SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **OSWALDO AMEZCUA** AND JOSEPH CONRAD FLORES, Defendants and Appellants.	SUPREME CT. NO. S133660 LASC KA050813

AUTOMATIC APPEAL FROM A JUDGMENT OF DEATH
FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
THE HONORABLE ROBERT J. PERRY, JUDGE PRESIDING

SUPREME COURT
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Deputy

APPELLANT'S REPLY BRIEF

on behalf of

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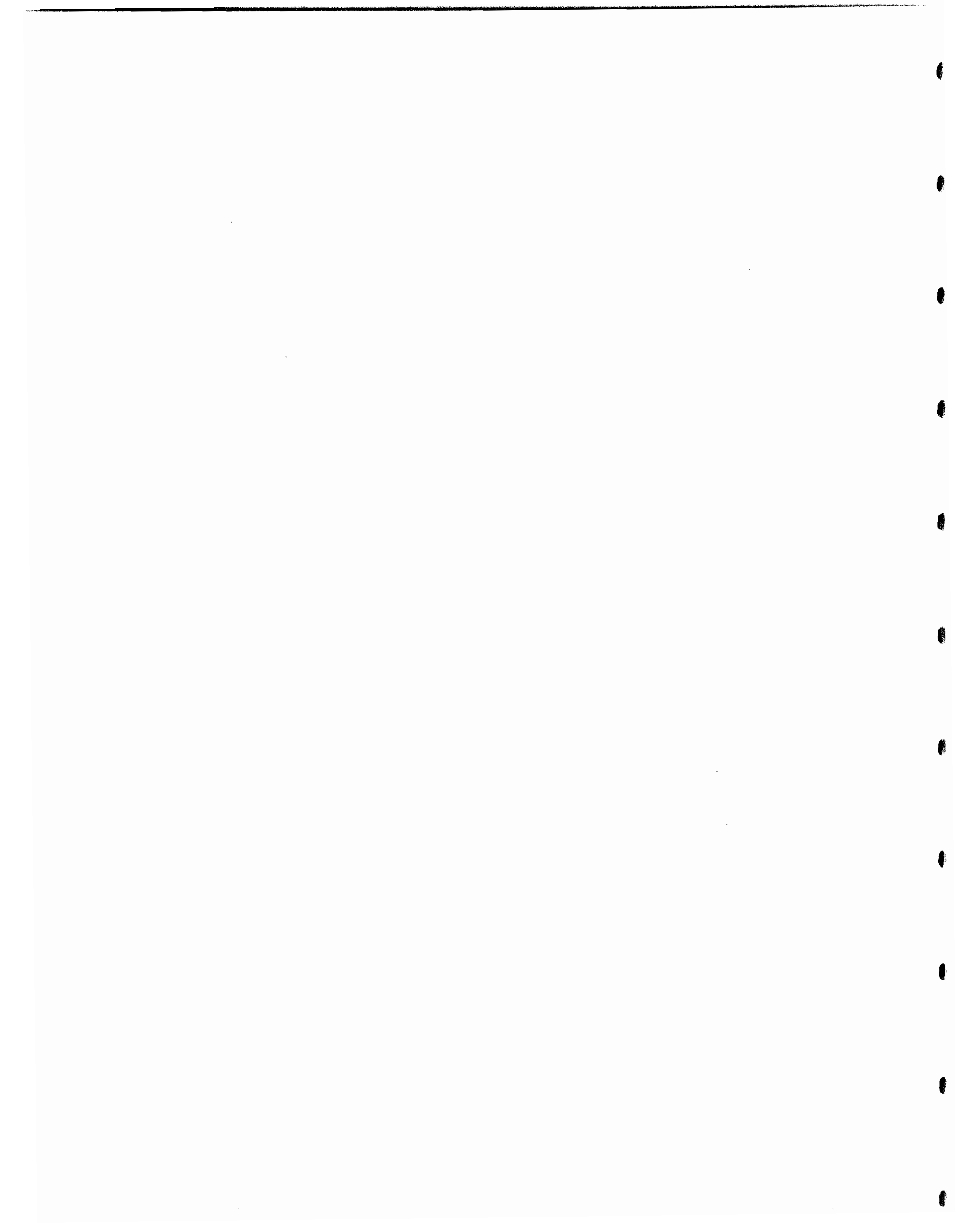
DEATH PENALTY



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SUPREME CT. NO. S133660

LASC KA050813

APPELLANT'S REPLY BRIEF

on behalf of

OSWALDO AMEZCUA

INTRODUCTION

The jury convicted appellant of four counts of first degree murder (counts 4, 11, 42, 45) with related findings that the murder was committed for the benefit of a criminal street gang (counts 4, 11, 42, 45) and that appellant intentionally discharged a semiautomatic firearm in the commission of specified offenses causing great bodily injury or death (counts 4, 11). As to counts 42 and 45, the jury found the shooting from a

motor vehicle special circumstance allegation to be true. The jury also found the multiple murder special circumstance allegation to be true.

The jury also convicted appellant of 11 counts of attempted willful, deliberate, premeditated murder (counts 5-7, 18-24, 46) with related findings in some counts that the victim was a peace officer (counts 18-24); in some counts that the crimes were committed for the benefit of a criminal street gang (counts 5-7, 46); and in certain counts that the crimes involved the intentional discharge of a firearm (counts 5-7, 18-24).

The jury also convicted appellant of five counts of false imprisonment (counts 28-31, 33); of three counts of being a felon in possession of a firearm (counts 9, 13, 34); of arson of property (count 17); of two counts of assault with a semiautomatic firearm (counts 26, 27); and of custodial possession of a shank (count 37).

The jury convicted appellant of shooting at an inhabited dwelling (count 8) and of robbery in the second degree (count 12) with the further findings that both of these crimes were committed for the benefit of a criminal street gang and involved the personal intentional discharge of a firearm. The jury further found that appellant had been previously convicted of robbery in the second degree on June 2, 1993, in Los Angeles Superior Court Case number KA017616.

In the opening brief and this reply brief, appellant explains that the trial court violated his rights to a fair trial and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution when, during the selection of the jury, the trial court erred by restricting voir dire on the question of whether prospective jurors would always vote for death if appellant were to be convicted of multiple murders

and by excusing a prospective juror who stated repeatedly that she was willing to carry out her duties as a juror in accordance with the court's instructions and her oath despite conscientious reservations about imposing the death penalty.

Appellant further asserts that the trial court committed federal constitutional error when it erroneously instructed the jury that a person who aids and abets is "equally guilty" of the crime committed by a direct perpetrator. In a prosecution for murder, an aider and abettor's culpability is based on the combined acts of the principals, but the aider and abettor's own mens rea and therefore his level of guilt "floats free."

In addition, appellant was denied his right of confrontation under the Sixth Amendment when the results of one victim's autopsy were entered into evidence through the in-court testimony of a forensic pathologist who did not perform the autopsy. The trial court also erred in admitting the prosecutor's jailhouse interview of appellants. Evidence Code section 1153, Penal Code section 1192.4, and public policy render statements regarding criminal conduct made in the course of plea negotiations inadmissible.

Further, appellant's rights to a fair trial, to present a defense, and to the presumption of innocence were violated by heightened courtroom security. Here, the trial court did not base its security order exclusively on case-specific reasons as is required and did not state on the record why the need for the heightened security measures outweighed potential prejudice to the defendants. Also, the prosecutor committed misconduct and violated appellant's right to due process of law when he invited the jurors during closing argument to depart from their duty to view

the evidence objectively and instead to view the case through the eyes of the victims.

Appellant asserts that his right to a reliable determination of the judgment of death was violated by the failure to present a penalty phase defense, appellant's express requests and the trial court's consent notwithstanding. In addition, the trial court erred in instructing the jury that death is a greater punishment than life imprisonment without possibility of parole and in so doing violated the Eighth Amendment's guarantee of a capital jury suitably instructed to avoid an arbitrary and capricious death verdict.

Appellant further asserts that California's Death Penalty statute, as interpreted by the courts and applied at appellant's trial, violates the United States Constitution.

In this brief, appellant does not reply to arguments by respondent that are adequately addressed in his opening brief. The failure to address 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, cert. den. (1993) 510 U.S. 963), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully briefed.

The arguments in this reply are numbered to correspond to the argument numbers in appellant's opening brief (AOB).

Statutory references are to the Penal Code unless otherwise noted.

ARGUMENT

Jury Selection Issues

I.

THE TRIAL COURT ERRED IN REJECTING THE DEFENSE REQUEST THAT THE QUESTIONNAIRE ASK PROSPECTIVE JURORS WHETHER THEY WOULD ALWAYS VOTE FOR DEATH IF APPELLANT WAS CONVICTED OF MULTIPLE MURDERS. THE RULING DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND IMPARTIAL JURY AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Summary of Contentions

The trial court committed reversible error during jury selection when it modified a defense-requested question and changed the call of the question. Defendants were charged with five different murders and defense counsel asked that the jury questionnaire include this question, to be answered Yes or No: "If you find the defendant guilty of five different murders with special circumstances would you always vote for the death penalty?" The court found the defense question would cause prospective jurors to prejudge the evidence and changed the question to ask, "If you found a defendant guilty of five murders, would you always vote for death and refuse to consider mitigating circumstances (his background, etc.)?"

Appellant argued in the opening brief that the court's modified question, stated in the conjunctive, improperly suggested that only evidence of mitigating circumstances would prevent a death verdict. In

addition, the question was compound. Jurors who would consider mitigating evidence, but nevertheless always vote for death, could answer No. (AOB 70-73.)

Respondent argues that (1) appellant failed to object below and has thus forfeited his claim (RB 32-33); and (2) the trial court may have modified the defense question, but did not deny defense counsel the opportunity to voir dire potential jurors (RB 34-35).

Appellant addresses each of respondent's contentions in the sections that follow.

B. Appellant's Claim Has Not Been Forfeited

Respondent relies on cases that are inapposite to first argue that appellant has waived his claim of error by inaction below. In the opening brief, appellant noted that only counsel for Flores agreed to the modified question. The record is silent as to defense counsel's position. (AOB 66.) Respondent incorrectly characterizes counsel's silence as consent amounting to waiver of appellate review of the issue, citing *People v. Clark* (1992) 3 Cal.4th 41, 125-126; *People v. Thompson* (2010) 49 Cal.4th 79, 97; *People v. Rogers* (2009) 46 Cal.4th 1136, 1149; *People v. Robinson* (2005) 37 Cal.4th 592, 617. (RB 32-33.)

Here, the defense requested that the prospective juror be asked a plainly worded question, "If you find the defendant guilty of five different murders with special circumstances would you always vote for the death penalty?" The intent behind the question is manifest, viz., the identification of those potential jurors who would always vote for death given a specific circumstance present in the case. Under *Wainwright v.*

Witt (1985) 469 U.S. 412, 424, a "prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances," is subject to a challenge for cause. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005; *People v. Ledesma* (2006) 39 Cal.4th 641, 671.)

The defense-proffered question was unambiguous, directed, and functional. Respondent does not argue otherwise. Instead, respondent's arguments raise only procedural claims.

It has long been the rule that a failure to object to a prospective juror during the jury selection procedure does not waive the right to raise the issue on appeal. (See, e.g., *People v. Cox* (1991) 53 Cal.3d 618, 648 fn.4 [no waiver of appellate review of for-cause excusal of juror where defense counsel expressly affirmed no objection or implicitly acceded to court's ruling]; *People v. Memro* (1995) 11 Cal.4th 786, 818 (failure to object to for-cause excusal of jurors does not waive right to appeal but does suggest counsel's concurrence in court's action); *People v. Cleveland* (2004) 32 Cal.4th 704, 735 (accord).)

In *People v. Stewart* (2004) 33 Cal.4th 425, the defendant argued on appeal that the trial court had erred in excusing jurors based on their responses to a questionnaire without conducting follow-up questioning. The respondent Attorney General's Office argued, as respondent does here, that the defendant had forfeited his right of review of the issue by failing to object below. This Court noted that the record disclosed no indication that defendant, explicitly or implicitly, conceded the propriety of that course of action, but that defense counsel had stated his

objections. This Court concluded that the claim was not waived because the record disclosed no indication that the defendant had conceded, affirmatively or otherwise, to the court's procedure for determining whether to excuse jurors challenged for cause. (*Id.*, at p. 452.)

In contrast, in *People v. Thompson*, *supra*, upon which respondent relies (RB 32), this Court reasoned that the defendant had forfeited his right to review because his trial counsel explicitly endorsed the procedures that were the subject of the defendant's appeal. *Thompson* pointed out that the defense counsel had not only initially drafted the questions, but had expressly agreed to the various revisions the trial court and prosecutor had suggested. (*People v. Thompson*, *supra*, 49 Cal. 4th at p. 97.) In appellant's case, as noted above, the record disclosed no concession by trial counsel that the question had been appropriately modified. Respondent's reliance upon *Thompson* is misplaced.

