In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **DANIEL NUNEZ and WILLIAM SATELE,** Defendants and Appellants.	Case No. S091915 **CAPITAL CASE**

Los Angeles County Superior Court Case No. NA039358
The Honorable Tomson T. Ong, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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DEATH PENALTY

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INTRODUCTION

Appellant Nunez's February 2012 supplemental brief allegedly raises a new claim, but it is based on law in *People v. McCoy* (2001) 25 Cal.4th 1111 (*McCoy*). *McCoy* held that an aider-abettor may be found guilty of greater homicide crimes than the perpetrator. (*McCoy, supra*, 25 Cal.4th at p. 1122.) Nunez cited *McCoy* in his September 2007 opening brief (Nunez AOB 114, 117-118) to essentially argue the same theme urged now. Appellant Satele's December 2007 opening brief likewise cited *McCoy* and *People v. Mendoza* (1998) 18 Cal.4th 1114, to advocate that the "mental state required of an aider and abettor is 'different from the mental state necessary for conviction as the actual perpetrator[.]'" (Satele AOB 45.) Satele's point was the main justification for the law in *McCoy*. The Respondent's Brief did not cite *McCoy*, but that brief discussed *McCoy*'s aider-abettor law as analyzed in *People v. Garcia* (2002) 28 Cal.4th 1166 (*Garcia*). (RB 104-105; see *People v. Yang* (2010) 189 Cal.App.4th 148, 155 (*Yang*) [discussing *McCoy*, and stating "[w]e find our answer largely in *Garcia*"].)

Later, in *People v. Samaniego* (2009) 172 Cal.App.4th 1148 (*Samaniego*) (see *People v. Gonzales* (2011) 51 Cal.4th 894, 941, fn. 28 (*Gonzales*) [discussing *Samaniego* as to harmless error]; *People v. Lee* (2011) 51 Cal.4th 620, 638 (*Lee*) [citing *Samaniego* as to forfeiture]), which Nunez relies on with *People v. Nero* (2010) 181 Cal.App.4th 504 (*Nero*) (Nunez Supp. AOB 11-14), the defendant urged that CALCRIM No. 400 (CALJIC No. 3.00's later comparable instruction) was "defective in failing to inform the jury that an aider and abettor can be guilty of a lesser crime than the perpetrator" under *McCoy*. (*Samaniego, supra*, 172 Cal.App.4th at pp. 1163-1164.) This is identical to Satele's prior claim, which was the law adopted in *Nero*. (*Nero, supra*, 181 Cal.App.4th at p. 507 ["Extending [*McCoy*'s] holding, we conclude that an aider and

abettor may be found guilty of *lesser* homicide-related offenses than those the actual perpetrator committed"] [italics in original]; see *Yang, supra*, 189 Cal.App.4th at p. 157 [noting *Samaniego* and *Nero*].) "Nor is the notion that an aider and abettor's mens rea 'floats free' new in California law." (*Nero, supra*, 181 Cal.App.4th at p. 516.) Respondent thus questions whether there is a "new" claim here.

The alleged new claim (CALJIC No. 3.00 erroneously instructed that an aider-abettor is "equally guilty" with the perpetrator; Nunez Supp. AOB 3-27; Satele Supp. Letter Brief 1-3; 37CT 10754; 38CT 11081; 14RT 3177-3178; 18RT 4418) is also related to the prior claims of: (1) jury unanimity findings were required as to who was the shooter versus who was the aider because it was factually impossible (there was insufficient evidence) for the jury to find that both appellants personally and intentionally discharged the murder gun (RB 102-119 [Arg. II]; Nunez AOB 40-102 [Args. I-II]; Satele AOB 30-58 [Arg. I]); and (2) the trial court erred by refusing to give Nunez's requested pinpoint aider-abettor instruction (RB 196-200 [Arg. XII]; Nunez AOB 192-204 [Arg. VIII]; Satele AOB 165-178 [Arg. VIII]).

At any rate, Nunez urges this Court to agree with *Nero, supra*, 181 Cal.App.4th 504, and *Samaniego, supra*, 172 Cal.App.4th 1148, both of which held that the equally-guilty language in CALJIC No. 3.00 (or CALCRIM No. 400's former version) is misleading.[1] (Nunez Supp. AOB

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[1] The 2012 version of CALCRIM No. 400 omits the "equally guilty" language, and it instead instructs as follows:

> A person may be *guilty of a crime* in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. [¶] A person is *guilty of a crime* whether he or she committed it personally or aided and abetted the perpetrator. [¶] [Under (continued...)

11-14.) In *Samaniego*, the defendant did not raise an objection to the "equally guilty" language at trial, and the Court of Appeal thus found that the claim (raised here) was forfeited. (*Samaniego, supra*, 172 Cal.App.4th at p. 1163.)

At the guilty phase in this case, the trial court asked: "3.00 principals, any objection as defined?" Nunez's trial counsel replied: "No." Satele's counsel replied: "I can't really object to that." (13RT 3039.) Nunez nonetheless claims that there was no forfeiture here under "settled" law. (Nunez Supp. AOB 21.) Satele does not discuss the forfeiture problem in his supplemental letter brief (filed after Nunez's supplemental opening brief). (See Satele Supp. Letter Brief 1-3.) As will appear, given that the equally-guilty language was generally an accurate statement of law, the failure to request modification or clarification of CALJIC No. 3.00 thus forfeited the alleged new claim here as in *Samaniego*. (See *Lee, supra*, 51 Cal.4th at p. 638 [finding forfeiture], citing *Samaniego, supra*, 172 Cal.App.4th at p. 1163; *Lopez, supra*, 198 Cal.App.4th at pp. 1118-1119

(...continued)

> some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime.]

(Italics added; see *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1119 (*Lopez*) ["We note that CALCRIM No. 400 has been amended to remove the 'equally guilty' language. (Judicial Council of Cal., Crim. Jury Instns. (2011) p. 167.)"].) Simply put, the alleged new claim here would presumably not exist regarding criminal trials where the 2012 version of CALCRIM No. 400 is used. At any rate, the CALCRIM No. 400's 2012 Bench Notes (in part) indicate: "An aider and abettor may be found guilty of a different crime or degree of crime than the perpetrator if the aider and abettor and the perpetrator do not have the same mental state." (Citing *McCoy, supra*, 25 Cal.4th at pp. 1115-1116, *Samaniego, supra*, 172 Cal.App.4th at p. 1166, and *People v. Woods* (1992) 8 Cal.App.4th 1570, 1577-1578.)

[forfeited challenge to CALCRIM No. 400's "equally guilty" language], citing *Samaniego, supra*; *People v. Canizalez* (2011) 197 Cal.App.4th 832, 849 (*Canizalez*) [same].)

The Court of Appeal in *Samaniego* alternatively found that "there was no prejudicial error" as to the equally-guilty language under the harmless error test in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] (*Chapman*). (*Samaniego, supra*, 172 Cal.App.4th at pp. 1163, 1165.) It opined: "The error here is harmless beyond a reasonable doubt because the jury necessarily resolved these issues against appellants under other instructions." (*Id.* at p. 1165; see *Gonzales, supra*, 51 Cal.4th at p. 941, fn. 28.) As will appear, the same is true here. The Attorney General's forfeiture and harmless error arguments were rejected in *Nero*, but as will appear, *Nero* is distinguishable as to the forfeiture and harmless error issues. As to harmless error specifically, the Court of Appeal in *Nero* stated: "We cannot say, on this record, beyond a reasonable doubt, that Brown would have been found guilty of second degree murder in the absence of the error." (*Nero, supra*, 181 Cal.App.4th at p. 519.) As will appear, the foregoing cannot be said here. (See *Lopez, supra*, 198 Cal.App.4th at p. 1120, fn. 6 [finding no justification for reversal "even if *Nero* were correctly decided"].)

Finally, as to Nunez's supplemental brief on prospective juror 2066's removal under *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776] (*Witherspoon*) and *Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841] (*Witt*) (see Nunez AOB 243-252 [Arg. XII]; Nunez Supp. AOB 28-32; Satele AOB 246-254 [Arg. XV]; RB 28-60), as will appear, a death penalty reversal is unjustified despite that result in *People v. Pearson* (2012) 53 Cal.4th 306 (*Pearson*). This is so mindful that the trial judge here was the same in *Pearson*.

