

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,)
)
Plaintiff and Respondent,) Case No. S161781
)
v.)
) Superior Court No.
JUSTIN HEATH THOMAS,) RIF086792
)
Defendant and Appellant.)
)
)
_____)

**SUPREME COURT
FILED**

APR - 7 2017

Appeal from the Superior Court of the State of California

Jorge Navarrete Clerk

In and For the County of Riverside

Deputy

Honorable Terrance R. Boren, Judge

APPELLANT'S REPLY BRIEF

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DEATH PENALTY

TABLE OF CONTENTS

GUILT PHASE ISSUES

I.	THE JUDGMENT OF GUILT SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY ADMITTED EVIDENCE OF HARTWELL'S MURDER, AND JUSTIN'S ALLEGED PLAN TO MURDER MICHAEL AGUON AND HIS GIRLFRIEND.	1
II	THE JUDGMENT OF GUILT SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY ADMITTED BROWN'S TESTIMONY FROM THE TEXAS TRIAL INTO EVIDENCE OVER DEFENSE OBJECTION	27
III	THE TRUE FINDING TO THE PRIOR MURDER SPECIAL CIRCUMSTANCE ALLEGATION SHOULD BE REVERSED BECAUSE THE TEXAS MURDER CONVICTION DID NOT MEET THE REQUIREMENT OF PENAL CODE SECTION 190.2, SUBDIVISION (A)(2), TO BE CONSIDERED A PRIOR MURDER CONVICTION	30
IV	THE TRUE FINDING TO THE ROBBERY SPECIAL CIRCUMSTANCE ALLEGATION SHOULD BE REVERSED BECAUSE THE ROBBERY WAS INCIDENTAL TO NORIEGA'S MURDER	52
V.	THE JUDGMENT OF GUILT TO COUNT ONE MUST BE REVERSED BECAUSE: (1) THE TRIAL COURT FAILED TO FULLY AND PROPERLY INSTRUCT THE JURY FOR THE LESSER INCLUDED OFFENSE OF SECOND DEGREE MURDER; AND (2) THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT SECOND DEGREE MURDER COULD INVOLVE AN INTENTIONAL KILLING.	55
VI	JUSTIN'S CONVICTION FOR MURDER (COUNT ONE) MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT PROVOCATION WAS RELEVANT TO WHETHER JUSTIN SHOT NORIEGA WILLFULLY, DELIBERATELY, AND WITH PREMEDITATION	61
VII	JUSTIN'S CONVICTION OF MURDER (COUNT ONE) MUST BE REVERSED	

BECAUSE THE TRIAL COURT FAILED TO GIVE JURY INSTRUCTIONS FOR:
(1) SELF-DEFENSE; (2) VOLUNTARY MANSLAUGHTER BASED ON HEAT
OF PASSION; AND (3) VOLUNTARY MANSLAUGHTER BASED ON
UNREASONABLE SELF-DEFENSE 68

VIII THE JUDGMENT OF GUILT MUST BE REVERSED BECAUSE JUSTIN WAS
FORCED TO WAIVE HIS PRO-PER STATUS BECAUSE THE TRIAL COURT
REFUSED TO PROVIDE ADEQUATE FUNDING TO HIS DEFENSE 70

IX THE TRUE FINDING TO THE ROBBERY SPECIAL CIRCUMSTANCE
ALLEGATION, THE CONVICTION FOR MURDER (COUNT ONE), AND THE
JUDGMENT OF DEATH, SHOULD BE REVERSED BECAUSE THE TRIAL
COURT FAILED TO INSTRUCT THE JURY WITH THE LESSER INCLUDED
OFFENSE OF GRAND THEFT 73

X THE JUDGMENT OF GUILT SHOULD BE REVERSED BECAUSE THE TRIAL
COURT’S ACCOMPLICE INSTRUCTION LOWERED THE PROSECUTION
BURDEN OF PROOF BY INSTRUCTING THE JURY THAT THE
CORROBORATING EVIDENCE FOR BROWN’S TESTIMONY HAD TO BE
ONLY SLIGHT 77

XI THE JUDGMENT OF GUILT SHOULD BE REVERSED BECAUSE: (1)
CALCRIM NO. 319 ERRONEOUSLY PREVENTED THE JURY FROM
CONSIDERING FOR THE TRUTH OF THE MATTER ASSERTED BROWN’S
STATEMENT TO SILVA THAT A HEATED ARGUMENT PRECEDED
JUSTIN’S SHOOTING OF NORIEGA; AND (2) CALCRIM NO. 318 WAS A ONE-
SIDED INSTRUCTION IN FAVOR OF THE PROSECUTION AND FORCED THE
JURY TO ACCEPT BROWN’S TESTIMONY AS TRUE 82

XII THE JUDGMENT OF GUILT SHOULD BE REVERSED BECAUSE THE TRIAL
COURT ADMITTED INFLAMMATORY AND PREJUDICIAL PHOTOGRAPHS
OF THE BODIES OF NORIEGA AND HARTWELL 89

PENALTY PHASE ISSUES

XIII THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL
COURT ERRONEOUSLY DENIED JUSTIN’S MOTION TO WAIVE HIS RIGHT

	TO COUNSEL AND REPRESENT HIMSELF	93
XIV	THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT COERCED A VERDICT BY FORCING THE JURY TO CONTINUE PENALTY PHASE DELIBERATIONS AFTER THE JURY HAD STATED THAT IT WAS DEADLOCKED	97
XV	THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT INQUIRED INTO THE NUMERICAL DIVISION OF THE JURY .	106
XVI	THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT IT HAD TO FIND BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING FACTORS OUTWEIGHED THE MITIGATING FACTORS IN ORDER TO IMPOSE THE DEATH PENALTY	108
XVII	THE JUDGMENT OF DEATH SHOULD BE SET ASIDE BECAUSE: (1) THE CALIFORNIA DEATH PENALTY STATUTE, AS A MATTER OF LAW, VIOLATES THE RIGHT TO DUE PROCESS OF LAW IN THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION, THE GUARANTEE OF THE RIGHT TO A JURY TRIAL IN THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION, THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION; AND (2) THE IMPOSITION OF THE DEATH PENALTY, AS A MATTER OF LAW, VIOLATES THE AFOREMENTIONED CONSTITUTIONAL PROVISIONS	109
XVIII	THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT REFUSED TO GIVE DEFENSE-REQUESTED INSTRUCTIONS REGARDING LINGERING DOUBT AND MERCY	110
	DECLARATION REGARDING WORD COUNT	112

PROOF OF SERVICE 113

TABLE OF AUTHORITIES

CASES

<i>Apprendi v. New Jersey</i> (2000) 530 U.S. 466	31, 36, 47, 48, 51, 74
<i>Arizona v. Washington</i> (1978) 434 U.S. 497	103
<i>Carter v. Kentucky</i> (1981) 450 U.S. 288	111
<i>Chapman v. California</i> (1967) 386 U.S. 18	58
<i>D'Amico v. Board of Medical Examiners</i> (1974) 11 Cal.3d 1	6
<i>Descamps v. United States</i> (2013) ___ U.S. ___ [133 S.Ct. 2276	31, 45-51
<i>Francis v. Franklin</i> (1985) 471 U.S. 307	78
<i>In re Phoenix H.</i> (2009) 47 Cal.4th 835	14
<i>Jiminez v. Myers</i> (9th Cir. 1993) 40 F.3d 976	103
<i>Lowenfield v. Phelps</i> (1988) 484 U.S. 231	107
<i>Marshall v. Rodgers</i> (2013) ___ U.S. ___ [133 S.Ct. 1446]	94
<i>People v. Andrews</i> (1989) 49 Cal.3d 200	32
<i>People v. Ault</i> (2004) 33 Cal.4th 1250	104, 105
<i>People v. Barton</i> (1995) 12 Cal. 4th 186	73
<i>People v. Barton</i> (1995) 12 Cal.4th 186	64
<i>People v. Bigelow</i> (1985) 37 Cal.3d 731	72
<i>People v. Blakely</i> (2000) 23 Cal.4th 82	11
<i>People v. Boyce</i> (2014) 59 Cal.4th 672	111

People v. Breaux (1991) 1 Cal.4th 281 97, 98

People v. Bryant (2014) 60 Cal.4th 335 78, 99

People v. Carmen (1954) 43 Cal.2d 342 44

People v. Carpenter (1995) 21 Cal.4th 1016 11, 12

People v. Carrasco (2014) 59 Cal.4th 924 54

People v. Chism (2014) 58 Cal.4th 1266 86

People v. Cooper (1991) 53 Cal.3d 1158 79

People v. Cummings (1993) 4 Cal.4th 1233 14, 15

People v. Davis (2009) 46 Cal.4th 539 19

People v. Denard (2015) 242 Cal.App.4th 1012 46, 48, 49, 50

People v. Ewoldt (1994) 7 Cal.4th 380 5, 9, 10

People v. Falsetta (1999) 21 Cal.4th 903 5

People v. Field (1950) 99 Cal.App.2d 10 64

People v. Friend (2009) 47 Cal.4th 1 82, 84

People v. Gibson (1976) 56 Cal.App.3d 119 23

People v. Green (1980) 27 Cal.3d 1 52

People v. Hardy (1992) 2d Cal.4th 86 93

People v. Hawkins (1995) 10 Cal.4th 920 11, 12, 13

People v. Haynes (1998) 61 Cal.App.4th 1282 64

People v. Herrera (2010) 49 Cal.4th 613 106

<i>People v. Hill</i> (1998) 17 Cal.4th 800	23, 106
<i>People v. Hillhouse</i> (2002) 27 Cal.4th 469	8
<i>People v. Hudson</i> (2009) 175 Cal.App.4th 1025	82, 84
<i>People v. Johnson</i> (2006) 39 Cal.4th 826	79
<i>People v. Jones</i> (2012) 54 Cal.4th 1	7
<i>People v. Knoller</i> (2007) 41 Cal.4th 139	35, 36, 56
<i>People v. Louis</i> (1986) 42 Cal.3d 969	104
<i>People v. Marin</i> (2015) 240 Cal.App.4th 1344	46, 47, 48
<i>People v. McCurdy</i> (2014) 59 Cal.4th 1063	17
<i>People v. McGee</i> (2005) 38 Cal.4th 682	40, 45, 46, 47
<i>People v. Martinez</i> (2003) 31 Cal.4th 673	31, 32, 34
<i>People v. Mendoza</i> (2000) 23 Cal.4th 896	67
<i>People v. Moon</i> (2005) 37 Cal.4th 1	86
<i>People v. Morrison</i> (2004) 34 Cal.4th 698	5
<i>People v. Nesler</i> (1997) 16 Cal.4th 561.	104
<i>People v. Partida</i> (2005) 37 Cal.4th 428	3
<i>People v. Patterson</i> (1989) 49 Cal.3d 615	44
<i>People v. Peau</i> (2015) 236 Cal.App.4th 823	67
<i>People v. Rios</i> (2000) 23 Cal.4th 450	19
<i>People v. Robinson</i> (1964) 61 Cal.2d 373	75

<i>People v. Rodriguez</i> (1986) 42 Cal.4th 730	98, 102
<i>People v. Rodriguez</i> (1998) 17 Cal.4th 253	31
<i>People v. Rogers</i> (2006) 39 Cal.4th 826	14, 15, 58, 61, 63
<i>People v. Saez</i> (2015) 237 Cal.App.4th 1177	46, 47
<i>People v. Sandoval</i> (1992) 4 Cal.4th 155	98, 100, 101, 103
<i>People v. Sheldon</i> (1989) 48 Cal.3d 935	98, 101
<i>People v. Smithey</i> (1999) 20 Cal.4th 936	7
<i>People v. Spector</i> (2011) 194 Cal.App.4th 1335	19, 20
<i>People v. Stewart</i> (1983) 145 Cal.App.3d 967	85
<i>People v. Streeter</i> (2012) 54 Cal.4th 205	110
<i>People v. Swain</i> (1996) 12 Cal.4th 593	56
<i>People v. Thomas</i> (1945) 25 Cal.2d 880	64, 65
<i>People v. Tully</i> (2012) 54 Cal.4th 952	91
<i>People v. Turk</i> (2008) 164 Cal.App.4th 1361	65
<i>People v. Valdez</i> (2012) 55 Cal.4th 82	107
<i>People v. Valentine</i> (1946) 28 Cal.2d 121	64
<i>People v. Watson</i> (1956) 46 Cal.2d 818	58, 96
<i>People v. Wharton</i> (1991) 53 Cal.3d 522	67
<i>People v. Wilson</i> (2013) 219 Cal.App.4th 500	46
<i>People v. Windham</i> (1977) 19 Cal.3d 121	93, 94, 95

<i>People v. Woodell</i> (1998) 17 Cal.4th 448	38, 39, 40, 41, 42 43
<i>People v. Wickersham</i> (1982) 32 Cal.3d 307	63
<i>People v. Wright</i> (2015) 242 Cal.App.4th 1461	64
<i>People v. Zapien</i> (1993) 4 Cal.4th 929	6
<i>Pullman-Standard v. Swint</i> (1982) 456 U.S. 273	104
<i>Rose v. Clark</i> (1986) 478 U.S. 570	72
<i>Schwendeman v. Wallenstein</i> (9th Cir. 1992) 971 F.2d 313	78
<i>Shepard v. United States</i> (2005) 544 U.S. 13	48
<i>Taylor v. United States</i> (1990) 495 U.S. 575	48
<i>United States v. Berger</i> (9th Cir. 2007) 473 F.3d 1080	103
<i>United States v. Evanston</i> (9th Cir. 2011) 651 F.3d 1080	103
<i>United States v. Garza</i> (5th Cir. 1979) 608 F.2d 659	23
<i>United States v. Perez</i> (1824) 22 U.S. 579	103

STATUTES

California Constitution, Article I, section 11	44
Evidence Code section 352	16
Evidence Code section 770	86
Evidence Code section 1101	4, 5, 7, 8, 12, 14, 15, 17, 18, 19, 21
Evidence Code section 1108	7

Evidence Code section 1202	86
Evidence Code section 1291	6, 28
Evidence Code section 1300	43
Evidence Code section 1301	43
Evidence Code section 1302	43
Texas Penal Code section 19.02	1, 30, 31, 33, 34, 36, 37, 50
Penal Code section 188	31, 65
Penal Code section 1259	55, 83

SECONDARY AUTHORITY

CALCRIM NO. 213	84
CALCRIM NO. 226	84, 85
CALCRIM NO. 318	82, 83, 85, 87
CALCRIM NO. 319	82, 83, 86, 87, 88
CALCRIM NO. 334	78, 81
CALCRIM NO. 520	55, 56, 57, 62
CALCRIM NO. 520	56, 57, 62
CALCRIM NO. 522	66
CALCRIM NO. 776	108

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Honorable Terrance R. Boren, Judge

APPELLANT’S REPLY BRIEF

I

**THE JUDGMENT OF GUILT SHOULD BE REVERSED
BECAUSE THE TRIAL COURT ERRONEOUSLY
ADMITTED EVIDENCE OF HARTWELL’S MURDER,
AND JUSTIN’S ALLEGED PLAN TO MURDER THE
MICHAEL AGUON AND HIS GIRLFRIEND.¹**

¹ Counsel has omitted the constitutional and statutory basis of the claims in the headings in the interest of brevity. These omissions are not intended to be a waiver of any claim.

Justin argued in the Opening Brief the trial court erred by admitting evidence pertaining to Hartwell's death, and his alleged plan to kill Michael Aguon and his girlfriend,² because: (1) the evidence was admitted to prove Justin's intent when he shot Noriega, but the intent of the shooter was never in dispute; (2) numerous extraneous and prejudicial facts concerning Hartwell's death were admitted into evidence; and (3) the prejudicial impact of the evidence outweighed its probative value. (AOB at pp. 58-83.) Respondent argues the evidence was properly admitted because: (1) any issue pertaining to admission of the Aguon incident was waived because of the lack of an objection in the trial court; (2) it was probative of Justin's motive to kill Noriega; (3) it was relevant to whether Justin killed Noriega with premeditation and deliberation; (4) it was relevant to Brown's credibility; and (5) the probative value of the evidence outweighed its prejudicial effect. Finally, respondent argues that any error was harmless. (RB at pp. 44-70.) These arguments must be rejected.

1. THIS COURT CAN REVIEW ON THE MERITS WHETHER THE TRIAL COURT ERRED BY ADMITTING THE INCIDENT WITH MICHAEL AGUON AND CHRISTINE.

The issue of the admissibility of uncharged criminal conduct by appellant was first litigated when appellant was in pro per status. Justin did not object to the admission of evidence of Hartwell's murder during the April 20, 2007, hearing. (2Aug. RT 253-254, 259.)

² For ease of reference, the evidence pertaining to Hartwell's death, and appellant's alleged plan to kill the Aguons, will be referred to as the "other crimes evidence" when collective reference is made to the evidence.

The prosecutor then discussed with the trial court the incident with the Aguon and Christine in which Maximilian Garcia would be a witness. (2Aug. RT 255.)³ A few pages later, the prosecutor again referred to the incident with Aguon and Christine. (2Aug. RT 257.) The trial court made a few comments regarding the similarity of the incidents. (2Aug. RT 257-258.) Justin then argued, “I believe that would be prejudicial because there is no police reports indicating threats were made in that manner.” (2Aug. RT 258.) Justin was unable, after further inquiry by the trial court, to offer any other legal reason the evidence should be excluded. (2Aug. RT 257-258.)

Justin’s prejudice objection was sufficient to preserve for review whether the trial court erred under Evidence Code section 352 by admitting evidence of the incident with Aguon and Christine. Section 352 does not require any particular form of objection. (*People v. Partida* (2005) 37 Cal.4th 428, 434-435.) The objection must alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought. (*People v. Partida, supra*, 37 Cal.4th at p. 435.) Justin’s objection alerted the trial court that he sought exclusion of the other crimes evidence based on its prejudicial nature. That was sufficient.

Counsel was reappointed for Justin. On October 10, 2007, the trial court again addressed the admissibility of the uncharged criminal conduct. (2`RT 1005-1023.) Defense counsel objected to the admission of the Hartwell murder. (2RT 1004-1005.) The trial court

³ Garcia testified before the jury that Justin allegedly planned to kill Aguon and Christine because he believed they were going to report him to the police. (9RT 2331-2334.)

ruled the Hartwell murder was admissible. (2RT 1023.) There was no discussion of the Aguon incident. This subsequent discussion between the attorneys and the trial court regarding the admissibility of the Hartwell murder did not negate the earlier objection made by Justin to the admission of the Aguon incident. Hence, this Court can review on the merits whether the trial court erred by admitting evidence of the incident with the Aguons.

2. EVIDENCE PERTAINING TO HARTWELL’S DEATH, AND THE PLAN TO KILL MICHAEL AGUON AND CHRISTINE, WAS NOT ADMISSIBLE UNDER EVIDENCE CODE SECTION 1101.

i. THE ADMISSION OF THE OTHER CRIMES EVIDENCE MAY NOT BE AFFIRMED BASED ON THEORIES NOT RELIED UPON BY THE TRIAL COURT WHEN IT RULED THE EVIDENCE WAS ADMISSIBLE.

The trial court, when it ruled the other crimes evidence was admissible, did not cite Brown’s credibility, Justin’s motive, or the issue of premeditation and deliberation, as the basis to admit the evidence. (2RT 1022-1023.) Respondent nevertheless argues the other crimes evidence was admissible for those reasons. Respondent relies on the rule that a trial court’s ruling that is correct in law will be upheld on appeal even if the trial court’s reason for its ruling was erroneous. (RT at p. 52, fn. 71.) This argument must be rejected because it is fundamentally unfair in the context of this case. The trial court expressly admitted the other crimes evidence only to prove intent. (2RT 1022-1023.) Remarkably, respondent does not make a single argument that the other crimes evidence was admissible to prove intent. Every argument made by respondent to support the admissibility of the other crimes evidence is based on some theory of admissibility other than intent.

The rule that the trial court's ruling will be upheld on appeal, despite an erroneous reason for the ruling, should not be applied to an evidentiary ruling which requires the trial court to evaluate the relevance of the proffered evidence in the context of other evidence and the parties' theories. The trial court determines the admissibility of evidence under Evidence Code section 1101 by evaluating the relevance of the proffered evidence in light of the other evidence, the parties' offers of proof, and their theories of the case. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 406 [in ruling upon the admissibility of evidence of uncharged acts, it is imperative that the trial court determine specifically what the proffered evidence is offered to prove, so that the probative value of the evidence can be evaluated for that purpose].) The trial judge is best situated to evaluate the evidence and perform this weighing process. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917-918.)