Respondent also relies upon *People v. Rogers*, *supra*. (RB 32.) In *Rogers*, the defendant complained on appeal that the trial court's voir dire, including its questionnaire, was constitutionally inadequate to determine whether jurors held disqualifying views regarding the death penalty. The defendant pointed, inter alia, to the jury questionnaire. This Court found that the defendant had waived his right of review regarding the questionnaire. "Defendant neither objected to the questionnaire used, nor proposed any modifications or additional questionnaire inquiries. He therefore has forfeited any claim that the questionnaire and its contents were inadequate to root out any pro-death-penalty bias on the part of the prospective jurors." (*People v. Rogers*, *supra*, 46 Cal. 4th at p. 1149.) In contrast, appellant proposed a question consistent with *Wainwright v. Witt*

that was intended to identify any prospective juror who would always vote for the death penalty if appellant was convicted of five murders. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) As was true in *Stewart*, *supra*, the silent record discloses no concession or affirmation on the part of trial counsel to the changes to the action taken by the trial court. *Rogers* is inapposite and respondent's reliance on it is misplaced.

In *People v. Robinson*, *supra*, upon which respondent also relies (RB 33), the defendant complained on appeal that voir dire examination had been inadequate in his case for a number of reasons, including the length and complexity of the jury questionnaire and the short time allowed jurors for completion of the questionnaire. This Court concluded that the defendant had forfeited any challenge to the length and content of the questionnaire because he had failed to object or suggest modifications to the questionnaire at the time. (*People v. Robinson*, *supra*, 37 Cal.4th at p. 617.) As was the case with *Rogers* and *Thompson*, respondent's reliance on *Robinson* is misplaced because, here, the defense did suggest a modification to the court's questionnaire. Appellant proffered a constitutionally appropriate question intended to identify the juror who would always vote for death if appellant were convicted of five murders and the record discloses neither concession to nor affirmation of the trial court's changes to the question.

Appellant did not forfeit his right to raise this issue.

C. Respondent's Remaining Contentions Lack Merit

Respondent contends that the trial court's modification of the requested instruction did not render voir dire improper (RB 33-37) and that

appellant errs in relying on *Morgan v. Illinois* (1992) 504 U.S. 719 and *People v. Cash* (2002) 28 Cal.4th 703. (See AOB 67-70.)

Appellant relied on *Morgan* and *Cash* in support of the principle that the parties are entitled to identify potential jurors ineligible under *Wainwright* who would automatically vote for either life or death based upon a fact or circumstance present in the case and for the further proposition that the time for making the necessary inquiries is during voir dire. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; AOB 69-70.) (Appellant also relied on *Morgan* and *Cash* in asserting that reversal of the penalty judgment is the appropriate remedy here. (AOB 70-73.) Respondent's brief is silent on this latter issue.)

Respondent contends that appellant's reliance on *Cash* is misplaced. (RB 35.) Respondent asserts that *Cash* is distinguishable for a reason tangentially related to appellant's use of *Cash*. Respondent argues that the trial court in *Cash* did not allow the defense to identify those jurors who, upon convicting the defendant and then learning he had killed before, would always vote for death because the court refused such inquiry at all stages of jury selection whereas the trial court here did not so limit voir dire. (RB 35-36.)

Respondent also argues that appellant's use of *Morgan v. Illinois*, *supra*, is misplaced because the trial court in *Morgan*, unlike the trial court here, chose to conduct voir dire without defense counsel's participation and because the court's inquiry there did not sufficiently inquire into the bias of potential jurors. (RB 36-37.)

As the foregoing shows, appellant made appropriate use of *Morgan* and *Cash* in his analysis and respondent's criticism of that reliance lacks merit.

The gist of respondent's argument appears to be that if the trial court introduced error into the jury selection process when it changed the defense-proffered question and thereby limited inquiry into the potential juror's bias, the error was corrected by the trial court allowing trial counsel to voir dire the jury. (RB 33-37.) Such an argument, however, overlooks the fundamental functional differences between jury questionnaires and oral voir dire proceedings. Typically, as occurred here, each potential juror is required to complete a questionnaire, which court and counsel preview before the oral voir dire proceedings take place. All potential jurors answer the same questions in the common questionnaire. In contrast, oral voir dire proceedings are most often characterized by random questions made to random jurors and when oral and written voir dire are both used, oral voir dire often explores the potential juror's questionnaire responses. To that extent, a questionnaire and the responses to the questionnaire have a specific role not replicated in oral voir dire proceedings.

For these reasons, respondent's thesis that any error introduced by the change in the defense-requested question was necessarily corrected by the opportunity to conduct oral voir dire proceedings is not supportable.

Appellant therefore respectfully submits that for the reasons set forth in the opening brief and in this argument, reversal of the judgment of death is warranted.

II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY EXCUSING PROSPECTIVE JUROR NO. 74 WHO, DESPITE CONSCIENTIOUS RESERVATIONS ABOUT IMPOSING THE DEATH PENALTY, STATED REPEATEDLY THAT SHE WAS WILLING TO CARRY OUT HER DUTIES AS A JUROR IN ACCORDANCE WITH THE COURT'S INSTRUCTIONS AND HER OATH

A. Summary of Contentions

The trial court committed reversible error and violated appellant's rights to a fair trial and impartial jury as guaranteed by the Fifth, Sixth, and Fourteenth Amendments when it excused Prospective Juror No. 74 for cause despite her willingness to fairly consider imposing the death penalty. (*Witherspoon v. Illinois* (1968) 391 U.S. 510; *Wainwright v. Witt* (1985) 469 U.S. 412.) Prospective Juror No. 74 expressed both confusion and reservations toward the death penalty, but consistently said her feelings about the death penalty would not impair her ability to be a fair and impartial juror in the case. The prospective juror said she could weigh aggravating and mitigating evidence and that she would vote for death if she found "the aggravating was enough, then you know, it would be hard, but I could make the decision." (5RT 1384:28-1385:1.)

Appellant contended in the opening brief that the trial court erred in excusing this prospective juror because the United States Supreme Court and this Court have made it clear that a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding a person who is willing to follow the court's instructions to weigh the aggravating and mitigating circumstances and determine whether death is the appropriate penalty under the law. (AOB 77-88.)

Appellant further contended that the appropriate remedy for error of this nature is reversal of appellant's death sentence. (AOB 88-90.)

Respondent claims that Prospective Juror No. 74 gave inconsistent and conflicting responses regarding her ability to impose the death penalty and asserts that substantial evidence therefore supports the trial court's findings. Respondent further argues that any error was harmless. (RB 37-45.)

Appellant addresses each of respondent's contentions in the sections that follow.

B. The Trial Court's Excusal of Prospective Juror No. 74 Is Not Supported by Substantial Evidence

A prospective juror in a capital case may be excluded for cause if the juror's views on capital punishment would prevent or substantially impair the juror's performance of his or her duties. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; *People v. Jenkins* (2000) 22 Cal.4th 900, 987; *People v. Blair* (2005) 36 Cal.4th 686, 741.) This Court has stated that when the prospective juror's answers are conflicting or equivocal, the trial court's findings regarding the prospective juror's state of mind are binding on the appellate court if the findings are supported by substantial evidence. (*People v. Duenas* (2012) 55 Cal.4th 1, 10; *People v. Wilson* (2008) 44 Cal.4th 758, 779.)

Respondent points to voir dire responses given by Prospective Juror No. 74 and characterizes them as conflicting. Respondent asserts that substantial evidence therefore supports the trial court's conclusion that this juror's personal feelings about the death penalty would have prevented her from carrying out her duties in accordance with the court's instructions and

the juror's oath, the standard articulated in *Wainwright v. Witt*, *supra*. (RB 37-38, 41-43.)

An examination of the record, however, reveals otherwise, i.e., that the trial court's determination that Prospective Juror No. 74 was not a proper death-qualified juror is *not* supported by substantial evidence.

Respondent and appellant rely upon the same factual representations regarding the prospective juror's questionnaire and oral voir dire responses. (See, e.g., AOB 77-81 and RB 37-39, 41-43.)

The record in fact shows that Prospective Juror No. 74 may have had ideas about the death penalty that were indefinite or complicated or made the death penalty difficult to impose, but this Court and the United States Supreme Court have recognized that such beliefs alone will not render a juror substantially impaired under *Witt*. (See, e.g., *Uttecht v. Brown* (2007) 551 U.S. 1, 9; *People v. Stewart* (2004) 33 Cal.4th 425, 447; *People v. Pearson* (2012) 53 Cal.4th 306, 327; AOB 81-88.)

The most direct exchange between the trial court and Prospective Juror No. 74 occurred when the trial court asked the juror if she was someone who kind of believed in the death penalty but could never impose death herself or whether she was someone who would be able to weigh all of the evidence and make an appropriate decision. During the jury selection process, the court asked each prospective juror to identify him- or herself with a series of four categories described by the court (see AOB 75-76). The court labeled the questions above that it asked of this prospective juror as describing categories 3 and 4, respectively.

During the colloquy between the court and Prospective Juror No. 74, the prospective juror initially described herself as a category 3

person, i.e., someone who kind of believed in the death penalty but could never impose death. But, then the prospective juror also said she could impose death albeit under "harsh circumstances." (5RT 1356:17-18.) After a further exchange, the court and the prospective juror agreed that the prospective juror was a category 4 person, i.e., someone who would be able to weigh all of the evidence and make an appropriate decision. (5RT 1357:3-6.) In short, Prospective Juror No. 74 and the trial court were in agreement that the prospective juror was a properly qualified juror under the *Witt* standard.

However, a little later in the proceeding when the court was formulating the list of prospective jurors to be excused for cause, the trial court added Prospective Juror No. 74 to the list, finding that the prosecutor had "pushed her over or got her to commit to being a [category] three." (5RT 1396: 17-20; AOB 80-81.)

The trial court was referring to an exchange between the prosecutor and Prospective Juror No. 74 when the prosecutor asked if the prospective juror had thought about having to tell the defendant's mother that her son was going to be executed. The prosecutor said: "Is there anybody that has listened to what I've said and starting to think, whoa, wait a minute, in front of the defendants, I am going to have to come back and return a verdict of death in front of them. [¶] Maybe with their family sitting out in the audience, I have to tell a mother that her son is going to be put to death?" (5RT 1387:1-17.) Prospective Juror No. 74's response to this was, "I don't think I could do it." (5RT 1388:11-12.)

The United States Supreme Court has made it very clear that a juror whose views on the death penalty would substantially impair the

performance of his duties as a juror in accordance with his *instructions* and his *oath* may be excused for cause. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; emphasis added.) If the juror is not substantially impaired, removal for cause is impermissible. (*Uttecht v. Brown*, *supra*, 551 U.S. at p. 9.)

Here, the trial court found the prospective juror disqualified for service based on a hypothetical verdict reached not on the law and the evidence, but on an impermissible basis – the verdict's effect upon others – based on a constructed hypothetical scenario ("I have to tell a mother that her son is going to be put to death") specifically intended to elicit the very response given by the prospective juror.

Neither the juror's oath[1] nor any legal instruction requires a juror to render a verdict on anything but the evidence presented and the instructions of the court.

In all other pertinent responses during the jury selection process, Prospective Juror No. 74 expressed some reservations about imposing the death penalty, but she also explained that she would vote for death if she found "the aggravating was enough, then you know, it would be hard, but I could make the decision." (5RT 1384:28-1385:1; also, see summary of the prospective juror's voir dire responses at AOB 77-81, 86-87.)

Here, the trial court relied on Prospective Juror No. 74's emotional reaction to a flawed hypothetical and found the prospective

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1 The oath administered to trial jurors pursuant to Code of Civil Procedure 232, subdivision (b), is as follows: "Do you and each of you understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render accordingly only to the evidence presented to you and to the instructions of the court."

juror's response to be dispositive in determining whether the juror was a properly death-qualified juror.

Hence, evidence that the jury was not a death-qualified juror was not supported by substantial evidence.

C. Respondent Agrees that *Witherspoon-Witt* Error Is Reversible Per Se

The law is settled that reversal of the penalty judgment is the appropriate remedy for *Witherspoon-Witt* error. (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 521-523; *Gray v. Mississippi* (1987) 481 U.S. 648, 668; *People v. Riccardi* (2012) 54 Cal.4th 758, 783; AOB 89-90.) Stare decisis thus compels its application here.

Respondent does not argue otherwise, but nonetheless urges this Court to apply a lesser standard and find the error in this case to be harmless. (RB 43-45.) In support of this request, respondent characterizes the erroneous for-cause exclusion of Prospective Juror No. 74 as a mere "technical error" that should be considered harmless. Respondent attributes this characterization to *Gray v. Mississippi*, *supra*, 481 U.S. at p. 666. (RB 45.) An examination of *Gray*, however, reveals that the "technical error" language and harmless error standard of review argument were the linchpins of an argument made by the State of Mississippi and rejected by the *Gray* Court. Mississippi argued that the erroneous exclusion of a prospective juror should be viewed as a "technical error that should be considered harmless" because it had no prejudicial effect. (*Ibid.*)

Gray explained why the harmless error analysis formulated in *Chapman v. California* (1967) 386 U.S. 18[2] could not apply to the fundamental constitutional issues at stake here. "Because the *Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury [citation] and because the impartiality of the adjudicator goes to the very integrity of the legal system, the *Chapman* harmless-error analysis cannot apply. We have recognized that 'some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error.' [Citation.] The right to an impartial adjudicator, be it judge or jury, is such a right. [Citation.] As was stated in *Witherspoon*, a capital defendant's constitutional right not to be sentenced by a 'tribunal organized to return a verdict of death' surely equates with a criminal defendant's right not to have his culpability determined by a 'tribunal "organized to convict."' [Citation.] (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 668.)

