discharged the firearm. Although Eloy Gonzalez and Miller returned to the car before appellant (RB 64), the timing of their respective returns to the car signifies nothing about who discharged the firearm.

Respondent claims that the testimony of Amor Gonzales and Laura Espinoza "established that Miller and Eloy Gonzalez were upset with Vargas for shooting [Muro], and that [appellant] tried to explain why he shot [Muro]." (RB 65.) While Miller and Eloy Gonzalez, according to Amor Gonzales, vented their anger at appellant by threatening he would "get 'taxed' or his 'ass kicked'" for his behavior (RB 64, citing 8 RT 1950-

1951), it was not clear from her testimony that the two were angered because appellant shot Muro.

On the contrary, the two female accomplices' testimony only shows that Miller and Eloy Gonzalez were angry at appellant, but does not explain why they were angry. Although Espinoza testified that appellant said he shot Muro because Muro "was like going to fight back" (RB 64, citing 8 RT 1951-1952, 2036-2038), Amor Gonzales did not corroborate this statement. Moreover, Espinoza's memory was not clear because she was "high the entire time." (AOB 51, citing 8 RT 1938).

In this case, it is impossible to ignore the fact that the prosecution's two key witnesses — Laura Espinoza and Amor Gonzales — both were facing murder charges and life in prison. (AOB 134, citing 7 RT 1890, 8 RT 2029.) They both entered into plea bargains granting them no further jail time for the murder and robbery charges in exchange for their testimony against appellant. (7 RT 1892; 8 RT 2031.) Any evidence corroborating Espinoza's and Amor Gonzales's testimony must therefore be compelling. Neither provided direct evidence of what occurred.

D. Appellant's Possession of the Handgun the Following Day Does Not Support the Inference He Fired the Gun the Previous Day

Respondent also notes that police officers arrested appellant the following day and found in his possession the gun used to kill Muro. (RB

64.) Although appellant has separately maintained in argument I, pp. 3-23 above, that the gun resulted from an unlawful search of appellant's home and therefore should have been excluded, even if the gun were admissible, appellant could have been given the gun for safe-keeping.

E. The Latent Palm Print Did Not Place Appellant At the Scene of the Crime

The prosecution relied on a latent palm print, identified as appellant's and taken from a Nissan Sentra near the fatal shooting, to try to prove that appellant committed the robbery and murder. (AOB 131; 7 RT 1915-1918.) Respondent mentions this fact by emphasizing that appellant's "palm print was located on the trunk of a car parked a few feet from where Jesse was killed." (RB 64.) But respondent fails to mention that the owner of the car testified that he did not drive the car regularly and left the car parked in the same place for extended periods of time. (AOB 132, citing 10 RT 2240.) Appellant lived in the area near where the shooting occurred. Therefore, the presence of his alleged palm print on the trunk of the car can be explained by his living in the vicinity. Even if it could reasonably be relied upon as evidence that appellant was present when the shooting of Muro occurred, it does not in any way identify appellant as the person who pulled the trigger.

F. Conclusion

Contrary to respondent's claims, the evidence at most shows that appellant was present at the time the robbery and shooting of Muro occurred, but it does not present substantial evidence that appellant discharged the firearm that killed Muro. Respondent insists that appellant's arguments rely on "facts and theories" that were "presented to the jury and clearly rejected." (RB 65.) Of course, any challenge to the sufficiency of the evidence must necessarily recount facts and advance theories considered by the jury. Without presenting a reviewing court with the record created at trial, the court would not be in a position to determine whether substantial evidence – evidence that is reasonable, credible and of solid value – supports the verdict. (*People v. Johnson, supra,* 26 Cal.3d at p. 576.) The question for a reviewing court is not whether this particular jury reviewed, considered, and rejected the evidence and defense theories, but whether any rational trier of fact could have done so. In this case, the jury's true findings for the personal discharge of a firearm enhancement relied on "layers of inference far too speculative to support the conviction." (*People v. Raley* (1992) 2 Cal.4th 870, 890.)

Since insufficient evidence supports the jury's true findings, this court must reverse appellant's enhancements for personally using and discharging a firearm in violation of former section 12022.53, subdivision

(d). Moreover, because the prosecution stated that it would not seek the death penalty unless the jury returned true findings on these two enhancements (9 RT 2217), this Court must reverse appellant's death sentence and instead impose a sentence of life without the possibility of parole. To uphold the jury's death sentence under these circumstances would deny appellant the "fundamental fairness" that constitutes the cornerstone of the Fourteenth Amendment's guarantee of due process. (See, e.g., *Spencer v. Texas* (1967) 385 U.S. 554, 563-564 [citing cases finding "fundamental fairness" as underlying due process right.)

Even if this Court decides not to reduce appellant's sentence to life without the possibility of parole, this Court should order a new penalty phase trial. Without the jury's true findings on the personal use of a firearm enhancements, appellant's death sentence would be "so grossly disproportionate" to appellant's personal culpability that it would violate the prohibition against cruel and unusual punishment contained in article I, section 17 of the California Constitution and the Eight Amendment. (See *People v. Mincey* (1992) 2 Cal.4th 408, 476.) Moreover, respondent has not shown that there was not a reasonable probability that it was appellant's alleged personal use of a firearm that persuaded the jury to impose the death penalty. (See *People v. Brown, supra*, 46 Cal.3d at p. 448.)

The Eighth Amendment's protection against cruel and unusual

punishment requires that criminal defendants' punishment in capital murder be appropriate for their "personal responsibility and moral guilt." (*Edmund v. Florida* (1982) 458 U.S. 782, 801; see also *Mullaney v. Wilbur* (1975) 421 U.S. 684, 698 [the criminal law has long been preoccupied with "the degree of [a defendant's] criminal culpability"].) As Professor Anne Poulin has pointed out, when the prosecution presents a defendant as being more culpable for a murder allegedly committed with co-defendants, it increases the likelihood that the jury "will impose the most serious sentence." (Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight* (2001) 89 Cal. L.Rev. 1423, 1473.)

Professor Poulin identifies a federal case that illustrates this point. (*Id.* at p. 1473, fn. 310.) In *Nichols v. Scott* (5th Cir. 1995) 69 F.3d 1255, the prosecutor interviewed jurors after the first trial ended in a mistrial. (*Id.* at p. 1262.) He learned that jurors' questions about whether the defendant "was the 'triggerman' had caused problems for the jury in considering the death penalty." (*Ibid.* quoting *Nichols v. Collins* (S.D. Tex. 1992) 802 F. Supp. 66, 75.) In the second trial, defense counsel argued that the defendant had not been the shooter, while the prosecution "primarily argued that [the defendant] had fired the fatal shot." (*Nichols v. Scott, supra,* 69 F.3d at p. 1262.) Both sides, in other words, recognized that the jury's willingness to impose the death penalty hinged on its conclusion that the

defendant was the shooter.

Thus, even if this court determines the evidence supporting the jury's findings are legally sufficient to support appellant's conviction in the guilt phase, the weakness of the evidence that appellant himself shot Muro nevertheless undermines the jury's consideration of this evidence during the penalty phase. (U.S. Const., 8th Amend., Cal. Const., art. I, § 17.) There was a reasonable possibility that if the jury had not concluded appellant personally discharged a firearm, at least one juror would have refused to impose the death penalty. (See *People v. Brown, supra*, 46 Cal.3d at p. 448.)

V.

APPELLANT'S CONVICTIONS AND SENTENCE MUST BE REVERSED BECAUSE THE COURT ABUSED ITS DISCRETION IN FAILING TO SEVER THE NON-CAPITAL CHARGES

A. Introduction

The trial court's joinder of appellant's capital and non-capital charges prejudiced appellant in violation of his right to due process of law, right to a reliable guilt and penalty trial, and right against cruel and unusual punishment under both the California and United States constitutions. (AOB 134-152; U.S. Const., 5th, 8th, & 14th Amends.; Cal. Const., art. I §§ 7, 17, 24.) The evidence underlying the charges against appellant were not cross-admissible because the crimes were not sufficiently similar to prove identity, common design, or plan. (AOB 140-147.) The gang evidence and murder charges were unusually likely to inflame the jury against appellant. (AOB 147-150.) And the charge in count four that appellant robbed Simon Cruz and the enhancements in counts one and two that appellant personally discharged a firearm were factually weak. (AOB 150-151.)

Respondent argues that the evidence for all charges against appellant was cross-admissible (RB 69-72), maintains that none of the crimes was unduly inflammatory (RB 74), and denies that the evidence supporting

some counts was stronger than the evidence supporting other counts (RB 74-76.) As appellant shows below, since the evidence underlying the various charges did not share common, distinctive features relevant to proving identity, a common design or plan, or motive, the evidence was not cross-admissible. Moreover, the prosecution joined several weak counts with stronger counts in an attempt to bolster its case against appellant. Finally, the gang evidence and murder charges were unusually inflammatory and likely to prejudice the jury against appellant. As a result, the trial court erred by not granting appellant's motion to sever the capital charges.

B. The Evidence Underlying the Charges Were Not Cross-Admissible Because The Crimes Were Not Sufficiently Similar to Prove Identity, Common Design, or Plan

Respondent criticizes appellant for not discussing "the abundance of evidence supporting the inference that he committed each of the robberies." (RB 70.) Though respondent concedes that an armed robbery "may not be original in itself, the surrounding circumstances of the robberies show [appellant] committed each one with the assistance of his cohorts Miller and Eloy Gonzalez." (RB 70.) Yet respondent's ensuing description of the evidence ostensibly connecting appellant to the Baek and Hong robbery (RB 70-71), the Hill robbery (RB 71), the Cruz robbery (*ibid.*), the Stukkie robbery (*ibid.*), and the Muro robbery and killing (*ibid.*) undermines its

claim that they shared unusual, identifying features. To the contrary, respondent's discussion illustrates that these offenses in fact do not "share common features that are so distinctive as to support an inference that the same person committed them." (RB 70, quoting *People v. Scott* (2011) 52 Cal.4th 452, 472-473.)

This Court has held that, under Evidence Code section 1101, "[e]vidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. [Citation.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) Appellant's crimes did not share any characteristic that would suggest his identity, a common design or plan, or his intent. Nevertheless, respondent describes these robberies' "several similarities" as appellant's "approaching the victim, pulling a black handgun gun [*sic*] on them, and demanding their money." (RB 71-72.) But these are all features of typical armed robberies and do not display any distinctive characteristics indicating that nobody other than appellant could have committed them. (AOB 147.) Respondent also notes that two of the robberies took place on the same day in the same city and that two others took place at the same apartment complex. (RB 72.) Finally, respondent argues that appellant, Miller, and Eloy Gonzalez "were all members of the Southside criminal street gang and

committed the crimes in furtherance of their gang." (RB 72.) All of the similarities mentioned by respondent rely on the conclusion that appellant was a participant in all of these crimes. The prosecution offered no evidence that showed the crimes were so distinctive that certain features served as a signature supporting a rational inference that appellant participated in the crimes.