The trial court concluded the other crimes evidence was admissible to prove intent after evaluating the evidence and the parties' theories of the case. (2RT 1022-1023.) This Court cannot conclude the trial court would have reached the same conclusion if the prosecutor's theory of admissibility for the other crimes evidence was to prove Justin's motive, that he acted with premeditation and deliberation, or Brown's credibility.

It is fundamentally unfair for respondent to manufacture on appeal reasons to uphold the trial court's ruling admitting the other crimes evidence which were not offered in the trial court. The proponent of evidence has the burden of establishing its admissibility. (*People v. Morrison* (2004) 34 Cal.4th 698, 724.) This Court must assume the prosecutor cited every

theory of admissibility he believed appropriate when he argued for the admission of the other crimes evidence. (2RT 1022; 2 Aug. RT 235-258; 1CT 271-286.) The prosecutor's failure to cite the theories of admissibility now offered by respondent deprived Justin of the opportunity to argue to the trial court why the evidence was either not admissible under those theories or should be excluded under section 352.

The cases cited by respondent are distinguishable. None of those cases applied the rule that a correct ruling will be affirmed, despite the trial court citing the wrong reason for its ruling, in the context of evidence offered under a specific and narrow theory of relevance. In *People v. Zapien* (1993) 4 Cal.4th 929, the prosecutor admitted testimony from the preliminary hearing pursuant to Evidence Code section 1291. The trial court judge erroneously stated the preliminary hearing testimony would be admissible even if the defendant's motive to cross examine the witness at the hearing was different from his motive to cross examine the witness at trial. This Court concluded it did not need to resolve whether this comment meant the trial court misunderstood the legal standard. The preliminary hearing testimony was admissible because the motive to cross examine was the same at each hearing. (*People v. Zapien, supra*, 4 Cal.4th at p. 974.) The issue regarding the admissibility of the preliminary hearing testimony did not depend on the relevance of that testimony to the defendant's innocence or guilt. *People v. Zapien* dealt with a procedural issue of admissibility and not a relevance issue.

D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 19, applied the above

rule of law to the legal standard the trial court applied to a ruling on a summary judgment motion. The case did not deal with an admission of evidence issue. In *People v. Jones* (2012) 54 Cal.4th 1, defendant was found guilty of murder, rape, and sodomy. The trial court admitted evidence of a different sexual assault pursuant to Evidence Code section 1101 to show the defendant's intent. The trial court declined to admit the prior incident pursuant to Evidence Code section 1108 because this Court had not yet resolved the constitutionality of the statute. This Court ruled the evidence was admissible under section 1108, regardless of its admissibility under section 1101, because the only requirement for admissibility was that the prior offense, and charged offenses, were sex crimes. (*People v. Jones, supra*, 54 Cal.4th at p. 50.) *People v. Jones* does not apply to the instant case. The Hartwell murder and the incident with Aguon and Christine were not admissible merely because they met the definition of a certain type of crime.

In *People v. Smithey* (1999) 20 Cal.4th 936, the trial court admitted a hearsay statement declaring the victim/declarant's state of mind because the defense counsel had opened the door to its admission during cross-examination of a witness. The Attorney General conceded the hearsay statement was not admissible on that basis. However, the prosecutor had argued the statement to show the declarant's state of mind. This Court ruled the hearsay statement was admissible for the nonhearsay purpose of showing the declarant's state of mind and to impeach the defendant's testimony that he was friendly with the victim. (*People v. Smithey, supra*, 20 Cal.4th at p. 971-972.) In *People v. Smithey*, there was no

dispute the victim/declarant's hearsay statement was relevant. The only issue was its admissibility under the hearsay rule. Conversely, the admissibility of the Hartwell murder, and the incident with Aguons, depended on a precise theory of relevance. Hence, *People v. Smithey* is of no assistance to respondent.

ii. THE OTHER CRIMES EVIDENCE WAS NOT ADMISSIBLE TO PROVE MOTIVE.

Respondent argues the other crimes evidence was admissible to prove Justin's motive to kill Noriega because Noriega had threatened to report Justin's drug dealing to law enforcement. There was no evidence Noriega had threatened to report Justin to the police. Indeed, that scenario was unlikely because Noriega was Justin's drug supplier. (6RT 1910.) Justin told Reeder he feared Noriega was a "narc." (7RT 2021-2022, 2143-2144; 8RT 2276.) Regardless, the other crimes evidence was not admitted to prove Justin had a motive to murder Noriega. It was expressly admitted to prove the shooter intended to kill Noriega. (2RT 1022-1023.)⁴

⁴ Respondent's attempt to treat intent and motive as interchangeable concepts is erroneous. Respondent argues Justin's motivation to silence potential "narcs" created a direct, logical nexus between the other crimes evidence and Noriega's death. Respondent is wrong. Motive and intent are distinct concepts. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 504.) "Motive describes the reason a person chooses to commit a crime." (*People v. Hillhouse, supra*, 27 Cal.4th at p. 504.) Motive to commit a particular crime "is different from a required mental state such as intent or malice." (*Ibid.*) Intent in the context of section 1101, subdivision (b), refers to the defendant possessing the requisite state of mind to be guilty of a criminal offense. Respondent's assertion, "there was a direct logical nexus between the Noriega murder and the uncharged acts," (RB at p. 53), is speculation without evidentiary support because the murders were unrelated incidents separated by years.

Respondent's motive argument is really an argument that Justin acted pursuant to a common scheme or plan when he shot Noriega and committed the other crimes evidence. This Court cannot uphold the admission of the other crimes evidence to prove a common scheme or plan because: (1) the evidence was not admitted for that purpose; and (2) the legal standards for the admission of uncharged crimes to prove intent, and a common scheme or plan, are distinct.

"The least degree of similarity between the uncharged act and the charged offense is required in order to prove intent." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) "A greater degree of similarity is required in order to prove the existence of a common scheme or plan." (*Ibid.*) "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*Id.*, at p. 403.) "This distinction, between the use of evidence of uncharged acts to establish the existence of a common design or plan, as opposed to the use of such evidence to prove intent or identity, is subtle but significant." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 394, fn. 2.)

People v. Ewoldt explained that uncharged crimes are ordinarily inadmissible to prove a common design or plan when it is undisputed that a crime was committed:

For example, in most prosecutions for crimes such as burglary and robbery, it is beyond dispute that the charged offense was committed by someone; the primary issue to be determined is

whether the defendant was the perpetrator of that crime. Thus, in such circumstances, evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible. Although such evidence is relevant to demonstrate that, assuming the defendant was present at the scene of the crime, the defendant engaged in the conduct alleged to constitute the charged offense, if it is beyond dispute that the alleged crime occurred, such evidence would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value.

(People v. Ewoldt, supra, 7 Cal.4th at p. 406.)

In the instant case, it was undisputed Noriega was shot and killed. The only issue was the identity of the shooter. Under the above reasoning from *People v. Ewoldt*, the murder of Hartwell, and the incident with Aguons, were not admissible to prove Justin was the person who shot Noriega.

iii. THE OTHER CRIMES EVIDENCE WAS NOT ADMISSIBLE TO BOLSTER BROWN'S CREDIBILITY.

Respondent argues: (1) Brown was a material witness to Noriega's murder; and (2) evidence of Hartwell's murder was admissible to bolster Brown's credibility. (RB at pp. 53-54.) The other crimes evidence was not admissible to support Brown's credibility. This theory of relevance was not set forth in the prosecutor's pretrial motion. (1CTP 271-286.) It was also not argued by the prosecutor in court. (2Aug. RT 254-259; 2RT 1022.) The trial court did not cite Brown's credibility as a reason for admitting the other crimes evidence. (2RT 1022-1023.) This theory of admissibility is purely an-after-the fact justification by the

Attorney General for the admission of the uncharged crimes which should be rejected by this Court.

The trial court could not have admitted the other crimes evidence to bolster Brown's credibility if the prosecutor had offered the evidence for that purpose. Under respondent's argument, section 1101 evidence is relevant if it corroborates to any degree the testimony of a prosecution witness. This reasoning must be rejected because it would in practical effect eliminate the restrictions imposed on the admission of other crimes evidence in section 1101, subdivisions (a) and (b).

Respondent cites *People v. Carpenter* (1995) 21 Cal.4th 1016, 1049, and *People v. Hawkins* (1995) 10 Cal.4th 920, 951-952, overruled on another point in *People v. Blakely* (2000) 23 Cal.4th 82, 89-91, in support of the argument the other crimes evidence was admissible to prove Brown's credibility. (RB at p. 53.) These cases are distinguishable.

In *People v. Carpenter*, the defendant was convicted of a series of murders and sexual assaults. The victims were murdered and assaulted in wooded areas. Physical evidence suggested two of the victims had been strangled with a narrow piece of cord or a wire. The defendant received the gun he used to shoot several of the victims from someone named Mollie Purnell. A witness testified that she went to the Purnell's home during a weekend and saw the defendant there. The defendant explained he was a professional thief and showed her a suitcase which he referred to as his "thief kit." It contained a firearm and woven wire similar to that used to kill two of the victims. The defendant argued the witness's testimony

about seeing a firearm and the woven wire was inadmissible. This Court concluded, “the court properly admitted the statement about the defendant’s being a ‘thief,’ offered not to prove its truth, but to indicate the circumstances in which the defendant showed the witness the gun and the suitcase. These circumstances were relevant to her credibility, which was a material issue.” (*People v. Carpenter, supra*, 21 Cal.4th at p. 1049.)

People v. Carpenter was not a section 1101 case. The testimony about the gun and the woven wire demonstrated the means by which the charged murders were committed. Here, the murder of Hartwell, and the incident with the Aguons, did not demonstrate anything about how Noriega was killed. Those incidents had no impact whatsoever on Brown’s credibility. She knew nothing about the uncharged crimes.

In *People v. Hawkins*, the defendant committed two murders during separate incidents. The second incident was at a market where the defendant killed a customer and shot the store manager who survived. The defendant was arrested six days after the second murder. Prior to being arrested, the defendant admitted to his brother his participation in the incident. The defendant said he was thinking of returning to the market to kill the surviving witness. The defendant’s brother discouraged him from doing so. They argued. The defendant then assaulted his brother with a knife and caused serious injury. The police arrived and took the brother’s statement which incriminated the defendant. (*People v. Hawkins, supra*, 10 Cal.4th at p. 950.)

The defendant objected under section 1101 to the admission of his assault on his

brother with the knife. The brother testified at the preliminary hearing the defendant had not said anything to him about the murders. This testimony contradicted the brother's statement to the police the day the defendant was arrested. The brother at trial inculpated the defendant. The defense counsel, during cross-examination, emphasized the contradiction between the brother's trial testimony and preliminary hearing testimony. The prosecutor, on redirect examination, elicited the defendant's assault against his brother to explain why the brother was afraid of the defendant and recanted his accusations when he testified at the preliminary hearing. This Court concluded the stabbing incident was admissible because it was relevant to the brother's credibility. (*People v. Hawkins, supra*, 10 Cal.4th at pp. 951-952.)

The instant case bears no similarity at all to *People v. Hawkins*. When Brown was arrested during 1994, she gave a statement to the police which inculpated Justin in Noriega's death. (6RT 1918-1919, 1821, 1923, 1945.) Hartwell's murder, and the incidents with the Aguons, had no bearing on Brown's motive to give truthful testimony when she testified during the Texas trial. There was no evidence those incidents influenced Brown's statement to the police. The section 1101 incident in *People v. Hawkins*, itself, involved the prosecution witness whose credibility was in question. Brown, conversely, had no connection to the section 1101 evidence admitted against Justin. Hence, the murder of Hartwell, and the incident with the Aguons, was not relevant to Brown's credibility.

iv. THE OTHER CRIMES EVIDENCE WAS NOT ADMISSIBLE TO PROVE PREMEDITATION AND DELIBERATION.

Respondent argues the other crimes evidence was admissible to prove premeditation

and deliberation and cites *People v. Rogers* (2006) 39 Cal.4th 826, and *People v. Cummings* (1993) 4 Cal.4th 1233, in support of this argument. (RB at p. 54.) However, the argument is conclusory. Respondent simply asserts this theory of admissibility, cites the above cases, and fails to further develop the argument. This Court should deem the argument abandoned because of respondent's failure to adequately explain it. (*In re Phoenix H.* (2009) 47 Cal.4th 835, 845 [points asserted without argument or authority are deemed abandoned].)

Justin explained at length in the Opening Brief why the other crimes evidence was not admissible to prove intent. (AOB at pp. 66-73.) The other crimes evidence was not admissible to prove premeditation and deliberation for the same reasons. Noriega was shot multiple times at close range. (6RT 1913, 1938; 8RT 2307-2311.) The shooter obviously intended to kill Noriega. The defense counsel argued during closing argument that Justin was not the shooter and did not dispute the intent of the shooter to kill Noriega. (13RT 2946-2953.)

Neither *People v. Rogers* nor *People v. Cummings* supports respondent's argument. The defendant in *People v. Rogers* was a deputy prior to being terminated from the police department. The defendant, while employed as a deputy, killed two prostitutes one year apart. The location and method of execution were similar. One of the prostitutes was a 15 year old girl named Clark. The defendant admitted he killed Clark, but claimed he had a diminished mental state because of childhood abuse and was provoked by Clark's taunts. The prosecution during its rebuttal case admitted evidence, pursuant to section 1101, of a

complaint filed by a prostitute against the defendant when he worked as a deputy. The theory of relevance was the prior complaint demonstrated that defendant's motive to kill Clark was to prevent her from reporting him to law enforcement. This Court approved of the admission of the evidence for that purpose. (*People v. Rogers, supra*, 39 Cal.4th at p. 862.)

The section 1101 incident in *People v. Rogers* occurred prior to the defendant killing the victim. The section 1101 incident provided a direct and immediate motive for the defendant to commit the charged offense. He did not want to get in trouble again because of another complaint by a prostitute. Conversely, Hartwell's death occurred after Noriega's death. The fact that Justin may have had a motive to kill Aguon, Christine, and Hartwell did not mean he had the same motive to kill Noriega. They were separate and unrelated incidents.

In *People v. Cummings*, the defendant told someone named Norton that he was not worried about being stopped by a police officer while driving a stolen vehicle because he was not going to give the officer the opportunity to ask questions. A few days later Cummings and his co-defendant were passengers in a vehicle stopped by a police officer. The defendants murdered the police officer. The defendant objected to the admission of his statement to Norton based on section 1101. This Court approved the admission of the statement because it was directly relevant to the defendant's motive and intent to shoot any police officer who got in his way. (*People v. Cummings, supra*, 4 Cal.4th at p. 1289.)

The defendant's comments in *People v. Cummings* preceded the shooting of the police

officer and established the motive for the murder. The section 1101 evidence in Justin's case involved separate and unrelated events from Noriega's death. The fact Justin may have had a motive to murder Hartwell or kill Aguon and Christine did not mean he had the same motive to kill Noriega.

3. THE OTHER CRIMES EVIDENCE WAS NOT ADMISSIBLE UNDER EVIDENCE CODE SECTION 352.

Respondent argues Justin ignored the deferential abuse of discretion standard by arguing the other crimes evidence should not have been admitted. Even under the abuse of discretion standard there must be some logical connection between uncharged criminal acts offered under section 1101 and a fact in dispute. As explained above, there was no such connection.

Respondent argues the section 1101 evidence was admissible under section 352 because: (1) the intermediate fact proved by the uncharged offenses was the motive for the Noriega shooting which was relevant to the issues of premeditation and deliberation and Brown's credibility; (2) appellant placed all elements of the charged murder in issue by pleading not guilty; (3) the murders were similar based on appellant's belief Hartwell and Noriega were going to his report his criminal activities; (4) the trial court did not make a contradictory ruling by admitting the uncharged crimes evidence, but refusing to instruct the jury with voluntary manslaughter instructions; (5) the occurrence of the Hartwell murder three years after has no impact on its admissibility; and (6) the trial court acted within its discretion by admitting the voluminous details about Hartwell's murder. (RB at pp. 54-62.)

Many of the above arguments are a repetition of the arguments made by respondent which are addressed above. Justin will therefore be brief. The uncharged crimes were not admissible to prove Justin killed Noriega. The three incidents had no connection to each other. Respondent's argument is actually that Justin acted in conformance with a character trait of assaulting people. Evidence of a character trait is not admissible under section 1101, subdivision (a).

Respondent's reliance on *People v. McCurdy* (2014) 59 Cal.4th 1063, is misplaced. The defendant in that case kidnaped an eight year old girl and then sexually assaulted and murdered her. The defendant denied kidnaping the victim. The defendant was charged with murder, kidnaping, and kidnaping to commit a lewd act. The trial court admitted, pursuant to section 1101, evidence the defendant had molested his sister for about 12 years starting when she was about three years old. The defendant argued the trial court erred by admitting evidence the defendant molested his sister because the identity of the kidnaper was not in dispute. This Court rejected that argument. The molestation of the defendant's sister was relevant to whether the defendant, if he was the kidnaper, did so with lewd intent. In *People v. McCurdy*, the uncharged crime—the defendant's molestation of his sister—was relevant to prove an element of a charged offense if the jury concluded the defendant was the kidnaper. In Justin's case, the uncharged crimes did not prove identity and were not offered for that purpose. They added nothing to the jury's determination of the intent of the shooter because Noriega was shot multiple times at essentially point blank range.

Appellant addressed in the Opening Brief the argument the uncharged crimes were admissible because he placed all the elements of the offense in issue by pleading not guilty. This argument simply ignores the limitation imposed by section 1101, subdivision (a), on the admission of evidence. There must be a valid theory of relevance for uncharged crimes to be admitted under section 1101, subdivision (b). In Justin's case, there was no valid theory of relevance for the uncharged crimes.

The deaths of Noriega and Hartwell, and the incident with the Aguons, lacked sufficient similarity to prove Justin's intent when he allegedly shot Noriega. Respondent can point to only one similarity—Justin's alleged desire to silence a "narc,"—between the incidents. Otherwise the circumstances of the incidents are completely different. The incidents are separated in time, location, individuals involved, and the means to kill. The uncharged crimes added nothing to whether the person who shot Noriega intended to kill him because Noriega was shot multiple times at point blank range.

Justin argued in the Opening Brief the trial court's ruling admitting the uncharged crimes contradicted its refusal to give jury instructions for voluntary manslaughter based on heat of passion and unreasonable self-defense. Respondent argues the trial court's rulings were not contradictory because: (1) Justin confuses the elements of the offense with affirmative defenses; and (2) the heat of passion, or provocation, elements of voluntary manslaughter did not negate the requisite intent to kill. (RB at p. 70, fn. 19.)

An intent to kill is an element of voluntary manslaughter based on heat of passion and

unreasonable self-defense. (*People v. Rios* (2000) 23 Cal.4th 450, 451.) Hence, the fact the shooter intended to kill Noriega did not necessarily preclude the giving of voluntary manslaughter instructions. The trial court correctly refused to give voluntary manslaughter instructions only if there was no evidence Justin acted in self-defense or because of the heat of passion. Noriega was shot multiple times at point blank range. There was no doubt the shooter intended to kill him.

Hartwell's death three years after Noriega's death is significant for the section 1101 analysis because it precludes any causal relationship between those incidents. Justin is not arguing criminal conduct occurring after the charged offense can never be admissible under section 1101. The evidence was simply not admissible in this case. Respondent's reliance upon *People v. McCurdy* and *People v. Davis* (2009) 46 Cal.4th 539, 602, is misplaced because the charged offense, and section 1101 incident, in those cases involved sexual conduct which is a relatively immutable personality trait. The same cannot be said for killing two people three years apart under different circumstances.

In *People v. Spector* (2011) 194 Cal.App.4th 1335, the defendant was charged with murder based on shooting the female victim. His defense was the victim committed suicide. The Second Appellate District approved the trial court's admission into evidence of seven separate incidents over 20 years where the defendant held a firearm to the head of a female victim in a similar manner to the charged offense. (*People v. Spector, supra*, 194 Cal.App.4th at p. 1354-1358.) The defendant's conduct had the following similarities: (1) he was alone

with a woman he had invited to his house or hotel; (2) he had a romantic or sexual interest in her; (3) he drank alcohol; (4) he exhibited romantic or sexual interest in her; (5) the victim attempted to leave; (6) he lost control; (7) he threatened the victim and pointed an accessible firearm at her; and (8) he blocked the door to prevent her escape. (*People v. Spector, supra*, 194 Cal.App.4th at p. 1383.) Hence, the evidence was admissible to prove the victim did not die as the result of accident, mistake, or suicide. Justin's conduct did not have any such distinguishing features.