Respondent thus asks this Court to visit an argument the High Court has previously considered and rejected. At its essence, respondent's argument, which is heavily dependent on the concurring opinion in *People v. Riccardi*, *supra*, appears to be this: *Witherspoon* and *Witt* limit the State's power to exclude capital case jurors, but this power is neither unilateral nor unlimited and therefore its misapplication is a technical error subject to harmless error analysis. (RB 45.)

As noted, the concurring opinion in *Riccardi* is the source of respondent's harmless error argument. The concurring opinion discussed

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2 *Chapman* articulated this standard: "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

and contrasted the reasoning and rulings in *Gray v. Mississippi*, *supra*, and in *Ross v. Oklahoma* (1988) 487 U.S. 81, and observed: "[T]he *Ross* majority declined to apply the reasoning articulated in the *Gray* court's majority opinion – that an error in ruling on a challenge for cause, which might have affected the ultimate composition of the jury as a whole, always requires reversal." (*People v. Riccardi*, *supra*, 54 Cal.4th at p. 843, conc. opn. of Cantil-Sakauye, C.J.) *Ross* instead applied the harmless error analysis in a case in which the error lay in the erroneous inclusion of a prospective juror who stated he would automatically vote for death if the defendant was found guilty. The juror was then excused as a result of a defense peremptory challenge. (*Ross v. Oklahoma*, *supra*, 487 U.S. at pp. 83-87.)

Chief Justice Cantil-Sakauye was unable to find accord between the different holdings of *Gray* and *Ross* regarding application of harmless error analysis. Her concurring opinion speculated that: "Ultimately, the difference between *Gray* and *Ross* perhaps boils down to a question of policy." (*People v. Riccardi*, *supra*, 54 Cal.4th at pp. 842-845, conc. opn. of Cantil-Sakauye, C.J.) The concurring opinion invited clarification by the High Court: "Appellate courts around the country would certainly be assisted if the United States Supreme Court were to provide further elucidation on this important subject. . . ." (*Id.*, at p. 846.)

But, as Justice Liu points out in his concurring opinion, *Ross* factually distinguished *Gray* by noting that one of the principal analytical concerns in *Gray* regarding the composition-of-the-jury-panel-as-a -whole viewpoint was the inability to know to a certainty whether the prosecution would and could have used a peremptory challenge to remove the wrongly

excused juror. In *Ross*, on the other hand, the prospective juror was in fact removed and did not sit, thus eliminating the need to speculate whether the juror would have been removed in the absence of the erroneous ruling. *Ross* thus declined to extend the rationale of *Gray* beyond circumstances involving an erroneous excusal for cause in which it was unknown whether the prosecution would have removed that prospective juror through the use of a peremptory challenge. (*People v. Riccardi*, *supra*, 54 Cal.4th at p. 847, conc. opn. of Liu, J.)

Gray was decided in 1987 and *Ross* in 1988. Justice Liu pointed out in his concurring opinion that both cases have been repeatedly applied by state and federal courts and therefore the doctrine of stare decisis offers no basis for reconsidering this issue.

> The Chief Justice contends that *Gray* and *Ross* considered together lack a certain theoretical purity. (See conc. opn. of Cantil-Sakauye, C. J., ante, at pp. 834–844.) But *Ross* itself makes explicit the ground of distinction between the two cases, and in the two and a half decades since *Gray* and *Ross* were decided, state and federal courts have dutifully applied their respective holdings without complaint and without any split of authority. There appear to be few cases where a trial court has erroneously excluded a prospective juror for cause resulting in an unknowable effect on the composition of the jury as a whole. But in the few cases where this has occurred, courts have consistently applied *Gray*. (See *People v. Stewart* (2004) 33 Cal.4th 425, 432; *People v. Heard* (2003) 31 Cal.4th 946, 951; *Szuchon v. Lehman* (3d Cir. 2001) 273 F.3d 299, 329-331; *U.S. v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1272–1273.) There are significantly more cases where a trial court has erroneously failed to exclude a prospective juror but the juror did not end up sitting on the jury. In such cases, courts have consistently applied *Ross* to find harmless error. (E.g., *People v. Farley* (2009) 46 Cal.4th 1053, 1096; *People v.*

Wallace (2008) 44 Cal.4th 1032, 1056; *People v. Gordon* (1990) 50 Cal.3d 1223, 1246-1247; *Beuke v. Houk* (6th Cir. 2008) 537 F.3d 618, 638; *Soria v. Johnson* (5th Cir. 2000) 207 F.3d 232, 242-243 & fn. 12; *U.S. v. Nururdin* (7th Cir. 1993) 8 F.3d 1187, 1191; *Pickens v. Lockhart* (8th Cir. 1993) 4 F.3d 1446, 1450-1451; *U.S. v. Farmer* (11th Cir. 1991) 923 F.2d 1557, 1566; *Pursell v. Horn* (W.D.Pa. 2002) 187 F. Supp. 2d 260, 322; *Ward v. State* (Ind. 2009) 903 N.E.2d 946, 954–955.)

Neither *Gray* nor *Ross*, singly or together, has proven unworkable. No factual premise of either decision has changed in the past 25 years. And far from having been eroded by subsequent legal developments, both cases have been repeatedly and faithfully applied by state and federal courts. There is no basis in the doctrine of stare decisis for revisiting this settled law. (*People v. Riccardi*, *supra*, 54 Cal. 4th at pp. 847-848, conc. opn., Liu, J.

Because, as Justice Liu explained, there is no basis in the doctrine of stare decisis for revisiting this settled law, respondent's request lacks merit and should not be granted.

Guilt Phase Issues

III.

THE TRIAL COURT COMMITTED FEDERAL CONSTITUTIONAL ERROR WHEN IT ERRONEOUSLY INSTRUCTED THE JURY THAT A PERSON WHO AIDS AND ABETS IS "EQUALLY GUILTY" OF THE CRIME COMMITTED BY A DIRECT PERPETRATOR. IN A PROSECUTION FOR MURDER, AN AIDER AND ABETTOR'S CULPABILITY IS BASED ON THE COMBINED ACTS OF THE PRINCIPALS, BUT THE AIDER AND ABETTOR'S OWN MENS REA AND THEREFORE HIS LEVEL OF GUILT "FLOATS FREE."

A. Summary of Contentions

The prosecutor argued that appellant was the driver of the car from which Flores shot and killed John Diaz (count 42) and Arturo Madrigal (count 45) and shot at but did not kill Fernando Gutierrez (count 46.) As to these crimes, the jury convicted appellant of two counts of first degree murder and one count of attempted willful, deliberate, and premeditated murder. The prosecutor argued that appellant, as the car's driver, aided and abetted in a drive-by shooting and was just as culpable as the shooter. The prosecutor further argued that "[p]rincipals include those who directly and actively commit the act constituting the crime, and those who aid and abet in the commission of the crime." The prosecutor said, "Each principal, regardless of the extent or manner of participation[,] is *equally guilty*." (13RT 2868; italics added.)

The trial court instructed the jury similarly, stating that those who aid and abet a crime and those who directly perpetrate the crime are principals and *equally guilty* of that crime. (CALJIC No. 3.00; 17CT 4515; 13RT 2958.)

Appellant contended in the opening brief that the trial court erred when it instructed that the actual killer and the aider and abettor are *equally guilty* of the crime. An aider and abettor of a homicide is not always as guilty as the actual killer. Rather, an aider and abettor's guilt in a homicide, not involving felony murder, is based on the combined acts of all the principals, along with the aider and abettor's own mens rea. An aider and abettor may therefore be culpable for a lesser crime than the direct perpetrator and it is error to instruct the jury to the contrary. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1120; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164-1165; *People v. Concha* (2009) 47 Cal.4th 653, 663; *People v. Nero* (2010) 181 Cal.App.4th 504, 515-518.)

Respondent initially argues that appellant forfeited this claim by inaction below. (RB 107-111.) Respondent next argues that under the factual circumstances present in this case the trial court did not commit error when it instructed in the language of CALJIC No. 3.00. (RB 111-113.) Respondent further contends that any alleged error was harmless. (RB 113-115.)

Appellant addresses each of respondent's contentions in the sections that follow.

B. Appellant's Claim Has Not Been Forfeited

In the opening brief, appellant noted that defense counsel did not object to this instruction, but also asserted that counsel's failure to object has no legal consequence because a trial court has an independent duty to correctly instruct the jury regarding applicable legal principles.

(Pen. Code, § 1259; *People v. Graham* (1969) 71 Cal.2d 303, 317-318; AOB 94-95.)

Appellant contended that the facts of the Diaz, Madrigal, Gutierrez crimes established instances in which the liability of the actual killer may have been greater than the liability of appellant. The prosecution's proof that appellant committed the requisite acts with the requisite mens rea at the time of the separate shootings was weak. Moreover, appellant's post-crime statements do not necessarily prove he possessed the joint operation of act and mental state to establish he had the same culpability as his codefendant. For that reason, appellant was entitled to have the jury directed that even if he was a principal he was not necessarily guilty of the same crime as the other principal. (See AOB 94-95.)

Misinstruction on elements of a crime is federal constitutional error. *(Neder v. United States* (1999) 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.) The effect of such a violation is determined under the harmless error test of *Chapman v. California* (1967) 386 U.S. 18, 24. Has it been demonstrated beyond a reasonable doubt that the jury verdict would have been the same in the absence of the misinstruction?

The gist of respondent's argument is that appellant forfeited his claim because he neither objected to the instruction nor requested clarifying or amplifying language below. (RB 108-111.) Respondent argues that because the questioned "equally guilty" language of CALJIC No. 3.00 is a generally correct statement of the law, appellant was obliged to request that the instruction be modified in order to preserve the issue for

appellate review. (RB 110-111.) Respondent supports this contention with citations to *People v. Mejia* (2012) 211 Cal.App.4th 586, 624; *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118-1119; *People v. Canizalez* (2011) 197 Cal.App.4th 832, 849; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163. (RB 110-111.)

As appellant explained in the opening brief, *Samaniego* and *Nero* held that to the extent the pattern aiding and abetting instructions described aiders and abettors and direct perpetrators as being "equally guilty," the instructions were misleading. (AOB 97-111.) Both *Samaniego* and *Nero* based their holdings on this Court's articulations in *People v. Concha* (2009) 47 Cal.4th 653, 663, and *People v. McCoy* (2001) 25 Cal.4th 1111, 1120, that an aider and abettor's guilt in a homicide prosecution for both the substantive offense and the degree of the crime is based on the combined acts of all of the principals, but on the aider and abettor's own particular mens rea. (AOB 93-94, 97-104.)

Mejia, upon whom respondent relies, characterized this exposition of the law on the liability of principals as an "unremarkable proposition," preparatory to ruling that the defendants had forfeited their claim of error by failing to request modification or amplification below. (*People v. Mejia*, *supra*, 211 Cal.App.4th at p. 624.) The Court in *Lopez*, *supra*, noted that the Judicial Council of California had amended CALCRIM No. 400 to remove the "equally guilty" language, but *Lopez* nevertheless characterized the instruction with the "equally guilty" language as being "generally accurate, but potentially incomplete in certain cases," and held that a request for modification was necessary in order to preserve the issue for appeal. (*People v. Lopez*, *supra*, 198 Cal.App.4th at

pp. 1118-1119.) In *Canizalez*, *supra*, the Court of Appeal, quoting from *Samaniego*, found that the former version of CALCRIM No. 400, which included the "equally guilty" language, "is generally an accurate statement of the law." (*People v. Canizalez*, *supra*, 197 Cal.App.4th at p. 849.)

In *People v. Nero*, *supra*, the Court of Appeal, in contrast, concluded: "We believe that even in unexceptional circumstances CALJIC No. 3.00 and CALCRIM No. 400 can be misleading." (*People v. Nero*, *supra*, 181 Cal.App.4th at pp. 517-518.) *Nero* noted that the jury in its case had received multiple instructions from which it should have known that the mental states of the direct perpetrator and the aider and abettor were not linked, but the jury still asked if the aider and abettor could be guilty of a greater or lesser offense than the direct perpetrator. *Nero* interpreted the jury's question to mean that the pattern instruction (CALJIC No. 3.00) with its "equally guilty" language was confusing. (*Ibid.*)

This Court made clear in *McCoy* and again, almost a decade later, in *Concha*, that an aider and abettor is liable for the combined acts of all the principals, but only for his own mens rea. *McCoy* explained that each person's level of guilt "floats free" because each person's mens rea "floats free." (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1121.)