Respondent likens the "interconnectivity of the crimes" to those committed by the defendant in *People v. Vines* (2011) 51 Cal.4th 830, 854-858. In *People v. Vines*, this Court identified eight common and distinctive features that suggested the defendant's identity as the perpetrator, including his contemporaneous or former employment at both restaurants that were robbed, the perpetrator's use of a "disguised and unnaturally gruff or gravelly voice," and the discovery that the same type of ammunition used to kill someone in one robbery had been stored in a truck used in another robbery. (*Id.* at p. 858.) By contrast, no similarly distinctive features marked the evidence offered by the prosecution against appellant. Instead, the crimes alleged by the prosecution exhibited the typical features shared by most armed robberies.

Respondent also argues that "the gang evidence was cross admissible [*sic*] as to all counts because it was relevant to prove the substantive charges of street terrorism (counts 7 & 12) and the gang enhancements on

the remaining charges." (RB 72.) But the elements of the substantive gang offense differ from the elements of the gang enhancements. Whereas the prosecution had to introduce evidence that appellant was an "active participant" in a street gang under section 186.22, subdivision (a), the prosecution did not have to prove active participation for the gang enhancements under section 186.22, subdivision (b). Thus, the additional evidence regarding the substantive gang offenses would not have been cross-admissible.

C. Appellant Was Prejudiced by the Inflammatory Nature of the Gang Evidence and Murder Charges and Misjoinder Allowed the Prosecution to Bolster Weak Charges with Stronger Charges

Respondent maintains that "the evidence supporting [Muro's] murder and all of the remaining charges were strong." (RB 75.) To the contrary, as appellant has shown in arguments II, III, and IV above and in Appellant's Opening Brief, there was insufficient evidence that appellant was an active participant in a criminal street gang, that appellant participated in the robbery of Cruz, or that appellant personally discharged a firearm. By erroneously denying appellant's motion to sever, the trial court enabled the prosecution to bolster these weak cases with arguable stronger cases.

Respondent asserts that "all of the underlying crimes were similarly egregious" and that no single crime was more inflammatory than the other.

(RB 74.) Yet, even as the trial judge noted, the prosecution presented the killing of Muro as the execution of a vulnerable victim for no other reason than to eliminate a potential witness. (13 RT 3431-3432.) By presenting evidence of the Muro killing in the same trial as evidence of the other robberies, the prosecution in effect encouraged the jury to perceive the other crimes as involving greater danger than they did. Evidence regarding a heartless killing — including the alleged enhancements in counts one and two that appellant personally discharged a firearm — prejudicially spilled over into the prosecution's cases regarding the robberies. Moreover, the admission of evidence concerning the substantive gang offense allowed the prosecution to portray appellant as a hardened gang member, thereby prejudicing the jury against him.

D. The Misjoinder of Counts Rendered Appellant's Trial Fundamentally Unfair in Violation of His Fifth and Fourteenth Amendment rights to Due Process of Law

To violate the federal constitution, misjoinder must have "resulted in prejudice so great as to deny [the criminal defendant's] Fifth Amendment right to a fair trial." (*United States v. Lane* (1986) 474 U.S. 438, 446 fn. 8.) Although the decision whether or not to consolidate unrelated counts rests with the trial judge, if the simultaneous trial of more than one offense renders a criminal defendant's trial fundamentally unfair, then consolidation violates his rights to due process of law under the Fifth and

Fourteenth Amendments. (See *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1084.) In *Bean*, the Ninth Circuit Court of Appeal held that joinder of two indictments deprived the defendant of a fundamentally fair trial on one of the charges when the consolidation of a relatively weak case with a "compelling" case "lead[] the jury to infer criminal propensity." (*Id.* at p. 1083.) As a result of the misjoinder of appellant's counts, the jury wrongfully convicted appellant and the court wrongfully sentenced appellant to death in violation of his right to due process of law and his right against cruel and unusual punishment. (U.S. Const, 5th, 8th, & 14th Amends.; Cal. Const., art I, §§ 7, 17, 24.)

E. Conclusion

Since the charges were not cross-admissible at trial, the charges were likely to inflame the jury, the prosecution joined weak cases with stronger cones, and one of the charges carried the death penalty, the trial court abused its discretion when it denied appellant's motion to sever. (*People v. Sandoval* (1992) 4 Cal.4th 155, 173.) Even if this Court were to conclude that there is no reasonable chance that, had the trial court not erred in refusing to sever, the result at the guilt phase would have been different, appellant's death sentence must be reversed because the refusal to sever impacted the penalty phase. There is a "reasonable possibility" that, had the trial court not denied appellant's motion to sever, the result at the guilt

phase in at least one of the cases would have been different — a result that would have changed the jury's normative considerations during the penalty phase. (See *People v. Brown, supra* 46 Cal.3d at pp. 447-449; *People v. Prince, supra*, 40 Cal.4th at pp. 1299-1300.) The erroneous refusal to sever requires reversal of appellant's death sentence because it deprived appellant of his right to a reliable guilt and determination because it risked unjustified convictions in cases with weak evidence. (See *Beck v. Alabama, supra*, 447 U.S. at pp. 637-638; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358 [opinion of Stevens, J.][emphasizing the "vital importance" that a death sentence "be based on reason rather than caprice or emotion"]; see U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 17.) The joinder of the trials allowed the jury to consider damaging evidence at the penalty phase regarding the non-capital offenses, which would have persuaded them to make the normative decision that appellant deserved death.

VI.

THE TRIAL COURT BREACHED ITS SUA SPONTE DUTY TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER

A. Introduction

Although substantial evidence showed the fatal shooting arose out of a sudden quarrel or resulted from heat of passion, the trial court only instructed the jury on first and second degree murder, denying appellant's rights to due process of law, a jury trial, and against cruel and unusual punishment under both the California and United States constitutions. (AOB 154-162; 2 CT 683-690; U.S. Const., 5th, 6th, 8th & 14th Amends., Cal. Const., art. I, §§ 7, 15, 17, 24.) For a homicide to be voluntary manslaughter, the passion aroused need not be anger or rage, but can be any violent, intense, highly wrought, or enthusiastic emotion. (*People v. Breverman* (1998) 19 Cal.4th 142, 163.) Santiago Martinez testified he saw four people "struggling" as he drove. (5 RT 1438.) Appellant's conviction and death sentence must be reversed because the trial court failed to instruct the jury sua sponte on the lesser included offense of voluntary manslaughter.

Respondent denigrates appellant's argument as "pure conjecture and speculative at best, and does not support an instruction on voluntary

manslaughter because there is no evidence of provocation." (RB 81.) To the contrary, Martinez's testimony about witnessing an altercation and Espinoza's testimony about appellant's statement when he returned to the car provide sufficient evidence from which a reasonable jury could infer that appellant committed voluntary manslaughter instead of murder.

B. Substantial Evidence Required The Trial Court to Instruct the Jury Sua Sponte on the Lesser Included Offense of Voluntary Manslaughter

Respondent insists there was "no evidence of provocation." (RB 78.) Martinez's "brief observation of a struggle alone," respondent contends, was insufficient to warrant a jury instruction on voluntary manslaughter. (RB 81.) According to respondent, the jury could not have concluded that a "reasonable person" would have been provoked by Muro's behavior because "there was absolutely no evidence of the circumstances leading up to the struggle." (*Ibid.*) And there was no evidence "that [appellant] was in fact provoked by [Muro]." (RB 81.) Notwithstanding respondent's characterization of the evidence, the testimony of Martinez and Espinoza provided sufficient evidence to require a jury instruction on voluntary manslaughter.

A court must instruct on a lesser included offense if there was substantial evidence from which reasonable jurors could conclude the lesser, but no the greater offense had been committed. (*People v.*

Castenada (2008) 44 Cal.4th 636, 665.) To be guilty of voluntary manslaughter, (1) the defendant must have actually killed in the heat of reason-obscuring passion and (2) the provocation must be sufficient to provoke a state of passion in a reasonable person. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1143-1144.)

Though it was "really dark" outside, Martinez nevertheless saw two pairs of men grappling with each other. (5 RT 1441, 1452, 1453.) Respondent focuses on Martinez's description of the men as involved in a "struggle" and surrounding the word with quotations marks throughout its argument. (RB 80-81.) It must be borne in mind, however, that Martinez testified in Spanish. (5 RT 1451.) For that reason, the stress respondent places on the word "struggle" is misplaced. Police officer Charles Celano, for example, remembered Martinez using the word "pegando" to describe the altercation. (9 RT 2296.) Officer Celano understood "pegando" to mean "hitting." (*Ibid.*) In his police report, Officer Celano described the four men as "fighting," with the word "fighting" placed in quotation marks. (9 RT 2297.) What Martinez witnessed, in other words, resembled a brawl. Though Martinez could not see exactly what happened during the altercation (5 RT 1453), he immediately reported the altercation to police. (5 RT 1441). From this behavior alone, the jury could reasonably infer that the fighting was sufficiently violent to instill fear in Martinez.

In addition to Martinez's testimony, Espinoza also testified to an altercation between appellant and Muro. According to Espinoza, when appellant got into the car he claimed that Muro was fighting back and coming at him. (8 RT 1951.) Espinoza testified that appellant admitted to shooting Muro because "he got up." (*Ibid.*) Thus, if the jurors believed the testimony of both Martinez and Espinoza, there was sufficient evidence from which a reasonable juror could infer that appellant actually was provoked by Muro and that Muro's actions were sufficient to provoke a state of passion in a reasonable person.

C. Application of the *Sedeno* Harmless Error Standard to the Erroneous Error to Instruct the Jury on Manslaughter as a Lesser Included Offense Violates the Sixth and Fourteenth Amendments Because It Removes Both Facts and Law From the Consideration of the Jury

Notwithstanding respondent's assertion to the contrary (RB 81), appellant's federal constitutional rights were violated because the evidence required a voluntary manslaughter instruction. (See *Beck v. Alabama, supra,* 447 U.S. at p. 632; *Vickers v. Ricketts* (9th Cir. 1986) 798 F.2d 369, 374.) Respondent nevertheless contends that "the jury would have rejected [appellant's] claim that he killed Jesse in the heat of passion because the jury found the killing was committed to further the robbery." (RB 83.) In support, respondent adduces the rule announced in *People v. Sedeno* (1974)

10 Cal.3d 703, 721 (*Sedeno*), that "[E]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions." (RB 82, quoting *People v. Chatman* (2006) 38 Cal.4th 344, 392.)