ARGUMENT

I. APPELLANTS FORFEITED REVIEW OF THE ALLEGED NEW CLAIM, IT LACKS MERIT, AND ANY INSTRUCTIONAL ERROR WAS HARMLESS UNDER *CHAPMAN*

Appellants claim that CALJIC No. 3.00 erroneously instructed that an aider-abettor is "equally guilty" with the shooter in violation of *McCoy, supra*, 25 Cal.4th 1111. In other words, as held in *Nero, supra*, 181 Cal.App.4th 504, they claim that CALJIC No. 3.00 (see 14RT 3177; 18RT 4418; 37CT 10754; 18CT 11081) was defective because it failed to inform the jury that an aider-abettor can be guilty of a lesser homicide crime than the perpetrator under *McCoy*. (Nunez Supp. AOB 3-27; Satele Supp. Letter Brief 1-3; see *Yang, supra*, 189 Cal.App.4th at p. 157.)

The alleged new claim was forfeited because appellants failed to ask the trial court to modify or clarify CALJIC No. 3.00. (13RT 3039.) Specifically, given that the equally-guilty instruction was generally an accurate statement of law, the failure to request modification or clarification thus forfeited this contention. (*Lopez, supra*, 198 Cal.App.4th at pp. 1118-1119 [citing *Samaniego* with "but see" cite to *Nero*]; *Canizalez, supra*, 197 Cal.App.4th at p. 849; *Samaniego, supra*, 172 Cal.App.4th at p. 1163; see *Lee, supra*, 51 Cal.4th at p. 638 [citing *Samaniego* as to forfeiture].) Alternatively, the claim fails because CALJIC No. 3.00's equally-guilty language was an accurate statement of the law in general. (*Lopez, supra*, 198 Cal.App.4th at p. 1118; *Canizalez, supra*, 197 Cal.App.4th at p. 849; *Samaniego, supra*, 172 Cal.App.4th at p. 1163; see *Lee, supra*, 51 Cal.4th at p. 638.) Finally, reversal of the death penalty and the first degree premeditated murder convictions is unjustified because any error was harmless under the test in *Chapman, supra*, 386 U.S. 18. (See *Gonzales, supra*, 51 Cal.4th at p. 941, fn. 28 [discussing the *Samaniego* court's

harmless error analysis, and finding "*Samaniego* does not aid defendant"]; *Canizalez, supra*, 197 Cal.App.4th at pp. 850, 852-853 [any equally-guilty language error was harmless under *Chapman*].)

A. Appellants Forfeited Review

Satele "joins" in Nunez's briefing, and he offers "additional arguments[.]" (Satele Supp. Letter Brief 1-3.) Nunez claims that there was no forfeiture under "settled" law. (Nunez Supp. AOB 21.) This Court apparently disagrees with Nunez. (*Lee, supra*, 51 Cal.4th at p. 638 ["failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal"], citing *Samaniego, supra*, 172 Cal.App.4th at p. 1163.) One appellate court has joined the *Samaniego* court's forfeiture finding as to attacks on "equally guilty" instructions. (*Lopez, supra*, 198 Cal.App.4th at pp. 1118-1119; *Canizalez, supra*, 197 Cal.App.4th at p. 849.)

As a preliminary matter: "Joinder may be broadly permitted (Cal. Rules of Court, rule 8.200(a)(5)), but each appellant has the burden of demonstrating error and prejudice [citations]." (*Nero, supra*, 181 Cal.App.4th at p. 510, fn. 11.) On February 24, 2011, this Court published its unanimous opinion in *Lee, supra*, 51 Cal.4th 620 (affirming a felony-murder conviction and death penalty). One year later, on February 24, 2012, Nunez submitted to this Court his supplemental brief urging that there was no forfeiture here under "settled" law. (Nunez Supp. AOB 21.) Nunez did not acknowledge or cite this Court's forfeiture finding in *Lee* that cited *Samaniego* with approval. (See Nunez Supp. AOB 3-27.) Likewise, in his supplemental letter brief filed on April 30, 2012, i.e., over one year after *Lee* was published, Satele did not discuss the forfeiture issue at all. (See Satele Supp. Letter Brief 1-3.) Thus, to the extent Satele's cursory joinder was an attempt to address the forfeiture problem, his reliance solely on Nunez's *Samaniego* analysis is insufficient to satisfy his

burden on appeal, and (at the very least) this Court should consequently consider the issue about CALJIC No. 3.00's equally-guilty language "only as to" Nunez. (See *Nero, supra*, 181 Cal.App.4th at p. 510, fn. 11.)

At any rate, appellants forfeited review. (*Lee, supra*, 51 Cal.4th at p. 638; *Lopez, supra*, 198 Cal.App.4th at pp. 1118-1119; *Canizalez, supra*, 197 Cal.App.4th at p. 849; *Samaniego, supra*, 172 Cal.App.4th at p. 1163.) And as explained below, *Nero* is distinguishable and does not exempt appellants from the forfeiture rule.

As in *Nero, supra*, 181 Cal.App.4th 504, appellants did not ask the trial court to modify or clarify the CALJIC No. 3.00 equally-guilty instruction. (13RT 3039.) However, in *Nero*, where perpetrator (i.e., knife-stabber) Nero and his co-defendant sister (Brown) were convicted of second degree murder, the deliberating jury sought clarity on whether Brown "must" receive the same level of guilt as Nero if Brown were found to be Nero's aider-abettor. (*Nero, supra*, 181 Cal.App.4th at pp. 511-512.) The court initially replied that the "'same standard of proof applies to both defendants.'" (*Id.* at p. 511.) After the jury foreperson re-framed the issue, the court replied that the aider and abettor can be "'no more responsible'" and "'can bear no great responsibility as far as the degree'" compared to the perpetrator. (*Ibid.*) The foregoing was an incorrect statement of this Court's prior law that an aider-abettor may be found guilty of greater homicide offenses than those the perpetrator committed. (*McCoy, supra*, 25 Cal.4th at p. 1122; *Nero, supra*, 181 Cal.App.4th at p. 520 ["This, of course, was wrong under *McCoy*'s express holding"].) Also, in *Nero*, after the jury foreperson sought clarity on whether Brown could bear "less responsibility" than Nero, the court told the jurors that it probably wanted to confer with the attorneys as to their approval on how to answer the question. (*Nero, supra*, 181 Cal.App.4th at pp. 511-512.) Instead of conferring with the lawyers, the court "reread" to the jury CALJIC

No. 3.00's "equally guilty" language, and it gave its opinion as to the meaning of equally-guilty. (*Id.* at pp. 512-513.)

Given the foregoing, the Court of Appeal in *Nero* disagreed with the Attorney General's forfeiture argument in that case. The Court of Appeal in *Nero* reasoned as follows:

> When the jury first asked its question, the trial court consulted with the attorneys, who were not present in court. They agreed that the jury should be told that what is "proven must be proven beyond a reasonable doubt in order to have a conviction." The jury foreperson and another juror, however, informed the court that this did not answer the jury's question. The juror then specifically asked if an aider and abettor could be found guilty of "the same level, murder two or manslaughter, or could they be at a lower level? Or you said it can't be the higher level, but could they be at [the] lower level?" The court said it needed to confer further with the attorneys before it answered that question. Instead of doing so, the court reread the aiding and abetting instructions, including the statement on CALJIC No. 3.00 that "each principal, regardless of the extent or manner of participation, is equally guilty." On this record, Brown's counsel was neither told about the jury's followup question nor consulted about how to answer it. Therefore, even if we assumed that Brown initially forfeited the issue by agreeing to CALJIC Nos. 3.00 and 3.01 in an unmodified form, the issue was "renewed" by the jury's questions and by the court's failure to consult trial counsel about them.

(*Nero, supra*, 181 Cal.App.4th at p. 517, fn. 13.)