Given that clear expression of the law of aider and abettor liability, the reasoning applied by the courts in *Samaniego*, *Mejia*, *Lopez*, and *Canizalez* is flawed. This Court has iterated and reiterated that direct perpetrators and aiders and abettors are "equally guilty" *only* in certain evidentiary circumstances. *Mejia* in fact acknowledged "that the extent of an aider and abettor's liability is dependent upon his particular mental state, which may, under the specific facts of any given case, be the same as, or

greater or lesser than, that of the direct perpetrator." (*People v. Mejia*, *supra*, 211 Cal.App.4th at p. 624.) Despite its recognition that aider and abettor liability, correctly stated, is dependent upon the aider and abettor's particular mental state, *Mejia*, and the other cases upon which respondent relies, concluded that as a general proposition the "equally guilty" language of CALJIC No. 3.00, as given to appellant's jury, was a correct statement of the law. But this cannot be. *McCoy* and *Contra* inform us that the accurate "general" legal proposition on aider and abettor liability is that the extent of an aider and abettor's liability is dependent upon his particular mental state. In contrast, the statement of law that principals are equally guilty does not describe a general proposition of law, but rather a specific statement of law that is correct or not depending on the specific facts of the case.

For that reason, the line of reasoning set forth in *Mejia* and the other cases upon which respondent relies does not withstand scrutiny. Moreover, the removal of the "equally guilty" language from CALCRIM 400 and CALJIC No. 3.00 by the Judicial Council of California and West's Committee on California Criminal Jury Instructions, respectively, strongly suggests that the reasoning supporting the excised equally guilty language as correctly stating the law on aider and abettor liability did not withstand the scrutiny of both of those bodies.

Appellant contended in the opening brief that he has not forfeited his claim of error because a trial court is obligated sua sponte to correctly instruct the jury on the applicable law. (AOB 111-112.) Appellant has explained above why *McCoy* and *Concha* establish that an

instruction that all principals are equally guilty is not correct, even generally.

Appellant further asserts that trial counsel's failure to request a modified instruction cannot result in a forfeiture of his claim of error. "The trial court's duty to fully and correctly instruct the jury on the basic principles of law relevant to the issues raised by the evidence in a criminal case is so important that it cannot be nullified by defense counsel's negligent or mistaken failure to object to an erroneous instruction or the failure to request an appropriate instruction." (*People v. Avalos* (1984) 37 Cal.3d 216, 229; *People v. Hernandez* (1988) 47 Cal.3d 315, 353.)

In addition, Penal Code section 1259 invests in this Court authority to review any instruction given, even if no objection was made below, if, as happened here, appellant's substantial rights were affected by the misinstruction. "Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also 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."

For these reasons, appellant's claim of error is not forfeited.

C. The Trial Court Erred in Instructing That Principals Are Equally Guilty Given the Facts in This Case

Respondent argues there was no instructional error given the circumstances of this case. (RB 111-113.)

Respondent first contends there was no instructional error because the trial court also provided the jury with a definition of aider and abettor liability that included the requirements of knowledge, intent, and conduct (CALJIC No. 3.01) and instructed the jury that it must separately decide each defendant's guilt (CALJIC No. 17.00). (RB 111-112.)

The problem with this analysis is perhaps best illustrated by respondent's own argument. Appellant respectfully directs this Court to the first full paragraph of page 112 of respondent's brief, which begins in this manner: "By instructing the jury with CALJIC Nos. 3.00, 3.01, and 17.00, the trial court effectively told the jury. . . ." Respondent purports in this paragraph to explain why the clear directive of CALJIC No. 3.00 that the principals are equally guilty had no effect in this case because the giving of CALJIC Nos. 3.01 and 17.00 removed any consequence the "equally guilty" language may have had. Nothing in respondent's argument explains why the jury would not follow the simpler, clearer, and more direct charge that principals are equally guilty in deciding the guilt of defendants in lieu of parsing and pulling together two disparate jury instructions in order to know that it must separately determine each defendant's mental state in order to determine each defendant's guilt.

Respondent also argues the misinstruction does not matter here because the evidence does not suggest that appellants had different mental states. (RB 112-113.) Respondent supports its argument largely

with references to statements made by Flores to the prosecutor at a time when Flores and appellant were representing themselves. (RB 112-113.) Appellant summarized this evidence in his "Introduction" to this particular argument in opening brief and so respectfully refers the Court to that section. (AOB 91-93.) Appellant also explained in the opening brief that the misinstruction affected the determination of his guilt of the charged murders (AOB 97-104) and the determination of the degree of his murder liability (AOB 104-111), and appellant therefore respectfully directs the Court to those separate discussions at the pages noted, supplemented as follows.

These statements upon which respondent relies were made by appellants a few years after the crimes were committed. While they may serve as circumstantial evidence of appellant's mental state at the time of the commission of the various crimes, appellant was entitled to have the jury consider such evidence in the context of the presence or absence of other evidence of his mental state at the times the crimes were committed in determining his culpability. Penal Code section 20 requires a joint operation of actus reus and mens rea at the time of the commission of the crime. (*People v. Concha*, *supra*, 47 Cal.4th at p. 660.) The instruction stating that principals in the commission of the crime are *equally guilty* manifestly directs the jury away from an evaluation of appellant's individual mens rea.

D. The Failure to Instruct Correctly on the Elements of Aiding and Abetting Was Not Harmless Beyond a Reasonable Doubt

Respondent's final contention is that any alleged error was harmless in the determination of appellant's guilt for the consequences of shots fired by Flores at Diaz, Madrigal, and Guiterrez. (RB 113-115.)

Respondent supports this argument with statements made by Flores to the prosecutor. (RB 114.) While Flores' statements serve as direct evidence of Flores' mental state, the statements are not illuminative of appellant's mental state, as respondent implicitly recognizes when respondent asserts: "Appellant Amezcua never stated that he did not share in appellant Flores' intent to kill, and there is no indication that appellant Amezcua harbored a different intent." (RB 114.)

In the corresponding discussion in his opening brief, appellant noted that no percipient witness identified appellant as either participating in, or even being present during the murders of Diaz and Madrigal and the attempted premeditated murder of Gutierrez. The prosecution's evidence of appellant's role as the driver in both events was derived through statements made primarily by Flores, but also by appellant, during their recorded jailhouse interviews with the prosecutor. (AOB 112-114.) As appellant stated in the preceding section, these statements by Flores present evidence of Flores' mental state, but not necessarily appellant's. To the extent these statements, made a few years after the crimes were committed, may serve as circumstantial evidence of appellant's mental state at the time of the commission of the various crimes, appellant was entitled to have the jury consider such evidence in the context of the presence or absence of

other evidence of his mental state at the times the crimes were committed in determining his culpability.

The case for first degree murder committed with express malice, premeditation, and deliberation or by means of lying-in-wait or by shooting from a motor vehicle with the intent to kill may have been strong, but it should and must be distinguished from the determination of appellant's own culpability. The case for first degree murder was strong for any person identified as the actual killer, but the evidence did not identify appellant as the actual killer. As to any aider and abettor, there is an inherent reasonable doubt as to the personal mens rea of that individual.

Without proof that appellant possessed the requisite mens rea, it is not possible to state beyond a reasonable doubt that absent the misinstruction, the jury verdict would have been the same – that appellant would have been found guilty of the first degree murders of Diaz and Madrigal and the attempted willful, deliberate, premeditated murder of Guiterrez. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

For these reasons, the error was not harmless beyond a reasonable doubt and reversal of both first degree murder convictions and the attempted premeditated murder conviction is warranted.

IV.

Appellant Was Denied His Right of Confrontation under the Sixth Amendment When the Results of Arturo Madrigal's Autopsy Were Entered into Evidence Through the In-Court Testimony of a Forensic Pathologist Who Did Not Perform the Autopsy

A. Summary of Contentions

Appellant argued in the opening brief that his Sixth Amendment right to confront witnesses against him was violated when Dr. Lisa Scheinin, who neither performed nor observed the autopsy of Arturo Madrigal, was allowed to testify to the findings and conclusions made by Dr. Juan Carrillo, the forensic pathologist who actually performed the autopsy. (AOB 115-142.)

Respondent contends that appellant has failed to show that his Sixth Amendment right of confrontation was violated by the admission of Dr. Scheinin's testimony. (RB 86-88.) Respondent initially argues that appellant waived his claim because he failed to object to Dr. Scheinin's testimony on this constitutional basis. (RB 88-91.) Respondent next claims there was no Confrontation Clause violation because Dr. Carrillo's opinion and conclusions were prepared before appellant was a suspect in Madrigal's murder and they were therefore not testimonial. (RB 91-99.) Respondent's final contention is that any error was harmless. (RB 99-101.)

B. Appellant's Claim Has Not Been Forfeited

Respondent argues that because appellant did not raise a Confrontation Clause objection to Dr. Scheinin's testimony at trial, this issue has not been preserved for appeal. (RB 88-91.)

Appellant anticipated and addressed respondent's claim of procedural default in the opening brief. (AOB 140-142.) There, appellant asserted that any procedural fault resulted because trial counsel rendered ineffective assistance in failing to object to the testimony on Sixth Amendment grounds. *Crawford* was decided in 2004; appellant's trial was held in 2005. By then, *Crawford* had been recognized as a significant development in criminal defense jurisprudence. Appellant argued there was no satisfactory explanation for counsel's failure to object on confrontation grounds. (AOB 140-142.)

Respondent argues that appellant should not be allowed to rely on a claim of ineffective assistance by counsel to salvage his claim of error because given the other evidence of guilt defense counsel could have made a tactical decision not to object to Dr. Scheinin's testimony in order to avoid delays in the trial schedule. (RB 90-91.)

But, the evidence in question – autopsy findings and conclusions – included opinions regarding (1) the gunshot wounds, including the trajectory and age of the wounds; (2) the cause of death; (3) and the assignment of death as a homicide. All of this evidence was indisputably a critical part of the prosecution's case. Trial counsel's failure to object clearly fell below a standard of reasonable competence. A standard of reasonable competence requires defense counsel to diligently

investigate the case and research the law. (*People v. Thimmes* (2006) 138 Cal.App.4th 1207, 1212-1213.)

Moreover, the prosecution relied on the autopsy results as "science," as objective "corroboration" in arguing appellant was guilty of premeditated murder. Had trial counsel objected, there is a reasonable probability the outcome of the trial regarding the murder of Arturo Madrigal would have been more favorable to appellant. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.)

C. The Admission of Testimonial Evidence Violated the Confrontation Clause

Respondent contends the autopsy report was not testimonial because it was written before appellant was a suspect. Thus, no violation of the Confrontation Clause occurred. (RB 91-99.)

Appellant summarized Dr. Scheinin's testimony at pages 116-117 of the opening brief. As respondent acknowledges, Dr. Scheinin testified not only about the condition of Madrigal's body, but also about Dr. Carrillo's opinion and conclusions regarding the cause of Madrigal's death, as Dr. Carrillo memorialized them in the autopsy report he authored. (RB 98; AOB 115-116; 7RT 1739-1745.)

Crawford v. Washington (2004) 541 U.S. 36, 68, established that the prosecution violates the Confrontation Clause when it introduces a declarant's testimonial, out-of-court statements through the in-court testimony of a different witness unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 59.)

Respondent's reliance on *People v. Dungo* (2012) 55 Cal.4th 608 is misplaced. (RB 94-98.) In *Dungo*, this Court held that statements in an autopsy report describing a nontestifying pathologist's observations of the condition of the victim's body were not testimonial. *Dungo* explained that autopsy reports typically contain two kinds of statements – "(1) statements describing the pathologist's anatomical and physiological observations about the condition of the body; and (2) statements setting forth the pathologist's conclusions as to the cause of the victim's death." (*Id.*, at p. 619.) Unlike Dr. Scheinin's testimony in the present case, the witness's testimony in issue in *Dungo* concerned only the nontestifying pathologist's observations about the condition of the victim's body. *Dungo* found such statements to be nontestimonial in nature because "[t]hese statements, which merely record objective facts, are less formal than statements setting forth a pathologist's expert conclusions." (*Ibid.*)

In *People v. Lopez* (2012) 55 Cal.4th 569, this Court concluded that a nontestifying analyst's laboratory report and a colleague's testimony relating some of the report's contents did not violate the defendant's right to confrontation. In reaching this decision, *Lopez* considered whether the critical portions of the laboratory report were made with the requisite degree of formality or solemnity to render them testimonial in the context of the following decisions of the United States Supreme Court: *Crawford v. Washington* (2004) 541 U.S. 36; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305; *Bullcoming v. New Mexico* (2011) 564 U.S. ___ (131 S.Ct. 2705; 180 L.Ed.2d 610); *Williams v. Illinois* (2012) 567 U.S. ___ (132 S.Ct. 2221; 183 L.Ed.2d 89).