This Court should carve out an exception to the *Sedeno* harmless error test for circumstances that justify an instruction on the lesser included offense of manslaughter. As Justice Kennard explained in her dissenting opinion in *People v. Breverman* (1998) 19 Cal.4th 142, the relationship between murder and manslaughter differs from the relationships between other greater and lesser included offenses. (*Id.* at p. 188-189 (dis. opn. of Kennard, J.).) For "[p]roof of the elemental facts of the crime of murder plus proof of an additional elemental fact (heat of passion) establishes the crime of voluntary manslaughter." (*Id.* at p. 189.) As a result, when a jury finds the presence of the additional element of heat of passion, they concomitantly find the absence of the element of malice. (*Id.* at p. 188.) Yet if the jury is not instructed on the elements of voluntary manslaughter, they will never consider applying the heat of passion element to the evidence before them. For the lesser included offense of voluntary manslaughter, the *Sedeno* harmless error rule should not apply.

Since application of the *Sedeno* harmless error rule in the context of

voluntary manslaughter effectively removes both facts and legal principles from the consideration of the jury, it violates both the Sixth and Fourteenth Amendments. The due process clause of the Fourteenth Amendment requires the state to prove beyond a reasonable doubt every elemental fact necessary to establish an offense. (*Mullaney v. Wilbur, supra,* 421 U.S. 684.) Both the due process clause of the Fourteenth Amendment and the jury guarantee of the Sixth Amendment require a jury to conclude beyond a reasonable doubt that criminal defendants are guilty of every element of the crime with which they are charged. (*Sullivan v. Louisiana, supra,* 508 U.S. at pp. 277-278.) The jury thus has a "constitutional responsibility . . . to apply the law to [the] facts and draw the ultimate conclusion of guilt or innocence." (*United States v. Gaudin* (1995) 515 U.S. 506, 514.) Since the jury was not instructed how to apply the law — voluntary manslaughter — to the evidence presented at trial — that Muro provoked appellant — the trial court effectively lessened the prosecution's burden to prove every element of the crime of first degree murder. Thus, this Court must carve out an exception to the *Sedeno* harmless error test for circumstances in which substantial evidence requires instruction on voluntary manslaughter.

D. Conclusion

As appellant argued in Appellant's Opening Brief, this Court must reverse appellant's convictions, special circumstances findings, and death

sentence under either the automatic reversal standard (*Beck v. Alabama, supra,* 447 U.S. at p. 638) or the *Chapman* harmless error standard (*Chapman v. California, supra,* 386 U.S. at p. 24). (AOB 160-161.) Moreover, even if this Court concludes that failure to instruct the jury on voluntary manslaughter does not warrant a reversal of his convictions and special circumstances findings, this Court must reverse appellant's death sentence because there is a "reasonable probability" that if the jury had been instructed on manslaughter, at least one juror would have made the normative determination that appellant did not deserve death. (See *People v. Brown, supra,* 46 Cal.3d at p. 448.)

VII.

APPELLANT'S CONVICTIONS MUST BE REVERSED BECAUSE CALJIC NO. 2.51 IS UNCONSTITUTIONAL

In Appellant's Opening Brief, appellant showed that the standard jury instruction contained in CALJIC No. 2.51 allowed the jury to determine guilt based solely on the presence of an alleged motive and shifted the burden of proof to appellant to show an absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. Thus the instruction violated the constitutional guarantees of a fair jury trial, due process of law, and a reliable verdict in a capital case under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 163.)

Respondent argues that appellant forfeited this claim by not objecting to the instruction at trial, that CALJIC No. 2.51 does not impermissibly lessen the prosecution's burden of proof, and that any resulting error from the instruction was harmless. (RB 83-85.)

Respondent asserts that appellant did not request a modification of CALJIC No. 2.51 at trial and forfeited his claim by not objecting to the instruction. (RB 84.) But the authorities adduced by respondent to support its position only apply to a claim that an instruction was "too general or incomplete." (See *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.) An appellate court may "review any instruction given, refused or

modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (§ 1259.) Thus an appellant's failure to object to an inadequate jury instruction does not forfeit any claims of instructional error on appeal if the error affected his substantial rights. (*People v. Caitlin* (2001) 26 Cal.4th 81, 149.)

As for respondent's argument that CALJIC No. 2.51 does not impermissibly lessen the prosecution's burden of proof, appellant directs the court to argument VII in Appellant's Opening Brief. (AOB 163-167.)

Respondent cites *People v. Breverman, supra,* 19 Cal.4th at pp. 177-178, in support of its contention that this Court should apply the prejudice standard set forth in *People v. Watson* (1956) 46 Cal.2d 818. (RB 85.) But this Court applied the *Watson* standard in *Breverman* to a trial court's failure "sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence" in a noncapital case. (*People v. Breverman, supra,* 19 Cal. 4th at p. 178.) In reviewing a jury instruction that impermissible shifts the burden of proof in a capital case, this Court should examined whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the federal Constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72-73; see also *Middleton v. McNeil* (2004) 541 U.S. 433, 437.)

VIII.

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY SUA SPONTE THAT THEY MUST AGREE UNANIMOUSLY WHETHER APPELLANT HAD COMMITTED MALICE MURDER OR FELONY-MURDER

Appellant was found guilty of first-degree murder by a jury that did not unanimously agree on each and every element of the charges against him. (AOB 168-180.) In his Appellant's Opening Brief, appellant argued that this Court should reconsider its case law regarding the relationship between premeditated malic murder and felony murder. (AOB 169-171.) California law sets forth different elements for malice murder and felony murder. (AOB 172; See *People v. Dillon* (1983) 34 Cal.3d 441, 465, 471-472, 477 fn. 24.) Since first degree malice murder and first degree felony murder require different elements (*People v. Carpenter* (1997) 15 Cal.4th 312, 394), they do not represent different alternatives to constituting the same offense, but instead represent different crimes (see *Richardson v. United States* (1999) 526 U.S. 813, 817). (AOB 175-176.) By failing to properly instruct the jury sua sponte that it must unanimously agree on which crime appellant committed, the trial court denied appellant his rights to due process and to have a properly instructed jury find that the elements of all the charged crimes had been proven beyond a reasonable doubt. (U.S. Const., 5th, 6th & 14th Amends.; *In re Winshp* (1970) 397 U.S. 358,

364; Cal. Const. art. I, §§ 7, 16.)

Respondent argues that appellant forfeited his claim by not raising it in the trial court. (RB 86.) In support, respondent cites four pages from this Court's opinion in *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1189-1192 (*Rodrigues*). Over the course of those four pages, this Court issued rulings on alleged "double counting" of aggravating and mitigating factors under section 190.3 (*id.* at p. 1189), jury instructions regarding unadjudicated offenses (*id.* at pp. 1190-1191), and jury instructions on sentencing discretion (*id.* at p. 1192). Nothing in those four pages, however, addressed the unanimity instruction raised in Appellant's Opening Brief.

It is well-settled that a defendant does not need to object at trial in order to raise on appeal an instructional issue affecting his substantial rights. (§ 1259; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn.7 [finding no forfeiture for the failure to object to an erroneous instruction containing a permissive presumption or inference].) Moreover, a trial court must sua sponte instruct the jury concerning their responsibility to agree unanimously that a particular act was committed beyond a reasonable doubt. (See *People v. Russo* (2001) 25 Cal.4th 1124, 1132.) In a case cited by respondent, this Court accordingly resolved the same forfeiture claim adversely to the government. (*People v. Tate* (2010) 49 Cal.4th 635, 697

fn. 34 [finding no forfeiture where defendant argued the trial court should have instructed the jury on unanimity sua sponte].)

Respondent otherwise argues, as appellant acknowledges, that this Court has rejected similar claims. (RB 86-88.) Because respondent relies on this Court's prior decisions without adding anything new to the discussion, the issues are fully briefed and no reply is necessary. For the reasons stated in Appellant's Opening Brief, this Court should reconsider its previous opinions and hold that a trial court's failure to instruct the jury that it must unanimously agree whether a criminal defendant committed malic murder or felony-murder violates the California and United States constitutions.

ISSUES RELATING PRIMARILY TO PENALTY PHASE ERROR

IX.

THE TRIAL COURT FAILED TO PROPERLY REWEIGH THE EVIDENCE AND STATE ITS REASONS FOR DENYING APPELLANT'S MODIFICATION MOTION AS REQUIRED BY SECTION 190.4, SUBDIVISION (E), AND THE STATE AND FEDERAL CONSTITUTIONS

A. Introduction

California's requirement that a trial court automatically review a death sentence serves to guard against the arbitrary and capricious imposition of the state's harshest punishment. A trial court's independent evaluation of the propriety of the death penalty curbs a jury's exercise of unprincipled discretion. A death sentence in this state remains a rare occurrence. As Justice Brennan noted, "[w]hen the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment." (*Furman v. Georgia* (1972) 408 U.S. 238, 294 (Brennan, J. conc.).) A trial court's review of the penalty phase evidence constitutes a crucial safeguard, a safeguard to ensure the state imposes its worst punishment only on its worst criminals. The trial court here did not properly review the evidence. As a result, appellant — who at most was involved in a spontaneous street killing, which was at worst, "a robbery gone bad" — received the state's

severest sanction.

In Appellant's Opening Brief, appellant highlighted the trial court's failure to independently reweigh the factors set out in section 190.3 that were considered by the jury when it imposed appellant's death sentence and to state its reasons for denying appellant's application to modify his death verdict in accordance with section 190.4, subdivision (e). (AOB 181-191; See *People v. Cunningham* (2001) 25 Cal.4th 926, 1039.) The trial court enumerated the aggravating and mitigating circumstances presented to the jury and mentioned what evidence, if any, was presented for each factor. (AOB 187, citing 13 RT 3431-3432.) Section 190.4, subdivision (e), however, required the trial court to conduct an independent evaluation of this evidence and to expound the reasons for its conclusion. Since the trial court did not analyze all of the factors together by balancing them, its comments recorded in the clerk's transcript do not comport with the requirements of section 190.4, subdivision (e).

Respondent counters that the trial court "properly considered a modification" of appellant's death sentence and insists the court's "reasons for denying the motion were memorialized in the clerk's transcript." (RB 88.) But respondent does not show how the trial court's statements on the record satisfied its obligation "to make an independent determination whether imposition of the death penalty upon [appellant] is proper in light

of the relevant evidence and the applicable law." (*People v. Marshall* (1990) 50 Cal. 3d 907, 942, internal citations and quotations omitted.) Respondent only offers a verbatim transcript of the trial court's listing of the factors considered by the jury. (RB 90, fn. 17.) Like the trial court in this case, respondent does not offer any explanation for how the court's denial of appellant's motion was supported by an independent, reasoned consideration of the evidence. The trial court fell far short of its obligations under section 190.4, subdivision (e).

