

**COPY**

**SUPREME COURT COPY**

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

**PEOPLE OF THE STATE OF CALIFORNIA,**

**Plaintiff and Respondent,**

**vs.**

**MARCOS ESQUIVEL BARRERA,**

**Defendant and Appellant.**

**CRIM. No. S103358  
Death Penalty Case**

**Los Angeles  
County Superior  
No. PA029724-01**

**SUPREME COURT  
FILED**

**SEP 11 2015**

**APPELLANT'S SUPPLEMENTAL REPLY BRIEF**

**Automatic Appeal from the Judgment of the  
Superior Court of the State of California  
for the County of Los Angeles**

**Frank A. McGuire Clerk**

**Deputy**

**The Honorable Judge Ronald S. Coen**

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**DEATH PENALTY**

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**APPELLANT'S SUPPLEMENTAL REPLY BRIEF**

**I.**

**THE PROSECUTOR ARGUED IN VIOLATION OF  
*PEOPLE V. COLEMAN* THAT APPELLANT'S FAILURE  
TO CONFESS HIS GUILT DEMONSTRATED LACK OF  
REMORSE**

Respondent contends that the prosecutor's comment during her penalty phase closing argument, that "[h]e doesn't admit any of this. His attorney does," referred to the contents of letters written by appellant to co-defendant Ramirez, rather than to appellant's failure to confess. Respondent argues that "the subject comments were not improper because they highlighted appellant's lack of concern for the murder victims, Lupita and Ernesto, as shown in the evidence of his letters to co-defendant Ramirez." (Supp. RB, 5.)

However, respondent's claim has no merit because the prosecutor made this comment prior to, and separately from her discussion of the letters to Ramirez. She specifically argued that appellant was unremorseful because he failed to "admit it," i.e., to



confess his guilt, and therefore was undeserving of mercy. (17RT 2183.)<sup>1</sup> By explicitly contrasting appellant's silence to the concession of guilt offered by defense counsel during the trial, the prosecutor made clear that she was pointing to appellant's failure to testify and *personally* admit his guilt to the jury or law enforcement as a demonstration of his lack of remorse. Although a prosecutor may permissibly argue that a capital defendant lacks remorse, "any argument that failure to confess should be deemed evidence of lack of remorse is not permissible." (*People v. Coleman* (1966) 71 Cal.2d 1159, 1168-1169.)

Respondent argues that *Coleman* is distinguishable from the instant case because the prosecutor herein did not expressly refer to appellant's decision not to testify, as the prosecutor had in *Coleman*.<sup>2</sup> (Supp. RB, 6.) However, a reasonable juror would, or could, have interpreted the comment, "[h]e doesn't admit any of this. His attorney does," as a reference to that decision. (*People v. Ashmus* (1991) 54 Cal.3d 932, 976 ["When, as here, the claim focuses on comments made by the prosecutor before the jury, a court must determine at the threshold how the remarks would, or could, have been understood by

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<sup>1</sup> "The prosecutor argued:  
When you can't talk about remorse, when  
you talk about whether you should give  
mercy, "remorse" have you heard anywhere  
that he's sorry? *He doesn't admit any of  
this. His attorney does.*"

(*Ibid.*)

<sup>2</sup> The prosecutor in *Coleman* stated that the defendant "will not get on that stand and admit what he has done." (71 Cal.2d at p. 1168.)

a reasonable juror”].)

Under the circumstances, respondent’s reliance on *People v. Hardy* (1992) 2 Cal.4th 86, 208-209, is misplaced. As explained in appellant’s reply brief (ARB 44-45), in *Hardy*, this Court found no violation of *Coleman* because the context of the prosecutor’s remarks made clear that the prosecutor was commenting not on the defendant’s failure to confess his guilt in front of the jury, but rather on conversations between the defendant and his friends. (2 Cal.4th, at p. 209.)<sup>3</sup> Respondent would have this Court find no *Coleman* error on similar grounds, but for the reasons stated above the record simply does not support such a conclusion.