By contrast, here, besides defense counsel's agreement to CALJIC No. 3.00 in an unmodified form (13RT 3039), the jury did not seek clarity on whether Satele or Nunez could be less responsible for the homicide, the trial court thus did not give a reply that violated the aider-abettor law in *McCoy, supra*, 25 Cal.4th 1111, and the "equally guilty" issue was not renewed as in *Nero*. (See 38CT 10915-10916 [two guilt phase jury notes]; 14RT 3439 [guilt phase jury deliberation began]; 15RT 3440, 3445 [jury notes discussed by court and parties], 3457-3481 [guilt phase verdicts

announced; jury polled].) The Court of Appeal's forfeiture rejection in *Nero* is thus distinguishable in this case. (See *Lopez, supra*, 198 Cal.App.4th at p. 1120, fn. 6 ["No jury confusion is evidenced in this case, nor is there evidence showing Brousseau could be guilty of something less than felony murder, along with *Lopez*. Therefore, even if *Nero* were correctly decided, it does not require reversal in this case"].)

Instead, as settled prior to the murders in this case: "A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Lang* (1989) 49 Cal.3d 991, 1024 (*Lang*); accord *Lee, supra*, 51 Cal.4th at p. 638 [finding forfeiture], citing *Samaniego, supra*, 172 Cal.App.4th at p. 1163; *People v. Hart* (1999) 20 Cal.4th 546, 622 (*Hart*) ["Defendant's failure to request such a clarifying instruction at trial, however, waives his claim on appeal"]; *Lopez, supra*, 198 Cal.App.4th at p. 1119 [citing *Lang* and *Samaniego*]; *Canizalez, supra*, 197 Cal.App.4th at p. 849 [citing among other cases *Hart* and *Samaniego*].)

Nunez claims that there was no forfeiture because his "substantial rights" were affected.[2] (Nunez Supp. AOB 21-23.) Respondent disagrees.

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[2] Section 1259 states:

> Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court *may* also review *any instruction given*, refused or modified, *even though no objection was made thereto in the lower court*, if the *substantial rights* of the defendant were affected thereby.

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(See *Lee, supra*, 51 Cal.4th at p. 638 [finding forfeiture], citing *Samaniego, supra*, 172 Cal.App.4th at p. 1163; *Lopez, supra*, 198 Cal.App.4th at pp. 1118-1119; *Canizalez, supra*, 197 Cal.App.4th at p. 849.) This is not a case where the trial court failed to instruct on "involuntary manslaughter due to diminished capacity" as in *People v. Graham* (1969) 71 Cal.2d 303. (Nunez Supp. AOB 22.) Without citation to a case, Nunez claims: "In all other cases, instructions which misstate the elements of a crime or theory of criminal liability may be reviewed on appeal without an objection having been made in the trial court." (Nunez Supp. AOB 22-23.) Respondent disagrees because as to criminal trials, "not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." (*Middleton v. McNeil* (2004) 541 U.S. 433, 437 [124 S.Ct. 1830, 158 L.Ed.2d 701] (*Middleton*) (per curium); *People v. Huggins* (2006) 38 Cal.4th 175, 192 (*Huggins*) [citing the foregoing opinion in *Middleton*].) Indeed, "'the Constitution entitles a criminal defendant to a fair trial, not a perfect one.'" (*Rose v. Clark* (1986) 478 U.S. 570, 579 [106 S.Ct. 3101, 92 L.Ed.2d 460].)

Here, no "substantial rights" were affected in that appellants do not claim that CALJIC No. 3.00's equally-guilty language (for example) "shifted the prosecution's burden of proof to imply [appellants] had to prove [their] innocence." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1134; see *Lopez, supra*, 198 Cal.App.4th at p. 1119.) Also, this is not a case where "it cannot be ascertained whether defense counsel specifically requested clarification" in that "portions of the record regarding the parties' discussion of the jury instructions before the trial court are missing." (*People v. Young* (2005) 34 Cal.4th 1149, 1203 (*Young*).) The record

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(...continued)
(Italics added.)

shows that at the guilty phase in this case, the trial court asked: "3.00 principals, any objection as defined?" Nunez's counsel replied: "No." Satele's counsel replied: "I can't really object to that." (13RT 3039.) Hence: "As a preliminary matter, a defendant's failure to request a clarification instruction forfeits that claim on appeal." (*Young, supra*, 34 Cal.4th at pp. 1202-1203, citing *People v. Marks* (2003) 31 Cal.4th 197, 237.)

Finally, as will appear, given that the equally-guilty language was generally an accurate statement of law, appellants forfeited review because they failed to request modification or clarification of the equally-guilty language. (See *Lee, supra*, 51 Cal.4th at p. 638 [finding forfeiture], citing *Samaniego, supra*, 172 Cal.App.4th at p. 1163; *Lopez, supra*, 198 Cal.App.4th at pp. 1118-1119; *Canizalez, supra*, 197 Cal.App.4th at p. 849.)

B. The Alleged New Claim Lacks Merit

1. Standard of Review

This Court has held:

> When an appellate court addresses a claim of jury misinstruction, it must assess the instructions as a whole, viewing the challenged instruction in context with other instructions, in order to determine if there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner.

(*People v. Wilson* (2008) 44 Cal.4th 758, 803 (*Wilson*).) Hence, assuming arguendo no forfeiture (but see *Lee, supra*, 51 Cal.4th at p. 638 [finding forfeiture], citing *Samaniego, supra*, 172 Cal.App.4th at p. 1163; *Lopez, supra*, 198 Cal.App.4th at pp. 1118-1119), this Court must review the entire record to determine whether there is a "reasonable likelihood" that the jury misunderstood and misapplied CALJIC No. 3.00's equally-guilty language. (See *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 180-184 (*Letner and*

Tobin); *Wilson, supra*, 44 Cal.4th at p. 803; *Huggins, supra*, 38 Cal.4th at p. 192; *Young, supra*, 34 Cal.4th at p. 1202.)

Here, CALJIC No. 1.01 properly instructed the jury to consider all instructions "as a whole and each in light of all" others. (37CT 10711; 14RT 3155; 18RT 4406; see *People v. Whisenhunt* (2008) 44 Cal.4th 174, 220 (*Whisenhunt*); *People v. Howard* (2008) 42 Cal.4th 1000, 1026 (*Howard*) ["We note again that jurors are told to consider the instructions as a whole. (See CALJIC No. 1.01; CALCRIM No. 200.) Nothing in the instructions undermines this central premise of criminal law"].) Also, it must be presumed that the jury followed all instructions. (*Shannon v. United States* (1994) 512 U.S. 673, 585 [114 S.Ct. 2419, 129 L.Ed.2d 459]; *Wilson, supra*, 44 Cal.4th at p. 803 [we "presume 'that jurors understand and follow the court's instructions'"]; *Lopez, supra*, 198 Cal.App.4th at p. 1119.)

2. Analysis

Appellants inspect CALJIC No. 3.00 in virtual isolation to all other instructions received by the jury. (Nunez Supp. AOB 3-27; Satele Supp. Letter Brief 1-3.) They thus ignore that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." (*Cupp v. Naughten* (1973) 414 U.S. 141, 146-147 [94 S.Ct. 396, 38 L.Ed.2d 368], citing *Boyd v. United States* (1926) 271 U.S. 104, 107 [46 S.Ct. 442, 70 L.Ed. 857]; accord *Middleton, supra*, 541 U.S. at p. 437; *Boyde v. California* (1990) 494 U.S. 370, 378 [110 S.Ct. 1190, 108 L.Ed.2d 316] (*Boyde*); see RB 140, fn. 62.) "[I]n assessing a claim of instructional error, we consider the entire charge to the jury, and not simply the asserted deficiencies in the challenged instruction." (*Whisenhunt, supra*, 44 Cal.4th at p. 220, citing *People v. Lewis* (2001) 25 Cal.4th 610, 649; see *Letner v. Tobin, supra*, 50 Cal.4th at p. 182; *Wilson, supra*, 44 Cal.4th at p. 803; *Huggins, supra*, 38 Cal.4th at p. 192; *Young, supra*, 34

Cal.4th at p. 1202; *Howard, supra*, 42 Cal.4th at pp. 1025-1026; see also RB 169.)

Here, CALJIC No. 3.00 instructed that persons involved in committing or attempting to commit "a crime" are called principals in that crime, and each principal is "equally guilty." (14RT 3177; 18RT 4418; 37CT 10754; 18CT 11081.) The *Samaniego* court opined that the equally-guilty language was "misleading" in light of *McCoy*'s rule that an aider-abettor could be guilty of a greater offense than the perpetrator (*Samaniego, supra*, 172 Cal.App.4th at p. 1164-1165), but the challenged language was nonetheless "generally an accurate statement of the law" (*id.* at p. 1163). In this case, there is no "reasonable likelihood" that CALJIC No. 3.00 mandated that the jury find appellants equally guilty of the same level or degree of homicide responsibility in light of "the instructions as a whole[.]" (See *Wilson, supra*, 44 Cal.4th at p. 803.)