B. The Trial Court Did Not Independently Determine Whether Imposition of the Death Penalty is Justified in Light of the Evidence and Applicable Law

Respondent claims that "the trial court's discussion with defense counsel and preliminary remarks show that it understood its obligation to reweigh the evidence of aggravating and mitigating factors and determine whether, in its independent judgment, the evidence supports a sentence of death rather than life imprisonment." (RB 89, citing 14 RT 3429-3431.) The trial court recited this Court's description of a trial judge's duties under section 190.4, subdivision (e) in *People v. Holt* (1997) 15 Cal.4th 691, 702. (RB 89-90, citing 14 RT 3431.) Although the trial court's recital of this Court's description indicates its awareness of an obligation to reweigh the evidence, it does not show that the trial court understood specifically how to apply this general rule to the concrete facts of the case before it. In fact,

a review of the record in this case reveals the trial court did not carry out its duties under section 190.4, subdivision (e), because it did not independently analyze the aggravating and mitigating circumstances considered by the jury.

The "trial court's comments," respondent continues, "viewed in full context, showed that it understood its obligation to reweigh the evidence and executed its responsibilities accordingly." (RB 90.) After citing verbatim the trial court's remarks regarding the section 190.3 factors considered by the jury (RB 90 fn. 17), respondent concludes that the "trial court's comments throughout its rulings indicate it determined that these mitigating factors were substantially outweighed by the aggravating factors." (RB 94.) But "comments" scattered throughout the trial court's recital of aggravating and mitigating factors do not — whether taken in isolation or together — constitute a considered analysis or reweighing of the evidence. Respondent's decision to include a three-page quotation here is telling. For it suggests that respondent could not itself determine the trial court's underlying rationale for denying appellant's modification motion. By including these unfocused remarks in toto, respondent has left it up to this Court to divine the trial court's reasons.

As the record cited by respondent shows, the trial court made various remarks concerning pieces of evidence that supported aggravating and

mitigating factors to be considered under section 190.3. (RB 90 fn. 17; 13 RT 3430-3441.) For example, the trial court found Muro's murder "senseless." (RB 94, citing 14 RT 3431.) But a comment on an isolated factor – divorced from a principled, synthesizing reasoning process that evaluates it in the light of other factors – does not constitute an independent reweighing of the evidence. Rather, it amounts to an opinion about a single piece of evidence, an opinion unilluminated by any rational analysis.

The trial court's desultory remarks did not amount to a reasoned, re-weighing of the evidence. When it came to appellant's history of marijuana, methamphetamine, and alcohol abuse, the trial court noted, "I can consider that also, I suppose." (14 RT 3440-3441.) From its remarks alone, it is unclear, what weight, if any, the trial court gave to this factor. The trial judge listed which pieces of evidence related to which factor, but did not explain the "reasons why it concluded the aggravating circumstances exceeded the mitigating circumstances." (RB 95.)

Though respondent notes that the "trial court's ruling and the details of its findings are stated nearly verbatim in the clerk's minutes" (RB 95, citing 3 CT 1268-1269), notably absent are the trial court's actual reasons for arriving at this ruling, including any explanation of the weight it accorded any specific findings. Since the trial court did not actually never conducted an independent, reasoned reweighing of the evidence, its

statements recorded in the clerk's minutes do not satisfy its obligation to give its reasons for rejecting appellant's motion. Thus, the trial court's statement in the clerk's minutes does not comport with the requirements of section 190.4, subdivision (e).

C. Conclusion

As argued previously, the automatic motion to modify is not merely a ritualistic procedure for the trial court to engage in to simply validate the jury's verdict, but is an important safety valve to the death penalty process. The legislature in California has wisely determined that the Court must have the final word on the relative culpability of a defendant based upon the enumerated aggravating and mitigating factors. Here the process did not follow the statutory mandate because the trial court did not independently reweigh the evidence presented during the penalty phase of appellant's trial in accordance with section 190.4, subdivision (e).

Although respondent cites the trial court's enumeration of the factors considered by the jury, respondent did not identify any place in the record where the trial court provided its reasons for denying appellant's motion to modify. Thus, this Court must remand this case for a new hearing on appellant's motion to modify the verdict. (See *People v. Sheldon* (1989) 48 Cal.3d 935, 962-963 [identifying remand as the appropriate remedy for a trial court's failure to comply with section 190.4,

subdivision (e)].)

The trial court's failure to independently reweigh the aggravating and mitigating evidence and to independently determine whether imposition of the death penalty was proper violated appellant's state and federal constitutional rights to due process, to present a defense, to a penalty determination based on all available mitigating evidence, and to a reliable determination of the death penalty. (U.S. Const., 5th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 17.) Under the Eight and Fourteenth Amendments, a sentencing judge or jury in a capital case "'may not refuse to consider' *or be precluded from considering* 'any relevant mitigating evidence.'" (*Smith v. Spisiak* (2010) 558 U.S. 139, 144, original italics, quoting *Mills v. Maryland* (1988) 486 U.S. 267, 374-275, in turn quoting *Skipper v. South Carolina* (1986) 476 U.S. 1, 4, in turn quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 114; see also *Woodson v. North Carolina* (1976) 428 U.S. 280 (plurality opinion); *Lockett v. Ohio* (1978) 438 U.S. 586.)

Further, a state may not capriciously deprive criminal defendants of their liberty or life. (*Hicks v. Oklahoma* (1980) 447 U.S. 343 (*Hicks*).) In *Hicks*, the United States Supreme Court considered whether depriving a criminal defendant his right under an Oklahoma law to have his punishment imposed in the discretion of the trial jury merely violated a matter of state

procedural law. (*Id.* at p. 346.) The Court noted that the defendant had a "substantial and legitimate expectation that he [would] be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion" and concluded that his liberty interest was protected by the Fourteenth Amendment against "arbitrary deprivation by the State." (*Ibid.*)

Section 190.4, subdivision (e), requires the trial judge to reweigh the aggravating and mitigating factors considered by the jury and to arrive at an independent determination that the death penalty is appropriate. Under this statutory scheme, the trial judge effectively becomes a sentencing judge and thereby comes within the purview of the Eighth and Fourteenth Amendments. Hence the trial court's refusal to conduct the statutorily mandated re-evaluation of the mitigating and aggravating factors considered by the jury constituted a violation of appellant's federal rights to due process of law and protection against cruel and unusual punishments. Moreover, the trial judge's approval of appellant's death sentence without following the requirements of section 190.4, subdivision (e), deprived appellant of his liberty interest — indeed, his life — in an arbitrary and capricious manner in violation of the Fourteenth Amendment.

X.

THE GOVERNMENT'S VIOLATION OF THE VIENNA CONVENTION ON CONSULAR RELATIONS REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS

A. Introduction

Appellant argued in Appellant's Opening Brief that his claim under the Vienna Convention on Consular Relations should be resolved in a habeas corpus petition. Respondent, on the other hand, insists that this Court should resolve appellant's claim based solely on the appellate record, and argues that the claim must fail because appellant has not shown prejudice.[6] Contrary to respondent's assertion, although further evidence of prejudice would undoubtedly be presented in a future habeas corpus action,

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Respondent suggests in a footnote it will seek to bar any subsequent claim in a habeas petition based upon a violation of appellant's right to consular notification under the Vienna Convention. The question whether any procedural bars apply to a claim in a habeas corpus petition are appropriately litigated in the context of the habeas corpus action, but appellant disputes that the procedural bars cited by respondent would apply. (For example, respondent refers to the procedural bar to a Vienna Convention claim in *In re Martinez* (2009) 46 Cal.4th 945, 950, 958 (RB 96, fn. 18), without mentioning the case involved a successor petition (*In re Martinez, supra,* 46 Cal.4th at p. 950.). *In re Waltreus* (1965) 62 Cal.2d 218, "does not, of course, apply to issues that could not be raised on appeal because they are based on matters outside the appellate record." (*In re Harris* (1993) 5 Cal.4th 813, 828, fn. 7.) *In re Seaton* (2004) 34 Cal.4th 193, addresses the need to "encourage prompt correction of trial errors and thereby avoid unnecessary retrials." (*Id.* at p. 200.) And *People v. Waidla* (2000) 22 Cal.4th 690, prohibits consolidating an appeal and a habeas corpus petition. (*Id.* at p. 703, fn.1.))

appellant demonstrated that the violation of his right to consular notification was prejudicial and merits reversal.[7]

B. The Vienna Convention on Consular Relations

On April 24, 1963, 172 countries, including the United States, signed the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 (Vienna Convention). (Robledo, *Vienna Convention on Consular Relations*, Audio Visual Library of International Law <http://http://untreaty.un.org/cod/avl/ha/vccr/vccr.html> [as of March 4, 2013.)[8] In 1969, with the advice and consent of the Senate, the United States ratified the Vienna Convention and the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, April 24, 1963, 21 U.S.T. 325, T.I.A.S. No. 6820 (Optional Protocol). (*Medillín v. Texas* (2008) 552 U.S. 491, 500 (*Medillín*).) Article 36 of the Vienna Convention was created to "facilitat[e] the exercise of consular functions."

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Appellant argues below that he was prejudiced by the violation of consular notification provision of the Vienna Convention and this Court should reverse his conviction. This argument was not raised in appellant's opening brief because appellant believed the claim was appropriately brought in a habeas corpus action, but the issue was nevertheless broached by respondent. Appellant is filing a motion to file a supplemental brief on this issue. By doing so, appellant seeks to ensure that the issues are properly before this Court and to give respondent the opportunity to respond to them.

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(Vienna Convention, Art. 369(1).) It provides that if a person detained by a foreign country "so requests, the competent authorities of the [foreign country] shall, without delay, inform the consular post [of the person's country of citizenship] of the person's detention and "inform the [detainee] of his righ[t]" to request assistance from his own state's consulate. (*Id.* at Art. 36(1)(b).) Article 36 also grants consular officers the right to visit a detainee, to converse and correspond with him, and to arrange for his legal representation. (*Id.* at Art. 36 (1)(c).) Though the Vienna Convention allows for the rights created by Article 36 to be "exercised in conformity with the laws and regulations of the [detaining] State," these laws and regulations "must enable full effect to be given to the purposes for which the rights . . . are intended." (*Id.* at Art. 36 (2).)