Justin also argued the trial court erred by admitting unnecessary details about Hartwell's death. Respondent argues the evidence was properly admitted because: (1) a complete presentation was necessary to place Hartwell's murder into context; (2) evidence pertaining to Hartwell's murder was no more inflammatory than the evidence pertaining to Noriega's death; and (3) Justin's analogy to the law of severance is unavailing. Justin argued this issue at length in the Opening Brief. The evidence pertaining to Hartwell's death could have been presented in a far more abbreviated and less prejudicial manner. Duvall's⁵ testimony about finding bones, a skull, and a torso at the location where Hartwell's body was found could have been omitted. (10RT 2540.) There was no need whatsoever for the autopsy photographs or the gruesome details of the autopsy. (11RT 2623-2624.) Exhibits 18 through 22 were the most gruesome photographs from the Noriega autopsy. (8RT 296-2297.) These

⁵ Duvall was the fire chief from Bastrop County who saw Hartwell's remains in the vehicle where her body was found. (10RT 2540-2541.)

photographs for the most part resembled a pile of dirt. Exhibits 42 through 48 were from Hartwell's autopsy. (11RT 2621.) These photographs showed a burned skull and vivid red photographs of the interior portion of the body. Appellant analogized to the law of severance solely to demonstrate how a weak prosecution case was unfairly bolstered by a stronger and more inflammatory case. Appellant's trial was as much about Hartwell's death as about Noriega's death. The trial should not have been conducted in this manner.⁶

4. THE ADMISSION OF THE OTHER CRIMES EVIDENCE WAS NOT HARMLESS ERROR.

Respondent argues the admission of the other crimes evidence was harmless error because: (1) Justin admitted killing Noriega to Reeder and Sams; (2) the jury was aware Justin had been convicted of killing Hartwell independent of its admission as section 1101 evidence; (3) the jury was given a limiting instruction; and (4) Brown's testimony established Justin killed Noriega. These arguments are wrong for several reasons.

When Reeder was first arrested for Hartwell's murder she told law enforcement that Justin had not killed anyone. (10CT 2660 [Reeder's testimony during the Texas trial].) Reeder spent one day in jail because of the arrest for murder. She was then brought before a judge and given immunity in exchange for her testimony. (8CT 1988.) Hence, Reeder had a significant incentive to cooperate with law enforcement before she said anything to them

⁶ Justin argued in the Opening Brief the admission of the other crimes evidence violated his federal constitutional rights. Respondent argues any error violated only state law. Justin's Opening Brief discussed this issue at length. He will therefore rest on the arguments in the Opening Brief.

about Justin stating he had killed someone named Rafa. Respondent's argument that Reeder was credible because she fully incriminated herself in helping Justin dispose of Hartwell's body makes little sense. She did so only after she had been granted immunity from prosecution.

Sams had little credibility. He was a close acquaintance of Hartwell. He frequently abused drugs with her. (9RT 2364, 2367.) Sams testimony at Justin's trial occurred long after Justin had been convicted of Hartwell's murder. Sams obviously blamed Justin for Hartwell's death. Sams therefore had an incentive to inculcate Justin in Noriega's death in retribution for the death of Hartwell. Sams interpreted appellant's comments as macho bragging and not serious comments. (9RT 2368-2369.) Respondent argues that Sams' perception of Justin's comments as exaggerated and false bragging is not relevant and the only relevant fact is that Justin made comments about killing someone. However, Sams' perception of Justin's comments as exaggerated and false bragging reflects Justin's tone when he made the comments. If Sams perceived Justin's comment as not being serious then it was probably intended in that manner.

Respondent's argument the other crimes evidence pales in significance to the damaging effect of Justin's statements to Reeder and Sams ignores the record. The jury learned Justin already had been convicted of a murder because of the admission of evidence pertaining to Hartwell's death. Nothing could have been more damaging to Justin's ability to receive a fair trial than the jury knowing this fact. Justin's trial was as much about

Hartwell's death as Noriega's death. Brown was the only witness directly connecting Justin to Noriega's death. She told law enforcement Justin killed Noriega only after she had been arrested and had a motive to falsely accuse him to obtain leniency. (6RT 1918-1919, 1921, 1923, 1945.)

All the witnesses connecting Justin to Noriega's death had dubious credibility. Justin's conviction of Hartwell's murder was alleged as a special circumstance. (1CTP 1.) However, the trial of this allegation was bifurcated. (14RT 3031-3048.) When the jury decided whether Justin was guilty of killing Noriega, the only reason it knew about his conviction for murdering Hartwell was because of its admission as section 1101 evidence.

The limiting instruction was of no consequence. "It is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence . . . can have any realistic effect." (*People v. Gibson* (1976) 56 Cal.App.3d 119, 130.) "You can't unring a bell." (*People v. Hill* (1998) 17 Cal.4th 800, 845.) "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.) Even if Justin's jury followed the limiting instruction, its evaluation of his guilt was still poisoned by days of testimony about a separate murder for which Justin had already been convicted and which had no relevance to whether Justin killed Noriega.

Justin attacked Brown's credibility by noting that she said a Glock firearm was used to shoot Noriega. However, the ballistics expert testified that type of firearm did not cause

Noriega's injuries. (6RT 1923, 1951; 12RT 2731.) Respondent argues Brown was nonetheless a credible witness because she simply told Detective Silva that appellant brought a Glock firearm to her house the day after Noriega was shot, and she did not claim that a Glock firearm was used to shoot Noriega. (RB at pp. 68-59.) Brown, however, testified as follows:

Q. Do you remember telling Detective Wilson that you knew for a fact that he'd shot him with a Glock .9-millimeter?

A. Yes.

(6RT 1923.) Brown later testified as follows:

Q. And you weren't just talking about a handgun when you were talking to Detective Wilson; you were very accurate about what kind of a gun was used to kill this man, weren't you?

A. Yes.

Q. You said it was a Glock .9 millimeter?

A. Yes.

(6RT 1951.)

Respondent cites the testimony on pages 2876 and 2877 of the reporter's transcript to support his argument that Brown never actually said appellant used a .9 millimeter Glock to shoot Noriega. However, that was not the understanding Silva had after he interviewed Brown. The defense counsel asked Silva about the report he prepared after he interviewed Brown. (13RT 2878.) The following exchange occurred:

Q. Okay. And on the last page, page 4, and it would be the third

paragraph up from the bottom, do you say the following, "Brown was the one who set up the buy of the gun used in the murder?"

A. That's correct.

Q. And in that paragraph at the end it was described as a Glock 9mm?

A. Yes, sir.

Q. I mean, you were there. You spoke with Ms. Brown in prison. You talked to her. You saw her facial expressions, her tone of voice. You made eye contact with her, right?

A. Yes, sir.

Q. You were face-to-face with her?

A. Yes, sir.

Q. You took from all of that that he used a 9mm, meaning Mr. Thomas?

A. That's correct.

Q. And it was a Glock?

A. Yes, sir.

(13RT 2878-2879.) Hence, Brown claimed Justin used a Glock .9 millimeter firearm to shoot Noriega when she made her statement to Silva and when she testified. Brown's trial testimony was untruthful because a Glock .9 millimeter firearm could not have been used to kill Noriega.

Respondent argues physical evidence connected Justin to Noriega's shooting because

Justin possessed a TEC-9 firearm in Texas and that type of firearm could have been used during the shooting. This was meager evidence Justin shot Noriega. Many people could possess TEC-9 firearms. Paul Sham, the prosecution ballistics expert, prepared a list of the firearms that could have discharged the bullets that killed Noriega. The list included 18 firearms and was not exclusive. (12RT 2730, 2739.)

Nothing could have been more prejudicial to Justin receiving a fair trial than the jury learning about the Texas murder conviction. The trial court aggravated the prejudice by allowing the prosecution to present, in practical effect, another whole trial about an inflammatory, but irrelevant, incident. Justin's jury was poisoned by the Texas conviction. The judgment must be reversed.

II

THE JUDGMENT OF GUILT SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY ADMITTED BROWN'S TESTIMONY FROM THE TEXAS TRIAL INTO EVIDENCE OVER DEFENSE OBJECTION.

Brown was the key witness against Justin. She provided the only testimony connecting Justin to Noriega's death. Justin argued in the Opening Brief the trial court erred by admitting Brown's testimony from the Texas trial into evidence because he did not have the same motive to cross-examine her during each of the trials. Respondent argues Justin's motive at the Texas and California trials was to discredit Brown's credibility and her testimony from the Texas trial was therefore admissible.

Justin noted the cross-examination of Brown during the Texas trial was abbreviated. Respondent argues Brown's testimony was properly admitted because motive and opportunity to cross-examine the witness is the test for admissibility and not the actual cross-examination. However, the abbreviated nature of Brown's cross-examination during the Texas trial demonstrated the motive of the defense counsel to attack Brown's credibility during that hearing was substantially less than the motive to attack her credibility during the California trial. Brown was the key witness for the California prosecution. The prosecution could not have proven its case as a matter of law absent Brown's testimony because her testimony was the only direct evidence Justin shot Noriega. Conversely, Justin had already been convicted of murder for stabbing Hartwell to death by the time Brown testified during

the Texas trial. It was a foregone conclusion Justin was going to receive a substantial sentence for a murder conviction. The defense counsel's motive to cross-examine Brown during the penalty phase of the Texas trial was simply not the same as the defense counsel's motive to cross-examine Brown during the California trial where she was the key witness in the guilt phase of a death penalty case.

Justin argued in the Opening Brief the admission of Brown's testimony violated his federal constitutional rights. Respondent's position is that no constitutional error occurred because Brown's testimony was properly admitted under Evidence Code section 1291. Justin was deprived of his right of confrontation under the Sixth and Fourteenth Amendments because: (1) he did not have an adequate opportunity to cross-examine Brown; and (2) Brown was the most crucial prosecution witness and her credibility was unfairly enhanced because the jury did not have the opportunity to see her and assess her utter lack of credibility as a convicted felon with a motive to falsely inculpate Justin.

Respondent argues the admission of Brown's testimony was harmless error because Justin admitted to Reeder and Sams that he had killed someone in California. (RB at p. 85.) This argument must be rejected. The prosecution had no evidence connecting Justin to Noriega's death absent the admission of Brown's testimony. If Brown's testimony had been excluded, the prosecution evidence consisted of: (1) Justin's statement to Reeder that he had killed someone in California—a State which had a population of tens of millions of people—by the name of Rafa; (2) Justin's statement to Sams about killing people; (3) Justin's

statements to Silva when he was interviewed; and (4) Noriega's dead body. Justin's statements to Reeder and Sams were far too vague to connect him to the death of a specific person. Justin admitting knowing Noriega when he was interviewed by Detective Silva, but he denied killing him. (16CT 4157, 4178, 4181, 4189, 4197, 4203.) There was no evidence from Noriega's autopsy suggesting Justin killed him. (8RT 2291-2314.)

The admission of Brown's testimony was the single most damaging evidence admitted at trial. It was the only evidence specifically connecting Justin to Noriega's death. The admission of her testimony was not harmless error. The judgment must be reversed.

III

THE TRUE FINDING TO THE PRIOR MURDER SPECIAL CIRCUMSTANCE ALLEGATION SHOULD BE REVERSED BECAUSE THE TEXAS MURDER CONVICTION DID NOT MEET THE REQUIREMENT OF PENAL CODE SECTION 190.2, SUBDIVISION (A)(2), TO BE CONSIDERED A PRIOR MURDER CONVICTION, AND THE TRIAL COURT ERRONEOUSLY OVERRULED DEFENSE OBJECTIONS TO EXHIBITS.

Justin argued in the Opening Brief the true finding to the Texas murder conviction special circumstance allegation should be reversed because: (1) the trial court erred by admitting documents into evidence from that conviction; and (2) the Texas murder conviction did not contain all the elements of a California murder conviction. (AOB at pp. 97-117.) Respondent argues the true finding to the special circumstance allegation should be affirmed because:

(1) Justin's Texas murder conviction contained all the elements of implied malice second degree murder under California law because Texas Penal Code section 19.02, subdivision (b)(1), states one who "intentionally or knowingly causes the death of another," is guilty of murder. (RB at p. 91);

(2) The Texas jury instruction for murder in section 19.02, subdivision (b)(2), which applies when one "intends to cause serious bodily injury and commit an act clearly dangerous to human life that causes the death of an individual . . .," satisfies the definition of implied malice under California law. (RB at pp. 91-92);

(3) Justin's Texas murder conviction contained all the elements of murder, as defined under California law, under the record of prior conviction test. (RB at pp. 94-97);

(4) *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Descamps v. United States* (2013) ___ U.S. ___ [133 S.Ct. 2276], did not require the jury to determine whether the Texas murder conviction met the definition of murder under California law. (RB at pp. 97-99); and

(5) The trial court's consideration of any inadmissible documents was harmless error. (RB at pp. 86-99.) Respondent's argument must be rejected.

A. THE TRUE FINDING TO THE MURDER SPECIAL CIRCUMSTANCE ALLEGATION CANNOT BE AFFIRMED BASED ON THE DEFINITION OF MURDER IN TEXAS PENAL CODE SECTION 19.02, SUBDIVISION (B)(1).

Justin conceded on page 107 of the Opening Brief the definition of murder in Texas Penal Code section 19.02, subdivision (b)(1), met the definition of express malice in Penal Code section 188. However, the elements test looks to the least adjudicated element of the conviction to determine whether the crime contains all the elements of the corresponding California statute. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 262.) Because the Texas jury was instructed for section 19.02, subdivision (b)(2), it is irrelevant that the definition of murder in section 19.02, subdivision (b)(1), contains all the elements of express malice under California law.

Justin argued in the Opening Brief that *People v. Martinez* (2003) 31 Cal.4th 673, addressed only whether a violation of section 19.02, subdivision (b)(1), included all the elements of murder as defined under California law. In other words, *People v. Martinez*

applied only the elements test. This conclusion followed from several statements in the opinion. This Court stated, “our conclusion makes it unnecessary to reach the Attorney General’s alternative argument that we properly may consider the facts and circumstances underlying the offense to which defendant pleaded guilty, facts that in this case were elicited during the penalty phase.” (*People v. Martinez, supra*, 31 Cal.4th at p. 688.) The Court then cited a number of cases that illustrated the record of conviction test it did not have to reach. (*Ibid.*) This language established this Court applied only the elements test.

This Court then stated, “our reliance on the wording of the Texas indictment to determine what crime defendant committed would not constitute improper consideration of extraneous ‘facts and circumstances of the offense’. In order to apply the ‘elements’ test of *Andrews, supra*, 49 Cal.3d at pages 222-223,⁷ we certainly must know, at the least, the crime to which defendant pleaded guilty.” (*People v. Martinez, supra*, 31 Cal.4th at p. 688.) A violation of section 19.02, subdivision (b)(1), contains all the elements of express malice under California law. Hence, Justin’s Texas murder conviction contained all the elements of murder as defined under California law **if** his conviction was based on a violation of section 19.02, subdivision (b)(1). Respondent argues in reliance on the above quoted passage from *People v. Martinez* that Justin’s Texas conviction was based on a violation of section 19.02, subdivision (b)(1), because: (1) the indictment alleged Justin intentionally and knowingly

⁷ *People v. Andrews* (1989) 49 Cal.3d 200.

caused the death of an individual, (RB at p. 91)⁸; (2) the jury found him guilty of murder as alleged in the indictment, (RB at p. 92)⁹; and (3) the Texas indictment in *People v. Martinez* contained similar wording. (RB at pp. 92.)

The problem with respondent's argument is that: (1) Justin did not plead guilty in the Texas case; (2) this Court must therefore look to the jury instruction and the verdict in the Texas case to determine the crime of which he was convicted; and (3) the jury instruction in the Texas case allowed the jury to find Justin guilty of section 19.02 based upon the theory of committing a dangerous act in subdivision (b)(2) of that statute.¹⁰

People v. Martinez looked to the indictment to determine the crime of which the defendant had been convicted because the defendant pled guilty. Justin had a jury trial for

⁸ The indictment appears at volume one, page 20 of the clerk's transcript and also at volume one, page 32 of the supplemental clerk's transcript. The indictment contained language for both subdivisions (b)(1) and (2) of Texas Penal Code section 19.02. (ICT 20.)

⁹ The verdict appears at volume one, page 32 of the supplemental clerk's transcript.

¹⁰ The Texas jury instruction stated as follows:

A person commits the offense of murder if he:

(1) intentionally or knowingly causes the death of an individual; or

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual.

(ICT 22.)

the Texas case. The Texas jury based its guilty verdict on the language of the instructions and not the language of the charging document. That is why the distinction between a guilty plea and a jury trial is significant for applying the least adjudicated elements test. The jury instruction, and not the language of the indictment, must be reviewed to determine the crime which Justin was found guilty of committing. This approach arguably appears to apply the record of conviction test because it is considered part of the Texas trial court record. However, this approach is consistent with *People v. Martinez* which looked to the wording of the indictment when it applied the elements test in the context of a guilty plea. (*People v. Martinez, supra*, 31 Cal.4th at p. 688.)

Furthermore, even if this Court does not review the jury instructions to determine the crime Justin was convicted of in Texas because that approach is inconsistent with the elements test, it cannot look to the charging document to make that determination because Justin had a jury trial. Hence, the true finding to the special circumstance allegation cannot be affirmed on the basis the Texas conviction was based on a violation of section 19.02, subdivision (b)(1), and thus contained the elements of express malice under California law.

B. THE TRUE FINDING TO THE MURDER SPECIAL CIRCUMSTANCE ALLEGATION CANNOT BE AFFIRMED BASED ON THE DEFINITION OF MURDER IN TEXAS PENAL CODE SECTION 19.02, SUBDIVISION (B)(2).

The true finding to the murder special circumstance allegation cannot be affirmed on the basis that a violation of section 19.02, subdivision (b)(2), contains all the elements of implied malice under California law. Section 19.02, subdivision (b)(2) applies to a person who “intends to cause serious bodily injury and commits an act clearly dangerous to human

life that causes the death of an individual . . .” Implied malice under California law requires “proof that a defendant acted with conscious disregard of the danger to human life.” (*People v. Knoller* (2007) 41 Cal.4th 139, 156.)

Justin argued in the Opening Brief that a violation of section 19.02, subdivision (b)(2), does not include the elements of implied malice under California law because: (1) the phrase “intends to cause serious bodily injury . . .” does not define a mental state of acting with conscious disregard for human life; and (2) the phrase, “commit an act clearly dangerous to human life,” focuses only on the nature of the act and not the mental state. Respondent asserts a violation of section 19.02, subdivision (b)(2), includes the elements of implied malice, but fails to perform any more analysis than to simply cite the elements of the subdivision. Respondent fails to address Justin’s argument that the mental state of “intend[ing] to cause serious bodily injury,” is a lesser state of mental culpability than “act[ing] with conscious disregard for human life.”

In *People v. Knoller* (2007) 41 Cal.4th 139, the Court of Appeal had concluded a second degree murder conviction based on implied malice could be affirmed if the defendant knew his conduct could have risked causing death or serious bodily injury. The Court of Appeal set the standard too low for a murder conviction based on implied malice. (*People v. Knoller, supra*, 41 Cal.4th at p. 143.) This Court concluded, “a conviction for second degree murder, based on implied malice, requires proof that a defendant acted with conscious disregard of the danger to human life. In holding that a defendant’s conscious disregard of

the risk of serious bodily injury suffices to sustain such a conviction, the Court of Appeal erred.” (*People v. Knoller, supra*, 41 Cal.4th at p. 156.) Similarly, the phrase, “intends to cause serious bodily injury . . .” in section 19.02, subdivision (b)(2), sets the bar too low to meet the definition of implied malice under California law. There is little difference between acting in conscious disregard of the risk of causing serious bodily injury—the standard *People v. Knoller* found too low to establish implied malice-- and intending to cause serious bodily injury—the standard to find a defendant guilty of murder under section 19.012, subdivision (b)(2). Hence, the true finding to the special circumstance allegation of murder cannot be affirmed based on the least adjudicated elements test.