Lopez concluded that to be testimonial the out-of-court statement must have been made with some degree of formality or solemnity, but also noted that the degree of formality remains a matter of dispute within the High Court. (*People v. Lopez*, *supra*, 55 Cal.4th at pp. 581-582.) *Lopez* also noted that "all nine high court justices agree that an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution, but they do not agree on what the statement's primary purpose must be." (*Ibid.*)

Dungo observed that an autopsy serves several purposes, only one of which is a criminal investigation, and concluded that "[t]he autopsy report itself was an official explanation of an unusual death, and such official records are ordinarily not testimonial." (*People v. Dungo*, *supra*, 55 Cal.4th at pp. 619-620; *Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. at p. 324 [business and public records generally admissible absent confrontation because they were created for the administration of an entity's affairs and not for proving some fact at trial].) In his concurring opinion, Justice Chin explained further that the autopsy report did not have the primary purpose of accusing the defendant or any other targeted individual of having committed a crime. Instead, its primary purpose was to describe the condition of the victim's body. (*People v. Dungo*, *supra*, 55 Cal.4th at p. 630 (conc. opn. of Chin, J.).)

Justice Chin also noted the presence of some circumstances indicating that the autopsy report in *Dungo* was prepared for the primary purpose of accusing the defendant of a crime. The defendant was a suspect at the time the autopsy report was prepared; an investigator was present at the autopsy; and the pathologist was aware that the defendant had

confessed before the autopsy report was written. These circumstances differed from *Williams*, in which the defendant was not a suspect at the time the autopsy report was written. However, Justice Chin further explained that the *Williams* plurality opinion mostly identified a defendant's status as a suspect as a circumstance that the Court must consider. It was not required that the defendant be a suspect in order for the autopsy report to be testimonial. (*People v. Dungo*, *supra*, 55 Cal.4th at p. 632; *Williams*, *supra*, 567 U.S. at p. ___ (132 S. Ct. at p. 2243.)

The key circumstance in Justice Chin's view was that the opinion concerning the manner of death came from the testifying expert who was subject to full cross-examination, and not from the nontestifying expert's report. (*People v. Dungo*, *supra*, 55 Cal.4th at p. 632, conc. opn. of Chin, J.; *People v. Barba* (2013) 215 Cal.App.4th 712, 738.)

In contrast, in the present case, as respondent acknowledges, Dr. Scheinin testified regarding Dr. Carrillo's opinion and conclusions as to the cause of Madrigal's death. The opinion and conclusion were contained in the autopsy report. (RB 98; see, e.g., 7RT 1739, 1744 (Dr. Scheinin testified that Dr. Carrillo's autopsy report included the opinion that Madrigal's death was a homicide resulting from a gunshot wound to the head.) Respondent relies on *Williams v. Illinois*, *supra*, and argues there was no Confrontation Clause violation here because appellant was not a suspect when the autopsy report was prepared and so therefore Madrigal's autopsy report was not prepared for the primary purpose of accusing a targeted individual. (RB 98-99; *Williams v. Illinois*, *supra*, 132 S.Ct. at p. 2243.)

But, as appellant noted above, Justice Chin explained in his concurring opinion in *Dungo* (in which Cantil-Sakauye, C.J., Baxter, J., and Werdegar, J., concurred), that although the plurality in *Williams* noted the defendant in that case was not a suspect at the time of the autopsy, the opinion did not hold that an autopsy report will only be testimonial when a suspect has already been identified. Rather, it was a "surrounding circumstance" which the court must take into consideration. (*People v. Dungo*, *supra*, 55 Cal.4th at p. 632; *Williams v. Illinois*, *supra*, 132 S.Ct. at p. 2243; see also *People v. Barba*, *supra*, 215 Cal.App.4th at pp. 733-734 (how to interpret *William*.)

Here, the trial court erred in not allowing appellant to confront Dr. Carrillo, who was not shown to be unavailable and who had not been previously subject to cross-examination by appellant. (See AOB 119-120 for discussion on the record's failure to establish that Dr. Carrillo was either unavailable or that appellant had a prior opportunity to cross-examine him.) The Confrontation Clause requires that appellant be afforded the opportunity to confront Dr. Carrillo regarding his opinion and conclusions regarding the cause of Madrigal's death. The prosecution's presentation of this evidence through the testimony of Dr. Scheinin violated appellant's Sixth Amendment right to confront witnesses against him.

D. The Erroneous Admission of Dr. Carrillo's Testimonial Statements through the In-Court Testimony of Dr. Scheinin Was Not Harmless beyond a Reasonable Doubt

Respondent argues that any Confrontation Clause violation arising from the erroneous admission of Dr. Carrillo's testimonial

statements through the testimony of Dr. Scheinin was harmless beyond a reasonable doubt. (RB 99-101.) Respondent asserts that evidence that Madrigal died from gunshot wounds to the head was overwhelming. Respondent points to Flores' statement that he "domed" Madrigal and shot him in the face and to other evidence establishing that Madrigal had been shot. (RB 100-101.)

However, as appellant observed in his discussion of prejudice in the opening brief (AOB 139-140), the jury was required to find proof of the corpus delicti of the crime independent of Flores' statement he had "domed" Madrigal. The court so instructed the jury. (*People v. Beagle* (1972) 6 Cal.3d 441, 455; CALJIC No. 2.72; 17CT 4513.) The inadmissible forensic autopsy evidence that Madrigal's death was a homicide and that he was killed by a fatal gunshot wound to the head corroborated Flores's statement, and the prosecution relied upon it.

The admission of the autopsy evidence thus cannot be said to have been harmless beyond a reasonable doubt with regard to proving that Madrigal's death was a premeditated murder. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

V.

THE TRIAL COURT ERRED IN ADMITTING THE JAILHOUSE INTERVIEW OF APPELLANTS; EVIDENCE CODE SECTION 1153, PENAL CODE SECTION 1192.4, AND PUBLIC POLICY RENDER STATEMENTS REGARDING CRIMINAL CONDUCT MADE IN THE COURSE OF PLEA NEGOTIATIONS INADMISSIBLE

A. Summary of Contentions

Over multiple defense objections, and as part of the prosecution's case-in-chief, the trial court allowed the jury to hear redacted versions of taped jailhouse interviews between trial prosecutor Darren Levine and appellant and coappellant Flores.

In the opening brief, appellant contended that because appellant's statements were made during plea negotiations, their admission was prohibited by statute and public policy. (Evid. Code, § 1153; Pen. Code, § 1192.4; *Bryan v. Superior Court* (1972) 7 Cal.3d 575, 588 [policy favoring settlement of criminal cases underlies the exclusionary rule].). Appellant further asserted that the introduction of these statements, which comprised admissions, confessions, and specific details regarding both mens rea and actus reus elements of charged crimes, created prejudicial error. (AOB 143-158.)

Respondent initially argues that the issue is procedurally defaulted because appellant failed to object to the admission of this evidence on the specific ground that these statements were made during plea negotiations. (RB 75-77.) Respondent further asserts that the statements made were admissible because they were not made during bona fide plea negotiations. (RB 77-86.)

B. Appellant's Claim Has Not Been Forfeited

Respondent argues appellant has waived this issue because defense counsel objected to the admission of the jailhouse statements not on the ground asserted here, but on grounds that the admission was made in violation of the advisement requirement in *Miranda v. Arizona* (1966) 384 U.S. 436 and was made involuntarily due to promises of leniency regarding restitution. (RB 75-76.)

The issue has not been waived for the reasons set forth in the authorities that follow. In *People v. Wilson* (2008) 43 Cal.4th 1, this Court, quoting from *People v. Boyer* (2006) 38 Cal.4th 412, 441 fn. 17, articulated the standard to be applied in determining whether a defendant has properly preserved an issue for purposes of appeal:

> As to this and nearly every claim on appeal, defendant asserts the alleged error violated his constitutional rights. At trial, he failed to raise some or all of the constitutional arguments he now advances. "In each instance, unless otherwise indicated, it appears that either (1) the appellate claim is of a kind (e.g., failure to instruct sua sponte; erroneous instruction affecting defendant's substantial rights) that required no trial court action by the defendant to preserve it, or (2) the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional legal consequence of violating the Constitution. To that extent, defendant's new constitutional arguments are not forfeited on appeal. [Citations.] [¶] In the latter instance, of course, rejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional 'gloss' as well. No separate constitutional discussion is required in such cases, and we

therefore provide none." (*People v. Wilson*, *supra*, 43 Cal.4th at p. 13 fn. 3.)

Moreover, although a party's failure to object may preclude a party from asserting the issue, a reviewing court may nevertheless resolve the issue if that court sees a need to do so. In *People v. Williams* (1998) 17 Cal.4th 148, this Court stated:

> In *Scott* [*People v. Scott* (1994) 9 Cal.4th 331], we held only that *a party* cannot raise a "complaint[] about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons . . . for the first time on appeal." (*Id.*, at p. 356.) We did not even purport to consider whether *an appellate court* may address such an issue if it so chooses. Surely, the fact that a party may forfeit a right to present a claim of error to the appellate court if he did not do enough to "prevent[]" or "correct[]" the claimed error in the trial court (*id.*, at p. 353) does not compel the conclusion that, by operation of his default, the appellate court is deprived of authority in the premises. An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party. (*People v. Williams*, *supra*, 17 Cal.4th. at p. 161 fn. 6.)

This Court has also held that when the facts relating to the contention are undisputed and there would probably be no contrary showing at a new hearing, the appellate court may properly treat the contention solely as a question of law and pass on it accordingly. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742; *Williams v. Mariposa County Unified Sch. Dist.* (1978) 82 Cal.App.3d 843, 850.) This is particularly true when the issue is of "considerable public interest" or concerns "important issues of public policy" and has been briefed and argued before the reviewing court. (See *Wong v. Di Grazia* (1963) 60 Cal.2d 525, 532, fn. 9; *Hale v.*

Morgan (1978) 22 Cal.3d 388, 394; *Pena v. Municipal Court* (1979) 96 Cal.App.3d 77, 80-81.) In this case, the facts relating to this issue are not in dispute. This court may therefore treat the contention as a question of law and pass on it accordingly. (*People v. Brown* (1996) 42 Cal.App.4th 461, 475; *People v. Blanco* (1992)10 Cal.4th 1167, 1172.)

Furthermore, waiver is not a favored concept and should be sparingly applied, especially in a criminal case. "Because the question whether defendant has preserved his right to raise this issue on appeal is close and difficult, we assume he has preserved his right, and proceed to the merits." (*People v. Bruner* (1995) 9 Cal..4th 1178, 1183, fn. 5; see also *People v. Wattier* (1996) 51 Cal.App.4th 948, 953.) "Whether the [general] rule shall be applied is largely a question of the appellate court's discretion." (*People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172-1173.)

Here, the fact that the Deputy District Attorney advised appellant that any statements he made could be used against him did not waive appellant's rights related to settlement negotiations since any purported waiver was not knowingly made. A finding of waiver is not to be made lightly. (*Moore v. Michigan* (1957) 355 U.S. 155, 161.) The United States Supreme Court stated, in another context, "[i]t has been pointed out that courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that we do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." (*Edwards v. Arizona* (1981) 451 U.S. 477, 482, internal quotation marks omitted; *Johnson v. Zerbst* (1938) 304 U.S. 458, 464.)

"A waiver is knowing and intelligent if made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." (*United States v. Harper* (8th Cir. 2006) 466 F.3d 634, 643.) "A waiver is voluntary if it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." (*United States v. Gaddy* (8th Cir. 2008) 532 F.3d 783, 788; see also *Glasser v. United States* (1942) 315 U.S. 60, 71; *Adams v. United States ex rel. McCann* (1942) 317 U.S. 269, 277-281.)

The inquiry into the validity of waiver has two distinct elements. (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) The court must determine, first, whether it was voluntary and second, whether it was knowing and intelligent. (*Id.*, at p. 421.) This determination is to be made based on the " 'totality of the circumstances.'" (*Fare v. Michael C.* (1979) 442 U.S. 707, 725.)

In this case, while appellants wanted to achieve certain objectives from their discussions with the prosecutor, e.g., either a sentence of no more than fifty years with no life-in-prison provision and/or a limit on restitution, it is not likely that they as lay persons would know that they could negotiate for these things in confidence. Moreover, it is appropriate to hold the prosecutor to a higher standard, i.e., to expect him to provide the proper advisements regarding statements made in the context of settlement negotiations before finding the unadvised defendant has waived his right of review on the use of such evidence. This experienced prosecutor only sought appellant's waiver of *Miranda* rights and failed to provide the necessary advisements and obtain the proper waivers regarding settlement negotiations before talking with appellants.

As Mr. Justice Black wrote for the Court: "The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer-to the untrained layman may appear intricate, complex and mysterious." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 462-463.)

C. Respondent's Contentions Lack Merit

Respondent contends that the interviews with appellants were not part of negotiations designed to reach a plea bargain, and therefore are not prohibited by Evidence Code section 1153 or Penal Code section 1192.4. (RB 77-86.)

Respondent reaches this conclusion by focusing on sections of the negotiations supporting its position, ignoring the crucial sections discussed below, and by applying a narrow and limited reading of the relevant statutes.

It is appropriate and relevant to begin by recognizing that appellants were unrepresented by counsel in these discussions and that their purpose and intent in the discussions were to negotiate a resolution of some aspects of the case, if not the entire case. Moreover, as laypersons, the appellants did not use legal terminology to describe their intent and objectives in speaking with the prosecutor. When the colloquy is viewed in

that context, it is clear that appellants *were* engaged in discussions with the intention of resolving aspects of the case, if not the entire case.