Without objection at the guilt phase (13RT 3084-3085), CALJIC No. 17.00 instructed the jury as follows:

> You must decide *separately* whether *each of the defendants* is guilty or not guilty. If you cannot agree upon a verdict as to both the defendants, but do agree upon a verdict as to any one of them, you must render a verdict as to the one as to whom you agree.

(14RT 3199 [italics added]; 37CT 10786.)[3]

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[3] Likewise, at the penalty phase, CALJIC No. 8.88 instructed the jury (in part) as follows:

> In this case, you must decide separately the question of the penalty as to each of the defendants. If you cannot agree upon the penalty to be inflicted on both defendants, but do agree on the penalty as to one of them, you must render a verdict as to the one on which you do agree.

(continued...)

CALJIC No. 17.00 properly instructed the jury to separately decide the level or degree of homicide responsibility for Nunez and Satele. (See *Nero, supra*, 181 Cal.App.4th at p. 518.) In other words, given CALJIC No. 17.00, it was not necessary for the trial court to modify CALJIC No. 3.00 so as to make clear to the jury that it could find that Nunez and Satele had different levels or degree of homicide responsibility as to the killings. (See *Whisenhunt, supra*, 44 Cal.4th at p. 220 ["Here, the trial court instructed the jury to consider the instructions as a whole and each in light of all the others, under CALJIC No. 1.01. Therefore, it was not necessary for the court to modify CALJIC No. 8.24 so as to repeat definitions of premeditation and deliberation which were already provided to the jury through CALJIC No. 8.20"].) CALJIC No. 17.31 (in part) instructed: "Disregard any instruction which applies to facts determined by you not to exist." (37CT 10790; 14RT 3201.) CALJIC No. 17.31 thus instructed the jury to disregard CALJIC No. 3.00's equally-guilty language if it determined that it did not apply. CALJIC No. 1.01 instructed the jury to consider all instructions "as a whole and each in light of all" others (37CT 10711; 14RT 3155; 18RT 4406; see *Whisenhunt, supra*, 44 Cal.4th at p. 220; *Howard, supra*, 42 Cal.4th at p. 1026), and it must be presumed that the jury in this case followed all instructions (see *Wilson, supra*, 44 Cal.4th at p. 803).

CALJIC No. 8.70 instructed: "Murder is classified into two degrees. If you should find the defendant guilty of murder, you must determine and state in your verdict whether you find the murder to be of the first or second degree." (37CT 10772; 14RT 3190.) CALJIC No. 1.11 instructed: "The

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(...continued)
(18RT 4433; 37CT 11117.) CALJIC No. No. 8.88 thus properly instructed the jury to separately determine the appropriate sentence for each appellant as to the multiple first degree premeditated murder convictions.

word 'defendant' applies to each defendant unless you are instructed otherwise." (37CT 10715; 14RT 3157; 18RT 4408.) CALJIC No. 8.71 instructed:

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a *defendant*, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree as well as a verdict of not guilty of murder in the first degree.

(14RT 3190 [italics added]; 37CT 10773.) CALJIC No. 8.74 instructed the jury that it must unanimously agree on whether each defendant was guilty of "an unlawful killing" as well as whether such homicide was murder in the first or second degree. (37CT 10774; 14RT 3190.) CALJIC No. 8.75 instructed the jury that it could find each defendant guilty of a "lesser crime" if it was not satisfied beyond a reasonable doubt that the defendant was guilty of first degree murder. (37CT 10775; 14RT 3190-3191.)

As to whether "the prosecution must show that the defendant had a specific intent to do the underlying act that resulted in the killing" (Nunez Supp. AOB 18-19, citing *People v. Steger* (1976) 16 Cal.3d 539, 546), the jury adequately received such instruction under the instructions as a whole. The jury received gang expert opinion that the commission of murder was a main activity of the gang that appellants had joined (9RT 2093), and the jury found true the special allegation that each appellant committed both murders with the "specific intent to promote, further or assist in criminal conduct by gang members" (38CT 10928, 10933). CALJIC No. 3.31 properly instructed the jury that murder (counts 1 and 2) required evidence of "specific intent in the mind of the perpetrator" (37CT 10758), and the jury found each appellant guilty of "willful, deliberate, premeditated" murder on counts 1 and 2 (38CT 10925-10926, 10930-1931). Hence, the new ("equally guilty") complaint thus fails.

Given the totality of the instructions as a whole, there is no reasonable likelihood that CALJIC No. 3.00 prevented the jury from finding that Satele or Nunez may be guilty of different levels or degrees of homicide responsibility in compliance with later clarification of aider-abettor law in *McCoy, supra*, 25 Cal.4th 1111. Instead, the instructions required the jury to determine the culpability of each appellant separately. (See *Wilson, supra*, 44 Cal.4th at p. 803.) Moreover, CALJIC No. 3.00 was "generally an accurate statement" of aider-abettor law. (*Samaniego, supra*, 172 Cal.App.4th at p. 1163; see *Canizalez, supra*, 197 Cal.App.4th at p. 849 [held that the 2009 version of "CALCRIM Nos. 400 and 403 are correct in law"].) CALCRIM No. 400's 2012 version and Bench Notes (see footnote 1, *ante*) merely show that CALJIC No. 3.00's "equally guilty" language needed clarification or modification, which appellants did not request at trial (13RT 3039) as required to avoid a finding of forfeiture on appeal (*Samaniego, supra*, 172 Cal.App.4th at p. 1163; see *Hart, supra*, 20 Cal.4th at p. 622; *Lang, supra*, 49 Cal.3d at p. 1024) notwithstanding section 1259 (see footnote 2, *ante*).

Besides wrongly criticizing CALJIC No. 3.00 in isolation of the instructions as a whole (see *Letner v. Tobin, supra*, 50 Cal.4th at p. 182; *Wilson, supra*, 44 Cal.4th at p. 803; *Whisenhunt, supra*, 44 Cal.4th at p. 220; *Huggins, supra*, 38 Cal.4th at p. 192; *Young, supra*, 34 Cal.4th at p. 1202; *Howard, supra*, 42 Cal.4th at pp. 1025-1026), Nunez's "new claim" focuses on the prosecutor's closing argument (Nunez Supp. AOB 6-7) without acknowledging that the jury was instructed that "statements made by the attorneys during the trial are not evidence" (14RT 3155), and that the instructions, and not the attorney's arguments, were controlling as to the law (14RT 3154). This Court has confirmed:

> [A]rguments of counsel "generally carry less weight with the jury than do instructions from the court. The former are usually

> billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law."

(*People v. Mendoza* (2007) 42 Cal.4th 686, 703, citing *Boyde, supra*, 494 U.S. at p. 384; see RB 140-141.) Further, the jury is presumed to have followed the instructions that the prosecutor's argument was not evidence and was not controlling as to the applicable law. (See *Wilson, supra*, 44 Cal.4th at p. 803; *People v. Carter* (2005) 36 Cal.4th 1114, 1176-1177; see also RB 88.) Hence, the jury was not bound by the prosecutor's characterization of the evidence or the law.

It is nonetheless true that this Court "must consider the arguments of counsel in assessing the probable impact of the instruction on the jury." (*Young, supra*, 34 Cal.4th at p. 1202; see *Letner and Tobin, supra*, 50 Cal.4th at pp. 182-184.) Here, during the closing argument to the jury at the guilt phase, as to Nunez's alibi evidence, the prosecutor argued that "[e]ither [Nunez] was committing that murder, or he was at home." (14RT 3206.) The prosecutor also argued:

> The law says, in jury instruction [CALJIC No.] 3.00, what a principal in a crime is. The principal is a person that actually commits this crime. In this case, the shooter. And those that aide and abet the principal are also principals, okay.