The Optional Protocol grants the International Court of Justice jurisdiction over disputes arising out of the Vienna Convention. (Optional Protocol, Art. 1.) On May 7, 2005, the United States withdrew from the Optional Protocol to the Vienna Convention. (*Medillín, supra,* 552 U.S. at p. 500.)

In recognition of the consular notification requirements of the Vienna Convention, in 1999 the Legislature codified the rights afforded to foreign nationals under Article 36. (§ 834c [noting Vienna Convention's requirement for consular notification "without delay"].) Section 834c,

subdivision (a)(1), provides that "every peace officer, upon arrest and booking or detention for more than two hours of a known suspected foreign national, shall advise the foreign national that he or she has a right to communicate with an official from the consulate."

C. The Procedural and Factual Background Reveal That the Government Violated Appellant's Rights Under the Vienna Convention and that Appellant Was Prejudiced by the Violation

1. The government did not inform appellant of his Vienna Convention rights to consular notification and assistance

Appellant is a Mexican citizen, but not a United States citizen. (13 RT 3331.) He was arrested at 8:30 a.m. on April 2, 1999. (13 RT 3348-3349.) No government officer informed appellant of his right to speak with the Mexican Consulate under Article 36 of the Vienna Convention or section 834C, subdivision (a)(1). (13 RT 3331.) As a result, appellant did not speak with anyone from the Mexican Consulate. On February 23, 2001, the jury sentenced appellant to death. (13 RT 3253-3254.)

2. Appellant's motion for a new trial and supporting documents lodged with the trial court show prejudice

On June 7, 2001, appellant moved for a new trial or for a reduction of his death sentence to life without parole because the government violated his right to consular notification under both Article 36 of the

Vienna Convention and section 834C, subdivision (a)(1). (3 CT 1093-1100.) Appellant explained that he would have consulted the Mexican Consulate if he had been informed of his right to do so. (3 CT 1094, 1097.) In turn, appellant argued, a Mexican consular official would have advised him to exercise his Fifth Amendment rights to remain silent in accordance with *Miranda v. Arizona* (1966) 384 U.S. 436. (3 CT 1097.) Instead, appellant — who was unfamiliar with the *Miranda* warning and the rights it protected — waived his right against self-incrimination and spoke to police. (3 CT 1097.) Although appellant's statement to police did not incriminate him, it contained several misstatements that turned out to be inconsistent with the facts later developed at trial. (*Ibid.*) If appellant had testified at his trial, appellant argued, the prosecution would have impeached him with "his uncounseled statement." (*Ibid.*) Consequently, appellant did not testify. (*Ibid.*)

In support of his motion, appellant lodged a letter and a declaration from Miguel Angel Isidro-Rodriguez, chief of the Mexican Consulate in Santa Ana (who testified at the hearing on the motion as discussed in section three, below). (3 CT 1144-1156.) Isidro-Rodriguez confirmed that "[l]ocal law enforcement authorities failed to notify [appellant] of his article 36 rights, and as a result, Mexico was barred from providing consular assistance at the most critical phase of his capital murder prosecution." (3

CT 1148.) He warned that "[m]any courts have mistakenly presumed that the assistance provided by the consulate would have been no different from that provided by trial counsel. This uninformed assumption both minimizes and disparages the quality of consular assistance." (3 CT 1149.) In other cases, Isidro-Rodriguez pointed out, Mexican consular officials helped trial counsel to locate witnesses, communicate with Spanish-speaking family members, and persuade prosecutors to dismiss capital charges. (3 CT 1149, citing Lafay, *Virginia Ignores Outcry,* The Roanoke Times (July 6, 1997) [reporting Mexican consulate's negotiated plea bargains on behalf of two Mexican citizens facing the death penalty] and Cooper, *Foes of Death Penalty Have a Friend: Mexico,* Sac. Bee (June 26, 1994) p. A1 [death penalty avoided in Kentucky and California cases in which Mexico intervened].)

According to Isidro-Rodriguez, at the time of appellant's trial, the "Mexican Foreign Ministry had implemented a far-reaching program of legal assistance to Mexican nationals facing the death penalty in the United States." (3 CT 1149.) As part of this commitment, Mexico retained an experienced capital defense attorney, Sandra Babcock, to direct the program. (3 CT 1155.)

As of September 2001, program attorneys were working on cases in California, Arizona, Oregon, Washington, Texas, Georgia, Illinois, Florida,

Oklahoma, Tennessee, and Kentucky. (3 CT 1155.) Through this program, Mexican representatives monitored and supported defense counsel, conferred regularly with the defendant and his family, and often helped to gather evidence for both the guilt and penalty phases of capital trials. (3 CT 1149, 1155.) When required, Mexico also paid for bilingual mitigation specialists, neuropsychologists, investigators, and other experts to help defense counsel in capital cases. (3 CT 1155.)

Most important, Isidro-Rodriguez explained that "[i]n Mexico's experience, early intervention by consular officers can often prevent the imposition of the death sentence." (3 CT 1155-1156.) Between December 1, 1994 and August 15, 2000, Mexican consular officials assisted 261 Mexican nationals in death penalty cases. Of those cases, 119 avoided capital prosecution, 19 were acquitted, and two death sentences were commuted. (3 CT 1149, fn. 3, citing Mexican Ministry of External Relations, Annual Report (2000).)

Once the Santa Ana Consulate had been informed of appellant's detention, wrote Isidro-Rodriguez, a consular official would have visited him in jail as soon as possible to explain the American adversarial system of criminal justice. (3 CT 1156.) Specifically, the Consulate "would have advised him in no uncertain terms that he should not speak to any law enforcement officer without first speaking with an American attorney."

(*Ibid.*) The Santa Ana Consulate would then have notified the Mexican Foreign Ministry and asked that appellant be included in the legal assistance program directed by Babcock. (3 CT 1149, 1156.) "Consular representatives would have worked in tandem with Ms. Bacock to ensure [appellant] received the resources and expertise available to him." (3 CT 1156.) The Santa Ana Consulate would have "played as active a role as necessary to help ensure [appellant] avoided the death penalty." (*Ibid.*) Because of Mexico's committed advocacy on behalf of its citizens who face the death penalty in the United States, Isidro-Rodriguez believed that Mexico's involvement in appellant's case, "would have made the difference between life and death." (*Ibid.*)

As a remedy for the violation of appellant's Vienna Convention rights, Isidro-Rodriguez asked that appellant's conviction and death sentence be vacated and that he be restored to the position he was in before the violation occurred. (3 RT 1150.) Returning appellant to the position he was in after his arrest but before his violation, reasoned Isidro-Rodriguez, would be consistent with the international law remedy of restitutio in integrum, which provides for the "restoration of the prior situation, the reparation of the consequences of the violation, and indemnification." (3 CT 1150, citing *Valasquez Rodriguez Case* (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para. 26 (1989).

3. Testimony at the hearing on appellant's motion for a new trial established prejudice

On October 3, 2001, the trial court heard appellant's motion for a new trial. (13 RT 3275-3363.) At the hearing, the parties stipulated that appellant was a Mexican national and that the arresting police officer did not advise him of his right to consular notification. (13 RT 3277.)

Sandra Babcock, a lawyer and the director of the legal assistance program for Mexican citizens facing the death penalty in the United States, testified. (13 RT 3302.) Babcock's ten years' experience as a capital defense lawyer and her involvement with the defense of Mexican nationals enabled her to serve as a bridge between defense attorneys and the Mexican government. (13 RT 3303.) Babcock had developed an extensive list of bilingual experts, including gang experts, neuropsychologists, psychiatrists, mitigation specialists, and investigators. (13 RT 3304.) She assisted attorneys representing capital defendants with Mexican citizenship by recommending certain experts. (13 RT 3305.) In the previous year, she had written amicus briefs in approximately a dozen capital cases involving Mexican nationals. (13 RT 3310.)

The Mexican government enlisted her to help appellant. (13 RT 3305.) She testified that neither she nor — to her knowledge — the Mexican government had been informed of appellant's situation until after

his conviction. (Ibid.) After learning of the conviction, Babcock contacted appellant's defense counsel, reviewed the penalty phase testimony, and conferred with consular officials about the Vienna Convention violations. (13 RT 3306-3307.) She advised defense counsel to retain a bilingual mental health expert. (13 RT 3307.)

Ms. Babcock recommended Dr. Ricardo Weinstein, a psychologist, because he was fluent in the Mexican-Spanish dialect and was trained in neuropsychology, which Babcock had learned was "very important" to developing "persuasive and compelling" mitigating evidence for capital juries. (13 RT 3308.) Babcock explained that the remedy for a treaty violation under international law is to restore the parties to the status quo before the violation. (13 RT 3329.) In this case, she testified, that would require a new trial for appellant. (Ibid.)

Weinstein, who worked on death penalty cases in over half a dozen states, also testified for the defense. (13 RT 3278-3301.) Weinstein qualified his remarks as "very limited in scope" because he was given insufficient time and resources to formulate comprehensive findings. (13 RT 3284, 3297.) Still, "just through brief interviews," including a clinical interview of appellant, together with psychological testing of appellant and a review of testimony by Dr. Greenzang, the defense's expert witness, Weinstein identified prejudicial deficiencies in appellant's penalty phase

defense. (13 RT 3280-3281, 3289.) Most notably, the defense did not present an accurate account of appellant's psycho-social development or explain how cultural factors hindered his assimilation into mainstream American society.

Weinstein criticized Greenzang's testimony for presenting appellant as the anomalous, antisocial "bad apple" in an otherwise stable, supportive family. (13 RT 3288.) In reality, Weinstein testified, appellant's family life "was fraught with issues of dysfunction," dysfunction that included sexual abuse "in the family" by the father. (13 RT 3288-3289.) But no one interviewed appellant's father or compiled an extensive social history of appellant's early development. (13 RT 3289.) Weinstein described appellant's first three years of life – years that are critical to long-term brain development – as disrupted by strife between his parents. (13 RT 3290.)