So, for example, appellants repeatedly asked the prosecutor about the possibility of reaching an outcome less severe than the death penalty. Such a result would necessarily involve a negotiated plea, although the word "plea" was never mentioned.

During the February 21, 2002, meeting, for example, the prosecutor reminded appellants that they had come to him asking for "50 years . . . [¶] . . . without the 'L. [life sentence].'" Flores explained he wanted that deal because with a sentence of 50 years without the life sentence, "I can get married and get a bone yard visit. . . . [¶] But if you give me the 'L,' I have no sex. (RB 66, citing DPSuppIIICT 51:21-22, 24.)

Flores explained that a 50-year sentence for him would be the functional equivalent of a term of life without the possibility of parole because he wouldn't live that long: "If you give me 50 years, I guarantee you I won't live 50 years. If you give me 85%, which I have to get it – " (DPSuppIIICT 52:8-9.)

The foregoing demonstrates that the colloquy between the prosecutor and appellants amounted to on-going plea negotiations since a guilty plea by appellants was a prerequisite to the imposition of a maximum sentence of fifty years. Respondent seeks to characterize the statements in issue as "unsolicited admissions," rather than talking points in a negotiated plea bargain, but the very statements themselves reveal on the cold face of the record that plea negotiations were taking place. (RB 80; *People v. Posten* (1980) 108 Cal.App.3d 633, 647-648.)

As part of these negotiations, appellants also asked for a cap on restitution. (RB p. 69, citing DPSuppIIICT 74-75.) Again, during the March 28, 2002, meeting, appellants included a request for limited restitution in their discussions. (Supp. III 1CT 99.)

As the foregoing statements establish, appellants were engaged in plea negotiations with the trial prosecutor. Appellants stated their conditions expressly – a 50-year sentence, no life term, and limits on restitution. Respondent contends appellants' statements were not made as part of bona fide plea negotiations, but that assertion fails to address the statements evincing on-going plea negotiations described above.

Respondent also argues that appellants were not attempting to negotiate a plea involving a reduced restitution amount. (RB 84-86.) But appellants, who were charged with five counts of first degree murder, seven counts of attempted murder, and a variety of other offenses, were aware that their conviction of the charged crimes would result in lengthy imprisonment. Under such a circumstance, a request for leniency regarding restitution and fines speaks to a legitimate and practical concern. The reality is that prisoners subject to restitution and other fines have those funds deducted from their trust accounts. Penal Code section 2085.5 authorizes the California Department of Corrections and Rehabilitation to deduct between 20-50 percent of the funds in an inmate's trust account, whether the source of the money is a prison job or outside sources.

Appellant has argued above that the statements in issue themselves fatally undercut respondent's argument. Appellant additionally asserts that to adopt respondent's contention that these statements were not made in the course of negotiations would require too narrow a reading of

Penal Code section 1192.4 and Evidence Code section 1153. Appellant pointed out in his opening brief that a liberal reading of the statutory provisions has been applied to promote the policies underlying the rule of exclusion. (AOB 153-156; *People v. Tanner* (1975) 45 Cal.App.3d 345.) The statutory provisions in issue may refer to offers to plead guilty, but courts have held that in order to promote candor in negotiations the statute extends to "any incidental statements made in the course of plea negotiations. . . ." (*Id.*, at pp. 351-352; see also *People v. Crow* (1994) 28 Cal.App.4th 440.)

D. Respondent's Authorities Are Inapposite

The cases relied on by respondent are not relevant to the circumstances present here. For example, respondent relies upon *People v. Posten*, *supra*, to support the contention that appellants' statements were not made in the course of bona fide plea negotiations. (RB at p. 80.) In that case, California police went to Virginia to pick up the defendant and return him to California for trial. On the return trip, the defendant spent several days in close quarters with the police officers, during which he requested a copy of the complaint identifying the charges against him, and "*apparently* attempted to use the return time to work out a deal regarding a plea." (*People v. Posten*, *supra*, 108 Cal.App.3d at p. 647; emphasis added.)

Posten rejected the defendant's claim that his incriminating statements were inadmissible because the officers had not given him his *Miranda* advisements and because the officers had an "opportunity to 'soften him'" while they were on the train. (*People v. Posten*, *supra*, 108

Cal.App.3d at p. 647.) The Court of Appeal found that the defendant had not been questioned by the officers about the crimes and held that the defendant's offers to plead guilty "were not made in the course of bona fide plea negotiations but were merely unsolicited admissions by appellant without any understanding that they would be inadmissible." (*Id.*, at pp. 647-648.)

Posten does not support respondent's position here. First, it is not clear in *Posten* that the defendant was in fact offering to negotiate a settlement of his case. The court describes the defendant's conduct as :apparently" trying to work out a deal. In contrast, as appellant explained above, appellants were in fact attempting to negotiate with the trial prosecutor for a more lenient sentence and more lenient restitution terms than statutorily provided for the charges. In addition, by virtue of their law enforcement status, the police officers in *Posten* were not in a position to negotiate a plea bargain with the defendant. The prosecutor in this case, in contrast, was, and that fact supports the conclusion that the statements made by appellants were made in the course of bona fide plea negotiations and come within the protection of Penal Code section 1192.4 and Evidence Code section 1153.

Respondent's reliance on *People v. Leonard* (2007) 40 Cal.4th 1370 is also misplaced because the factual circumstances in *Leonard* differ dramatically and in significant ways from those present here. (RB 81.) In *Leonard*, the defendant raised his hand just as the court was preparing to take a recess during a hearing on a pretrial motion and, when acknowledged by the court, said aloud: "I am guilty." On appeal, the defendant argued that his statement was inadmissible as an offer to plead

guilty. In finding this contention lacked merit, this Court noted that the defendant did not say he wanted to enter a plea of guilty. Instead, he said he *was* guilty. Moreover, the defendant made this statement in the context of a pretrial hearing on a motion. Unlike appellants' discussions with the trial prosecutor here, there were no plea negotiations taking place when the *Leonard* defendant confessed. This Court stated that excluding statements like, "I am guilty," in the circumstance before it would not encourage settlement of criminal cases. (*People v. Leonard*, *supra*, 40 Cal.4th at p. 1404.) In contrast, excluding statements made by appellants here during the course of plea negotiations is in keeping with the policy of encouraging case settlement.

E. The Erroneous Admission of the Statements Was Prejudicial to Appellant

The error was prejudicial to appellant, as appellant explained in the opening brief and reiterates here. (AOB 157-158.) The prosecution's case for the Diaz and Madrigal murder convictions and the Gutierrez attempted premeditated murder conviction was the direct product of information provided to the prosecutor and his investigator during these jailhouse interviews. The investigator testified at the grand jury, convened to hear evidence related to these crimes, that he provided the information obtained during the interviews to the law enforcement agencies. These agencies, in turn, obtained the evidence presented to the grand jury. The grand jury returned an indictment based on the evidence it heard. The indictment was later folded into the amended information on which the case went to trial. The prosecutor used these statements to obtain appellants' convictions.

In addition to having a prejudicial impact on these counts of conviction, appellants' statements included incriminating evidence about firearms and their requisite mental states relating to other originally charged crimes, enhancements, and special circumstances.

It is undisputed there was some evidence against appellants, but the additional evidence contained in the redacted jailhouse interviews rendered the case against appellants overwhelming. Nor can it be said that the prejudice was limited to the Diaz, Madrigal, and Gutierrez counts because the specific details provided during these jailhouse interviews were so manifestly egregious that it would not have been possible to contain the prejudice to these few counts.

Under these circumstances, the admission of these jailhouse statements was so prejudicial as to distort the prosecution's evidence and cause a miscarriage of justice. It is therefore reasonably probable that a result more favorable to appellant would have been reached in the absence of the above error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Collins* (1975) 68 Cal.2d 319, 322.) Accordingly, reversal of the judgment is warranted.

VI.

APPELLANT'S RIGHTS TO A FAIR TRIAL, TO PRESENT A DEFENSE, AND TO THE PRESUMPTION OF INNOCENCE WERE PREJUDICED BY HEIGHTENED COURTROOM SECURITY; THE TRIAL COURT DID NOT BASE ITS SECURITY ORDER EXCLUSIVELY ON CASE-SPECIFIC REASONS AND DID NOT STATE ON THE RECORD WHY THE NEED FOR THE HEIGHTENED SECURITY MEASURES OUTWEIGHED POTENTIAL PREJUDICE TO THE DEFENDANTS

A. Summary of Contentions

At the start of jury selection, defense counsel objected to the presence of eight uniformed deputies in the courtroom. The trial court stated that where security issues were concerned he deferred to the judgment of the courtroom bailiffs regarding security concerns and declined to make any changes in the courtroom security.

In the opening brief, appellant explained that the court abused its discretion in so ruling because a trial court must exercise its own discretion when ordering heightened security procedures and may not defer decision-making authority to law enforcement officers. (*Holbrook v. Flynn* (1986) 475 U.S. 560; *People v. Stevens* (2009) 47 Cal.4th 625, 644.) The court must balance the need for heightened security against the risk that the increased security will prejudice the defendant in the eyes of the jury (*Holbrook v. Flynn*, *supra*, 475 U.S. at p. 570). Such prejudice was the precise concern voiced here by counsel for appellant. In addition, the court must base its decision on case-specific reasons and must state the reasons for its decision on the record. (*People v. Hernandez* (2011) 51 Cal.4th 733, 742, 744.) (AOB 159-177.)

Respondent asserts that the trial court found a manifest need for heightened security measures based upon appellants' conduct in venues outside the courtroom and so did not abuse its discretion in allowing eight deputies to guard the courtroom. (RB 46-62.)

B. Respondent's Contentions Lack Merit

First, respondent agrees with appellant's assertions that the law requires a trial court to exercise its own discretion when ordering heightened security procedures and that the law commands that the trial court may not defer decision-making authority to law enforcement officers. (*Holbrook v. Flynn*, *supra*, 475 U.S. at p. 570; *People v. Stevens*, *supra*, 47 Cal.4th at p. 644.) Respondent also agrees that the law requires that the trial court balance the need for heightened security against the risk that the increased security will prejudice the defendant in the eyes of the jury (*Holbrook v. Flynn*, *supra*, 475 U.S. at p. 570). Finally, respondent agrees that the court must base its decision on case-specific reasons and must state the reasons for its decision on the record. (*People v. Hernandez*, *supra*, 51 Cal.4th at pp. 742, 744.) (AOB 163, RB 50-59.)

Respondent's dispute then is not with the law upon which appellant relies, but with appellant's assertion that the trial court did not properly comply with the law's various requirements. However, respondent is able to support this argument only by expanding the relevant record beyond the confines of the hearing on heightened security concerns that was held in the trial court. Respondent looks instead to the trial "record as a whole." (RB 52.)

Respondent argues that the record as a whole reflects that the trial court rightfully found there was a need for heightened security measures based upon appellants' dangerous and violent conduct in the jail. (RB 52-56.) Respondent points to evidence of specific misconduct by appellants in the county jail, which was originally made known to the court through the testimony of Sheriff's Deputy John Kepley. (See RB 52-53.)

What respondent does *not* reveal is that Deputy Kepley testified to this misconduct in the course of a hearing held in May 2002 regarding the kind of writing materials the defendants, who were then representing themselves, were allowed to have in their cells. (7CT 1710-1712; 2RT 30-69.) Nor does respondent reveal that the incidents upon which respondent's argument relies (possession of shanks, slipping out of cuffs and chains, shanking another inmate, and belligerence and threat directed at a deputy), and to which Deputy Kepley testified in 2002, took place in the years 2000 and 2001. (See RB 53; 7CT 1710-1712; 2RT 39-69.) In addition, the record shows that in March 2003, appellant directed a hand gesture miming a handgun toward the prosecutor and, when admonished by the court, publicly apologized. (2RT 630.)

Defense counsel made his objection to heightened courtroom security at the start of jury selection when the case was called for trial on February 22, 2005. (11CT 2810; 5RT 1201-1202; defendants' joinder at p. 1202.) Thus, by the time of the hearing on heightened courtroom security in 2005, appellant's alleged nonconforming behavior was remote.

Respondent further asserts that the trial court conducted a fact-specific analysis of the need for heightened security. Here, again, the

gist of respondent's argument is that the trial court referenced the need for heightened security based on appellants' jailhouse behavior. (RB 56.)

But, as appellant has noted above, these incidents happened years before the hearing regarding courtroom security and do not amount to substantial evidence that appellants were likely to exhibit dangerous or violent misconduct during the trial. The probative weight of the evidence of years-old misconduct by appellants was minimal. In contrast, the appellants' behavior in the courtroom was conforming. As the trial court found at the time of the security hearing, "Mr. Amezcua and Mr. Flores have conducted themselves in a very appropriate manner at all times with this court. . . ." (5RT 1203.) Appellants' conforming behavior in the courtroom was strong evidence that heightened courtroom security was unnecessary.