Justin argued in the Opening Brief that the procedure followed in the trial court to prove the Texas murder allegation violated *Apprendi v. New Jersey*. Respondent argues an *Apprendi* violation did not occur because the Texas conviction presented the legal question of the definition of malice. (RB at p. 98.) As argued above, the least adjudicated element of murder under section 19.02 did not include all the elements of murder as defined under California law. Furthermore, *Apprendi v. New Jersey* required Justin’s jury to determine that the Texas conviction contained all the elements of murder as defined under California law. This was clearly not done because the trial court, and not the jury, made that finding. (12RT 2770; 14RT 3087.) The jury instruction for the murder special circumstance stated:

The defendant is charged with the special circumstance of having been convicted previously of murder. You must now decide if the People have proved that this special circumstance is true. To prove that this special circumstance is true the People

must prove that the defendant was convicted previously of murder in the first or second degree. A conviction of murder in the state of Texas is the same as a conviction for first- or second degree murder.

In deciding whether the People have proved this special circumstance you may not consider the testimony of witnesses that testified during the guilt phase of that trial as that testimony relates to the facts and circumstances of the death of Regina Hartwell, rather you may consider that testimony only to the extent it relates to whether the defendant in this proceeding is the same person who was tried for murder in Texas.

(14RT 3059.) The above instruction did not require the jury to make any finding about whether Justin violated subdivision (b)(1) or (b)(2) of section 19.02. It merely required the jury to conclude whether Justin had been convicted of murder in Texas. The prosecutor, furthermore, emphasized this instruction when he argued to the jury that it merely had to decide whether Justin had been convicted in Texas of murder. (14RT 3060.)

C. THE TRUE FINDING TO THE MURDER SPECIAL CIRCUMSTANCE ALLEGATION CANNOT BE AFFIRMED BASED ON THE RECORD OF CONVICTION TEST.

Justin argued in the Opening Brief the true finding to the murder special circumstance allegation could not be affirmed based on the record of conviction test because: (1) the description of the facts in the Texas appellate court opinion was inadmissible hearsay; (2) the description of the facts in the appellate court opinion lacked sufficient detail to conclude the killing was committed with malice even if it was admissible; (3) Exhibits 107 through 112 did not establish what appellant did to be guilty of the Texas murder charge; and (4) the trial transcript from the Texas trial, Exhibits 106-1 through 106-11, were not read by the trial

court and thus could not have been the basis for a true finding to the allegation.¹¹

Respondent argues: (1) the description of the facts in the Texas appellate court opinion was admissible for the non-hearsay purpose of establishing the basis of the Texas court conviction; (2) the description establishes Justin killed Hartwell with malice; (3) regardless of whether the trial court judge read the transcript of the Texas trial, it was admitted into evidence and is before this Court, and establishes Justin killed Hartwell with malice. Respondent's arguments must be rejected.

i. THE TEXAS COURT OPINION WAS NOT ADMISSIBLE.

Respondent relies on *People v. Woodell* (1998) 17 Cal.4th 448, to support the argument the description of the facts in the Texas appellate court opinion was admissible over Justin's hearsay objection. *People v. Woodell* did not establish a blanket rule that all facts in the opinion describing the crime are admissible.

In *People v. Woodell*, a conviction from North Carolina was alleged to be a strike because the defendant personally used a deadly weapon during the commission of the offense. The trial court admitted into evidence a North Carolina appellate court opinion to prove the allegation. This Court first concluded the appellate court opinion was part of the record of conviction. (*People v. Woodell, supra*, 17 Cal.4th at pp. 456-457.) However, "whether and to what extent an opinion is probative in a specific case must be decided based

¹¹ Justin also argued the record of conviction test was no longer a constitutionally valid procedure to litigate prior conviction allegations based on the holding of *Descamps v. United States* (2013) _U.S._ [133 S.Ct. 2276, 186 L.Ed.2d 438].) This issue is addressed below.

on the facts of the case.” (*People v. Woodell, supra*, 17 Cal.4th at p. 457.) This Court then stated the admissibility of the opinion “does not mean that all hearsay statements within the opinion are also admissible or noticeable.” (*People v. Woodell, supra*, 17 Cal.4th at p. 458.) The normal rules of hearsay apply to the statements in the opinion. (*Id.*, at pp. 458-459.)

In *People v. Woodell*, the trier of fact was called upon to determine whether the defendant had suffered a prior conviction involving the personal use of a weapon. The appellate court opinion was admissible for the “nonhearsay purpose of determining the basis of the conviction. Specifically, in this case, the trier of fact could look to the opinion to determine whether the basis of the conviction was personal use of the weapon or vicarious liability for someone else who personally used the weapon.” (*People v. Woodell, supra*, 17 Cal.4th at p. 459.) The North Carolina opinion contained a number of hearsay statements that would be inadmissible hearsay if offered to prove the defendant personally used a weapon. (*Id.*, at pp. 459-460.) However,

The question before the jury, however, was not whether defendant did precisely those things, but only whether defendant's conviction was based on personal weapon use or vicarious liability. The opinion, as a whole, can be considered to decide this question. The appellate court's discussion of the evidence is relevant and admissible, not to show exactly what the defendant did, but to show whether the trial court found, at least impliedly, that the conviction was based on personal use rather than vicarious liability.

The admissibility of an appellate opinion used for this nonhearsay purpose does not turn on whether each factual statement in that opinion comes within an exception to the hearsay rule but on whether the opinion logically shows what

the original trial court found was the basis of the conviction. When a trial court considers whether to admit an appellate opinion for this purpose, it should focus on the issue the jury has to resolve in determining whether the conviction is a qualifying one. It should carefully consider whether the opinion as a whole, including any factual statements, is probative on whether the conviction was based on a qualifying theory. It should not simply admit any opinion containing relevant factual statements but only those probative on this specific issue.

(People v. Woodell, supra, 17 Cal.4th at p. 460.)

Applying this standard, the key portion of the Texas court opinion describing how Justin allegedly killed Hartwell should not have been admitted. The relevant part of the Texas opinion states, “On the day before the murder, Hartwell called LeBlanc’s apartment and spoke to appellant. They argued. After the call ended, appellant told LeBlanc he was going to kill Hartwell. /P/ The following day, appellant stabbed Hartwell to death in her apartment.” (ICT 15.)

Justin’s jury was instructed in the California case, “the question for you to decide is whether the defendant was convicted of murder in the first or second degree prior to this trial.” (14RT 3059.) Justin’s jury had to decide whether the Texas murder was committed with express or implied malice as those terms are defined under California law.¹² When determining the admissibility of an appellate court opinion, the trial court, “should carefully consider whether the opinion as a whole, including any factual statements, is probative on

¹² The trial court was also required to make this determination when it found true the special circumstance allegation of murder. (*People v. McGee* (2006) 38 Cal.4th 682, 695, 708-709.)

whether the conviction was based on a qualifying theory.” (*People v. Woodell, supra*, 17 Cal.4th at p. 460.) The above portions of the Texas court opinion lacked sufficient detail for Justin’s California jury to conclude Justin harbored express or implied malice when he killed Hartwell.

The issue the jury had to decide in *People v. Woodell* was significantly different from the issue the jury in Justin’s case had to decide. In *People v. Woodell*, the California trier of fact had to determine whether the defendant’s North Carolina conviction was based on the defendant personally using a dangerous or deadly weapon. This was a straightforward question of fact which this Court concluded could be resolved based on the description of the facts in the North Carolina opinion. Justin’s California jury had to decide whether the Texas opinion established he possessed a specific state of mind, i.e., express or implied malice, when he committed the Texas crime. This was not a straightforward question of fact similar to that in *People v. Woodell*. The Texas opinion was not probative on whether Justin harbored express or implied malice when he killed Hartwell because of its lack of details about how the stabbing was committed and the opinion’s failure to identify the source of information for its assertion that Justin killed Hartwell. Hence, it should not have been admitted over defense objection.

This Court, furthermore, should reconsider the holding of *People v. Woodell*. Justice Mosk filed a concurring and dissenting opinion in that case which was joined by Justice Kennard. Justice Mosk agreed that an appellate court opinion was part of the record of

conviction. (*People v. Woodell, supra*, 17 Cal.4th at p. 464 [J. Mosk, conc. & diss.].) He also concluded an appellate court opinion was not admissible over a best evidence objection, but the defendant had failed to preserve that claim for appeal by making an objection in the trial court. (*Id.*, at p. 464.)

Justice Mosk then addressed the reasoning of the majority opinion. He concluded, “the North Carolina appellate opinion was plainly hearsay, inasmuch as it constituted and contained statements made other than by a witness offered for their truth—that defendant personally used a deadly weapon.” (*People v. Woodell, supra*, 17 Cal.4th at p. 465 [J. Mosk, conc. & diss.].) Justice Mosk rejected the conclusion of the majority opinion that the issue was not the defendant’s conduct, but the basis of the conviction. “It is indeed the defendant’s conduct—here, whether or not defendant personally used a deadly weapon—that is of consequence.” (*Id.*, at p. 466.) He believed the contents of the opinion was being offered for the truth of the matter asserted:

The majority then assert that the North Carolina appellate opinion was not hearsay. But the opinion did, in fact, constitute and contain statements made other than by a witness offered for their truth--that defendant personally used a deadly weapon. The result would be no different if the opinion could be deemed to have been offered to prove the crime of which he was convicted or the basis of his liability. For it proves his crime and the basis of his liability only by proving his conduct. I recognize that an appellate opinion may be termed a "judicial statement." (Maj. opn., ante, at p. 459.) But a "judicial statement" is not admissible per se--and certainly not the opinion here, which largely recites inadmissible hearsay within inadmissible hearsay within inadmissible hearsay. Furthermore, the only "judicial statement" that comes within an exception as such, although only under

certain limited circumstances, is a judgment (see Evid. Code, §1300-1302) --which does not embrace the opinion here.

(People v. Woodell, supra, 17 Cal.4th at pp. 466-467 [J. Mosk, conc. & diss.].)

This Court should adopt the above reasoning. The Texas court opinion was offered to prove Justin stabbed Hartwell to death. The prosecution failed to carry its burden to show the statement in the Texas court opinion that Justin stabbed Hartwell was admissible hearsay. The trial court erred by admitting the opinion over defense objection.

ii. THE FACTS DESCRIBED IN THE TEXAS COURT OPINION FAILED TO ESTABLISH JUSTIN KILLED HARTWELL WITH EXPRESS OR IMPLIED MALICE

Respondent argues the description of the facts in the Texas court opinion established the crime contained all the elements of murder as defined under California law. Justin addressed this issue in the Opening Brief and above. Simply stabbing someone does not establish the stabber acted with express or implied malice. The stabbing could have been in response to provocation and thus only manslaughter or the result of gross negligence and thus involuntary manslaughter. The paucity of facts in the Texas court opinion precludes a finding that Justin acted with express or implied malice.

iii. THE TRUE FINDING TO THE MURDER SPECIAL CIRCUMSTANCE ALLEGATION CANNOT BE AFFIRMED BASED ON THE REPORTER'S TRANSCRIPT FROM THE TEXAS TRIAL.

The reporter's transcript from the Texas trial was admitted into evidence. (6RT 1736-1739; 14RT 3037-3038.) Appellant argued in the Opening Brief the true finding to the murder special circumstance allegation cannot be affirmed based on that transcript because:

(1) the trial court did not read the transcripts when it found the Texas conviction contained all the elements of murder as defined under California law; and (2) the jury did not read the transcripts when it found true the murder special circumstance allegation. Respondent fails to identify any information in the record suggesting the trial court, or the jury read the Texas trial transcript. Respondent does not even contend they did so. Respondent's argument is limited to arguing: (1) the Texas reporter's transcript is part of the appellate record; and (2) the testimony in the reporter's transcript establishes appellant committed murder as defined under California law. (RB at p. 95.) This argument confuses the roles of the trial court and an appellate court.

An appellate court in California is limited to reviewing findings of fact made by the trial court with limited exceptions not applicable herein. (*People v. Carmen* (1954) 43 Cal.2d 342, 352; cf. Cal. Const., art VI, §11, subds. (a) [the Supreme Court has appellate jurisdiction when judgment of death has been pronounced] & (c) [the Legislature may permit courts exercising appellate jurisdiction to take evidence and make findings of fact when a jury trial is waived or not a matter of right].) The task of evaluating evidence is entrusted to the trial court subject to appellate review. (*People v. Patterson* (1989) 49 Cal.3d 615, 625.) This Court lacks the jurisdiction, and the power, to make its own findings of fact in lieu of the findings of fact which should be made by the trial court. The posture of the litigation of the Texas murder allegations establishes that neither the trial court judge nor the jury made a finding, based on the reporter's transcript of the Texas trial, that appellant killed Hartwell

with malice as defined under California law. This Court cannot do so in substitution of the task vested by the California Constitution in the trial court. Hence, the true finding to the murder special circumstance allegation cannot be affirmed based on the reporter's transcript from the Texas trial.

D. THE TRUE FINDING TO THE MURDER SPECIAL CIRCUMSTANCE ALLEGATION CANNOT BE AFFIRMED BASED ON THE RECORD OF CONVICTION TEST BECAUSE *DESCAMPS V. UNITED STATES* (2013) ___ U.S. ___ [133 S.CT. 2276, 2288, 186 L.ED.2D 438] HELD THAT PROCEDURE VIOLATES A DEFENDANT'S SIXTH AMENDMENT RIGHT TO A JURY TRIAL AND DUE PROCESS OF LAW.

Appellant argued in the Opening Brief that *Descamps v. United States* condemned the approach approved by this Court which allows a trial court to examine records from a prior conviction to determine whether it contains all the elements of the corresponding criminal statute. (AOB at p. 115.) It is now clear based on *Descamps v. United States*, and cases interpreting it, that this Court should disapprove of the record of conviction test for prior conviction allegations.

In *People v. McGee* (2005) 38 Cal.4th 682, this Court explained how the trial court should apply the record of conviction test:

California law specifies that in making this determination, the inquiry is a limited one and must be based upon the record of the prior criminal proceeding, with a focus on the elements of the offense of which the defendant was convicted. If the enumeration of the elements of the offense does not resolve the issue, an examination of the record of the earlier criminal proceeding is required in order to ascertain whether that record reveals whether the conviction realistically may have been based on conduct that would not constitute a serious felony under California law. (Citation omitted.) The need for such an inquiry

does not contemplate that the court will make an independent determination regarding a disputed issue of fact relating to the defendant's prior conduct (see *id.* at p. 460), but instead that the court simply will examine the record of the prior proceeding to determine whether that record is sufficient to demonstrate that the conviction is of the type that subjects the defendant to increased punishment under California law. This is an inquiry that is quite different from the resolution of the issues submitted to a jury, and is one more typically and appropriately undertaken by a court.

(*People v. McGee, supra*, 38 Cal.4th at p. 706.)

In *Descamps v. United States*, the district court judge examined records pertaining to the defendant's prior conviction allegation to determine if the conviction qualified as a predicate felony under the Armed Career Criminal Act (ACCA). *Descamps v. United States* stated the district court's finding of the predicate felony, based on examining documents pertaining to the conviction, raised Sixth Amendment concerns if it went beyond merely identifying a prior conviction. The trial court should not make a disputed determination about what the defendant or judge must have understood as the factual basis of the plea or what the jury accepted as the theory of the crime. (*Descamps v. United States, supra*, 133 S.Ct at p. 2288.)

Four California appellate courts have interpreted the holding of *Descamps v. United States*. (*People v. Denard* (2015) 242 Cal.App.4th 1012; *People v. Marin* (2015) 240 Cal.App.4th 1344; *People v. Saez* (2015) 237 Cal.App.4th 1177; *People v. Wilson* (2013) 219 Cal.App.4th 500, 505-509 [the trial court violated the holding of *Descamps v. United States* by reviewing the preliminary hearing transcript of the prior conviction allegation and making

a finding based on disputed facts which elevated the conviction to a serious felony conviction].) In *People v. Saez*, a Wisconsin conviction for false imprisonment while armed was used to enhance the defendant's sentence. The trial court reviewed documents pertaining to the conviction because the least adjudicated element of the offense did not correspond to the elements of a violent or serious felony. (*People v. Saez, supra*, 237 Cal.App.4th at pp. 1193-1194.) The Court stated the trial court's reliance on the documents was proper under *People v. McGee*. (*Id.*, at pp. 1195-1196, 1199.) *People v. Saez* concluded *Descamps v. United States* had overruled *People v. McGee*. (*Id.*, at p. 1207.) Hence, "we conclude the trial court acted in contravention of the Sixth Amendment by necessarily relying on the police officer's statement in the Wisconsin record of conviction to increase Saez's sentence." (*Id.*, at p. 1208.)

In *People v. Marin*, the defendant's sentence was enhanced because of prior conviction for vehicular manslaughter. The defendant had a jury trial regarding the allegation which involved the prosecutor presenting the abstract of judgment and a minute order showing a plea of no-contest. The Court of Appeal concluded this evidence was insufficient to prove the allegation. Because the defendant argued constitutional principles barred his retrial, the Court of Appeal addressed the defendant's *Apprendi* argument regarding the prior conviction allegation. The Court agreed with *People v. Saez* that *People v. McGee* was no longer viable after *Descamps v. United States*. "The type of factfinding permitted by *McGee* is virtually indistinguishable from the Ninth Circuit approach that the high court disapproved in *Descamps*." (*People v. Marin, supra*, 240 Cal.App.4th at p. 1362.) Hence, the California

procedure for litigation of prior conviction allegations violated the holding of *Apprendi v. New Jersey*. (*Id.*, at p. 1363.)

People v. Marin then discussed what type of judicial fact finding for prior conviction allegations was constitutionally permissible. The trial court could examine the documents approved in *Taylor v. United States* (1990) 495 U.S. 575, and *Shepard v. United States* (2005) 544 U.S. 13, such as indictments, jury instructions, plea colloquies, and plea agreements, to the extent they show the statutory elements of the crime of which the defendant was convicted. This judicial fact finding was permissible because it reflected the crime which the defendant admitted during the guilty plea or the crime, and its elements, the jury found true beyond a reasonable doubt. (*People v. Marin, supra*, 240 Cal.App.4th at p. 1363.)

Conversely, impermissible judicial fact finding included: (1) resolution of disputed facts about what the defendant and state judge understood as the factual basis of a plea or what the jury in a prior trial must have accepted as the theory of the crime; (2) a finding concerning what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct; (3) a finding about amplifying but legally extraneous circumstances; (4) inferences about a plea transcript based on whatever a defendant says or fails to say about extraneous facts; and (5) the trial court's own findings about non-elemental facts. (*People v. Marin, supra*, 240 Cal.App.4th at pp. 1363-1364; see also *People v. Denard, supra*, 242 Cal.App.4th at p. 1033-1034 [agreeing with the holdings of *People v. Saez* and *People v.*

Marin that the records of conviction test had been overruled by *Descamps v. United States*].)

All of the above cases agreed that the records of conviction test as formulated by this Court violates the holding of *Descamps v. United States*. The trial court thus arguably erred by relying on any document to prove the Texas murder conviction other than the judgment of conviction.

The trial court violated the holding of *Descamps v. United States* when it applied the record of conviction test. The Court stated, “and also it appears to me that the analysis of the record of the defendant’s Texas conviction demonstrates that the defendant’s conduct, had it occurred in California, was punishable as first–or second–degree murder in California as well.” (12RT 2770.) *Descamps v. United States* found error precisely because the Ninth Circuit permitted judicial fact finding as to what the defendant did to commit the crime. (*Descamps v. United States, supra*, 133 S.Ct. at p. 2288.) *People v. Denard* concluded *Descamps v. United States* forbade fact finding about the defendant’s conduct to find true a prior conviction allegation. (*People v. Denard, supra*, 242 Cal.App.4th at pp. 1363-1364.) In the instant case, the trial court expressly looked to Justin’s conduct as revealed by the Texas documents admitted into evidence to find true the prior murder conviction allegation.