According to Weinstein, appellant also suffered several blows when he was young and a significant head injury about two years before the incidents that resulted in his capital case. (13 RT 3290.) From his limited investigation, Weinstein concluded that appellant suffered from brain injuries, learning disabilities, and severe depression. (*Ibid.*) Appellant self-medicated for his depression by drinking alcohol and taking drugs, which led to addiction by an early age. (*Ibid.*)

In Weinstein's opinion, appellant never assimilated into mainstream American society. After spending his formative years in Mexico, appellant was "transported suddenly from one country to the next without sufficient support to make that transition." (13 RT 3289.) As a result, appellant lacked "the level of acculturation to function adequately." (*Ibid.*)

Weinstein condemned Greenzang's decision to give appellant the Minnesota Multiphasic Personality Inventory (M.M.P.I.) as a "big error." (13 RT 3292.) First, appellant's learning disability prevented him from understanding the M.M.P.I.'s questions. Though appellant appeared to speak English fluently, Weinstein testified, he did not understand English fluently. (*Ibid.*) According to Weinstein, there was a "significant difference" between appellant's verbal I.Q. and performance I.Q. (*Ibid.*) Because of his learning disabilities, appellant's ability to understand certain words and phrases was "very compromised." (*Ibid.*) For example, appellant could not understand the concept of "seldom" or how a "double negative" functions. (*Ibid.*) Weinstein pointed out that "during the penalty phase, [appellant] was presented as a heartless sociopathic individual mostly based on the results of the M.M.P.I." (*Ibid.*) Yet Greenzang had no experience in administering or interpreting the M.M.P.I. (*Ibid.*)

Moreover, Weinstein testified that an extensive scholarly literature explains that the M.M.P.I. is not valid for the Hispanic population. (13 RT

3292.) In support of his claim, Weinstein presented an affidavit from Dr. Richard Cervantes attesting to the invalidity of the M.M.P.I. for the Hispanic population. (13 RT 3294.) Cervantes is a bilingual psychologist who works with the defense in capital cases as a mitigation specialist and expert on the cultural and psychological issues that confront Mexican immigrants to the United States. (13 RT 3309.) The affidavit was introduced as an exhibit. (13 RT 3295.)

Though Weinstein explained he had been given "insufficient resources to conduct the necessary investigation," he outlined what he and other experts would have done if they had been enlisted to help before appellant's trial. (13 RT 3295.) Weinstein would have conducted a complete neuropsychological evaluation to assess appellant's cognitive condition. (13 RT 3296.) An addiction specialist would have investigated the effect of appellant's drug and alcohol abuse. (*Ibid.*) A mitigation specialist with knowledge of Mexican culture would have determined appellant's "levels of acculturation" that would be relevant to the jury's consideration of the death penalty. (13 RT 3295-3296.) Typically, a mitigation specialist travels to a capital defendant's hometown and conducts extensive interviews with family members, friends, teachers, and others to draw a complete picture of the person's development. (13 RT 3295- 3296.)

Isidro-Rodriguez also testified for appellant. (13 RT 3330-3334.)

He confirmed he was authorized to sign the letter and declaration that were lodged with the trial court on behalf of the Mexican government (the contents of which are set forth in section C.2, above) and verified the declaration's accuracy. (13 RT 3331-3332.) Isidro-Rodriguez authenticated appellant's Mexican passport and informed the trial court that appellant had no criminal record in Mexico. (13 RT 3333-3334.)

Diane Booker, an immigration agent with the Immigration and Naturalization Service, testified for the prosecution. (13 RT 3335-3348.) Booker interviewed appellant at 8:55 p.m. on April 2, 1999 to establish his immigration status. (13 RT 3336.) After concluding appellant was a lawful permanent resident, Booker handed him an immigration rights form to read. (13 RT 3337.) Typically, Booker testified, she would summarize the form's contents, including the person's right to speak with an attorney or consular official for advice about his immigration status. (13 RT 3339, 3346-3347.) The form addressed appellant's immigration rights in the event he was convicted of a crime. (13 RT 3346.) A notation by Booker on the form indicated appellant had read its contents. (13 RT 3345.)

4. Defense counsel and prosecution arguments

Defense counsel argued that the Vienna Convention requires a peace officer to inform a foreign national of his right to consult a consular official from his country of origin. (13 RT 3349.) Even assuming Booker's

immigration advisements were proper for immigration purposes, defense counsel reasoned, they were irrelevant for the purposes of complying with the Vienna Convention, which required a peace officer to notify appellant of his right to seek the Mexican Consulate's help with his criminal charges. (13 RT 3350.) Thus, the government violated appellant's Vienna Convention rights. (13 RT 3550.)

Defense counsel argued that Weinstein's testimony, Babcock's testimony, and Cervantes' affidavit, all of which highlighted the services the Mexican government would have provided appellant, established prejudice. (13 RT 3350-3351.) If appellant had been properly notified under the Vienna Convention and contacted the Mexican Consulate, he would have benefitted from Weinstein's testimony at the penalty phase of his trial. (13 RT 3550.) Defense counsel confirmed that if he had been aware of Weinstein's and Cervantes' expertise in multi-cultural neuropsychological forensic analyses, he would have asked the court to allow them to testify. (13 RT 3356.) Moreover, defense counsel had been unaware that the M.M.P.I. was culturally biased. (*Ibid.*)

Even assuming a violation of the Vienna Convention, the prosecution countered, the defense's prejudice argument was based upon speculation that appellant would have availed himself of the Mexican Consulate's services, the Consulate would have recommended Weinstein

and Cervantes, and counsel would have used them. (13 RT 3551-3552.) The prosecution noted that appellant had not contacted the Consulate in connection with Booker's advisement about immigration states, and that defense counsel had not testified that he would have used Weinstein or Cervantes. (13 RT 3551-3552.) Finally, there would have to be a "reasonable possibility" that the experts' testimony would have made a difference to the jury. (13 RT 3553.)

The prosecution also argued that appellant had not been prejudiced by his Miranda waiver. (13 RT 3353.) He maintained that appellant's claim he was precluded from testifying because of the waiver was based on the fact appellant had given misinformation to the police. (13 RT 3353.) The prosecution pointed out that there had been no indication of what appellant would have testified to or how his testimony would have made a difference in either the guilt or penalty phase of his trail. (13 RT 3354.)

5. The trial court correctly found there was a violation, but incorrectly found no prejudice

After ruling that the government violated appellant's rights under the Vienna Convention, the trial court found that appellant failed to show how he was prejudiced by the violation. (13 RT 3363.) The trial court concluded that Booker's immigration advisement did not satisfy the requirements of the Vienna Convention. (13 RT 3558.)

Once there is a violation of the treaty, the trial court explained, "due process requires prejudice before any remedy should be imposed." (13 RT 3359.) The trial court rejected Babcock's suggested remedy that appellant should be restored to the position he was in immediately after his arrest as "unreasonable" and "not based upon law." (13 RT 3558.)

In the trial court's opinion, defense counsel's argument required an "assumption" that appellant would have notified the Mexican Consulate. (13 RT 3360.)

> This is speculation: Let's assume that Tustin P.D. told [appellant] that he had a right to talk to the Consulate or they would call the Consulate for him, what would have happened? Would they have said, "Don't talk to the police?" Would [appellant] have followed that advise [sic]? We don't know because he certainly hasn't told us.
>
> But he did, in essence, not talk to the police. He gave them a story, and that was it. Not very helpful to anybody. So we're right back where we were. Nothing happened, in essence, that would prejudice [appellant's] right to a fair trial.

(13 RT 3360.)

The trial court then inferred that Weinstein's testimony carried the implicit charge that defense counsel and Greenzang had performed incompetently. (13 RT 3361.) It believed that "those assumptions are just not supported by the evidence that was before this jury and certainly not noted by this court's observations of the trial." (*Ibid.*) The trial court characterized this implied incompetence of defense counsel as a "rational

choice" about "trial tactics." (*Ibid.*) Based on its past experience with defense counsel, the trial court concluded he had done what was best for appellant. (*Ibid.*)

Further, defense counsel had been "aware of the Vienna Convention well before trial." (13 RT 3361-3362.) Thus defense counsel could have spoken to the Mexican Consulate if he had wanted. (13 RT 3362.) But the trial court stated it did not think it was incompetent not to speak with the Mexican Consulate because the Vienna Convention was not "designed to help defendants like [appellant]." (*Ibid.*) The trial court described appellant as someone who immigrated to the United States at nine years old, whose family were all American citizens, who went to school in the United States, and who, "[f]or all practical purposes," was "an American citizen as well as a Mexican citizen." (13 RT 3362-3363.) The trial court also questioned Weinstein's conclusions by remarking that appellant did not appear to be "mentally slow in any way." (13 RT 3362.)

D. Appellant Has Enforceable Rights in California Courts Under the Vienna Convention in State Courts

Respondent alleges that "[n]or has Vargas identified legal authority entitling him to relief." (RB 97.) As appellant explains below, though the United States Supreme Court has ruled that a criminal defendant's rights under the Vienna Convention do not pre-empt state post-conviction

procedural limitations (*Medillín, supra,* 552 U.S. at pp. 498-499), the higher court has not ruled that a defendant's rights under the Vienna Convention are not enforceable in state courts.

Appellant did not learn of his Vienna Convention rights "until after he was tried, convicted, and sentenced to death." (3 CT 1145.) "Likewise, Mexican consular officials, were unaware [appellant] had been detained, and were therefore prevented from assisting [appellant] before and during his trial." (*Ibid.*, Letter from Mexican Consulate in Santa Ana to the Honorable John Ryan, dated September 17, 2001.) The Mexican government later sued the United States on behalf of appellant and other similarly situated Mexican citizens in the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals* (Mexico v. United States) (Mar. 31, 2008) 2004 I.C.J. 128 (*Avena*) for its failure to notify appellant and the others of their rights to consular notification in accordance with Article 36 of the Vienna Convention.

The ICJ held that the United States violated appellant's Article 36 Vienna Convention rights. (*Avena, supra,* 2004 I.C.J. at ¶ 153(9).) As a remedy for the violation of his Vienna Convention rights, the ICJ ordered that the United States "provide, by means of its own choosing, review and reconsideration of the convictions and sentences of [appellant and the other Mexican nationals], by taking into account . . . the violation of the rights set

forth" in the Vienna Convention. (*Ibid.*) The review and reconsideration of appellant's conviction and sentence must be "effective" and "guarantee that the violation and the possible prejudice caused by that violation will be fully examined. . . ." (*Id.* at ¶ 138, citations omitted.)

Moreover, as this Court has noted, "the ICJ required that the violation of article 36 be reviewed independently of due process provisions of the United States Constitution." (*In re Martinez* (2009) 46 Cal.4th 945, 960, emphasis added (*Martinez*).) Indeed, *Avena* stresses that "review and reconsideration" should not be limited to considering a treaty violation as just another fair trial concern addressed in appellate or post-conviction review. The right under Article 36 operates under a different rationale:

> [T]he defendant raises his claim in this respect not as a case of "harm to a particular right essential to a fair trial" — the concept relevant to the enjoyment of due process rights under the United States Constitution — but as a case involving the infringement of his rights under article 36, paragraph 1. The rights guaranteed under the Vienna convention are treaty rights which the United States is undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law

(*Avena, supra*, 2004 I.C.J. at ¶ 139.)