Respondent additionally contends the prosecutor’s argument was not improper because she expressly told the jury it could not consider the absence of remorse as an aggravating factor. (RB 6.) This point is irrelevant to appellant’s argument. The prosecutor argued that the jury should not exercise mercy because of appellant’s lack of remorse, as demonstrated by his failure to confess his guilt. (17RT 2183.) As

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<sup>3</sup>The Court stated:

[T]he prosecutor simply noted that Reilly had expressed remorse after the crimes but that Hardy had not. [Citation omitted.] Similarly, the prosecutor never suggested that the jury should consider the fact that Hardy did not testify at the penalty phase. The comment that, “Not once do you ever have *that* type of response from Mr. Hardy” (italics added) refers to the immediately preceding comment concerning Reilly’s remorseful comments to Debbie Sportsman. Thus, the comment can be reasonably construed as comment on the fact that Hardy never expressed *to his friends* his sorrow for the crimes, and not that he failed to express such remorse *at trial*.

(*Ibid.*, italics in original.)

discussed above, arguing that appellant's failure to admit his guilt demonstrated lack of remorse was *Coleman* error.<sup>4</sup>

Finally, respondent argues that even if the prosecutor's remarks constituted *Coleman* error, the error was harmless due to the "extremely aggravating" circumstances of the case. (RB 7.) That is not the proper standard for assessing prejudice. This Court has held that state law error during the penalty phase cannot be harmless if there is a reasonable possibility that the error affected the verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.) The Court has further held that the "reasonable possibility" standard is the same in sum and substance as the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Cowan* (2010) 50 Cal. 4th 401, 491.)

As appellant established in prior briefing (AOB 154-155, ARB 46-47), the proper inquiry under *Chapman*, and by extension under *Brown*, is whether the error might have affected the jury's decision-making, *not* whether there was overwhelming evidence to support the result. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; see also *People v. Jackson* (2014) 48 Cal.4th 724, 790, dis. opn., Liu, J.) Furthermore, the burden of proof falls on the State, which must prove beyond a reasonable doubt that the prosecutor's improper argument had no impact on the jury's penalty determination. (*Chapman v. California*, *supra*, 386 U.S., at p. 24.)

Respondent has not proven beyond a reasonable doubt – nor can it do so -- that the jury was not influenced in its penalty

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<sup>4</sup>Appellant has also argued that this constituted error under *Griffin v. California* (1965) 380 U.S. 606 (See AOB 131-138 and ARB 43-50.)

determination by the prosecutor's argument, particularly in light of the trial court's refusal to give CALJIC 2.60, which would have instructed the jury that it could not draw any adverse inference from appellant's decision not to testify. (See AOB 135-136; ARB 51-55.) As discussed in appellant's reply brief, studies of juries in capital cases have demonstrated that it is common for jurors to interpret a defendant's silence to mean that he or she lacks remorse. (See ARB 48, 53.)

Moreover, in a death penalty case, where each juror makes an individualized, normative determination as to the penalty appropriate for the particular defendant (*People v. Brown, supra*, 46 Cal.3d at p. 448), and "may assign whatever moral or sympathetic value " he or she deems appropriate to the sentencing factors" (CALJIC 8.88), a juror could decide that a sentence of life without the possibility of parole is warranted even in the face of "extremely aggravating circumstances." Respondent therefore cannot prove beyond a reasonable doubt that not a single juror would have found appellant deserving of mercy in the absence of the prosecutor's improper argument.

Respondent also maintains that any error in overruling appellant's objection to the prosecutor's comment was harmless because the jury was instructed, pursuant to CALJIC 1.02, that statements made by the attorneys at trial are not evidence. (Supp. RB 7.) This argument is not persuasive because CALJIC 1.02 addresses statements of fact made during argument, and did not inform the jury that it could not draw any adverse inference from appellant's failure to confess.