The trial court erred, furthermore, by examining any documents pertaining to the Texas conviction other than the verdict which was exhibit 109. *Descamps v. United States* discussed a constitutionally valid procedure for proving prior convictions alleged under the ACCA. The ACCA required comparing the prior conviction against a generic crime to

determine whether the prior conviction contained all the elements of the generic crime. The categorical approach, which compared the elements of the prior conviction against the generic crime applied when the crime in question had a single indivisible set of elements. (*Descamps v. United States, supra*, 133 S.Ct. at pp. 2281-2282, 2285.) The Court applied a modified categorical approach, which allowed scrutiny of a limited set of documents, for a divisible statute. A divisible statute set out elements in the alternative. (*Id.*, at p. 2281.)

The California burglary statute defined the crime more broadly than the generic definition of burglary:

Our decisions authorize review of the plea colloquy or other approved extra-statutory documents only when a statute defines burglary not (as here) overbroadly, but instead, alternatively, with one statutory phrase corresponding to the generic crime and another not. In that circumstances, a court may look to the additional documents to determine which of the statutory offenses (generic or non-generic) formed the basis of the defendant's conviction. But here no uncertainty of any kind exists, and so the categorical approach needs no help from its modified partner. We know *Descamps'* crime of conviction, and it does not correspond to the relevant generic offense. Under our prior decisions, the inquiry is over.

(*Descamps v. United States, supra*, 133 S.Ct. at p. 2286.)

In *Descamps v. United States*, the California burglary conviction had to contain the same elements as the generic crime to qualify as a predicate felony under the ACCA. In the instant case, the Texas murder conviction had to contain all the same elements of murder as defined under California law. Justin's crime of conviction, Texas Penal Code section 19.02, is known. It does not correspond to the elements of murder as defined under California law.

The inquiry should have been over and the trial court exceeded the bounds of what was permissible under *Descamps v. United States* by reviewing documents pertaining to the Texas conviction.

Justin's jury did find true the Texas murder allegation. (14RT 3087.) However, the trial court judge made the factual finding that the Texas conviction contained all the elements of a California murder conviction. (12RT 2770.) Justin's jury did not make any finding regarding the elements of the Texas conviction. Under *Descamps v. United States*, the determination of whether the Texas conviction contained all the elements of murder, as defined under California law, had to be made by the jury. Hence, an *Apprendi* violation occurred in this case despite the jury finding the Texas murder allegation true.

E. THE ADMISSION OF THE TEXAS DOCUMENTS WAS NOT HARMLESS ERROR.

Respondent argues the admission of the Texas documents was harmless error because the Texas conviction contained all the elements of murder as defined under California law under the least adjudicated elements test. Justin explained above why section 19.02 does not contain all the elements of murder as defined under California law. Justin incorporates that argument in this portion of the brief. This Court cannot conclude the jury would have imposed the death penalty without legally competent evidence Justin had been convicted of murder in Texas. That conviction was an aggravating factor which helped push the jury towards voting for death. The true finding to the murder special circumstance allegation, and the judgment of death, must be reversed.

IV

THE TRUE FINDING TO THE ROBBERY SPECIAL CIRCUMSTANCE ALLEGATION SHOULD BE REVERSED BECAUSE THE ROBBERY WAS INCIDENTAL TO NORIEGA'S MURDER.

Justin argued in the Opening Brief the true finding to the robbery special circumstance allegation had to be reversed because the robbery was incidental to Noriega's murder. (AOB at pp. 118-133.) Respondent argues: (1) there was substantial evidence Justin had an independent felonious purpose to commit robbery at the time of the murder; and (2) Justin had a concurrent intent to rob Noriega at the time of the murder. (RB at p. 100-107.)

A defendant does not have an independent felonious purpose when he or she intends to kill the victim and the robbery is incidental to the murder. (*People v. Green* (1980) 27 Cal.3d 1, 61-62.) Respondent argues Justin had an intent to rob Noriega independent of his intent to kill him because Justin: (1) said something to Noriega which caused Noriega to retrieve a green bag from the trunk of his vehicle; (2) then shot Noriega; (3) then placed the green bag in his trunk; and (4) later bragged about shooting someone and taking a bag of speed. Respondent further argues the fact that Noriega produced the bag of drugs before the shooting manifested Justin's concurrent intent to rob and kill him. (RB at p. 104.)

The prosecution theory of the case, based on the prosecutor's opening argument, was that Justin intended to kill Noriega because he believed he was a "snitch." (13RT 2905-2906.) The prosecution witnesses testified Justin's intent was to kill Noriega because he

believed he was a snitch and robbery was not the motive. (6RT 1913, 1938; 7RT 2022, 2144; 8RT 2276.) The prosecution produced no evidence Justin met Noriega for the purpose of robbing him.

Respondent's argument that Justin must have had an independent or concurrent intent to rob Noriega because he said something to Noriega, which caused him to retrieve a green bag from the trunk of his vehicle, is speculation. There is no way to know what, if anything, Justin said to Noriega or whether any statement Justin made was the reason Noriega retrieved the green bag from his trunk.

Respondent argues Justin "ignores Brown's testimony describing how he had Noriega produce the bag of drugs before the shooting." (Respondent's Brief at p. 104.) This assertion misrepresents the record. Justin made an unknown statement to Noriega. Noriega then retrieved the green bag. (6RT 1912-1913, 1942-1943.) The evidence does not establish Justin had Noriega retrieve the green bag. Respondent is making that assumption. Brown was the only contemporaneous witness to the shooting. She specifically testified that Justin did not meet Noriega for the purpose of robbing him. (6RT 1955.) Justin knew he had removed property from Noriega following the shooting when Sams heard appellant say he had shot someone and taken their drugs. (9RT 2369-2370.) Justin's statement to Sams two years after Noriega's death did not establish Justin's motive was robbery in light of the prosecution theory Justin killed Noriega because he was a "snitch." The true finding to the robbery special circumstance allegation must be reversed.

Justin also argued the judgment of death must be reversed because of the reversal of the robbery special circumstance allegation. This Court has rejected that argument under similar circumstances. (*People v. Carrasco* (2014) 59 Cal.4th 924, 970.) The robbery special circumstance finding added to the weight of aggravation considered by the jury when it imposed the death penalty. (*Brown v. Sanders, supra*, 546 U.S. at pp. 220-221.) The reversal of the robbery special circumstance allegation requires reversal of the judgment of death.

THE JUDGMENT OF GUILT TO COUNT ONE MUST BE REVERSED BECAUSE: (1) THE TRIAL COURT FAILED TO FULLY AND PROPERLY INSTRUCT THE JURY FOR THE LESSER INCLUDED OFFENSE OF SECOND DEGREE MURDER; AND (2) THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT SECOND DEGREE MURDER COULD INVOLVE AN INTENTIONAL KILLING.

Justin argued in the Opening Brief the conviction for murder (count one) must be reversed because the jury instruction for murder failed to instruct the jury that an intentional killing was second degree murder. Respondent argues: (1) this claim was forfeited because an objection was not made in the trial court; (2) the jury instruction was correct; and (3) any error was harmless.

Justin did not forfeit the claim. Penal Code section 1259 provides that any prejudicially erroneous instruction can be reviewed on appeal despite the absence of an objection in the trial court. Under section 1259, the only issue is whether the murder instruction was prejudicially erroneous. If so, then the forfeiture doctrine does not apply.

Respondent's argument the jury was correctly instructed for the elements of second degree murder misrepresents the record. Respondent argues, "Thomas's jury was properly instructed on second degree express malice murder. CALCRIM No. 520 stated the People had to prove an intent to kill for all murders. (17 Supp. CT 4324)." (Respondent's Brief at p. 112.) Respondent is wrong because CALCRIM No. 520 did not instruct the jury the

People had to prove an intent to kill for second degree murder.¹³

CALCRIM No. 520 instructed the jury the prosecution had to prove the following for the murder charge: (1) the defendant committed an act that caused the death of another person; and (2) when the defendant acted, he had a state of mind called express malice. It also instructed the jury that Justin acted with express malice if he unlawfully intended to kill. (13RT 2895; 17 CT 4324.) There is nothing in this language instructing the jury the prosecution had to prove an intent to kill for second degree murder. The instruction required Justin's jury to make the connection between express malice and second degree murder. There is no way to be sure Justin's jury made this connection because of the complexity of the murder instruction.

Respondent further argues the jury was correctly instructed because they were instructed, "the only exception to this rule stated in the instructions was for felony murder." (Respondent's Brief at p. 112.) This language was part of CALCRIM No. 521 and only contributed to the jury's confusion about whether second degree murder involved an intentional killing. CALCRIM No. 521 appears at pages 2896 and 2897 of the reporter's transcript and page 4326 of the clerk's transcript. It instructs the jury regarding the degrees of murder. CALCRIM No. 521 told the jury that willful, deliberate, and premeditated murder

¹³ A second degree murder conviction can be based on implied malice. (*People v. Swain* (1996) 12 Cal.4th 593, 601.) Implied malice is the commission of an act dangerous to human life, performed deliberately, and with conscious disregard for life. (*People v. Knoller* (2007) 41 Cal.4th 139, 143.) The theory of implied malice was omitted from the jury instructions at the request of the prosecutor. (13RT 2818.)

was first degree murder. (13RT 2896.) Hence, the jury knew in explicit terms what was required for first degree murder. However, the phrase, “all other murders except felony murder are of the second degree (13RT 2897), told the jury nothing about the elements of second degree murder. The jury was left to guess at what was included in the definition of second degree murder. Respondent argues the jury instructions repeatedly told the jury that all murders involved an intentional killing. (RB 113-114.) Respondent is wrong because this language is not in the instructions.

The only way the jury could have known that second degree murder involved an intentional killing was if the jury linked the definition of express malice in CALCRIM No. 520 with the phrase, “all other murders except felony murder are of the second degree,” in CALCRIM No. 521. There is no particular reason why the jury would have made this connection. Furthermore, it was likely the jury linked the concept of express malice only to first degree murder. The jury was told Justin acted with express malice “if he unlawfully intended to kill.” (13RT 2895.) The definition of first degree murder in CALCRIM No. 521 was couched in the language of an intent to kill. The jury was told Justin acted willfully “if he intended to kill,” acted deliberately if he “decided to kill,” acted with premeditation “if he decided to kill before committing the act that caused death.” (13RT 2896; 17CT 4326.) The jury most likely concluded express malice in CALCRIM No. 520 was simply further defined by the willful, deliberate, and premeditated language in CALCRIM No. 521 because an intent to kill was the subject in each of those portions of the jury instructions. The murder

instructions, when read as a whole, suffered from the gap identified in *People v. Rogers* (2006) 39 Cal.4th 826, 866.

Respondent argues any error was harmless because there was strong evidence of premeditation and deliberation. Respondent cites the following evidence to support this argument: (1) Justin's statements to Reeder about his motive to kill Noriega; (2) Justin's statements to third parties about killing people for getting out of line and for drugs; (3) evidence of planning; and (4) Justin's denial to Investigator Silva that he was involved in Noriega's death. (RB at pp. 115-118.) These arguments do not establish the instructional error was harmless under either the *Chapman*¹⁴ or *Watson*¹⁵ standard of review. Respondent is relying on Justin's statements made years after the incident and ignoring the evidence describing what actually happened during the incident. Brown testified Justin "wanted to make sure he wasn't going to be ambushed out there in the middle of nowhere." (6RT 1910.) This statement is ambiguous. Brown had no idea whether a murder was going to occur when Justin met Noriega. Brown believed she was there for drugs. (6RT 1939.)

Respondent argues there was evidence of planning because Justin "brought a companion with him whose sole purpose was to drive away Noriega's car after the murder, and he equipped himself with a shovel to bury the body." (RB at p. 117.) As explained below, Brown's testimony does not support the above assertion because: (1) there was no

¹⁴ *Chapman v. California* (1967) 386 U.S. 18, 24

¹⁵ *People v. Watson* (1956) 46 Cal.2d 818

evidence Justin brought along a third person to assist with a murder; and (2) the shovel was not brought along for the meeting with Noriega, but retrieved only after his death.

Brown testified: (1) Justin brought someone along with him to meet Rafi (6RT 1910); (2) she assumed Justin's friend was driving Noriega's vehicle (6RT 1914-1915); (3) Justin brought along a third party (6RT 1936-1937); (4) she saw Noriega on the ground and Justin putting his body in the back of a truck (6RT 1940); and (5) she went to her home after the incident and Justin reappeared two hours later with a shovel which he had taken from Brown's backyard. (6RT 1943.) Respondent relies on the testimony appearing on these pages to support the assertion Justin brought along a companion to drive his vehicle after the murder. (RB at p. 17.) There is no testimony on these pages that Justin brought someone else along for the purpose of driving Noriega's vehicle after his murder. Brown's testimony about when Justin obtained a shovel is a little unclear. (6RT 1944.) However, it appears Justin and Brown went to Brown's house, Justin retrieved the shovel, left for two hours and then returned to Brown's residence. (6RT 1943.) The fact that Justin did not bring a shovel with him when he initially met Noriega suggests he did not plan to commit a murder.

Justin's comments to Reeder and Sams, when placed in context, do not establish premeditated murder. Hence, the instructional error was prejudicial. Reeder testified Justin said he killed Noriega "because he was a narc." (7RT 2022.) She gave similar testimony at pages 2,144 and 2,276 of the reporter's transcript. (7RT 2144; 8RT 2276.) Reeder's testimony did not establish Justin arranged to meet Noriega for the purpose of killing him

because he believed he was a “narc.”

A heated argument preceded Justin shooting Noriega. (13RT 2872.) This argument could have been about Justin’s belief Noriega was a snitch and the argument caused the shooting. Sams testified Justin said he killed people for “getting out of line, money, drugs, things of that nature.” (9RT 2368-2369.) This comment was vague and provided no information about the specific sequence of events with Noriega. Sams also testified Justin said he shot someone for drugs. (9RT 2369-2370.) This comment was also vague and did not establish whether the shooting was planned, the spontaneous result of an argument, or Justin decided on the spur of the moment to kill Noriega for his drugs. Justin’s statement to Sams that he killed Noriega for drugs is inconsistent with his statements to Reeder that he killed Noriega because he was a “narc.” Justin’s statements to Reeder and Sams should be given little weight in assessing harmless error.

Finally, the fact that Justin denied killing Noriega is of no consequence. The jury obviously rejected that testimony. The jury’s rejection of Justin’s denial does not address whether the erroneous murder instruction was prejudicial.

For the reasons above, the judgment of guilt must be reversed.

VI

JUSTIN'S CONVICTION FOR MURDER (COUNT ONE) MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT PROVOCATION WAS RELEVANT TO WHETHER JUSTIN SHOT NORIEGA WILLFULLY, DELIBERATELY, AND WITH PREMEDITATION.

Justin argued in the Opening Brief the trial court erred by failing to instruct the jury to consider the role of provocation in determining whether he acted with premeditation when he shot Noriega. (AOB at pp. 150-164.) Respondent argues: (1) the trial court did not have a sua sponte duty to give a provocation instruction (RB at p. 120.); (2) the jury was instructed regarding premeditation and deliberation and that state of mind is inconsistent with acting because of provocation (RB at p. 120); (3) Justin did not rely on a provocation defense (RB at p. 121); (4) there was no evidence to support a theory of second degree murder based on provocation (RB at pp. 121-125); and (5) any error was harmless. (RB at pp. 125-127.)

Respondent relies on *People v. Rogers* (2006) 39 Cal.4th 826, for the proposition the trial court did not have a sua sponte duty to give a provocation instruction. Justin addressed in the Opening Brief why provocation is an element of first degree murder and that rule should have been reflected in the jury instructions pursuant to the trial court's sua sponte duty to correctly instruct the jury regarding the elements of the crime.

Respondent's argument is flawed for the additional reason that the murder instruction was defective for the reasons discussed in Issue V. The jury was instructed that first degree murder required premeditation and deliberation and all other murders were second degree

murder. (13RT 2896-2897.) This instruction told the jury nothing about the features of a second degree murder and expressly omitted any explanation provocation played in determining whether appellant was guilty of only second degree murder.

Justin's jury was instructed with CALCRIM Nos. 520 and 521. CALCRIM No. 521 told Justin's jury express malice "does not require deliberation or the passage of any particular period of time." (13RT 2895.) CALCRIM No. 521 instructed the jury for first degree murder, "the length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate, and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time." (13RT 2896-2897.) Under these instructions, the jury could have concluded Justin: (1) premeditated and deliberated Noriega's killing if he thought about it for just a few seconds before shooting him; and (2) shot Noriega because of provocation following their heated argument. Justin would not have been guilty of first degree murder if the final act triggering his decision to shoot was provocation by Noriega. Furthermore, the jury likely would have found Justin guilty of second degree murder if they had known the role provocation played in reducing the killing from first to second degree murder even if Noriega's provocation was not technically a superseding cause of Justin's premeditated and

deliberate killing.

Respondent cites *People v. Wickersham* (1982) 32 Cal.3d 307, 330 for the proposition that premeditation and deliberation are mutually exclusive. (RB at p. 120.) *People v. Wickersham* does not support this conclusion. *People v. Wickersham* stated, “although the evidence was sufficient to justify a finding of premeditation and deliberation, such a finding was not compelled. The jury could have found that appellant did not premeditate but rather acted upon a sudden and unconsidered impulse.” (*People v. Wickersham, supra*, 32 Cal.3d at p. 330.) This statement was not adopting a rule of law that provocation was mutually exclusive of premeditation and deliberation as a matter of law. The statement was simply an observation about the facts of the case.

People v. Rogers, furthermore, stated, “the manslaughter instruction does not preclude the defense from arguing that provocation played a role in preventing the defendant from premeditating and deliberating; nor does it preclude the jury from giving weight to any evidence of provocation in determining whether premeditation exists.” (*People v. Rogers, supra*, 39 Cal.4th at p. 880.) This observation suggests the trial court’s failure to give a provocation instruction in the instant case was not harmless error despite the jury finding appellant guilty of willful and deliberate premeditated murder. It was likely Justin’s jury would not have been convinced beyond a reasonable doubt the killing was first degree murder had they known the role provocation plays in reducing an intentional killing to second degree murder.

The fact that Justin's defense was denial is of no consequence. The jury rejected that defense. Justin's argument for the provocation instruction is not based on his denial of shooting Noriega. It is based on the remaining evidence. "Truth may lie neither with the defendant's protestations of innocence nor with the prosecution's assertion that the defendant is guilty of the offense charged, but at a point between these two extremes." (*People v. Barton* (1995) 12 Cal.4th 186, 196.) The jury is free to accept and reject part of the testimony of a witness. (*People v. Haynes* (1998) 61 Cal.App.4th 1282, 1294.) Hence, the jury having rejected Justin's denial was not bound by it in determining whether he shot Noriega because of provocation.

Respondent's argument there was no evidence to support the giving of a provocation instruction must be rejected. There was evidence Justin and Noriega had a heated argument immediately prior to the shooting. (13RT 2872.) Provocation sufficient to reduce a murder from first to second degree has been found when the defendant killed because of long simmering arguments between spouses regarding child custody (*People v. Wright* (2015) 242 Cal.App.4th 1461, 1484-1495), an argument induced by intoxication (*People v. Field* (1950) 99 Cal.App.2d 10, 13), a confrontation because a homeowner believed the defendant was trespassing on his property and looking into his residence (*People v. Valentine* (1946) 28 Cal.2d 121, 126-128, 131-132), and when the defendant learned his girlfriend had been unfaithful. (*People v. Thomas* (1945) 25 Cal.2d 880, 903-904.) The argument between Justin and Noriega—two drug dealers who both had access to firearms---was sufficient to raise a

question of fact whether Justin shot Noriega because of provocation such that Justin should have been convicted of second degree murder and not first degree murder.

Respondent argues there was no evidence the shooting was the result of a sudden and unconsidered impulse and hence no evidence of provocation. “The existence of provocation and its extent and effect, if any, upon the mind of defendant in relation to premeditation and deliberation in forming the specific intent to kill, as well as in regard to the existence of malice (Pen. Code, § 188), constitute questions of fact for the jury . . .” (*People v. Thomas, supra*, 25 Cal.2d at pp. 903–904.) A heated argument immediately prior to the shooting suggests the argument likely had some role in the shooting. If Justin’s plan was to shoot Noriega all along, it was unlikely he would first incite Noriega to potential violence by getting into a heated argument with him. Justin could have shot Noriega as the result of provocation even if Justin took the time to walk to his vehicle and retrieve a firearm. A defendant is not required to act in the immediate few seconds following the provocative act for the provocation to reduce the killing to second degree murder. The facts are construed in Justin’s favor in determining whether there is sufficient evidence to give a defense instruction. (*People v. Turk* (2008) 164 Cal.App.4th 1361, 1368.)