(14RT 3210-3211.) The prosecutor later argued:

> I will be the first one to tell you that I did not prove to you who the actual shooter was. Whether it was defendant Nunez or defendant Satele [*sic*]. But you know they were in the car. An [*sic*] whether they're in the back seat, the front seat, the driver's seat, all three of those individuals [Nunez, Satele, and driver Caballero; see RB 14, fn. 17] knew what was going down that day and participated in this murder. They were out looking for n-people [African-Americans] that night. They all are aiders and abetters [*sic*] and principals in the commission of this offense.

(14RT 3211.) The prosecutor also argued: "I would ask you, when you go back there, to sign the first degree murder charges as to each defendant[.]" (14RT 3213.) The prosecutor argued: "again, I'm the first to tell you I didn't prove who the actual shooter was, if you don't know who the actual shooter was – that jury instruction says the person that aided and abetted, you must find they intended to kill." (14RT 3214.) After a recess (14RT 3243), the prosecutor argued: "Let me stress, that you will be a [*sic*] ultimate deciders of the facts in this case." (14RT 3258.) The prosecutor ended his closing argument as follows: "they committed a gruesome, senseless, violent racial killing of Edward and Renesha." (14RT 3271.) In sum, the prosecutor did not tell the jury that it had no discretion to find that appellants had different levels or degrees of homicide responsibility.

Nunez's counsel (in part) argued that "[n]one of us were at the crime scene" (14RT 3276), Nunez "was at home with his child, the mother of his child, her mother, the rest of their family" during the shooting (14RT 3334), and Nunez was not guilty "if you believe my client [Nunez] did not tell you a lie on everything" (14RT 3340). Satele's counsel (in part) argued: "Was he [Satele] bragging about taking credit for a shooting? I don't know what goes through people's minds. It's possible he was bragging. Maybe he was going to improve his status to some of these gang guys." (14RT 3383.) Satele's counsel also argued regarding "the real person who did it" (14RT 3384) and "[t]he guilt or innocence of each defendant must be considered by you independently" (14RT 3391). Satele's counsel thus argued CALJIC No. 17.00's point that the jury had discretion to find that appellants had different levels or degrees of homicide responsibility. On rebuttal, the prosecutor (in part) argued that "each defendant" should be found guilty of first degree murder based on the evidence. (14RT 3433.) He did not tell the jury that it had no discretion to

find that appellants had different levels or degrees of homicide responsibility as justified by the evidence.

At any rate, besides wrongly criticizing CALJIC No. 3.00 in isolation and ignoring the instruction that the prosecutor's argument was not evidence and was not controlling as to the law, Nunez improperly focuses on the credibility of Vasquez and Contreras regarding confessions they received from appellants. (Nunez Supp. AOB 24 ["the prosecution presented evidence of [Nunez]'s presence in the car with codefendant Satele through the manifestly unreliable testimonies of Ernie Vasquez and Joshua Contreras"].) It is settled that witness-credibility is for the trier of fact's determination. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; see *People v. Hovarter* (2008) 44 Cal.4th 983, 996-1001 [denying various claims including assertion that jailhouse informant's testimony was "inherently improbable" and unreliable]; RB 104, 110.) As shown in the harmless error analysis which soon follows, the jury received strong proof that each appellant took responsibility for being the shooter in this case.

Finally, Nunez admits that he "was not prosecuted on the theory of provocative act murder" based on *McCoy* as discussed in *People v. Concha* (2009) 47 Cal.4th 653 (*Concha*), and he thus "does not rely on *Concha* in that respect." (Nunez AOB 8.) Nunez nonetheless argues:

> What *Concha* does provide is a helpful path to understanding the extent and nature of accomplice liability in the context of a murder prosecution and an analytical framework that, when followed, shows why the trial court's [CALJIC No. 3.00] instruction in this case that the actual killer and the aider and abettor are "equally guilty" was legally incorrect. [Nunez] relies on that particular aspect of *Concha*'s analysis.

(Nunez AOB 8.) *Concha* did not trigger a "new" claim here. *Concha* merely re-affirmed that a perpetrator and an aider-abettor may have different levels or degrees of homicide responsibility. (See *Concha, supra*, 47 Cal.4th at pp. 665-666.) *Concha* held that a defendant may be convicted

of first degree murder under certain circumstances when his or her accomplice is killed by the intended victim in the course of an attempted murder. (*Id.* at p. 658.) Since those circumstances are not present in this case, *Concha* does not aid appellants.

Reversal of the death penalty and the first degree premeditated murder convictions is thus unjustified because the supplemental or new claim lacks merit in this case.

C. Any Instructional Error Was Harmless

As noted, CALJIC No. 1.01 properly instructing the jury to consider all instructions "as a whole" (37CT 10711; 14RT 3155; 18RT 4406; see *Whisenhunt, supra*, 44 Cal.4th at p. 220; *Howard, supra*, 42 Cal.4th at p. 1026) and the jury presumably followed all instructions (*Wilson, supra*, 44 Cal.4th at p. 803). With the foregoing in mind, any instructional error due to CALJIC No. 3.00's equally-guilty language was harmless beyond a reasonable doubt under the test in *Chapman, supra*, 386 U.S. 18, as found in *Samaniego, supra*, 172 Cal.App.4th 1148. (See *Gonzales, supra*, 51 Cal.4th at p. 941, fn. 28; *Lopez, supra*, 198 Cal.App.4th at p. 1119 ["we see no prejudice" as to use of CALCRIM No. 400's "equally guilty" language]; *Canizalez, supra*, 197 Cal.App.4th at pp. 850 ["even if these ["equally guilty" instructional error] contentions had been preserved for appeal, we would nonetheless find that they did not result in prejudicial error"], 852 ["Even if the 'equally guilty' language in the 2009 version of CALCRIM No. 400 was an incorrect statement of the law, we nonetheless conclude that giving it here was harmless under even the most stringent harmless error standard"], citing *Chapman, supra*; see also *Wilson, supra*, 44 Cal.4th at p. 804 [finding instructional error harmless under *Chapman*].)

As noted earlier, the jury received gang expert opinion that the crime of murder was a main activity of the gang that appellants had joined (9RT 2093), and the jury found true the special charge that each appellant

committed both murders with the "specific intent to promote, further or assist in criminal conduct by gang members" (38CT 10928, 10933). Also, CALJIC No. 3.31 properly instructed the jury that murder (counts 1 and 2) required evidence of "specific intent in the mind of the perpetrator" (37CT 10758), and the jury found each appellant guilty of "willful, deliberate, premeditated" murder on counts 1 and 2 (38CT 10925-10926, 10930-1931). Given the foregoing, any instructional error here was harmless. (See *Gonzales, supra*, 51 Cal.4th at p. 941, fn. 28 ["[A]s defendant concedes, the *Samaniego* court deemed the instructional error harmless where a special circumstance alleging intent to kill was found true. [Citation.] Here, the jury returned such a true finding. Accordingly, *Samaniego* does not aid defendant"]; *Lopez, supra*, 198 Cal.App.4th at p. 1119 ["To the extent Brousseau contends the [CALCRIM No. 400 equally-guilty] instruction reduced the People's burden of proof by eliminating the need to prove Brousseau's intent, we disagree. 'Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions.' [Citation.] Other instructions elaborated on the required intent"]; *Samaniego, supra*, 172 Cal.App.4th at pp. 1165-1166.)

Unlike in *Nero, supra*, 181 Cal.App.4th 504, where the CALJIC No. 3.00 instruction was deemed prejudicial error under the *Chapman* test, this is not a case where the jury "asked if they could find [one defendant], as an aider and abettor, guilty of a greater or lesser offense than [the other defendant]." (*Id.* at p. 518.) This is not a case where a trial court "twice" reread CALJIC No. 3.00 "in response" to a jury's question. (*Ibid.*) This also is not a case where a trial court gave the "wrong" instruction of the law "under *McCoy*'s express holding." (*Id.* at 520.) Further, this is not a case where "[t]he evidence was in dispute" regarding the level or degree of

homicide responsibility concerning each defendant as in *Nero*. (*Id.* at p. 519; see *Canizalez, supra*, 197 Cal.App.4th at p. 852.)