Accordingly, article 36 does not recast federal constitutional rights in different language, but creates a separate right for criminal defendants who are foreign nationals, a right grounded in international law.

The United States Supreme Court has recognized the Avena

judgment "constitutes an international law obligation on the part of the United States." (*Medillín, supra,* 552 U.S. at p. 504.)

> The decision in Avena merely obligates the United States "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of [appellant and certain other] Mexican nationals" [(*Avena*, 2004 I.C.J. at p. 72, ¶ 153(9)], "with a view to ascertaining" whether the failure to provide proper notice to consular officials "caused actual prejudice to the defendant in the process of administration of criminal justice" [(*Id.* at p. 60, ¶ 121.)].

(*Medillín, supra,* 552 U.S. at p. 536, Stevens, J., concurring.)

Nevertheless, since the relevant treaties do not create "binding law in the absence of implementing legislation, and because it is uncontested that no such legislation exists, . . . the Avena judgment is not automatically binding domestic law." (*Medillín, supra,* 552 U.S. at p. 506.) The United States Supreme Court has accordingly denied petitions for writs of habeas corpus by two of the Avena defendants, Huberto Leal Garcia and Jose Ernesto Medillín, because "neither the Avena decision nor the President's Memorandum purporting to implement that decision constituted directly enforceable federal law" (*Leal Garcia v. Texas* (2011) 564 U.S. , ,131 S. Ct. 2866, 2867) that preempts post-conviction state procedural limitations (*Medillín, supra,* 552 U.S. at p. 498-499.).

Both the United States Supreme Court and this Court "continue to adhere" to the approach of "assuming, without deciding, that article 36

confers individual rights on foreign nationals." (*In re Martinez, supra,* 46 Cal.4th at p. 957, fn. 3; *People v. Cook* (2006) 29 Cal.4th 566, 600; *Medillín, supra,* 552 U.S. at p. 506 fn.4 [assuming article 36 grants foreign nationals an enforceable right]; *Breard v. Greene* (1998) 523 U.S. 371, 376 [Vienna Convention "arguably confers on an individual the right to consular assistance following arrest"].))

Even though state procedural rules do not have to give way to the ICJ's ruling in Avena, these rules may give way, if an aggrieved appellant can show actual prejudice. (See *Medillín, supra,* 552 U.S. at 536-537 & n. 4 (conc. opn. of Stevens, J.) As Justice Stevens noted in his concurring opinion in *Medillín,*, "[o]ne consequence of our form of government is that sometimes the States must shoulder the primary responsibility for protecting the honor and integrity of the Nation." (*Id.* at p. 536.) To illustrate this general principle, Justice Stevens cited *Torres v. State* (Ok. 2004) 43 I.L.M. 1227, in which "the State of Oklahoma unhesitatingly assumed" the costs of complying with Avena by ordering "an evidentiary hearing on whether Torres had been prejudiced by the lack of consular notification." (*Id.* at p. 537 n. 4.) Justice Stevens observed that the costs to Oklahoma were "minimal" compared to the United States' "plainly compelling interest in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the

role of international law. [Citation.]" (*Id.* at p. 537, internal quotations omitted.)

E. The Trial Court Correctly Ruled that the Government Violated Appellant's Rights Under the Vienna Convention

The trial court properly concluded that appellant's rights under the Vienna Convention had been violated because he was not notified of his right to consular notification before he was tried, convicted, and sentenced to death. Although Booker informed appellant of his right to consular consultation about his immigration status, her advisement did not extend to appellant's right to consular consultation about his criminal defense. As Babcock testified, appellant would have no reason to infer from Booker's advisement that he also had a right to consular assistance in his criminal proceedings. (13 RT 3321-3322.)

Before issuing its ruling, the trial court remarked, "I think we can all agree there was a technical violation of the Vienna Convention." (13 RT 3358.) Respondent seizes on this characterization in an attempt to minimize the court's ruling by writing "assuming there was a technical violation. . . ." (RB 100.) Each time it mentions the trial court's ruling, respondent describes the violation as "technical." (RB 100 ["[t]he trial court found a technical violation"]; RB 102 ["while there was a technical violation . . . ."].) Respondent thereby tries to diminish the wrong done to

appellant by belittling it as a "technical violation," though respondent offers no argument or authority that would enable this Court to distinguish between "technical" and supposedly "non-technical" violations.

Even so, respondent does not contradict the trial court's ruling. Its pretension to "assume" rather than concede the court's rightful finding should not enable it later to argue that it believes the court erred in its ruling. Respondent pursues this line of argument by describing the government's violation as "the delay in [appellant's] becoming aware of his right to consult with representatives from the Mexican consulate." (RB 102.) This delay, of course, continued throughout appellant's trial, until after his conviction, and until after his death sentence. A delay, in other words, that is more accurately described as a denial.

F. Appellant Was Prejudiced by the Government's Violation of His Vienna Convention Right to Consular Notification and Assistance

The record below belies respondent's insistence that appellant was not prejudiced by the government's violation of his Vienna Convention rights. (RB 102.) This Court has indicated that its standard of prejudice for violations of article 36 of the Vienna Convention is whether "the alleged violation denied [appellant] any benefit he would have otherwise received had the consulate been properly notified" so long as "he did not obtain assistance from other sources." (*People v. Mendoza* (2007) 42 Cal.4th 686,

711.) Here, appellant was denied the benefit of any resources the Mexican Consulate would have provided — including a bilingual mitigation specialist familiar with Mexican culture, an addiction specialist, a bilingual psychologist familiar with biases in standardized psychological testing, and a neuropsychologist. He was also denied the benefit of the financial assistance of the Mexican Consulate in preparing and presenting his defense, any intervention by Mexican consular officials to persuade prosecuting authorities not to seek the death penalty, and the wealth of knowledge acquired by Babcock and other representatives of the Mexican Consulate through the defense of Mexican nationals in criminal cases. Appellant did not obtain these kinds of assistance from other sources.

The assistance and resources of the Mexican Consulate are unique. It is widely recognized that "[c]riminal defense attorneys are not equipped to provide the same services as the local consulate" and that prompt consular access "may very well make a difference to a foreign national, in a way that trial counsel is unable to provide." (*Ledezma v. State* (Iowa 2001) 626 NW.2d 134, 152, citations omitted.) Many cases note that "[i]n addition to providing a 'cultural bridge' between the foreign detainee and the American legal system, the consulate may . . . conduct its own investigations, file amicus briefs and even intervene directly in a proceeding if it deems that necessary." (*Sandoval v. United States* (7th Cir. 2009) 574

F.3d 847, 850, quoting *Osagiede v. United States* (7th Cir. 2008) 543 F.3d 399, 403.)

Indeed, the Mexican Consulate has a long history of uniquely successful interventions in persuading California prosecutors not to seek the death penalty. (See, e.g., Cooper, *Foes of Death Penalty Have a Friend, supra,* at p. A1 [reporting that after this Court reversed a Mexican national's death sentence in 1992, the Mexican consul general successfully wrote to the district attorney "urging that death penalty charges not be re-filed" and quoting the prosecutor as stating: "You don't ignore a document like that"].) Even in far more aggravated circumstances than appellant's, timely Mexican consular interventions have been instrumental in securing plea agreements. (See, e.g., Greg Moran, *Arellano Félix Case Ends Quietly With Guilty Pleas*, San Diego Union-Tribune (Sept. 18, 2007) [interventions by Mexico helped persuade federal prosecutors in San Diego not to seek the death penalty against a drug cartel leader linked to at least 20 murders].)

The Mexican Consulate's letter and declaration lodged with the trial court, together with Weinstein's and Babcock's testimony, establish that appellant suffered prejudice as a result of the violation of his Vienna Convention rights. Had appellant been notified of his consular rights regarding his criminal charges at the time of his arrest, he would have

exercised his right to speak with the Mexican Consulate. The Mexican consulate would then have been informed of appellant's case from the beginning. Babcock, the director of the Mexican Consulate legal program that assists Mexican capital defendants, would have been notified and been able to assist appellant before his trial. In his letter, Isidro-Rodriguez specified that the Consulate would have advised appellant not to waive his Miranda rights and speak with police.

Appellant recognizes that the United States Supreme Court has held that suppression of a criminal defendant's statement to police should not be an available remedy for an Article 36 violation. (*Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 350.) Nevertheless, the higher court allowed that a criminal defendant can raise an article 36 claim "as part of a broader challenge to the voluntariness of his statements to police." (*Ibid.*) Similarly, this Court has held upheld a trial court's ruling that "under the totality of the circumstances, defendant's confession was not linked to the consular convention violation." (*People v. Enraca* (2012) 53 Cal.4th 735, 757.) In *People v. Enraca*, this Court noted that even if it assumed that the Philippines Consulate would have provided the defendant with a lawyer and advised him to remain silent, "there was no showing that this would have occurred before defendant was booked," which was the time of his confession. (*Id.* at p. 758.) Here, the declaration of Isidro-Rodriguez states

that Mexican consular officials would have visited appellant in jail as soon as possible after being notified of his detention. (3 CT 1156.) Hence, it is not accurate for respondent to assert that appellant has not shown how the Mexican Consulate's intervention would have affected his decision to make statements to police. (RB 100.) Without having a right to exercise his right to consular consultation, appellant could not voluntarily, knowingly, and intelligently waive his right against self-incrimination under the Fifth and Fourteenth Amendments.

Further, Babcock would have been able to provide appellant with experts at both the guilt and the penalty phases, including experts such as Weinstein and Cervantes. At the penalty phase, Weinstein would have advised counsel that the M.M.P.I. is an invalid test for Hispanics. (13 RT 3285-3286.) He could also have testified during the penalty phase about appellant's dysfunctional family history, self-medication, and diminished cognitive abilities as mitigating factors. (13 RT 3290.) Weinstein would have explained to the jury that, in spite of appellant's long-term residence in the United States, he had not assimilated into mainstream American society. (13 RT 3289.)

All of these mitigating factors could have been brought into appellant's penalty phase had he been fully apprised of his rights. Certainly, the call between a life without parole or death recommendation

in appellant's case was a close one. Appellant had strong mitigating factors in favor of life without parole, such as his youth, lack of any prior felony record, his kindness to elders and children, his drug use, and his low socioeconomic status. (13 RT 3430-3441.)

The prosecution, on the other hand, arguably presented two aggravating factors, the fact that two bullets were used to commit the crime and the problematic victim impact evidence. (13 RT 3431-3432.) If Weinstein had been able to testify during the penalty phase, the additional information supplied by him regarding the cultural assimilation problems with Mexican citizens and appellant's history of problems quite probably could have tipped the jury to recommended life without parole instead of death. These factors could have been considered by the trial judge in appellant's automatic motion to modify the death sentence pursuant to California Penal Code section 190.4, subdivision (e).