Respondent also argues there was insufficient evidence to give a provocation instruction because the information about two people shooting was merely a ruse provided by Silva during appellant’s interrogation. Brown told Silva that Justin and Noriega had a heated argument prior to the shooting. (13RT 2872.) This evidence alone was sufficient to

give the provocation instruction and was the basis of Justin's argument for why the trial court erred by not giving CALCRIM No. 522. (See AOB, pp. 151-152, 158, 162-163.) Justin simply noted in the Summary of Proceedings Portion of this issue the testimony about two people shooting. Justin did not rely on this evidence as the basis of his argument.

Respondent argues the failure to give a provocation instruction was harmless error because: (1) Justin confessed a motive to kill Noriega to two different people; (2) there was evidence of planning and deliberation; and (3) the defense evidence was weak. Respondent argued in Issue V there was evidence Justin planned to kill Noriega. Justin addressed that argument in Issue V. There was no evidence Justin planned to kill Noriega. Justin's statements to Reeder and Sams were made years after the incident and established at most conflicting evidence whether Justin in fact planned to kill Noriega. The jury most likely viewed Brown's testimony as the more reliable account of what happened because she was with Justin during the incident. Brown did not testify to any statements made by Justin suggesting a plan to kill Noriega. The fact Justin had to retrieve a shovel from Brown's house to bury Noriega suggests the killing was not planned.

The evidence Justin shot Noriega as the result of provocation was strong. The shooting did not occur until after the heated argument between Justin and Noriega. Noriega had access to a firearm and Justin most likely was aware of this fact.

The jury did not resolve, pursuant to the instructions for deliberation and premeditation, the factual question of whether Justin killed Noriega as the result of

provocation. The jury was instructed for premeditation and deliberation that, “a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.” (13RT 2896-2897.) Hence, the jury’s finding of premeditation and deliberation did not resolve whether Justin killed Noriega because of provocation. Neither *People v. Peau* (2015) 236 Cal.App.4th 823, 830-831, nor *People v. Wharton* (1991) 53 Cal.3d 522, requires the opposite conclusion. Neither case addressed how the above language impacted whether a finding of deliberation and premeditation precluded a finding of provocation. Cases are not authorities for propositions of law not considered therein. (*People v. Mendoza* (2000) 23 Cal.4th 896, 915.)

Finally, Justin addressed in the Opening Brief why the guilty verdict cannot be affirmed based on the felony murder theory. He will rely on the arguments in the Opening Brief.

VII

JUSTIN'S CONVICTION OF MURDER (COUNT ONE) MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO GIVE JURY INSTRUCTIONS FOR: (1) SELF-DEFENSE; (2) VOLUNTARY MANSLAUGHTER BASED ON HEAT OF PASSION; AND (3) VOLUNTARY MANSLAUGHTER BASED ON UNREASONABLE SELF-DEFENSE.

Justin argued in the Opening Brief the conviction for first degree murder (count one) must be reversed because the trial court failed to instruct for self-defense and voluntary manslaughter based on heat of passion and unreasonable self-defense. (AOB at pp. 165-184.) Respondent argues: (1) there was no evidence to support giving the instructions; and (2) any error was harmless. (RB at pp. 128-132.)

Respondent argues there was no evidence to warrant giving self-defense or voluntary manslaughter instructions because Silva's statement to Justin during the interrogation about two people firing guns was a ruse. Justin did not rely on Silva's statement to support his argument the instructions should have been given. Justin argued the self-defense, and voluntary manslaughter instructions, should have been given because: (1) a heated argument preceded the shooting; (2) Noriega was a drug dealer known to be armed; and (3) Noriega had an accessible firearm in his vehicle (AOB at p. 166.) Respondent's reference to the evidence about two people shooting is a red herring to distract this Court from the evidence which does support the giving of self-defense and voluntary manslaughter instructions.

Respondent's argues self-defense and voluntary manslaughter instructions were properly omitted because: (1) Brown's testimony established the heated argument between

Justin and Noriega caused Noriega to retrieve the drugs and was not the cause of the shooting; (2) Justin proceeded with shooting Noriega once he was satisfied he had the drugs. Respondent does not know the content of the argument between Noriega and Justin. (RB at pp. 131-132.) Respondent's argument is speculation.

The standard of review requires the facts to be construed in Justin's favor in determining whether there was sufficient evidence to give a defense instruction. (*People v. Turk, supra*, 64 Cal.App.4th at p. 1368.) Respondent's argument ignores all reasonable inferences suggesting Justin shot Noriega because of their argument. Any reasonable person in Justin's position would fear Noriega could resort to deadly force because of Noriega's status as a drug dealer, his access to a firearm, the remote location of the meeting, and their "heated argument." All of these facts suggest Justin shot Noriega in either reasonable or unreasonable self-defense and from provocation following their argument.

The trial court's failure to give the requested instructions was not harmless error. The fact that Justin's defense was denial is irrelevant because the remaining evidence raised questions of fact about self-defense and voluntary manslaughter based on heat of passion and unreasonable self-defense. In other words, if the jury concluded Justin shot Noriega—which obviously it did because of the verdict—then the evidence also raised the issue of self-defense and voluntary manslaughter. Justin will rest on the arguments in the Opening Brief regarding why the murder conviction cannot be affirmed despite the felony murder instructions given to the jury. (AOB at pp. 184.)

VIII

THE JUDGMENT OF GUILT MUST BE REVERSED BECAUSE JUSTIN WAS FORCED TO WAIVE HIS PRO- PER STATUS BECAUSE THE TRIAL COURT REFUSED TO PROVIDE ADEQUATE FUNDING TO HIS DEFENSE IN VIOLATION OF JUSTIN'S RIGHT TO REPRESENT HIMSELF.

Justin argued in the Opening Brief the judgment had to be reversed because he was forced to relinquish his pro-per status when the trial court erroneously denied his requests for funding. Respondent argues Justin was granted funding for expenses where he demonstrated need and was denied funding for expenses where he failed to make such a showing.¹⁶

Justin made an adequate offer of proof to warrant the granting of his funding requests. Justin's May 13, 2007, funding request stated \$4,200 was needed to interview witnesses and to telephonically locate witnesses. (1Conf. CST 94-97.) The funding request further stated:

Defense investigation has attempted to contact 14 military personnel through contact with ARPERCEN and H.R.C. St. Louis for locations of witnesses assigned to Schofield Barracks in 1992 and 1993. These Army personnel, according to Mr. Thomas, will verify his assignment in Hawaii, time stationed in the Army, and could alibi his location at the time the crime occurred. Telephone calls were made and defense was advised by H.R.C St. Louis to forward a request to them (H.R.C.) and ARPERCEN to assist in verifying the location of these military soldiers.

The representative from H.R.C. St. Louis stated that from the information currently available to defense investigation, it might not be possible to locate these soldiers. If a response is received

¹⁶ Justin's Opening Brief suggested the trial court had not provided any funding for Investigator Monahan. The brief should have said additional funding.

from H.R.C. St. Louis or ARPERCEN, then telephone contact will be attempted and reports written of those soldiers contacted by defense, which include 14 listed by Mr. Thomas.

(1Conf. CST 101.)¹⁷

The purpose of the defense request for funding was to locate these military witnesses. Justin's right to adequate funding of his defense required that he have the ability to locate live alibi witnesses and not be forced to rely solely on his own military records to establish an alibi. Speculation by the trial court that an alternative avenue of investigation was adequate was not a basis to deny Justin's request for funding to investigate his alibi defense. It is irrelevant what Justin's military records ultimately showed about his status in the military when Noriega was killed. The issue is whether Justin was forced to relinquish his pro-per status because of the lack of adequate funding. This issue does not turn on whether a particular avenue of investigation Justin wanted to pursue would have ultimately been successful. The issues are whether the funding request was reasonable, whether the trial court unreasonably denied the request, and whether Justin was forced to relinquish his pro-per status because of the denial of the request.

Respondent argues Justin failed to make an adequate offer of proof regarding the necessity to contact his former teachers and sports coaches. The testimony of such witnesses from the defendant's past is common during the penalty phase of a death penalty trial. The

¹⁷ A subsequent defense request for funding, submitted when Justin was represented by counsel, listed the names of military members Justin wished to contact to establish his alibi defense. (1Conf. CST 82-93.)

potential relevance of these witnesses was self-evident. A specific offer of proof regarding the testimony of each witness listed in the funding request was not required for the trial court to understand the necessity of contacting them.

Respondent's argument that the denial of the funding requests was reasonable because Justin did not want to present any mitigation evidence must be rejected. Justin's request for funding to pursue the alibi defense and contact his former teachers and coaches was denied during May 2007. (1Conf. CST 103.) The earliest hearing date cited by respondent to argue Justin did not want to present evidence in mitigation during the penalty phase was the September 12, 2007, hearing. (Sept. 12, 2007, Conf. CST 386.) Hence, the only reasonable conclusion is that Justin wanted to contact his former teachers and coaches to pursue evidence in mitigation — a reasonable request which should have been granted.

For the reasons above and in the Opening Brief, the trial court erroneously forced Justin to relinquish his pro-per status. The judgment must be reversed because this error was prejudicial per se. (Cf. *Rose v. Clark* 1986) 478 U.S. 570, 578; *People v. Bigelow* (1985) 37 Cal.3d 731, 744-745.)

IX

THE TRUE FINDING TO THE ROBBERY SPECIAL CIRCUMSTANCE ALLEGATION, THE CONVICTION FOR MURDER (COUNT ONE), AND THE JUDGMENT OF DEATH, SHOULD BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY WITH THE LESSER INCLUDED OFFENSE OF GRAND THEFT.

Respondent argued in the Opening Brief the murder conviction must be reversed, and the true finding to the robbery-murder special circumstance allegation must be vacated, because the trial court erroneously failed to instruct the jury for grand theft as a lesser included offense of robbery. The Opening Brief and Respondent's Brief contain a full discussion of the current state of the law regarding the duty of the trial court to instruct for lesser included offenses for felony murder and special circumstance allegations. Justin has not found any additional relevant case law regarding this issue since the submission of the Opening Brief. Justin will therefore rest on the arguments in the Opening Brief regarding the state of the law for lesser included offenses and felony murder and special circumstance allegations.

Respondent argues there was no need for a theft instruction because the jury was instructed regarding after-formed-intent for robbery. However, the need to instruct for lesser included offenses derives not only from the need to instruct the jury regarding all applicable offenses, but also from the necessity to avoid the pressure of the jury being forced to convict of the greater offense because it lacks other options. (*People v. Barton* (1995) 12 Cal. 4th 186, 200-201 [the trial court's failure to give jury instructions for lesser included offenses

put inordinate pressure on the jury to convict the defendant of the greater offense].) *Apprendi v. New Jersey, supra*, 530 U.S. 466, and its progeny, demonstrate that special circumstance allegations are the functional equivalent of the elements of a crime. Hence this Court's refusal to treat special circumstance allegations as elements of an offense for purpose of determining the scope of the trial court's duty to give lesser included offense instructions, is not consistent with current United States Supreme Court characterization of such allegations.

Respondent argues any error was harmless because: (1) there was no evidence Justin abandoned an intent to rob Noriega; and (2) the first degree murder conviction can be affirmed based on the theory of a premeditated and deliberate killing. To support this argument, respondent cites the argument between Noriega and Justin, Noriega retrieving the bag from the trunk, and Justin then shooting him. Respondent then concludes, "there was no evidence whatsoever of Thomas abandoning that intent to steal at any time." (Respondent's Brief at p. 145.) The problem with Respondent's argument is that it assumes Justin's intent was to commit a robbery.

The above sequence of events does not prove Justin intended to steal from Noriega prior to shooting him. The content of the argument is unknown. Justin's decision to shoot Noriega could have been the spur of a moment decision unaffected by any desire to take his property. Brown did not testify to any facts establishing that Justin had a plan to either kill or rob Noriega. Brown told Silva that Justin said he did not need money when the shooting

occurred. (13RT 2872.) This suggests Justin's motive was not robbery.

Justin's comments to Reeder and Sams were made several years after the incident and do not clearly establish whether Justin's plan all along was to rob Noriega. Sams testified that when "everybody was drinking, having a good time," (13RT 2370), Justin said he killed someone for drugs. (13RT 2369-2370.) The jury could have concluded from this testimony that Justin planned to rob Noriega, but it was not required to do so. The fact Justin was apparently intoxicated when he made the statement undermined its reliability as an accurate rendition of what actually occurred when Noriega was shot. Reeder testified Justin told her he killed someone "because he was a narc." (7RT 2022.) This statement does not establish Justin planned to rob Noriega. The jury may accept part of the testimony of a witness and reject another other portions of that testimony. (*People v. Robinson* (1964) 61 Cal.2d 373, 389.) Justin may have learned Noriega was a "narc" when they argued immediately prior to the shooting.

Sams' testimony about Justin stating he killed someone for drugs was not binding on the jury and the sequence of events described by Brown did not establish Justin's motive was robbery. The jury could have concluded Justin committed grand theft if it had been given appropriate instructions.

The murder conviction (count one) cannot be affirmed based on a theory of premeditation and deliberation for the reasons explained in other issues in the Opening Brief. It cannot be affirmed based on the felony murder theory, and the true finding to the robbery

special circumstance allegation cannot be affirmed, because the trial court failed to instruct the jury with grand theft instructions as a lesser included offense of robbery. Hence, the conviction for murder (count one) must be reversed and the judgment of death vacated.

X

THE JUDGMENT OF GUILT SHOULD BE REVERSED BECAUSE THE TRIAL COURT'S ACCOMPLICE INSTRUCTION LOWERED THE PROSECUTION BURDEN OF PROOF BY INSTRUCTING THE JURY THAT THE CORROBORATING EVIDENCE FOR BROWN'S TESTIMONY HAD TO BE ONLY SLIGHT.

Brown was the key prosecution witness against Justin. Brown's testimony from the Texas trial was read into evidence at Justin's trial. It was the only testimony connecting Justin to Noriega's shooting. The jury's assessment of Brown's credibility was the most important part of the prosecution case. Unfortunately, the jury did not get the benefit of seeing or hearing Brown—a drug addict with multiple felony convictions who named Justin as the person who killed Noriega only when she needed to curry favor with the police because of her own criminal problems—testify in person because she was killed by the police while reaching for her waistband after a vehicle pursuit. (6RT 1918-1919, 1921, 1923, 1933,1945; 13 RT 2856-2866.) Brown's testimony from the Texas trial was read to Justin's jury by prosecutor Hughes. (6RT 1905.) Hughes made Brown appear to be more credible than Brown would have appeared if she had testified before the jury.

To compound the prejudice from the jury not being able to scrutinize Brown's credibility, the jury was instructed that: (1) it had to determine whether Brown was an accomplice; and (2) only "slight" evidence corroborating Brown's testimony was required in order to convict Justin if the jury concluded Brown was an accomplice. (13RT 2890-2891.) Justin argued in the Opening Brief the "slight" evidence language lessened the

prosecution's burden of proof, violated due process and Justin's Sixth Amendment right to an accurate jury determination of the facts. Respondent argues: (1) the 'slight' language in the instruction was a correct statement of the law; and (2) any error was harmless. (RB at pp. 146-150.)

Justin acknowledges this Court recently approved the "slight" language in CALCRIM No. 334 in *People v. Bryant* (2014) 60 Cal.4th 335, 434.) This Court should reconsider its decisions approving of the "slight" language in CALCRIM No. 334 for the reasons set forth in the Opening Brief. A permissive inference violates due process if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury. (*Francis v. Franklin* (1985) 471 U.S. 307, 314-315.) Stated differently, "a permissive inference jury instruction is constitutional so long as it can be said with substantial assurance that the inferred fact is more likely than not to flow from the proved fact on which it is made to depend." (*Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 316.) In the instant case, the inferred fact in CALCRIM No. 334 was that Justin shot Noriega. The proved facts upon which this inference depends are the corroborating evidence of Brown's testimony that Justin shot Noriega. The corroborating evidence was the fact Noriega was shot and Justin's statements to third parties that he killed someone. The inferred fact does not logically flow from the proven facts. Justin's statements about killing someone were vague, cryptic, and non-specific. The fact Noriega was shot did not prove anything about who did the shooting. Hence, CALCRIM No. 334 set forth an unconstitutional

permissive inference which undermined the requirement the prosecution prove Justin's guilt beyond a reasonable doubt.

Respondent argues there was no evidence Brown was an accomplice and hence the slight corroboration instruction was harmless error. The trial court may instruct the jury only with instructions supported by the evidence. (*People v. Johnson* (2006) 39 Cal.4th 826, 879.) The trial court made the factual determination there was sufficient evidence Brown was an accomplice to give accomplice instructions. This Court must defer to that factual determination because there was evidence to support it.

Brown was with Justin when he purchased the .9 millimeter Glock firearm which Brown testified was the murder weapon. (13RT 2872-2973.) Justin wanted Brown to act as a lookout. He said he did not want to get ambushed. (6RT 1910.) Brown testified she did not know Justin had a gun with him the evening of the shooting. Brown's testimony suggested she had no prior knowledge Justin intended to shoot anyone. The jury was not required to accept this self-serving denial. Furthermore, Brown acted as an aider and abettor to robbery because she assisted Justin in fleeing the scene and disposing of Noriega's body. (6RT 1916-1917.) The jury found true the allegation Justin committed robbery during the commission of the murder. (14RT 3022-3023.) The liability of an aider and abettor to robbery continues until the robbers have reached a place of temporary safety. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1160.) Hence, Brown's potential liability for robbery was sufficient grounds to give accomplice instructions independent of whether she was an accomplice to murder.

The instruction that the supporting evidence may be “slight” was not harmless error because the corroborating evidence was slight at best. Reeder had an incentive to falsely accuse Justin of crimes when she was arrested for Hartwell’s murder. Brown was arrested during June 1994 and identified Justin as the person who shot Noriega. (6RT 1918-1919, 1926, 1928, 1945-1948.) Hartwell was murdered during June 1995. (7RT 2103-2114.) Reeder was interviewed during July 1995 by Texas law enforcement about Hartwell’s murder. (7RT 2137-2139.) She identified Justin as the person who murdered Hartwell. (Exhibit 148 [Reeder’s typed statement to Texas law enforcement following her interrogation].) Texas law enforcement obviously learned during the course of its investigation into Hartwell’s death that Justin was a suspect in a murder in California. Indeed, Brown testified during the penalty phase of the Texas trial. (6RT 1904.)

It was a reasonable inference Reeder learned Justin was a suspect in the murder of someone named Rafael from Texas law enforcement. Reeder testified Justin told her about killing someone named Rafa in California before he killed Hartwell. (7RT 2143.) The jury was not obligated to accept this testimony as truthful. Reeder’s typed statement to Texas law enforcement stated she had told Justin about things Hartwell had done to Reeder against her will. (Exhibit 148, p. 4.) The statement continued, “he told me that a friend of the family had done something similar to his ex-wife and he had fixed it so that was the last pain that person ever caused, meaning that he had killed that person. I don’t know if that was true or something he told me to make me feel better but that is just something he said to me one

time.” (Exhibit 148, p. 4.) Reeder’s statement logically would have included a reference to Justin telling her that he had killed someone named Rafael if Justin had in fact made such a statement to her. The omission from Reeder’s statement of anything about Justin killing Noriega suggests Reeder learned, after she made the statement to Texas law enforcement, that Justin was a suspect in the killing of Noriega. Justin’s jury easily could have concluded Reeder’s knowledge about Rafael being killed was the result of Texas law enforcement asking her if she knew about that topic rather than the result of appellant’s admissions to Reeder that he had killed someone in California.

Justin’s alleged statements to Sams did not make harmless the inclusion of the “slight” language in CALCRIM No. 334. Sams did not take the statements seriously and believed Justin was “full of bullshit.” (9RT 2370-2371, 2384.) Justin’s statement was vague and smacked of macho bragging rather than a serious statement of fact. Justin never told Sams he killed someone in California. He just said he shot someone for drugs. (9RT 2368-2369.)

“Slight” evidence of guilt is not proof of guilt beyond a reasonable doubt. The judgment of guilt must be reversed.