Here, Nunez testified at trial and presented alibi witnesses who testified that he was not at the scene of the shooting.[4] Hence, in rejecting Nunez's alibi evidence, the jury necessarily found credible the strong evidence that he was a shooter or shared the same level or degree of homicide responsible as his fellow gang member (Satele). Satele has admitted: "It is true that in the guilt phase there was evidence of two admissions by [him] as to his involvement[.]" (Satele AOB 206.) In his opening brief, Satele conceded: "it is true that there was some evidence that could support a finding that both defendants shot the victims" given their "admissions to that effect" to Vasquez and Contreras. (Satele AOB 37, 42.)

Indeed, the jury received evidence that about one hour after the murders, Satele told two fellow gang members (Kelly and Contreras in the presence of Caballero and Nunez), "we were out looking for niggers[,]" then Satele or Nunez said, "I think we hit one of them." (7RT 1597-1598, 1600-1602; 8RT 1631, 1673-1682; 9RT 2102-2104, 2106, 2109-2110.) The jury received proof that appellants jointly purchased the AK-47 rifle used to kill the victims, that particular rifle was found in a car with appellants merely one day after the murders, the rifle (when found) had 26 bullets in a clip that held 30 bullets, and police found four bullet casings at the murder scene. (8RT 1772, 1793-1809, 1812-1815, 1821, 8RT 1903-1906; 9RT 1945, 1954-1955, 1963, 1965-1967, 1969-1987, 1992, 1999,

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[4] Nunez told the jury that he was with his girlfriend (Guaca) and their baby in Guaca's bedroom during the murders. (See 12RT 2836-2847, 2885-2888, 2900-2905; 13RT 2929-2930, 2932-2933.) Guaca and her mother (Lopez) swore to the jury that Nunez's alibi testimony was true. (See 11RT 2543-2556, 2572, 2575-2581, 2587-2594, 2598-2599, 2607-2629, 2679-2680, 2689-2708, 2713-2716, 2724-2732, 2875.)

2012-2013, 2021, 2024-2025, 2029-2031, 2037, 2039, 2043-2044, 2053-2054, 2155-2157, 2160-2161.) The jury also received proof that appellants were "riders[,]" i.e., hardcore West Side Wilmas gang members who "put it down on people" (kill enemies). (7RT 1581-1583; 8RT 1646-1647; 9RT 1959-1960, 2090-2093.)

The foregoing was proof beyond a reasonable doubt that Nunez and Satele were each a shooter in this case, and that they shared the same level or degree of homicide responsible. This is not a case where "the jury was considering whether to impose a lesser degree or offense on the aider and abettor." (*Nero, supra*, 181 Cal.App.4th at p. 519.) Here, the jury found true charges that each appellant personally and intentionally fired a gun that caused the two murders under section 12022.53, subdivision (d). (38CT 10927-10929, 10932-10934; see 15RT 3458-3481; RB 102.) The jury also found true that each appellant committed the murders to benefit their gang under section 186.22. (38CT 10928, 10933; RB 158-175.) Thus, even if there was only one shooter as appellants urge, they clearly shared the same level or degree of homicide responsible in this case.

Vasquez told the jury that about nine weeks after the murders, while in a jail "pod" (6RT 1213-1227, 1302-1303; 7RT 1374-1375, 1384-1387, 1415-1424, 1428-1429, 1436-1438, 1442-1443, 1450-1451, 1479-1486; 9RT 1936-1937), Nunez asked Vasquez, "Did you hear about those niggers that got killed in your neighborhood?" (6RT 1225). After Vasquez replied, Nunez raised "two hands" like he was holding a gun and admitted, "I did that shit." Nunez said that he was "driving down the street" and "the guy looked at him wrong so he turned around and blasted him." (6RT 1225-1226; 9RT 1937-1939.) The foregoing was proof beyond a reasonable doubt that Nunez was a shooter in this case, or that he and fellow gang member Satele shared the same level or degree of homicide responsibility for the first degree premeditated murder convictions.

The jury received proof that one day after the shooting, Satele bragged that when he fired bullets from the AK-47 rifle at the "Black girl and Black guy" in Harbor City who were in the news, he was alone in the car. (7RT 1608-1622; 8RT 1626-1628, 1699-1711, 1747-1749; 9RT 1937-1938.) Further, Vasquez told the jury that in a jail holding cell about five weeks after the shooting, Satele confessed to Vasquez: "we did that" or "I did that" shooting and "I AK'd them" or "we AK'd them." (6RT 1210-1211; 7RT 1362, 1364, 1453; 9RT 1937-1939; Satele AOB 9, 36-37.) The foregoing was proof beyond a reasonable doubt that Satele was a shooter in this case, or that he and fellow gang member Nunez shared the same level or degree of homicide responsibility for the first degree premeditated murder convictions. (See *Canizalez, supra*, 197 Cal.App.4th at p. 852 ["the evidence that Morones and Canizalez were coparticipants in the speed contest and coperpetrators of the victims' death is overwhelming"].)

As previously noted, without objection at the guilt phase (13RT 3084-3085), CALJIC No. 17.00 instructed the jury to separately decide whether appellants were guilty as charged. (14RT 3199; 37CT 10786.) The Court of Appeal in *Nero* noted that CALJIC No. 17.00 and other instructions "suggest that Brown's mental state was not tied to Nero's[.]" (*Nero, supra*, 181 Cal.App.4th at p. 518.) The same exists here. Likewise, at the penalty phase, CALJIC No. 8.88 properly instructed the jury to separately determine the appropriate sentence for Nunez and Satele as to the first degree premeditated murder convictions. (18RT 4433; 37CT 11117.) Further, as shown, given the totality of the instructions, there is no reasonable likelihood that CALJIC No. 3.00 barred the jury from finding that Satele or Nunez could be guilty of different levels or degrees of homicide responsibility in compliance with later clarification of aider-abettor law in *McCoy, supra*, 25 Cal.4th 1111. Ultimately, the jury herein

found appellants guilty of the same offenses because they were equally guilty in light of the evidence presented at trial.

Hence, unlike in *Nero, supra*, 181 Cal.App.4th 504, any error due to CALJIC No. 3.00's equally-guilty language was harmless beyond a reasonable doubt in this case, and reversal is consequently unjustified. (See *Gonzales, supra*, 51 Cal.4th at p. 941, fn. 28; *Lopez, supra*, 198 Cal.App.4th at pp. 1119-1120; *Canizalez, supra*, 197 Cal.App.4th at pp. 850, 852-853; *Samaniego, supra*, 172 Cal.App.4th at pp. 1165-1166.)

II. THERE WAS NO *WITHERSPOON* ERROR AS PREVIOUSLY BRIEFED

As to the previously briefed issue of prospective juror 2066's removal under *Witherspoon, supra*, 391 U.S. 510 (see Nunez AOB 243-252 [Arg. XII]; Nunez Supp. AOB 28-32; Satele AOB 246-254 [Arg. XV]; RB 28-60), a death penalty reversal is unjustified in this case (RB 28-60) despite a finding of *Witherspoon* error in *Pearson, supra*, 53 Cal.4th 306.

A. Standard of Review

The United States Supreme Court has stated:

> In *Witherspoon*, this Court held that the State infringes a capital defendant's right under the Sixth and Fourteenth Amendments to trial by an impartial jury when it excuses for cause all those members of the venire who express conscientious objections to capital punishment.

(*Witt, supra*, 469 U.S. at p. 416.) The test for *Witherspoon* excusal is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Witt, supra*, 469 U.S. at p. 424; see *Pearson, supra*, 53 Cal.4th at p. 327; *Wilson, supra*, 44 Cal.4th at pp. 778-781; see also RB 29-30 [collection of cases cited].)

"The trial court is in the unique position of assessing demeanor, tone, and credibility firsthand – factors of 'critical importance in assessing the

attitude and qualifications of potential jurors." (*People v. DePriest* (2007) 42 Cal.4th 1, 21 (*DePriest*).) This Court has held:

> The standard of review of the court's ruling regarding the prospective juror's views on the death penalty is essentially the same as the standard regarding other claims of bias. If the prospective juror's statements are conflicting or equivocal, the court's determination of the actual state of mind is binding. If the statements are consistent, the court's ruling will be upheld if supported by substantial evidence.

(*People v. Horning* (2004) 34 Cal.4th 871, 896-897; accord *Pearson, supra*, 53 Cal.4th at pp. 327-328.) Also, "the trial judge may be left with the 'definite impression' that the person cannot apply the law even though, as is often true, he has not expressed his views with absolute clarity." (*DePriest, supra*, 42 Cal.4th at p. 21, citing *Witt, supra*, 469 U.S. at pp. 425-426.)