Respondent also contends that the trial court did not defer decision-making authority regarding security measures to the bailiffs. The essence of respondent's argument is that the trial court did not rely solely on the judgment of jail or court security personnel, but instead exercised its discretion in allowing the increased security measures. (RB 56-59.) Thus, respondent argues that "[a]lthough the trial court stated that it 'normally [left] security issues up to the bailiffs, to the experts,' the court's remarks made it clear that it was exercising its own discretion when it found that heightened security measures appropriate, stating '*I* feel that *I* am going to allow the number of bailiffs to remain for today.'" (5RT 1202-1203, emphasis added.) (RB 58.)

This strained reading of the record ignores the trial court's clear and unambiguous statement that its practice was to leave security

measures to the bailiff. Nor does it address this Court's holding that when the defendant's alleged prior misconduct occurred outside the courtroom, sufficient evidence of the conduct must be presented on the record so that the trial court may make its own determination. (*People v. Mar* (2002) 28 Cal.4th 1201; AOB 172-173.)

The cold face of the record establishes that the trial court did not in fact do what the law required it to do. The court did not balance the need for heightened security against the risk that the increased security will prejudice the defendant in the eyes of the jury. (*Holbrook v. Flynn*, *supra*, 475 U.S. at p. 570.) The court did not base its decision on case-specific reasons and did not state the reasons for its decision on the record. (*People v. Hernandez*, *supra*, 51 Cal.4th at pp. 742, 744.) And, because it did not follow these procedures, the trial court failed to exercise its own discretion when ordering heightened security procedures. (*Holbrook v. Flynn*, *supra*, 475 U.S. at p. 570; *People v. Stevens*, *supra*, 47 Cal.4th at p. 644.)

C. Appellant Was Prejudiced by the Unconstitutional Security Measures Imposed at His Trial

Respondent contends that appellants were not prejudiced by the presence of eight bailiffs in the courtroom or the physical restraints binding them because there was no indication that bailiffs were stationed near appellants and there was no indication that jurors saw that appellants were physically restrained. Respondent further argues that appellants' convictions were supported by overwhelming evidence of their guilt. (RB 59-62.)

Appellant discussed the prejudice created by the heightened security measures within the courtroom in his opening brief at pages 174-177. Respondent does not take issue with the authorities upon which appellant relies and appellant therefore reiterates his argument regarding prejudice for the convenience of the Court.

This Court has determined that "[d]ecisions to employ security measures in the courtroom are reviewed on appeal for abuse of discretion." (*People v. Hernandez*, *supra*, 51 Cal.4th at p. 741; see also *People v. Stevens*, *supra*, 47 Cal.4th at p. 632; *People v. Duran* (1976) 16 Cal.3d 282, 293 fn. 12.)

Trial courts have a constitutional responsibility to balance the need for heightened security during a criminal trial against the risk that the additional precautions will prejudice the defendant in the eyes of the jury. "It is that judicial reconciliation of the competing interests of the person standing trial and of the state providing for the security of the community that . . . provides the appropriate guarantee of fundamental fairness." (*Lopez v. Thurmer* (2009) 573 F.3d 484; citing *Illinois v. Allen* (1970) 397 U.S. 337; *Estelle v. Williams* (1976) 425 U.S. 501, 506; *Holbrook v. Flynn*, *supra*, 475 U.S. 560.)

In *Illinois v. Allen* (1970) 397 U.S. 337, the Supreme Court held that the Constitution might permit, under some circumstances, a trial court to order that an obstreperous defendant be bound and gagged in the courtroom during his trial. The Court expressed reservations about this method of control; it acknowledged that "even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort." (*Id.*, at p. 344.) The

Court also recognized the possibility "that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant." (*Ibid.*) Thus, although the Court refused to rule out the possibility that binding and gagging might be the most reasonable way to deal with a disruptive defendant under certain circumstances, it made clear that such a measure would be appropriate only in the most extreme cases.

In *Estelle v. Williams*, *supra*, the Court held that requiring a defendant to wear "identifiable prison clothes" violated his due process right to a fair trial. The Court wrote: "The constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment. The defendant's clothing is so likely to be a continuing influence throughout the trial that . . . an unacceptable risk is presented of impermissible factors coming into play." (*Estelle v. Williams*, *supra*, 425 U.S. at pp. 504-505.)

There can be no gainsaying that the presence of eight uniformed and armed deputies in the courtroom served as a constant reminder in appellant's trial that the community and by implication those within the courtroom needed to be safeguarded from him. There can be no gainsaying that the pronounced limitations on appellant's ability to move necessarily produced by the physical restraints, and which no drapery could have successfully concealed, served as a constant reminder in appellant's trial that he was perceived by the court authorities as posing a danger to others. The combination of these two factors was so likely to have been a continuing influence throughout the trial that there is a reasonable probability that impermissible factors affected the outcome of the trial.

(*People v. Hernandez*, *supra*, 51 Cal.4th at p. 746; *People v. Watson* (1956) 46 Cal.2d 818, 837.)

In both *Dyas v. Poole* (9th Cir. 2002) 309 F.3d 586 and *Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633, the Ninth Circuit identified factors that increased the likelihood the defendant was prejudiced by the unconstitutional security measures. The first of these was that the respective defendants were charged with violent crimes. The second factor was that the cases against the defendants were not overwhelming, a fact reflected by the length of the jury deliberations. (*Dyas v. Poole*, *supra*, 309 F.3d at p. 588; *Rhoden v. Rowland*, *supra*, 172 F.3d at p. 637.)

Here, appellant's propensity for violence was a critical issue in both the guilt and penalty phases. Appellant was charged with serious crimes of violence, which he disputed. His propensity for violence was clearly a factor that was likely to influence the jury in determining whether he was culpable for the crimes. The presence of eight deputies strongly suggested to the jury that the trial judge believed that appellant was a danger to the community and to the courtroom and therefore had the character of someone who would have committed the crimes charged. As a result, in finding appellant guilty, the jury was likely to have relied upon the improper inference that appellant had a violent nature sourced in the presence of eight armed deputies within the courtroom.

In the penalty phase of a capital trial, the jury knows that the defendant is a convicted murderer. "But the extent to which he continues to be dangerous is a central issue the jury must decide in determining his sentence." (*Duckett v. Godinez* (9th Cir. 1994) 67 F.3d 734, 748.) If the jury is led to believe that the defendant is so dangerous that eight deputies

are required to secure the courtroom against his actions, it is likely to conclude that the safety of other inmates and the prison staff can only be ensured by executing him. In a case involving heightened security accomplished by shackling a defendant, the court observed "[A] jury might view the shackles as first hand evidence of future dangerousness and uncontrollable behavior which if unmanageable in the courtroom may also be unmanageable in prison, leaving death as a proper decision." (*Elledge v. Dugger* (11th Cir. 1987) 823 F.2d 1439, 1450.) The jurors here were likely to have viewed appellant in the very same way due to the presence of the eight armed deputies, and to have relied upon that improper inference in reaching a death verdict.

In finding prejudice, both *Dyas* and *Rhoden* observed that the prosecution's case was disputed, and that the jury deliberations were lengthy, indicating that the jurors did not find the case to be clear cut. Here, in the guilt phase appellant disputed his guilt and the jury deliberated for approximately five days before convicting appellant (see Procedural History, *supra*). In the penalty phase, even though appellant presented no defense, the jury did not return a death verdict until the day after it received the case.

Under all of the circumstances described above, a finding of prejudice is virtually compelled by *Dyas* and *Rhoden* as is the conclusion that the presence of eight deputies within the courtroom compromised the presumption of innocence to which appellant is entitled. Reversal of the death sentence and the judgment of conviction is warranted as there is a reasonable probability that impermissible factors affected the outcome of

the trial. (*People v. Hernandez*, *supra*, 51 Cal.4th at p. 746; *People v. Watson*, *supra*, 46 Cal.2d at p. 837.)

VII.

THE PROSECUTOR COMMITTED MISCONDUCT AND VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW WHEN HE INVITED THE JURY TO DEPART FROM THEIR DUTY TO VIEW THE EVIDENCE OBJECTIVELY AND INSTEAD TO VIEW THE CASE THROUGH THE EYES OF THE VICTIMS

A. Summary of Contentions

In arguing for appellant's conviction, the prosecutor told the jury of his concern that the jurors would be numbed by the evidence of so many murders. "My concern, and I will just tell you right now here my concern is okay, you see one murder. You look at that, wow. You see two murders, wow. [¶] Three, wow. [¶] Four, then the fifth murder you see and you start to think, wow, people really do this. This isn't a movie. This is not a movie. This is not a television show, but what worries me is over time, you can get what? More pictures you look at it, the more you can get numb to it." (13RT 2861:18-27.)

The prosecutor then reminded the jurors they had promised to do their best and exhorted them to "remember what justice is." (13RT 2862:2.)

The prosecutor continued: "REMEMBER WHAT IT MUST HAVE BEEN LIKE TO BE ONE OF THEIR VICTIMS BEING SHOT AND CHOKING AND TRYING TO GET YOUR LAST BREATH OUT WHILE YOUR BLOOD IS GURGLING IN YOUR LUNGS. WHAT IT MUST BE LIKE TO BE ONE OF THOSE PEOPLE. [¶] That's what this case is about. The infliction of that kind of pain and cold hearted killing for what?" (13RT 2862:2-9; emphasis added.)

Later, in his argument, the prosecutor turned to appellant's actions on the Santa Monica Pier and, specifically, to the assault with a

firearm of Jing Huali (count 27).[3] The prosecutor argued: "What do we know? Jing Huali, while she was laying down, the defendant shot her. An assault with a firearm. I POINT A LOADED GUN AT YOUR HEAD, THE ASSAULT IS COMPLETE. THAT'S IT; IT'S DONE. YOU DO NOT HAVE TO FIRE. [¶] I PUT MY LEFT ARM AROUND AND I PUT A GUN TO YOUR HEAD, A LOADED GUN, COMPLETED, DONE, PROVEN. I BET YOU WOULD FEEL ASSAULTED IF SOMEONE HAD A LOADED GUN POINTED AT YOUR HEAD. [¶] She was shot." (13RT 2894:28-2895:9; emphasis added.)

Appellant argued he was denied a fair trial and due process of law by the prosecutor's invitation to the jury to decide appellant's guilt of the charged crimes on the basis of sympathy, fear, and passions rather than a reasonable objectiveness. (AOB 178-187.)

Respondent contends that appellant has forfeited his claim of misconduct and that the prosecutor's comments did not deny due process by rendering the trial fundamentally. (RB 101-107.)

B. Appellant Has Not Forfeited His Claim

Respondent contends that a defendant must timely object to misconduct and/or request an admonition in order to preserve the claim for review. (RB 102-103, citing *People v. Hinton* (2006) 37 Cal.4th 839; *People v. Gutierrez* (2002) 28 Cal.4th 1083.) Respondent points out that appellant did neither. (RB 103.) Appellant addressed the issue of counsel's failure to timely object to the prosecutor's argument at pages 183-185 of the opening brief and respectfully refers the Court to that discussion on this

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3 The jury convicted appellant of assault with a firearm of Jing Huali and found the great bodily injury enhancement to be true. (17CT 4561.)

particular point. Appellant additionally notes that this Court has held that the failure to request an admonition does not forfeit the issue for appeal if an admonition would not have cured the harm caused by the misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Bradford* (1997) 15 Cal.4th 1229, 1333.) The challenged argument by the prosecutor presents one of these circumstances because the prosecutor's argument invited each juror to put him- or herself in the place of the victims and no admonition would have effectively removed the emotional pull of such an argument. Courts have recognized that in certain situations, "one cannot unring a bell"; that "after the thrust of the saber it is difficult to say forget the wound"; and, "if you throw a skunk into the jury box, you can't instruct the jury not to smell it." (*United States* v. *Garza* (5th Cir. 1979) 608 F.2d 659, 666, quoting prior case law; internal quotations omitted.)

Under the circumstances of the particular argument made by the prosecutor in this case, no admonition would have cured the harm of having the juror view the evidence from the perspective of the victim.

C. The Improper Argument Denied Appellant a Fair Trial and Due Process of Law

Initially, appellant observes that respondent does not claim that the prosecutor's comments were proper. Respondent agrees that under the law it is improper to make arguments to the jury suggesting that "emotion may reign over reason," or to present inflammatory rhetoric that invites the jury to have an irrational, subjective response. (RB 105; *People v. Redd* (2010) 48 Cal.4th 691.) Respondent agrees that a prosecutor may not do what the prosecutor here did, *viz.*, invite the jury to view the case through a victim's eyes or to otherwise appeal to the sympathy or passions

of the jury. (RB 105; *People v. Lopez* (2008) 42 Cal.4th 960; *People v. Leonard* (2007) 40 Cal.4th 1370.)

Respondent is wrong in asserting that appellants suffered no prejudice from the offending remarks. Appellant reiterates the argument made in the opening brief at pages 185-187. The prosecutor's invitation to the jury to decide appellant's guilt of the charged crimes based on sympathy, fear, and passions rather than a reasonable objectiveness was "of sufficient significance to result in the denial of the defendant's right to a fair trial." (*United States v. Agurs* (1976) 427 U.S. 97, 108.) When the prosecutor invited the jurors to "remember what it must have been like to be one of their victims being shot and choking and trying to get your last breath out while your blood is gurgling in your lungs," the prosecutor was not merely drawing reasonable inferences from the evidence at trial. Instead, he was trying to incite the passions of the jurors against appellant. The United States Supreme Court has long recognized that a jury typically places great confidence in the prosecutor and therefore improper suggestions and insinuations by the prosecutor against the accused are apt to carry much weight. (*Berger v. United States* 1935) 295 U.S. 78, 88.)