XI

THE JUDGMENT OF GUILT SHOULD BE REVERSED BECAUSE: (1) CALCRIM NO. 319 ERRONEOUSLY PREVENTED THE JURY FROM CONSIDERING FOR THE TRUTH OF THE MATTER ASSERTED BROWN'S STATEMENT TO SILVA THAT A HEATED ARGUMENT PRECEDED JUSTIN'S SHOOTING OF NORIEGA; AND (2) CALCRIM NO. 318 WAS A ONE-SIDED INSTRUCTION IN FAVOR OF THE PROSECUTION AND FORCED THE JURY TO ACCEPT BROWN'S TESTIMONY AS TRUE.

The jury was instructed with CALCRIM Nos. 318 and 319. CALCRIM No. 318 told the jury it could consider out of court statements made by witnesses as evidence the information in those statements were true. (13RT 2888.) CALCRIM No. 319 told the jury it may consider Brown's statements to Silva to decide whether to believe her trial testimony which was read into the record. (13RT 2888.) Appellant argued in the Opening Brief CALCRIM No. 318: (1) was argumentative because it instructed the jury to consider Brown's out-of-court statements only for their truth; and (2) contradicted CALCRIM No. 319 because CALCRIM No. 318 told the jury it could consider Brown's out-of-court statements as evidence the information therein was true, but CALCRIM No. 319 prevented the jury from considering Brown's out-of-court statements as true. (AOB at pp. 231-244.)

Respondent argues: (1) any instructional error was waived; (2) CALCRIM No. 318 did not apply to Brown because of the "except as otherwise instructed" language in the second sentence of the instruction; (3) a similar challenge to CALCRIM No. 318 was rejected in *People v. Friend* (2009) 47 Cal.4th 1, and *People v. Hudson* (2009) 175

Cal.App.4th 1025; and (4) Brown's statements to Silva were not admitted for their truth and the jury was therefore properly instructed in CALCRIM No. 319 not to consider those statements for their truth. (RB at pp. 150-159.) These arguments must be rejected.

1. THE WAIVER DOCTRINE DOES NOT APPLY.

Respondent does not argue the giving of CALCRIM Nos. 318 and 319 was invited error. Appellate review of whether the instructions were correct is not barred for that reason. The plain language of Penal Code section 1259 permits appellate review of any prejudicially erroneous instruction. Applying the forfeiture doctrine to jury instructions is inconsistent with section 1259 if the instructions in issue are prejudicially erroneous. Hence, this Court should review appellant's claims regarding the instructions on the merits.

2. CALCRIM NO. 318 WAS IMPERMISSIBLY ARGUMENTATIVE EVEN IF IT APPLIED ONLY TO BROWN'S TESTIMONY FROM THE TEXAS TRIAL AND NOT TO BROWN'S STATEMENTS TO SILVA.

The introductory portion of CALCRIM No. 318 stated, "you have heard evidence of statements that a witness made before trial. Except as otherwise instructed, if you decide that the witness made those statements, you may use those statements in two ways . . ." (13RT 2888.) Respondent argues this phrase in CALCRIM No. 318, and the language in CALCRIM No. 319 stating that instruction applied to Brown's statements to Silva, meant the jury would not apply CALCRIM No. 318 to Brown's out-of-court statements to Silva. Justin argued CALCRIM No. 318 was impermissibly argumentative because it directed the jury to believe Brown's testimony from the Texas trial and her statements to Silva. (AOB at p. 240.) CALCRIM No. 319 applied only to Brown's statements to Silva. (13RT 2888.)

CALCRIM No. 318 applied to “statements that a witness made before trial . . . (13RT 2888), and Brown’s testimony from the Texas trial was a statement she made before trial of the instant case. Hence, CALCRIM No. 318 impermissibly directed the jury to believe Brown’s testimony from the Texas trial even if the “except as otherwise provided” language in the instruction meant the jury did not apply it to Brown’s statements to Silva.

In *People v. Friend*, this Court rejected the argument language in CALJIC No 2.13, that the jury could consider a prior statement of a witness “as evidence of the truth of the facts as stated by the witness on that former occasion,” directed the jury to consider the prior statements as true. (*People v. Friend, supra*, 47 Cal.4th at p. 41.) This Court should reconsider that holding for the reasons explained on page 240 of Appellant’s Opening Brief. The phrase “as evidence of the truth of the facts as stated by the witness on that former occasion” in CALJIC No. 213, and the phrase “to evaluate whether the witness’s testimony in court is believable,” in CALJIC No. 318, suggested to the jury that it should believe the prior statements of the witness. The option of rejecting the prior statements of the witness may have been implicit in both phrases. However, the jury was clearly more likely to elect the suggested option rather than the option available only through implication.

In *People v. Hudson*, the Court rejected the argument CALCRIM No. 318 improperly directed the jury to accept as true the prior statements of a witness. The Court reached this conclusion because CALCRIM No. 226 instructed the jury that it may believe or disbelieve all or a portion of the testimony of a witness. (*People v. Hudson, supra*, 175 Cal.App.4th at

p. 1029.) *People v. Hudson* reached the wrong conclusion because CALCRIM No. 226 was a general instruction regarding witness credibility which did not apply to the pretrial statements of witnesses.

CALCRIM Nos. 226 and 318 distinguish between the testimony of a witness and the pretrial statements of a witness. CALCRIM No. 226 instructs the jury, “you alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience.” The instruction continues, “you may believe all, part, or none of any witness’s testimony. Consider the testimony of each witness and decide how much of it to believe.” The remainder of CALCRIM No. 226 sets forth factors for the jury to consider to evaluate credibility. CALJIC No. 226 is thus confined to evaluating witness “testimony.” CALCRIM No. 318, conversely, applies to “statement[s] that a witness made before trial.” CALCRIM No. 226 did not cure the suggestive nature of CALCRIM No. 318 because CALCRIM No. 226 was a general witness credibility instruction and CALICRIM No. 318 was a specific pretrial witness statement instruction. The specific instruction guided the jury over the general instruction regarding how to evaluate the pretrial statement of a witness. “It has long been held that jury instructions of a specific nature control over instructions containing general provisions.” (*People v. Stewart* (1983) 145 Cal.App.3d 967, 975.) Hence, CALCRIM No. 318 controlled over CALCRIM No. 226 with regard to how the jury evaluated Brown’s testimony from the Texas trial.

3. CALCRIM NO. 319 IMPERMISSIBLY PREVENTED THE JURY FROM CONSIDERING BROWN’S STATEMENTS TO SILVA FOR THE TRUTH OF THE MATTER ASSERTED AND IMPERMISSIBLY LIMITED THE JURY

TO USING THOSE STATEMENTS TO DETERMINE WHETHER TO BELIEVE BROWN'S TRIAL TESTIMONY.

CALCRIM No. 319 told Justin's jury it could consider Brown's statements to Silva only in "deciding whether to believe the testimony of Dorothy Brown that was read here at trial." Respondent argues this was a correct statement of the law because Brown's statements to Silva were not admitted for the truth of the matter asserted pursuant to Evidence Code sections 770 and 1202. However, the prosecution never made a motion that Silva's testimony about Brown's statement to him during the 1998 interview was not being admitted for the truth of the matter asserted. The trial court never ruled, when the evidence was admitted, that it could not be considered for the truth of the matter asserted.

"Unless evidence is admitted for a limited purpose, or against a specific party, evidence admitted at trial may generally be considered for any purpose." (*People v. Chism* (2014) 58 Cal.4th 1266, 1305.) During discussion of jury instructions, the defense counsel acquiesced to the trial court giving CALCRIM No. 319. (13RT 2794-2795.) Acquiescence to an instruction does not constitute invited error. (*People v. Moon* (2005) 37 Cal.4th 1, 28 [defense counsel's acquiescence in a trial court's mistake will not constitute invited error unless the record shows that counsel had a tactical purpose for so doing].) The defense counsel commented, during discussion of whether appellant would testify, that Silva was being called to testify about impeachment issues. (13RT 2861.) This comment was not the equivalent of a judicial ruling that Silva's testimony was not being admitted for the truth of the matter asserted.) Hence, Silva's testimony about Brown's statements during the 1998

interview was admitted for the truth of the matter asserted.

CALCRIM No. 319 was erroneous even if Silva's testimony about Brown's statements to him were admitted solely for impeachment. However, CALCRIM No. 319 instructed the jury it could consider Silva's testimony about Brown's statements to him, "in deciding whether to believe the testimony of Dorothy Brown that was read here at trial." (13RT 2888.) This language did not permit the jury to consider the statements for the purpose of not believing Brown's trial testimony. Justin, as the proponent of this impeachment evidence, offered Silva's testimony to prove Brown's trial testimony was not truthful. CALCRIM No. 319 did not allow the jury to consider the impeachment evidence for the purpose for which it was admitted into evidence.

4. THE GIVING OF CALCRIM NOS. 318 AND 319 WAS NOT HARMLESS ERROR

Respondent argues any error was harmless because: (1) CALCRIM No. 318 did not apply to Silva's testimony about Brown's statements because of the "except as otherwise instructed" language in that instruction; and (2) Brown's statement to Silva during the interview, that a "heated" argument occurred prior to the shooting, was consistent with her trial testimony that Justin yelled something to Noriega and they exchanged words prior to the shooting. (RB at pp. 158-159.) Appellant will rest on the arguments in the Opening Brief regarding the prejudice from the giving of CALCRIM No. 318.

Justin argued in Issue VII the trial court erred by failing to give jury instructions for self-defense and voluntary manslaughter based on heat of passion and unreasonable self-

defense. One of the facts cited by Justin in support of that argument was the occurrence of an argument between him and Noriega prior to the shooting. (AOB at p. 166, 168.) Respondent's argument that Brown's statement to Silva about a "heated" argument occurring prior to the shooting was equivalent to her trial testimony about the exchange between Noriega and Justin suggests the trial court erred by failing to give the jury instructions referenced above. Brown testified, "yeah, he said something to him. Rafael got out and moved to the back of the vehicle and opened the trunk." (6RT 1912.) She later testified, "they exchanged words in Spanish. He opened the trunk." (6RT 1938.) Justin was prejudiced by the language in CALCRIM No. 319, that Brown's statements to Silva could not be considered for the truth of the matter asserted, to the extent Brown's trial testimony failed to convey that Noriega and Justin had a "heated" argument prior to the shooting.

For the reasons above and in the Opening Brief, the judgment of guilt must be reversed.

XII

THE JUDGMENT OF GUILT SHOULD BE REVERSED BECAUSE THE TRIAL COURT ADMITTED INFLAMMATORY AND PREJUDICIAL PHOTOGRAPHS.

Justin argued in the Opening Brief the trial court erred by: (1) admitting inflammatory and prejudicial photographs of the bodies of Noriega and Hartwell; and (2) admitting photographs of Noriega and Hartwell while they were alive. Respondent argues the photographs were properly admitted because: (1) the record shows the trial court carefully weighed the prejudicial nature of the photographs against their probative value when it decided which photographs to admit into evidence; (2) the trial court excluded some photographs; (3) the single in-life photographs of Noriega and Hartwell were admissible to identify them; and (4) the autopsy photographs of Noriega and Hartwell were admissible to show the manner and circumstances of death.

The trial court's weighing of the prejudicial and probative value of the photographs did not mean error did not occur. The trial court's ultimate conclusion about which photographs to admit into evidence is the issue. The exclusion of some photographs from evidence did not mitigate the prejudice from the jury viewing the inflammatory photographs which were admitted into evidence.

Exhibit 31 was an in-life photograph of Noriega. (6RT 1865.) Exhibit 32 was an in-life photograph of Hartwell. (7RT 2023.) These photographs were not offered to prove any fact in dispute. The prosecution merely had to offer a certified copy of the judgment of conviction

from Justin's conviction in Texas to prove he murdered Hartwell. Reeder, Sams, Leal, and Barnes were the witnesses from Texas who testified and personally knew Hartwell. (7RT 2032; 9RT 2363-2364; 10RT 2402-2405; 10RT 2463-2465.)¹⁸ None of these witnesses needed the assistance of a photograph in order to testify about the subject of their testimony. The other witnesses from Texas were police officers and forensic experts who did not know Hartwell and a photograph of her was of no assistance to their testimony.

Similar reasoning applies to the in-life photograph of Noriega. Heather Kelley was shown the photograph of Noriega and identified him. (6RT 1867.) Kelley made no further reference to the photograph during her testimony and did not need to view it to testify. (6RT 1867-1883.) Noriega had lived with Kelley's family which included her sisters Jennifer and Eva Barajas. (6RT 1888-1889; 7RT 2042.) Neither Jennifer nor Eva were shown the in-life photograph of Noriega when they testified. (6RT 1888-1903; 7RT 2041-2053.)

The in-life photographs of Hartwell and Noriega were simply an appeal to the emotions of the jury with no corresponding evidentiary value. The power of the image to sway emotions cannot be underestimated. There was no reason for the admission of these photographs.

The gruesome autopsy photographs of Hartwell and Noriega were not necessary to

¹⁸ Because Justin had been convicted in Texas of Hartwell's murder, the argument at page 169 of the Respondent's Brief that the prosecution had to prove Hartwell's murder by a preponderance of the evidence for the jury to consider it, makes little sense. The prosecution had proof of that fact beyond a reasonable doubt by the simple expedient of admitting a certified copy of the Texas judgment.

explain the circumstances of their deaths. Dr. Bayardo was the medical examiner who testified about the cause of Hartwell's death. The prosecution did not need to prove the grim details of Hartwell's death because it had the benefit of the Texas conviction to prove Justin killed her. Dr. Bayardo could have simply testified about the entry point of the stab wounds and the depth of the wounds without the necessity of displaying photographs to the jury. Dr. Ditraglia testified about the cause of Noriega's death. He relied on the diagram of Noriega's body, which was marked Exhibit 147, to demonstrate the injuries to Noriega's body from the bullets. (8RT 2304-2305.) The photographs of Noriega's remains were not used for any purpose other than to inflame the emotions of the jury.

Respondent cites a number of cases which hold that in-life photographs of victims, and autopsy photographs, are admissible. The admissibility of these type of photographs must turn on the particular facts of each case. For instance, in *People v. Tully* (2012) 54 Cal.4th 952, 1021, this Court stated, "the photograph, which was shown to three witnesses, was relevant to establish the witnesses' ability to identify the victims as the people about whom they were testifying." Here, there was no issue about the ability of Heather Kelly or her two sisters to identify Noriega. They knew him well. The ability of any of these three witnesses to identify Noriega in Exhibit 31 was not necessary for Dr. Ditraglia to identify the body that was the subject of his testimony as Noriega's body.

Respondent's comparison of the gruesome nature of post-mortem photographs of victims in other cases with the photographs in the instant case is of little value. The issue is

how the photographs in this case impacted Justin's jury. The evidence connecting Justin to Noriega's death was weak. Hence, the prejudicial impact of the post-mortem photographs of Noriega and Hartwell played a correspondingly greater significant role in influencing the jury. The jury most likely wanted to convict someone for Noriega's death. Justin was the only option offered to the jury.

Respondent also relies on the rule that a not guilty plea puts all elements of the offense in issue and thus warranted the admission of the photographs in issue. This rule does not dispense with the requirement that the probative value of a particular item of evidence must outweigh its prejudicial effect to be admissible.

Respondent's harmless error analysis must be rejected. The evidence connecting Justin to Noriega's death was weak. Brown's testimony was the only evidence connecting Justin to Noriega's death. She was the classic drug addicted felon who had an incentive to falsely blame someone else for criminal conduct in order to benefit herself. Brown's testimony contained a material discrepancy because she stated Justin used a Glock firearm to kill Noriega, but the ballistics evidence confirmed that type of firearm could not have fired the fatal bullets. (6RT 1923, 1951; 12RT 2731; 13RT 2872-2873.) The prosecution made up for its shortfall in reliable evidence with testimony from drug users and felons, and inflammatory photographs. Neither the guilty verdicts nor the judgment of death survive the test of fairness or reliability. The judgment must be reversed.

PENALTY PHASE ISSUES

XIII

THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY DENIED JUSTIN'S MOTION TO WAIVE HIS RIGHT TO COUNSEL AND REPRESENT HIMSELF.

Justin made a motion to represent himself following the jury's true finding to the Texas murder special circumstance allegation. (14RT 3090-3095.) The trial court made several findings of fact in connection with the motion, including the findings that Justin was not requesting a delay, had behaved in the courtroom, and had the mental capacity to represent himself. (14RT 3100-3102.) The trial court nevertheless denied the request because it believed there would be a certain amount of disruption of the trial if Justin represented himself. (14RT 3130.)¹⁹ Respondent argues the trial court's order denying Justin's motion should be affirmed because: (1) the motion was untimely and the trial court therefore acted within its discretion by denying it; and (2) the proceedings would have been disrupted. Finally, respondent argues any error was harmless.

Justin's motion was not timely under this Court's precedents for what constitutes a timely request by a criminal defendant for self-representation. (E.g., *People v. Hardy* (1992) 2d Cal.4th 86, 193.) The untimeliness doctrine has its origins in *People v. Windham* (1977) 19 Cal.3d 121. *People v. Windham* noted, "the timeliness of a midtrial motion for self-

¹⁹ The Opening Brief erroneously cites to volume 15 of the reporter's transcript for the location of the trial court's ruling denying Justin's *Faretta* motion. This appears to be a typographical error.

representation in the post-*Faretta* era is an issue of first impression in California.” (*People v. Windham, supra*, 19 Cal.3d at p. 126.) The Court then discussed pre-*Faretta* cases from the other states and the federal circuit courts which considered the requirement for a timely assertion by a defendant of his right to represent himself. *People v. Windham* concluded, “the experience of other jurisdictions in dealing with the procedural implementation of a constitutionally based right of self-representation demonstrates that the requirement of a pretrial motion to that effect is a workable and appropriate predicate to the exercise of the *Faretta* right.” (*People v. Windham, supra*, 19 Cal.3d at p. 127.)

The requirement adopted in *People v. Windham* for a timely assertion by a defendant of his right to represent himself was not based on language from the *Faretta* decision. The defendant in *Faretta* requested to represent himself weeks before the trial commenced. The opinion in *Faretta v. California* simply described the factual posture in which the defendant had asserted his right to represent himself. It did not condition the defendant’s right to represent himself upon the timing of its assertion. Common sense, and the orderly administration of justice, obviously require a defendant to not delay or disrupt a trial with an assertion of the right of self-representation. Absent such factors, *Faretta v. California* does not support the timeliness test adopted in *People v. Windham*.

Marshall v. Rodgers (2013) ___ U.S. ___ [133 S.Ct. 1446], a per curiam opinion, does not address whether *Faretta v. California* imposed a timeliness requirement for a defendant’s assertion of his right to represent himself. The defendant in that case waived and then

requested representation by counsel multiple times before the trial commenced. The defendant waived his right to counsel for the trial. He then requested appointment of counsel to file a motion for a new trial. The federal district court, and the California appellate courts, rejected the defendant's argument that his right to assistance of counsel had been violated. The Ninth Circuit reversed because it concluded the defendant had been denied his right of representation by counsel when the trial court refused to appoint counsel to assist the defendant with filing a motion for a new trial.

The Supreme Court reversed the ruling of the Ninth Circuit. The issue was whether the California state courts had unreasonably applied established United States Supreme Court case law. (*Marshall v. Rodgers, supra*, 133 S.Ct. at p. 1447.) The Court concluded California's approach of permitting trial courts to exercise discretion, using the *Windham* factors, to rule on post-waiver request for counsel did not unreasonably apply established United States Supreme Court precedent. (*Marshall v. Rodgers, supra*, 133 S.Ct. at pp. 1450-1451.) *Marshall v. Rodgers* did not discuss the timeliness requirement for a defendant's waiver of his right to counsel.

This Court should modify its timeliness doctrine to avoid a conflict with the holding of *Faretta v. California*. A defendant's request to represent himself should be deemed untimely only when the defendant's request will delay the trial or disrupt a trial in progress. Justin did not seek a continuance of the penalty phase of his trial. He was ready to commence representing himself. (14RT 3100-3102.) Justin's request would not have delayed the trial.

The trial court believed some amount of disruption of the trial was inevitable if Justin represented himself. (14RT 3103.) This concern was speculation. A defendant's lack of competence to represent himself is not a basis to deny a request for self-representation. (*Faretta v. California, supra*, 422 U.S. at pp. 835-836.) Justin's inability to competently represent himself was not a basis to deny his request for self-representation.

Appellant argued in the Opening Brief why the erroneous denial of his request to represent himself should be reversible per-se and not tested for prejudice under *People v. Watson, supra*, 46 Cal.2d 818, or *Chapman v. California, supra*, 386 U.S. at p. 24. Appellant will rest on those arguments regarding the standard for prejudice.