B. *Pearson* Does Not Change Respondent's Previously Briefed Position

A death penalty reversal is unjustified here despite a finding of *Witherspoon* error in *Pearson, supra*, 53 Cal.4th 306, and this is true mindful that the trial judge here was the same in *Pearson*. (RB 28-60.) After other jurors were individually questioned for death-qualification (3RT 552-617), prospective juror 2066 was the last person to receive *Witherspoon* voir dire (3RT 617-630; 23CT 6658-6596 [prospective juror 2066's completed questionnaire in full]; see RB 40).

In *Pearson*, when asked her general feelings about the death penalty, the prospective juror (C.O.) wrote on her questionnaire that the she had none. (*Pearson, supra*, 53 Cal.4th at p. 328.) By contrast, here, on her questionnaire, prospective juror 2066 stressed that she was a Christian, and religion was "very important" to her. Before reaching the *Witherspoon* inquires beginning at Question 230 of the questionnaire (see RB 36-39), when merely asked how religion might affect her jury service (Question

75), prospective juror 2066 handwrote: "I would not send any person to death. The Bible say thou shall not kill." Her husband was also religious, and both considered religion "#1" in their life. (23CT 6566.) On Question 230(a) of the questionnaire (see RB 36-37), prospective juror 2066 wrote "I don't know yet" in response to the inquiry of whether her capital punishment views would cause her to "refuse to find the defendant guilty of first degree murder" to "prevent the penalty phase from taking place" even if: (1) the prosecution had proved first degree murder beyond a reasonable doubt; and (2) she believed that the defendant was guilty of first degree murder. (23CT 6585.)

This is not a case where the excused juror had "'no strong feelings on the death penalty.'" (*Pearson, supra*, 53 Cal.4th at pp. 330, 332.) Here, on Question 230(c) of the questionnaire (RB 37), prospective juror 2066 checked "yes" in response to the inquiry of whether "in the penalty phase" her capital punishment views would cause her to "automatically refuse to vote in favor the penalty of death and automatically vote for a penalty of life imprisonment without the possibility of parole" without considering "any of the evidence of any of the aggravating and mitigating factors" regarding "the facts of the crime and the background and character of the defendant" even if the jury had found: (1) the defendant guilty of first degree murder; and (2) one or more special circumstances were true. (23CT 6585.) Thus, prospective juror 2066's views against the death penalty were definite and unqualified, unlike the error in *Pearson*.

This is not a case where the excused juror "made no conflicting or equivocal statements about her ability to vote for a death penalty in a factually appropriate case." (*Pearson, supra*, 53 Cal.4th at p. 330.) Here, on Question 230(e) of the questionnaire (see RB 38), prospective juror 2066 wrote "I might" as to whether her "yes" answer to Question 230(c) would "change" if (prior to voting) she were "instructed and ordered by the

court" that she "must consider and weigh" the evidence and the aggravating and mitigating factors regarding the facts of the crime and the background and character of the defendant. (23CT 6586.) However, on Question 230(f) of the questionnaire (see RB 38), prospective juror 2066 wrote "I don't know if I could" as to whether she could set aside her "own personal feelings regarding what the law ought to be and follow the law as the court explains it to you[.]" (23CT 6586.) As to Question 231 of the questionnaire ("What are your general feelings about the death penalty?"; see RB 38-39), prospective juror 2066 wrote: "I don't feel at ease with it." (23CT 6586.) As to Question 237 ("Because of moral, religious or personal views and beliefs you may have against the death penalty, would you find it impossible to return a verdict of guilty of first degree murder?"), prospective juror 2066 checked "yes." As to her reason for her "yes" to Question 237, she wrote (in Question 238): "Its [*sic*] not the verdict its [*sic*] the punishment. I'm sensative [*sic*] to [*sic*] because I have a son thats [*sic*] been in & out of mental hospital." (23CT 6587.) As to Question 254 ("Do you have any philosophical, religious or other belief that would prevent you from sitting in judgment on a case?"), prospective juror 2066 checked "yes[.]" As to her explanation for the "yes" to Question 254, prospective juror wrote (in Question 255): "I'm sensitive to death penalty." (23CT 6588-6589.) As to Question 269 ("List the most influential book you have read; describe its influence on you"), prospective juror 2066 wrote: "Bible & books that talk about good morals." (23CT 6590.) As to Question 274 ("How would religious principles affect your ability to determine the truth of a charge in a criminal case?"), prospective juror 2066 wrote: "Its [*sic*] just the death penalty. I would rather sentence a person under doctors care first [*sic*] the death." (23CT 6591.)

After submitting her questionnaire answers to counsel and the trial court, prospective juror 2066 testified that she strongly opposed the death

penalty, but there may be rare cases where a death penalty should be imposed for a deliberate murder. On the other hand, at a penalty phase, she "probably would be hesitant" to vote for a death penalty. She said that she could do her best to follow instructions or the law as to the death penalty. The prosecutor asked if he proffered "a bunch of aggravating factors about various things" would she still vote for life instead of a death penalty. Prospective juror 2066 replied: "Yes, I think I would." Nunez's counsel asked: "Can you conceive of a crime so heinous that you would ever vote for death?" Prospective juror 2066 answered: "No, I don't think so." (3RT 617-629.)

Given the foregoing, over defense objection, the trial court found prospective juror 2066 not qualified. She was thus excused. The trial court reasoned:

> This Court has examined the juror's state of mind, particularly the demeanor in this case, and the reluctance of the responses, and the equivocal responses that the juror has had, and the conflicting responses that the juror has had. And this Court makes the determination as to the juror's state of mind, and she is incapable of imposing the death penalty. And the reason ask [*sic*] because of her reluctance to be able to do that when asked [*sic*] her the leading question as to whether or not she could impose it under certain circumstances she said, yes; but when asked if there's another choice, life imprisonment, what would she do, she, without reluctance and without equivocation, chose life imprisonment if there's a choice. [¶] Given that is the case, and given her responses in the questionnaire, her demeanor in the court and her state of mind as observed by this Court, with multiple inferences that are given, the Court infers based upon her responses that she is not death qualified and excuses her for cause.

(3RT 629-630.)

This is not a case where the trial court's ruling was based on "an erroneous view of the law" or an erroneous reading of *People v. Guzman* (1988) 45 Cal.3d 915 (*Guzman*). (*Pearson, supra*, 53 Cal.4th at p. 330.)

The trial court did not cite *Guzman* (or any case) when it excused the juror in this case. (3RT 629-630.) The court instead properly focused on prospective juror 2066's state of mind, her demeanor, and her clearly reluctant, equivocal, and conflicting responses in her questionnaire and during her testimony. (See 3RT 617-630.) As previously briefed, prospective juror 2066 admitted (during voir dire and on her questionnaire) that her personal views would substantially impair her juror performance. (23CT 6566, 6585-6590.) As the trial court read into the record, in her answer to Question 232, prospective juror 2066 wrote that she "strongly opposed" the death penalty. (3RT 620; 23CT 6586; see *DePriest, supra*, 42 Cal.4th at p. 21 ["B.T. strongly disfavored the death penalty"]; *People v. Hoyos* (2007) 41 Cal.4th 872, 906 [at voir dire "R.J. stated he was biased against the death penalty"]; *People v. Griffin* (2004) 33 Cal.4th 536, 558 (*Griffin*) [E.B. had "mixed feelings" about death penalty].)

Also, this is not a case where there was no "attempt to determine" whether the prospective juror "could nonetheless return a verdict of death." (See *Witherspoon, supra*, 391 U.S. at p. 514; see *People v. Stewart* (2004) 33 Cal.4th 425, 446 ["Decisions of the United States Supreme Court and of this court make it clear that a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case under *Witt*"].) Prospective juror 2066 stated multiples times that she could not subordinate her personal or religious views compared to a duty to abide by her oath as a juror to obey court instructions and governing death penalty law in California.