Accordingly, for all of the reasons stated above and in appellant's supplemental opening brief, the prosecutor's violation of *People v. Coleman, supra*, 71 Cal. 2d at pp.1168-69, requires reversal of

appellant's death sentence.

II.

**RESPONDENT'S ARGUMENTS AS TO WHY THIS COURT SHOULD REJECT APPELLANT'S CUMULATIVE ERROR CLAIM ARE MERITLESS**

Respondent advances three arguments as to why this Court should reject appellant's claim of cumulative error, none of which has merit.

First, respondent argues that "several of appellant's claims were forfeited due to his failure to object below." (Supp. RB 8.) Respondent is incorrect. As appellant demonstrated in his reply brief, each and every one of his claims is fully cognizable on appeal. (See ARB 18-20, 32-33.) Second, respondent contends "there are no multiple errors to accumulate, and/or any alleged error was harmless." (Supp. RB 8.) Respondent is wrong here, too.

In the guilt phase, the trial court violated appellant's constitutional rights to due process, a fair trial and a reliable determination of guilt by erroneously failing to instruct the jury on second degree felony murder based on torture, and giving a flawed unanimity of doubt instruction that unconstitutionally lowered the prosecution's burden of proof regarding first degree murder. Appellant submits that each violation by itself was prejudicial and constitutes reversible error. However even if this Court concludes otherwise, the cumulative impact of these errors mandates reversal of the conviction and special circumstances findings

In the penalty phase, appellant was deprived of his constitutional right to a fair and reliable penalty determination due to the prosecutor's improper argument that appellant lacked remorse because he did not

testify or personally admit his guilt, and that he was therefore undeserving of the jury's mercy. This error was compounded by the trial court's erroneous refusal to instruct the jury that it could not draw any adverse inference from appellant's decision not to testify. The cumulative prejudicial effect of these interrelated errors requires reversal of appellant's death sentence.

Finally, respondent contends that reversal is not required because appellant was not entitled to a "perfect trial," only a fair one, and that "[t]he record shows that appellant received a fair trial." (Supp. RB 9.) For all of the reasons stated above and in appellant's opening brief, reply brief and supplemental opening brief, appellant did *not* receive a fair trial, and is therefore entitled to reversal of his conviction and death sentence.

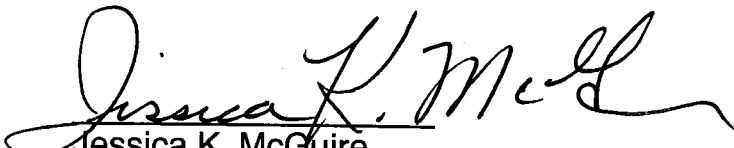
### **CONCLUSION**

For all of the foregoing reasons appellant requests that this Court reverse his conviction, strike the special circumstances and set aside his sentence of death.

Dated: September 9, 2015

Respectfully submitted

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State Public Defender

  
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Assistant State Public Defender


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**CERTIFICATE OF COUNSEL**  
**(Cal. Rules of Court, rule 8.630 (b)(1))**

I, Jessica K. McGuire, am the Assistant State Public Defender assigned to represent appellant Marcos Barrera, in this automatic appeal. I have conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 1687 words in length excluding the tables and this certificate.

DATED: September 9, 2015

  
JESSICA K. McGUIRE  
Attorney for Appellant





**DECLARATION OF SERVICE BY MAIL**

Case Name: **People v. Marco Esquivel Barrera**  
Case Number: **Supreme Court No. S103358**  
**Los Angeles County Superior Court No. PA029724**

I, DENISE A. ARMENDARIZ, declare I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 770 L Street, Suite 1000, Sacramento, California 95814. I served a copy of the following document(s):

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 9, 2015 at Sacramento, California.

  
**DENISE A. ARMENDARIZ**