Harmless error cannot be found because appellant requested the death penalty and the jury imposed that sentence.(16RT 3297.) The basis for assessing prejudice is whether appellant would have received a life sentence if his motion to represent himself had been granted. It was reasonably likely Justin would not have received the death penalty if he had been allowed to represent himself during the penalty phase of the trial. The judgment of death must be reversed.

XIV

THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT COERCED A VERDICT BY FORCING THE JURY TO CONTINUE PENALTY PHASE DELIBERATIONS AFTER THE JURY HAD STATED THAT IT WAS DEADLOCKED.

Justin argued in the Opening Brief the trial court coerced a penalty phase verdict by compelling the jury to continue deliberating after the jurors stated they were hopelessly deadlocked. Respondent argues the verdict was not coerced because: (1) the jury deliberated only five hours and seven minutes before reporting a deadlock and approximately two hours of that time was spent listening to a reading of testimony; and (2) the jury was making progress because it had moved from a six to six split to an 11-to-one split.²⁰ Finally, respondent argues the abuse of discretion standard applies to Justin's claim of jury coercion. Respondent's arguments must be rejected.

1. THE LENGTH OF THE JURY'S PENALTY PHASE DELIBERATIONS SUGGESTED THE VERDICT WAS COERCED.

The length of time the jury had deliberated is not the only measure of whether the jury was hopelessly deadlocked and should have been discharged. (See *People v. Breaux*

²⁰ In footnote 117, Respondent states the jury foreperson was describing a series of votes of 6-6, 8-4, and 10-2. (RB at p. 186, fn. 117.) This footnote corresponds to a citation to page 3713 of the reporter's transcript. (RB at p. 186.) On page 3713, the jury foreperson referred to a 6-4 split with two jurors uncertain, and an 11-1 split. Respondent again refers to the 6-6, 10-2, and 11-1 split on page 192 of the Respondent's Brief and cites pages 3712 and 3713 of the reporter's transcript. Counsel cannot determine the source of Respondent's reference to the 6-6, 8-4, and 10-2 votes. These votes do not appear on those pages.

(1991) 1 Cal.4th 281, 319.) The complexity of the case must be measured against the length of the jury deliberations. (*Ibid.*) The guilt phase testimony commenced on October 29, 2007, (6RT 1775), and ended on November 27, 2007. (13RT 2867.) Penalty phase evidence was presented on December 11, 2007 (15RT 3151-3243), December 12, 2007, (15RT 3245-3253), December 17, 2007 (16RT 3286-3345, 3349-3458), and December 18, 2007 (17RT 3462-3597.) Only one expert testified during the penalty phase. (17RT 3486.) Neither the guilt phase nor the penalty phase evidence was especially complex. The complexity of the case cannot account for the amount of time the jury was required to deliberate to reach a penalty phase verdict.

The cases relied upon by Respondent provide little useful guidance about what is a reasonable period of time for the jury to deliberate before a mistrial should be declared. In *People v. Sandoval* (1992) 4 Cal.4th 155, 195, the trial lasted five months and the jury had been deliberating about the penalty only three days when the trial court allowed the jury to continue deliberating over defense objection. The opinion in *People v. Sheldon* (1989) 48 Cal.3d 935, failed to provide any information about the length of the guilt or penalty phases. *People v. Rodriguez* (1986) 42 Cal.4th 730, also did not provide information about the length of the guilt or penalty phases of the trial. However, the Court commented, “here the trial had been long, the evidence voluminous, and the issues complex. Deliberations had been punctuated by the reading of testimony and three supplemental charges to aid the jury in its task.” (*People v. Rodriguez, supra*, 42 Cal.4th at p. 775.)

Justin's case, in contrast, was not especially long for either the guilt or penalty phases, and the issues were not especially complex. The above cases do not undermine the inference of coercion.

2. The Jury's Deadlock Suggests the Verdict was Coerced.

The movement of the votes by the jurors did not warrant continued deliberations. When the jurors were polled, only juror 11 said further deliberations could "maybe" result in a verdict. (18RT 3715.) Seven jurors believed further deliberations would not help. Four jurors believed further deliberations probably would not help. The vast majority of jurors were firm that additional deliberations would not result in a verdict.

The cases cited by respondent are distinguishable. *People v. Bryant* (2014) 60 Cal.4th 335, was a co-defendant death penalty case. Four defendants were tried in a joint trial for the murder of four people and the attempted murder of a fifth person. In *People v. Bryant*, the guilt phase evidence lasted two and one-half months and included the testimony of 121 witnesses. The penalty phase lasted seven days and included the testimony of 41 witnesses. The length and complexity of the trial was substantially greater than Justin's trial and thus justified a longer period of penalty phase deliberations.²¹

Several other factors distinguish this case from *People v. Bryant*. The jury in *People v. Bryant* had already reached a penalty phase verdict for the co-defendant. This suggested a reasonable possibility it could reach a penalty phase verdict for the other defendant which

²¹ Justin's trial, including the guilty and penalty phase, lasted about seven and one-half weeks. (6RT 1750; 16 CT 4287; 17CT 4366.)

was the subject of the jury deadlock. A juror in *People v. Bryant* suggested clarification of the definition of “sympathy” in factor K could help break the deadlock. The jurors therefore identified a specific legal issue for clarification which could help break the deadlock. Justin’s case did not involve a co-defendant, for which a penalty phase verdict had been returned, or clarification of a specific legal issue which the jury believed could help it resolve the deadlock.

Furthermore, the jury in *People v. Bryant* reported their deliberations improved after the trial court instructed it to resume deliberations. This suggested the verdict was the result of the consciousness vote of the jurors and not capitulation to the coercion of the trial court. In Justin’s case, nothing intervened between the jurors informing the trial court that they were hopelessly deadlocked, the trial court forcing them to continue deliberations, and the jury returning a verdict of death. (18RT 3719-3720, 3723; 18 CT 4517.) This suggests the penalty phase verdict reached by Justin’s jury was the result of simply being forced to continue deliberations despite the jurors’ protests they were hopelessly deadlocked.

In *People v. Sandoval*, the trial court polled the jurors and they each stated that there was not a reasonable possibility they could reach a penalty verdict with further deliberations. The jury had voted five times. The trial court stated it wanted to let the jury deliberate one more day. The trial had lasted five months and the jury had deliberated about the penalty for only 14 and one-quarter hours. This Court found the trial court did not abuse its discretion by allowing the jury to continue deliberating. There was no evidence in *People v. Sandoval*

that juror fatigue was a factor in whether the jury should be allowed to continue deliberating. In Justin's case, the jury foreperson reported in response to the trial court's inquiry about breaking the deadlock, "Your Honor, it's so thick and heated in that room right now. And we've all came together as mature adults here and tried to, you know, work it out and weigh the evidence. I really don't think so, your Honor." (18RT 3713.) The fact this Court approved of the trial court allowing the jurors to continue deliberating in *People v. Sandoval*, despite the report of a deadlock, does not warrant the conclusion the trial court acted within its discretion in Justin's case when it compelled the jury to continue deliberating following the report of a deadlock.

People v. Sheldon (1989) 48 Cal.3d 935, is also distinguishable. The jury had deliberated regarding the penalty for a little more than a day and one-half. The trial court asked whether the rereading of the instructions or testimony might assist the jury. The jury foreperson said such measures had not been discussed. Several jurors said further instructions could help the jury reach a verdict. One juror requested a rereading of the instructions. Only one ballot had been taken and the split was 11 to one. This Court concluded the verdict had not been coerced because, "the jury had deliberated for only two days, and had taken only ballot, and . . . several jurors had indicated that such a reinstruction might produce a unanimous verdict." (*People v. Sheldon, supra*, 48 Cal.3d at p. 959.) In Justin's case, multiple ballots had been taken and 11 of the 12 jurors believed nothing could be done to break the deadlock.

Respondent argues, “the fact that the jury reached a penalty verdict after resuming deliberations bore out the trial court’s conclusion that additional deliberations would be productive.” (RB at pp. 192-193.) Respondent cites *People v. Rodriguez* (1986) 42 Cal.3d 730, 775-776, in support of this argument. *People v. Rodriguez* does not support the conclusion that the return of a verdict necessarily means the trial court acted properly by compelling the jury to continue deliberating. *People v. Rodriguez* stated, in commenting on the trial court’s decision to have the jury continue deliberating, that “subsequent events bore out that conclusion, for on the next three days following the jury’s final statement of deadlock, it requested, and was read, five portions of testimony that had not previously been read to it during deliberations. Thus, the deliberations remained properly focused on the evidence.” (*People v. Rodriguez, supra*, 42 Cal.3d at pp. 775-776.) *People v. Rodriguez* did not conclude the trial court acted properly by requiring the jury to continue deliberating merely because it reached a verdict. *People v. Rodriguez* concluded the jury was properly required to continue deliberating because subsequent events showed the jury continued to evaluate the evidence. There was no evidence Justin’s jury continued to evaluate the evidence and reached a verdict for that reason. Furthermore, respondent’s reasoning would mean any verdict was not coerced simply because a verdict was reached. This would eliminate the coerced verdict doctrine.

The certitude of the jury that they were hopelessly deadlocked should also be a factor. A juror will inevitably change his or her vote to the vote of the majority, even if that

vote does not reflect their conscience, if the jury is being held hostage to continued deliberations over its objection. A vote for death because of capitulation is not a conscientious vote for death and should not be ratified by this Court.

Jiminez v. Myers (9th Cir. 1993) 40 F.3d 976, 979, stated the issue of whether the trial court coerced a verdict was a mixed question of law and fact which was reviewed de novo. This Court has applied the abuse of discretion standard. (*People v. Sandoval* (1992) 4 Cal.4th 155, 195.) The Ninth Circuit has continued to treat the issue of jury coercion as a mixed question of law and fact subject to de novo review. (*United States v. Evanston* (9th Cir. 2011) 651 F.3d 1080, 1083; *United States v. Berger* (9th Cir. 2007) 473 F.3d 1080, 1089.)

This Court should treat juror coercion as a mixed question of law subject to de novo review. The trial court's discretion to declare a mistrial because of juror inability to reach a verdict, or to require it to continue deliberating, must be "sound." (*United States v. Perez* (1824) 22 U.S. 579, 579.) "If the record reveals that the trial judge has failed to exercise the 'sound discretion' entrusted to him, the reason for such deference by an appellate court disappears." (*Arizona v. Washington* (1978) 434 U.S. 497, 510, fn. 28.) The United States Supreme Court has thus declined to apply a strictly deferential standard of review to whether the jury should be required to continue to deliberate when it cannot reach a verdict.

Whether a verdict has been coerced is the type of issue this Court typically has treated as a mixed question of law and fact subject to de novo review. Mixed questions of law and fact are those "in which the historical facts are admitted or established, the rule of law is

undisputed, and the issue is whether the facts satisfy the [relevant legal] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.” (*People v. Louis* (1986) 42 Cal.3d 969, 984, quoting *Pullman-Standard v. Swint* (1982) 456 U.S. 273, 289, fn. 19.)

Juror misconduct provides a useful analogy. This Court reviews de novo whether juror misconduct was prejudicial. (*People v. Nesler* (1997) 16 Cal.4th 561.) For a juror misconduct case, the prejudice issue is one in which the “historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] [legal] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.” (*People v. Ault* (2004) 33 Cal.4th 1250, 1265.)

In the instant case, the facts pertaining to whether Justin’s jury was hopelessly deadlocked are undisputed. Those facts are in this appellate record. This Court thus has to apply the undisputed historical facts to the law to determine whether the trial court erred by allowing Justin’s jury to continue to deliberate whether he should be sentenced to death. This inquiry is similar to the prejudice inquiry for jury misconduct.

Other precedent supports applying the de novo standard of review. De novo review of mixed questions of law and fact is favored when constitutional rights are implicated. (*People v. Ault, supra*, 33 Cal.4th at p. 1264.) “The proper standard of review is influenced in part by the importance of the legal rights or interests at stake.” (*Id.*, at p. 1265.) “[I]ndependent appellate review of a mixed law and fact question is crucial when an

excessively deferential appellate affirmance risks error in the final determination of a party's rights, either as to the entire case, or on a significant issue in the litigation.” (*Id.*, at p. 1266.) The trial court's decision to require Justin's jury to continue deliberating implicated his Sixth Amendment right to a verdict that was not the result of coercion. The highest stake recognized under the law was implicated—whether Justin would be sentenced to death.

The trial court erred by forcing the jury to resume deliberations after it was hopelessly deadlocked. Hence, the sentence must be vacated.

XV

THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT INQUIRED INTO THE NUMERICAL DIVISION OF THE JURY.

Appellant argued in the Opening Brief the trial coerced a jury verdict by inquiring into the numerical breakdown of the jurors ballots. Respondent argues: (1) the error was waived because of the lack of an objection in the trial court; and (2) this Court has approved of the trial court inquiring into the numerical breakdown of the juror ballots. The issue was not waived. This Court, furthermore, should alter its practice and hold that the trial court's inquiry into the numerical breakdown of the jurors ballots is inherently prejudicial.

The waiver doctrine is not applied when an objection would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Respondent argues Justin waived any error because California law did not require the trial court to inquire into the numerical breakdown of the jurors ballots. Respondent's argument is irrelevant. The question is whether the defense counsel could have prevented the trial court from inquiring into the numerical breakdown of the jurors' ballots by making a timely objection. The defense counsel could not have prevented the trial court from making this inquiry with an objection because California law permitted it. Respondent's argument the defense counsel could have objected, and persuaded the trial court to not inquire into the numerical breakdown of the jury, is speculation. There is no reason to believe an objection would have been sustained given the permissibility of such an inquiry under California law. The law does not require a futile act. (*People v. Herrera* (2010) 49 Cal.4th 613, 622.) A defense objection would have been futile and thus

was not required.

Appellant explained in the Opening Brief why the trial court's numerical inquiry into the breakdown of the jurors' ballots was inherently coercive. This Court's approval of such an inquiry (*People v. Valdez* (2012) 55 Cal.4th 82, 160), is in direct conflict with the federal courts which condemn the practice as inherently coercive and prejudicial. (See e.g., *Lowenfield v. Phelps* (1988) 484 U.S. 231, 239-240.) The view that judicial inquiry into the numerical breakdown of the jurors' ballots is permissible cannot be reconciled with the view that such an inquiry is inherently coercive and prejudicial. The knowledge of the minority jurors, that the trial court knows the numerical breakdown of the ballots, and is forcing them to continue deliberations, communicates to the minority jurors the trial court's hope and pressure they will change their verdict. When the numerical breakdown is 10 to two or 11 to one, the one or two minority jurors obviously know the trial court does not expect the 10 or 11 majority jurors to change their vote. Judicial ignorance of the split of the jurors' ballots insulates the jury deliberation process from this coercion.

The trial court's inquiry into the numerical division of the jurors' ballots was inherently prejudicial. The judgment of death must be reversed.

XVI

**THE JUDGMENT OF DEATH MUST BE REVERSED
BECAUSE THE TRIAL COURT FAILED TO REQUIRE
THE JURY TO FIND BEYOND A REASONABLE DOUBT
THAT THE AGGRAVATING FACTORS OUTWEIGHED
THE MITIGATING FACTORS IN ORDER TO IMPOSE
THE DEATH PENALTY.**

Justin argued in the Opening Brief the trial court erred by refusing the defense counsel's request to modify CALCRIM No. 766 to instruct the jury the aggravating circumstances had to outweigh the mitigating circumstances beyond a reasonable doubt in order for the jury to impose the death penalty. Respondent relies on this Court's decisions holding that the weighing process is a normative decision to argue Justin's argument should be rejected. Justin has not found any additional relevant authority regarding this issue since the submission of the Opening Brief. Justin will therefore rest on the arguments in the Opening Brief.

XVII

THE JUDGMENT OF DEATH SHOULD BE SET ASIDE BECAUSE: (1) THE CALIFORNIA DEATH PENALTY STATUTE, AS A MATTER OF LAW, VIOLATES THE RIGHT TO DUE PROCESS OF LAW IN THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION, THE GUARANTEE OF THE RIGHT TO A JURY TRIAL IN THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION, THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION; AND (2) THE IMPOSITION OF THE DEATH PENALTY, AS A MATTER OF LAW, VIOLATES THE AFOREMENTIONED CONSTITUTIONAL PROVISIONS

Justin argued in the Opening Brief that California's death penalty scheme suffered from a variety of infirmities which rendered it unconstitutional. He will rest on the arguments in the Opening Brief.

XVIII

THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT REFUSED TO GIVE DEFENSE-REQUESTED INSTRUCTIONS REGARDING LINGERING DOUBT AND MERCY.

Justin argued in the Opening Brief the trial court erred by: (1) failing to give the defense requested lingering doubt instruction; and (2) failing to give the defense requested mercy instruction. Respondent argues: (1) the jury instruction for the jury to consider the circumstances of the crime and the defense argument regarding lingering doubt were adequate substitutes for a lingering doubt instruction; (2) the trial court gave an instruction regarding “sympathy,” and that term is interchangeable with the term “mercy,” and (3) any error was harmless.

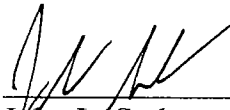
People v. Streeter (2012) 54 Cal.4th 205, 265-266, concluded the jury instruction to consider the circumstances of the crime, together with the defense argument regarding lingering doubt, were adequate substitutes for a lingering doubt instruction. This Court should reconsider that holding. The factor K instruction given to Justin’s jury instructed the jury it could consider in mitigation, “any other circumstance, whether related to these charges or not, that lessens the gravity of the crime even though the circumstance is not a legal excuse or justification.” This language suggested lingering doubt about guilt should not be considered. A legal excuse or justification pertained to guilt. By defining mitigation as facts that “lessen the gravity of the crime even though the circumstance is not a legal excuse or justification,” the instruction told the jury facts pertaining to guilt were not to be considered

in mitigation. The jury would reasonably interpret the factor K language in this manner both because of the language in the instruction and because the jury had already decided the issue of guilt. There would be no reason for the jury to believe it should revisit the issue of guilt in any manner, including in mitigation of the sentence, absent a clear and explicit instruction that doubt about guilt was a valid consideration in mitigation of the penalty. The factor K instruction given to Justin’s jury did not meet this standard.

The arguments of counsel cannot substitute for correct instructions from the trial court. (*Carter v. Kentucky* (1981) 450 U.S. 288, 304.) During the penalty phase argument, the defense attorney referred to Dr. Stalcup’s testimony about Justin’s methamphetamine induced psychosis and the specific intent to commit murder. (18RT 3698.) He then argued, “would you think to yourself that maybe, maybe that leaves in your mind a doubt, a lingering doubt? That means years from now when this case is over will you say to yourself I convicted him, but those facts, those facts, do they make me wonder whether or not I should have really thought about that alleged murder.” (18RT 3698-3699.) This was a persuasive argument to convince the jury not to sentence appellant to death. However, it was not an adequate substitute for a factor K instruction which instructed the jury regarding lingering doubt in clear and explicit terms and which had the authority of the trial court.

This Court has ruled that “sympathy” and “mercy” are functional synonyms. (*People v. Boyce* (2014) 59 Cal.4th 672, 707.) Justin disagrees for the reasons explained in the Opening Brief. Justin will rest on those arguments.

Dated: March 31, 2017

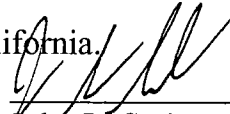


John L. Staley

DECLARATION REGARDING WORD COUNT

I declare under penalty of perjury that this Reply Brief contains 28,287 words.

Executed on March 31, 2017, in San Diego, California.



John L. Staley

PROOF OF SERVICE

(People v. Thomas, Superior Court Case No. RIF-086792;
Supreme Court No. S161781)

I reside in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 16935 West Bernardo Drive, Suite 260, San Diego, CA 92127. On March 31, 2017, I serve the foregoing document described as: **APPELLANT’S REPLY BRIEF** on all parties to this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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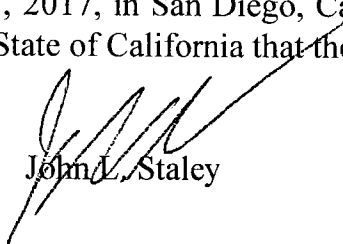
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John L. Staley