While the prosecutor's misconduct was not repeated frequently during his argument, it was egregious in scope because the prosecutor asked the jurors to remember the experiences of *all* of the victims. As a result, the improper argument affected the outcome of all of the charged assaultive crimes. Moreover, the particularly graphic nature of the prosecutor's argument exacerbated the prejudicial effect. It provided a personal and bloody overlay to the prosecution's case. The argument complained of here, which was directed at eliciting an emotional response

to, rather than an objective evaluation of, the evidence, misdirected the jury's attention from its important function of properly assessing appellant's guilt or innocence of the charged crimes based on relevant evidence of his conduct and mental state. It caused the jurors to focus on irrelevant information pertaining to the victim's pain. The improper argument was thus of sufficient significance to deny appellant a fair trial.

Penalty Phase Issues

VIII.

THE FAILURE TO PRESENT A PENALTY PHASE DEFENSE, APPELLANT'S EXPRESS REQUESTS AND THE TRIAL COURT'S CONSENT NOTWITHSTANDING, VIOLATED APPELLANT'S RIGHT TO A RELIABLE DETERMINATION OF THE JUDGMENT OF DEATH

A. Summary of Contentions

In a hearing before guilt phase verdicts were reached, appellant requested that defense counsel not present mitigating evidence, cross-examine witnesses, or present argument during the penalty phase. (AOB 188-192.) Appellant also requested that the court not give defense-proffered penalty phase instructions. (AOB 193-195.) As a result of appellant's request, the defense made no penalty phase presentation and the jury was not given the instructions submitted by defense counsel

The failure to present a penalty phase defense deprived appellant of the right to counsel, the right to a jury trial, the right to due process of law, and the right to a reliable determination of the facts in a capital trial, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The error also defeated the state's own interest in fair, accurate, and reliable capital judgments. (AOB 195-205.)

Respondent argues that appellant knowingly and voluntarily decided against presenting mitigating evidence and requesting instructions to the jury. Respondent further argues that a capital defendant has the right to self-representation at the penalty phase of trial. According to

respondent, the failure to present a defense at the penalty phase did not violate appellant's right to, and the state's interest in, a reliable judgment of death. (RB 115-130.)

B. Respondent's Contentions Lack Merit

Respondent relies to a great extent on *People v. Sanders* (1990) 51 Cal.3d 471, upon which the trial court also relied. (RB 122-126.) Appellant discussed *Sanders* and the precedents therein in his discussion of the relevant law in his opening brief. Appellant also examined cases that were decided after *Sanders*, including, *People v. Deere* (1991) 53 Cal.3d 705 (*Deere II*). Appellant respectfully refers the Court to his discussion of *Sanders* at pages 195-205 of his opening brief and supplements his argument below.

Appellant contended in the opening brief that failure to present a penalty phase defense affected the state's independent interest in achieving a reliable penalty verdict. (See, e.g., AOB 202-204.) The reliability required by the Eighth Amendment in death penalty cases can be assured "only when the record on which the verdict is based is complete, i.e., when it does not lack any significant portion of the evidence of the appropriateness of the penalty that counsel reasonably concludes . . . makes the most compelling case in mitigation." (*People v. Deere* (*Deere II*), *supra*, 53 Cal. 3d at pp. 728-729.)

Here, as appellant explained in his opening brief, the record was not "complete" in that it lacked a penalty phase defense in its entirety. Defense counsel did not cross-examine the prosecution's witnesses. Counsel also did not call the seven to ten family members who were

prepared to testify about incidents of abuse by the police upon appellant and various relatives. In the guilt phase, the jury heard evidence that appellant had shot at and wounded police officers on the Santa Monica Pier just before his arrest. Evidence that appellant and members of his family had previously been abused by law enforcement personnel may have been pertinent to the jury's understanding of appellant's state of mind. (AOB 203-204.)

Counsel had also prepared other mitigating witnesses to testify, including appellant's family members, a psychologist, and a social historian. These witnesses could have testified about incidents of parental drug use, family instability, parental rejection and neglect, exposure to domestic violence, learning disabilities in elementary school, and appellant's history of poverty, head injuries, and substance abuse. This mitigation evidence would have helped jurors understand appellant as an individual and thus would have helped the jurors reach a reliable penalty decision. (12RT 2819-2820). Counsel also planned to play the tape-recording of the hostage negotiations conducted during the Santa Monica Pier incident because the recording revealed a softer and friendlier side of appellant as he dealt with the hostages. Again, such evidence would have assisted the jury in reaching a verdict that reflected a true weighing of the relevant aggravating and mitigating circumstances. (AOB 204.)

The United States Supreme Court has frequently stated that the Eighth Amendment and evolving standards of societal decency impose a high requirement of reliability on the determination that death is the appropriate penalty in a particular case (see, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Mills v. Maryland* (1988) 486 U.S. 367, 377).

Respondent argues that this Court has repeatedly rejected arguments that the failure to present mitigating evidence in and of itself is insufficient to make a death judgment unreliable. (RB 130.) But here, in this case, the defense not only failed to present mitigating evidence, it failed to test the prosecution's case through cross-examination – "the greatest legal engine ever invented for the discovery of truth." (5 Wigmore, *Evidence*, Chadborne Rev. 1974, Section 1376).

The United States Supreme Court has frequently stated that the Eighth Amendment and evolving standards of societal decency impose a high requirement of reliability on the determination that death is the appropriate penalty in a particular case (see, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Mills v. Maryland* (1988) 486 U.S. 367, 377).

For the foregoing reasons and for reasons set forth in the opening brief, appellant respectfully asserts that the failure to present a penalty phase defense, appellant's express requests and the trial court's consent notwithstanding, violated appellant's right to, and the state's interest in, a reliable determination of the judgment of death. It also violated appellant's right to effective assistance of counsel.

IX.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT DEATH IS A GREATER PUNISHMENT THAN LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE AND IN SO DOING VIOLATED THE EIGHTH AMENDMENT'S GUARANTEE OF A CAPITAL JURY SUITABLY INSTRUCTED TO AVOID AN ARBITRARY AND CAPRICIOUS DEATH VERDICT

A. Summary of Contentions

The trial court instructed the prospective jurors that death was a more severe punishment than life without the possibility of parole.

> [¶] The law says life without parole is a lesser sentence. It's less serious than death. Many of you said [in questionnaire responses], My God, I'd rather be dead than spend my life in prison. I'm telling you, the law that you have sworn to follow says, No, you cannot consider that. That may be your personal feeling. But you must agree to follow the law and the law says life without parole is a lesser punishment to death. (5RT 1305:26-1306:5.)

Appellant argued that the instruction violated the Eighth Amendment's guarantee of a capital jury suitably instructed to avoid an arbitrary and capricious death verdict. Appellant asserted that the notion that a competent mind may rationally conclude that death is the less severe option is grounded in concepts of human dignity, which the United States Supreme Court has declared to be the core concept underlying the Eighth Amendment. (AOB 206-224.)

Respondent argues there was no error as this Court has held that an instruction that death is a more severe penalty than life without parole is a correct statement of law. (RB 130-131.)

B. Respondent's Contentions Lack Merit

Respondent merely asserts that a trio of cases controls the outcome of this issue and otherwise gives the issue summary treatment. (See RB 130-131.) The cases upon which respondent relies are *People v. Tate* (2010) 49 Cal.4th 635, 707; *People v. Harris* (2005) 37 Cal.4th 310, 361; and *People v. Thomas* (2011) 52 Cal.4th 336, 361-362.)

Appellant discussed the *Harris-Tate-Thomas* line of cases in his opening brief and explained there that uncertainties attend the issue of which penalty – death or life without parole – is the more severe penalty as the result of the way in which the cases built upon each other in seriatim. (AOB 219-222) For the sake of economy, appellant does not repeat the discussion here, but respectfully refers the Court to pages 219-222 of the opening brief.

Appellant also respectfully points out that respondent never addressed the merits of appellant's contention that the notion that a competent mind may rationally conclude that death is the less severe option is grounded in concepts of human dignity, which the United States Supreme Court has declared to be the core concept underlying the Eighth Amendment. (See AOB 208-219.)

Finally, there is the matter of prejudice from the instruction that death is the more severe penalty. Appellant discussed prejudice at pages 223-224 of the opening brief. In addition, appellant notes that Penal Code section 190.3, subdivision (k), provides that the jury shall impose a judgment of death if it determines that the aggravating factors outweigh the mitigating factors. However, this articulation does not necessarily mean that death is the more severe verdict. Therefore, given the uncertainties

attending the *Harris-Tate-Thomas* line of cases appellant has discussed in the opening brief, appellant asserts that it is not accurate to unequivocally instruct that death is the more severe penalty and the trial court erred in so instructing.

X.

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

Appellant argued in the opening brief that California's death penalty statute, as interpreted by this Court and applied at appellant's trial, violates the United States Constitution. (AOB 225-262.)

Respondent argues that appellant's constitutional challenges to California's death penalty statute must be denied because, in respondent's view, appellant has failed to provide persuasive reasons for departing from the precedents set forth in respondent's brief. (RB 131-136.)

Appellant replies to respondent's contention as follows: In *People v. Schmeck* (2005) 37 Cal.4th 240 (abrogated on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-643), a capital appellant presented a number of often-raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id.*, at p. 303.) This Court acknowledged that in dealing with these attacks in prior cases, it had given conflicting signals on the detail needed in order for an appellant to preserve these attacks for subsequent review. (*Id.*. at p. 303 fn. 22.) In order to avoid detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we

previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (*Id.*, at p. 304.)

Accordingly, pursuant to *Schmeck* and in accordance with this Court's own practice in decisions filed since then, appellant has identified the systemic and previously rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requests the Court to reconsider its decisions rejecting them. Appellant contends that these arguments are squarely framed and sufficiently addressed in Appellant's Opening Brief and therefore makes no further reply.

Cumulative Error

XI.

THE NUMEROUS ERRORS THAT OCCURRED DURING THE GUILT AND PENALTY PHASES OF HIS TRIAL, WHEN CONSIDERED CUMULATIVELY, DEPRIVED APPELLANT OF A FAIR TRIAL

Respondent argues that appellants have failed to demonstrate there were any errors whatsoever and that there is therefore no basis for invoking the cumulative error doctrine. Respondent further argues that if there was any error, there was no prejudice given the state of the evidence. (RB 136.)

To the contrary, prejudicial errors were committed at appellant's trial and these errors adversely affected the trial's outcome, as appellant has explained in the opening and this reply brief. Appellant respectfully refers the reader to his discussion regarding the cumulative effect of the errors at pages 263-264 of the opening brief.

Joinder

XII.

APPELLANT JOINS IN ALL CONTENTIONS RAISED BY HIS COAPPELLANT THAT MAY ACCRUE TO HIS BENEFIT

In his opening brief, appellant stated that he joined in all contentions raised by his coappellant that may accrue to his benefit. (Rule 8.200, subdivision (a)(5), California Rules of Court ["Instead of filing a brief, or as a part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related appeal."]; *People v. Castillo* (1991) 233 Cal.App.3d 36, 51; *People v. Stone* (1981) 117 Cal.App.3d 15, 19 fn. 5; *People v. Smith* (1970) 4 Cal.App.3d 41, 44; AOB 265.)

Appellant here reiterates his joinder in all contentions raised by his coappellant that may accrue to his benefit.

CONCLUSION

For the reasons set forth in the opening brief and this reply brief, it is respectfully submitted on behalf of defendant and appellant OSWALDO AMEZCUA that the judgment of conviction and sentence of death must be reversed.

DATED: July 31, 2013

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Rule 8.630, subdivision (b)(1), California Rules of Court, states that an appellant's reply brief in an appeal taken from a judgment of death produced on a computer must not exceed 47,600 words. The tables, the certificate of word count required by the rule, and any attachment permitted under Rule 8.204, subdivision (d), are excluded from the word count limit.

Pursuant to Rule 8.630, subdivision (b), and in reliance upon Microsoft Office Word 2007 software, which was used to prepare this document, I certify that the word count of this brief is 19,289 words.

DATED: July 31, 2013

Respectfully submitted,

____

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PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to the within entitled action. My business address is 321 Richmond Street, Ste A, El Segundo, California 90245. On August 2, 2013, I served the Appellant's Reply Brief on behalf of Oswaldo Amezcua in People v. Amezcua and Flores (CSC No. S133660; LASC No. KA050813) on the interested parties in said action by placing true copies thereof, enclosed in sealed envelope(s) addressed as stated below, with postage/delivery fee fully prepaid at El Segundo, California, with the United States Postal Service or United Parcel Service.

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I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and that this declaration was executed on August 1, 2013, at El Segundo, California.

____

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