In summary, there was an admitted violation of appellant's consular rights as enumerated in the Vienna Convention and section 834c as well as a violation of appellant's right to due process under the Fourteenth Amendment and right against cruel and unusual punishment, including the heightened reliability required in capital cases, under the Eighth Amendment.. (U.S. Const., 8th & 14th Amend.; *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *Hewitt v. Helms* (1983) 459 U.S. 460, 466; *Woodson v.*

North Carolina, supra, 428 U.S. at pp. 295-300; *Thompson v. Oklahoma*, (1988) 487 U.S. 815, 856.) And a new trial should be ordered. If these rights had not been violated, appellant, at a minimum, would have benefitted from the testimony of Weinstein during the penalty phase. Appellant did not obtain similar assistance from another source. Thus, appellant, contrary to the holding of the trial court and the arguments of respondent, meets the standard of prejudice set forth in *Mendoza, supra,* 42 Cal. 4th at p. 711.[9] Indeed, the trial court's disparaging remark that the Vienna Convention was not designed to protect people like appellant

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Since Appellant's Opening Brief was filed, the United States Senate has revised proposed legislation intended to execute domestically the United States' obligations under the Vienna Convention. Senator Patrick Leahy's Consular Notification Compliance Act is now part of Senate Bill No. 3241, the Department of State, Foreign Operations, and Related Programs Appropriations Act of 2013. (S. 3241, 112th Cong. (2012)<http://thomas.loc.gov/cgi-bin/query/F?c112:1:./temp/~c112PPH5FR:e335899:> [as of March 5, 2013].) Under this proposed legislation, to obtain relief a criminal defendant alleging a violation of the Vienna Convention must make a "showing of actual prejudice to the criminal conviction or sentence as a result of the violation." (*Id.* at § 7090(a)(2).) "The court may conduct an evidentiary hearing if necessary to supplement the record and, upon a finding of actual prejudice, shall order a new trial or sentencing proceeding." (*Ibid.*) But to qualify for review under the act, a petitioner must only show that (1) a violation of article 36 of the Vienna Convention occurred and (2) if the violation "had not occurred, the consulate would have provided assistance to the individual." (*Id.* at § 7090, subdivision (a)(2).) Thus the propose legislation indicates that the Senate contemplates that all Vienna Convention violations will be subject to "review and reconsideration" through a post-conviction evidentiary hearing.

further undermines its erroneous prejudice ruling. (13 RT 3362-3363.)

G. The Violation of Appellant's Vienna Convention Rights Also Constitutes a Violation of His Federal Constitutional Rights to Due Process of Law and to Be Free From Cruel and Unusual Punishment

The denial of appellant's rights under this section also violates the due process clause of the Fourteenth Amendment, the Eighth Amendment's prohibition on cruel and unusual punishment prohibition on cruel, and the Eighth Amendment's requirement of heightened reliability in capital cases. (See *Hicks v. Oklahoma, supra,* 447 U.S. 343, 346; *Hewitt v. Helms, supra,* 459 U.S. at p. 466 [liberty interests protected by the federal Constitution's due process clause arise from both the due process clause itself and the laws of the states]; *Woodson v. North Carolina, supra,* 428 U.S. at pp. 295-300 [Eighth Amendment requires individualized sentencing determination in a capital case]; *Thompson v. Oklahoma, supra,* 487 U.S. at p. 856 ["Under the Eighth Amendment, the death penalty has been treated differently from other punishments"].) By denying appellant his right to consular notification and assistance, the government arbitrarily deprived appellant of his rights to due process of law under the Fourteenth Amendment. (See *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

H. Respondent Incorrectly States the Law Concerning the Appropriateness of Habeas Review

Respondent concludes that where no prejudice appears from an incomplete appellate record, "[i]t is neither necessary nor appropriate to delay resolution of [appellant's] consular notification claim pending his anticipated pursuit of habeas relief." (RB 96.) As appellant has shown above, the record in this case establishes that appellant was prejudiced by the government's violations of his rights under the Vienna Convention, especially because the violation implicated appellant's state and federal constitutional rights. Nevertheless, should this Court conclude that prejudice has not been established, then appellant urges this Court to delay any ruling on the Vienna Convention until appellant has had an opportunity to develop the factual record.

Respondent's attempt to treat appellate review as a surrogate for habeas corpus procedures contravenes this Court's longstanding recognition of the crucial distinction between the two proceedings. (Compare, e.g., *In re Ketchel* (1968) 68 Cal.2d 397 (an appellate court must restrict its review to that which appears on the trial record") with *People v. Diaz* (1992) 3 Cal.4th 495, 557-558 and *People v. Seaton* (2001) 26 Cal.4th 598, 643 [both finding that when the appellate record "sheds no light" on the challenged acts or omissions, a reviewing court "should not speculate;"

such a claim "should generally be made in a petition for writ of habeas corpus, rather than on appeal"]; See also *People v. Mendoza, supra,* 42 Cal.4th at p. 711 [citing *Seaton* and applying its rationale to a Vienna Convention claim, noting that "[w]hether defendant can establish prejudice based on facts outside of the record is a matter for a habeas corpus petition" and agreeing that the claim "is appropriately raised in such a petition"].)

I. Conclusion

The trial court correctly ruled that the government violated appellant's rights to consular notification and assistance under the Vienna Convention and section 834C, subdivision (a)(1). The government's violation deprived appellant the benefit of services he would otherwise have received if the Mexican Consulate had been properly notified and he did not receive comparable help from other sources.

The Mexican Consulate would have advised appellant not to waive his Miranda rights. The Consulate's intervention at this critical stage would have altered how appellant conducted the guilt phase of his trial.

Appellant also was prejudiced by not benefitting from the bilingual experts the Mexican Consulate would have provided him at the penalty phase of his trial. Evidence offered by appellant at his motion for a new trial shows that the defense did not present an accurate account of appellant's psycho-social development or explain how cultural factors

hindered his assimilation into mainstream American society. Moreover, the defense relied on a psychological test that was biased against people from appellant's country of origin.

This court should accordingly reverse appellant's conviction and grant him a new trial. At the very least, this Court should modify appellant's death sentence to life without parole.

If this Court concludes that the appellate record alone does not establish prejudice, then this Court should defer its ruling on appellant's Vienna Convention claim until appellant has been able to develop an adequate factual basis for his claim in a petition for writ of habeas corpus.

XI.

INSTRUCTING THE JURY PURSUANT TO CALJIC NO. 8.85 VIOLATED APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A RELIABLE SENTENCING DETERMINATION

Appellant argued in its opening brief that CALJIC No. 8.85 violated appellant's rights under the Eighth and Fourteenth Amendments because the instruction does not inform the jury which of the sentencing factors are aggravating, which are mitigating, and which could be considered as either aggravating or mitigating. (AOB 205-208.) Appellant recognizes this Court has previously rejected similar arguments, but asks the court to reconsider appellant's argument in the context of the jury's instruction at his trial. Since respondent relies on this Court's prior decisions without introducing any new arguments (RB 102-103), the issues have been fully briefed and no reply is necessary. For the reasons stated in Appellant's Opening Brief, this Court should reconsider its previous opinions and hold that the deficiencies of CALJIC No. 8.85 deprived appellant of his right to a reliable sentencing determination.

ARGUMENTS RELATING TO THE UNCONSTITUTIONALITY OF THE CALIFORNIA DEATH PENALTY STATUTE

XII.

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

Appellant argued in Appellant's Opening Brief that many features of California's capital sentencing scheme violated the United States Constitution, both on its face and as applied in this case. (AOB 209-232.) Appellant acknowledges that this Court has previously rejected these arguments, but urges the Court to reconsider them. Respondent relies on the Court's previous precedents without including any substantive new arguments. (RB 104-112.) Accordingly, the issues have been fully briefed and no further briefing necessary unless this Court requests further briefing to reconsider these claims. (See *People v. Schmeck* (2005) 37 Cal.4th 240, pp. 303-304 [standard claims challenging death penalty considered fairly presented to the Court], abrogated in part on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610.)

XIII.

THE CUMULATIVE EFFECT OF THE ERRORS RESULTED IN A DENIAL OF DUE PROCESS AND THUS REQUIRES REVERSAL

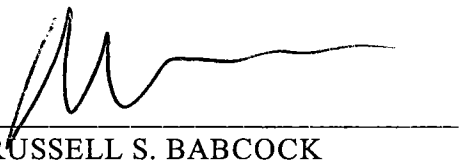
Appellant argued in Appellant's Opening Brief that even if none of the errors in appellant's case is prejudicial in isolation, the cumulative effect of these errors, in any combination, undermines the confidence in the integrity of the guilt and penalty proceedings and requires a reversal of the judgment of conviction and sentence of death. (AOB 233-236.) Respondent denies there were any errors at appellant's trial and maintains that appellant received a "fair and untainted trial." (RB 112-113.) Since appellant adequately addressed respondent's contentions in Appellant's Opening Brief, the issues have been fully briefed and no reply is necessary.

CONCLUSION

This Court must reverse the guilt phase of appellant's conviction and thus set aside the death sentence. Alternatively, if this Court does not find that the numerous constitutional and statutory errors that occurred during the guilt phase warrant reversal, the penalty phase of appellant's case must still be reversed.

Respectfully submitted,

Dated: March 7, 2013

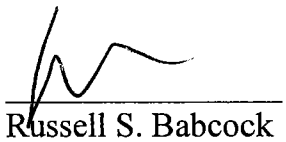


RUSSELL S. BABCOCK
Attorney for Appellant Eduardo D. Vargas

CERTIFICATE OF WORD COUNT

I certify that the APPELLANT'S REPLY BRIEF does not exceed 47,600 words pursuant to California Rules of Court 8.630, subdivision (b)(1)(C) and that the actual word count is approximately 24,162 words.

Dated: March 7, 2013



Russell S. Babcock

CERTIFICATE OF MAILING

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California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Ms. Kristen K. Chenelia
Office of the Attorney General
P.O. Box 85266
San Diego, CA 92186-5266

Honorable Francico B. Brisnero
700 Civic Center West
P.O. Box 1994
Santa Ana, CA 92702

Mr. Eduardo Vargas
San Quentin State Prison
San Quentin, CA 94974
P.O. Box T33620

Mr. Robison Harley
825 N. Ross
Santa Ana, CA 92701

Office of the District Attorney
700 Civic Center West
Santa Ana, CA 92701

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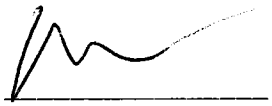

Russell S. Babcock