This is not a case of "mere generalized opposition to the death penalty[.]" (Satele AOB 249; Nunez AOB 246.) The prosecutor asked that if he presented "a bunch of aggravating factors about various things" would she "still vote for that life sentence" over a death penalty. Prospective juror 2066 replied: "Yes, I think I would." (3RT 624; see *People v. Lewis and*

Oliver (2006) 39 Cal.4th 970, 1007 (*Lewis and Oliver*) ["A.L. could see himself voting for life imprisonment even where the murder was 'brutal' and aggravation outweighed mitigation"]; *Griffin, supra*, 33 Cal.4th at pp. 559-560.) The federal and California test "does not require that a juror's bias be proved with 'unmistakable clarity.'" (*Witt, supra*, 469 U.S. at p. 424; see *DePriest, supra*, 42 Cal.4th at p. 20; *Griffin, supra*, 33 Cal.4th at p. 558 [*Witt* test applies to state constitutional impartial-jury right].)

Nunez's counsel asked: "Can you conceive of a crime so heinous that you would ever vote for death?" Prospective juror 2066 confessed: "No, I don't think so." (3RT 624; see *DePriest, supra*, 42 Cal.4th at p. 21 ["no" answer given to defense counsel's "conceive of" question]; *People v. Schmeck* (2005) 37 Cal.4th 240, 262 (*Schmeck*).) Nunez's counsel asked, "And you believe it would make you nervous and ill at ease to even have to consider [a death penalty], correct?" Prospective juror 2066 declared: "Yes." (3RT 625.)

The following exchange ensued between Nunez's counsel and prospective juror 2066:

> [NUNEZ'S COUNSEL]: But if you found you really believed it was the only reasonable solution, not this case but a made up case, you would then vote for death if that's the only solution you see that's fair in this heinous crime?
>
> PROSPECTIVE JUROR 2066: I don't know if you could say yes on that one. I would, like I said before, look at other alternatives if they were presented.
>
> [NUNEZ'S COUNSEL]: If you get to this end point, you see there are only two alternatives, he goes to prison or she goes to prison, or whoever, for the rest of their natural life, or they go up to prison to be killed; are you saying you could never, ever, no matter what it was, say, "well, I will vote for death"?
>
> PROSPECTIVE JUROR 2066: Yes, I'm saying that right now.
>
> [NUNEZ'S COUNSEL]: Right now?

PROSPECTIVE JUROR 2066: Yes.

[NUNEZ'S COUNSEL]: You didn't say that a minute ago?

PROSPECTIVE JUROR 2066: Maybe the question was presented to me a little different.

(3RT 625-626; see 23CT 6566 [Question 75 answer: "I would not send any person to death"].)

When further queried by Nunez's counsel, prospective juror 2066 honestly said: "I believe a case could be that bad, but I still wouldn't want to vote for the death penalty." (3RT 626.) The court asked: "Is it you couldn't or you don't want to, or both?" Prospective juror 2066 replied: "Both." (3RT 627; see *DePriest, supra*, 42 Cal.4th at pp. 21-22.) After Satele's counsel opined that it is "hard for everybody" to vote for a "tough decision" like a death penalty, prospective juror 2066 responded: "I don't know if I could." (3RT 627-628; see 23CT 6585.)

This is not a case where the excused juror gave views about the death penalty that were "vague and largely unformed[.]" (*Pearson, supra*, 53 Cal.4th at p. 330.) Unlike the juror in *Pearson*, prospective juror 2066's responses were not "unequivocally affirmative" as to her ability to follow the law. (*Id.* at p. 330.) Prospective juror 2066 clearly did not show "a willingness to perform her duty" as to the penalty phase. (Nunez Supp. AOB 31.) Thus, prospective juror 2066 was not similarly situated as juror C.O. in *Pearson* and was properly excused for cause (compare *Pearson, supra*, 53 Cal.4th at pp. 328-333), even though *Pearson* and this case were presided by the same trial judge. (See Nunez Supp. AOB 29-31.)

Also, "[t]here is nothing in this record which indicates that anybody [ultimately] had trouble understanding the meaning of the questions and answers with respect to" prospective juror 2066. (See *Witt, supra*, 469 U.S. at p. 435.) After multiple attempts "to determine whether [she] could

nonetheless return a verdict of death" (see *Witherspoon, supra*, 391 U.S. at p. 514), prospective juror 2066 gave no assurances that she "could nonetheless subordinate [her] personal views" to her "oath as a juror" to "obey the law of the State" (*id.* at pp. 514-515, fn. 7). As the high court has confirmed, "many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear[.]'" (*Witt, supra*, 469 U.S. at pp. 424-425.) Also, "the trial court has broad discretion over the number and nature of questions about the death penalty." (*People v. Stitely* (2005) 35 Cal.4th 514, 540.)

Here, the trial court cited prospective juror 2066's "demeanor" as additional grounds for its ruling under *Witherspoon*. (3RT 629; see *Schmeck, supra*, 37 Cal.4th at p. 262 ["demeanor and responses" were "substantial evidence" to support trial court's finding]; *Griffin, supra*, 33 Cal.4th at pp. 560-561 ["demeanor" factor inferred from record].) "[T]he trial judge may be left with the 'definite impression' that the person cannot apply the law even though, as is often true, he has not expressed his views with absolute clarity." (*DePriest, supra*, 42 Cal.4th at p. 21, citing *Witt, supra*, 469 U.S. at pp. 425-426; see *Lewis and Oliver, supra*, 39 Cal.4th at p. 1007; *Schmeck, supra*, 37 Cal.4th at p. 263; *Griffin, supra*, 33 Cal.4th at p. 559.)

The trial court also noted that prospective juror 2066 seemed reluctant, and that she gave "conflicting" and "equivocal" responses. (3RT 629; see 23CT 6558, 6566, 6585-6590.) "If the prospective juror's statements are conflicting or equivocal, the court's determination of the actual state of mind is binding." (*People v. Horning* (2004) 34 Cal.4th 871, 896-897; see *DePriest, supra*, 42 Cal.4th at p. 21; *Lewis and Oliver, supra*, 39 Cal.4th at p. 1007; *Schmeck, supra*, 37 Cal.4th at pp. 261-263; *Griffin, supra*, 33 Cal.4th at pp. 558-559.) Here, prospective juror 2066 was at best

equivocal about her willingness to follow her oath as a juror at the penalty phase. Thus, the trial court's ruling is binding.

There was no *Witherspoon* error in this case, and *Pearson* does not aid appellants' contention to the contrary. (See RB 28-60.)

III. THERE WAS NO CUMULATIVE PREJUDICE AS PREVIOUSLY BRIEFED

Nunez claims that the alleged new error (regarding the "equally guilty" language"), coupled with the alleged errors that he previously briefed, constitutes cumulative error at the guilty and penalty phases. (Nunez Supp. AOB 33-34; see Nunez AOB 330-332; Satele AOB 226-232.) As shown, Nunez's new claim was forfeited. Alternatively, it lacks merit, and error (if any) was harmless. Further, as shown, *Pearson* does not aid appellants as to the *Witherspoon* claim. Thus, there was no cumulative error for the reasons given here and as previously briefed. (RB 211, 260.)

CONCLUSION

For the foregoing reasons, respondent respectfully asks that this Court affirm the judgment of conviction and death penalty for each appellant.

Dated: May 25, 2012

Respectfully submitted,

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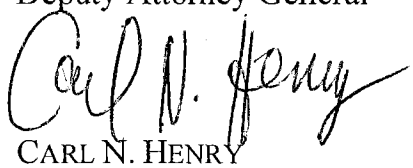

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CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 10,785 words.

Dated: May 25, 2012

KAMALA D. HARRIS
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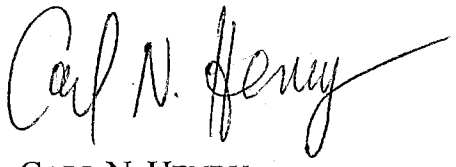

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DECLARATION OF SERVICE

Case Name: *PEOPLE V. DANIEL NUNEZ AND WILLIAM SATELE* Case No.: S091915

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On May 25, 2012, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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{DELIVER TO: HON. TOMSON T. ONG, JUDGE}

On May 25, 2012, I caused an original and thirteen (13) copies of the **SUPPLEMENTAL RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at **350 McAllister Street, San Francisco, CA 94102** by **Overnight Mail Delivery**.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 25, 2012, at Los Angeles, California.

Ronda Jones
Declarant

Signature

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