SUPREME COURT COPY

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No. S065573

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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Deputy

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. FRANK KALIL BECERRA, Defendant and Appellant.	Los Angeles County (Sup. Ct. No. BA 106878

APPELLANT'S REPLY BRIEF

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

HONORABLE J.D. SMITH, JUDGE

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DEATH PENALTY

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No. S065573

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	
v.	)	Los Angeles County
	)	(Sup. Ct. No. BA 106878
FRANK KALIL BECERRA,	)	
Defendant and Appellant.	)	

APPELLANT'S REPLY BRIEF

INTRODUCTION

The trial court arbitrarily revoked appellant's right to self-representation as he was diligently working to prepare his defense. This unjustified revocation of appellant's exercise of his Sixth Amendment rights denied him the right to have his voice heard, and requires reversal. Subsequent errors by the trial court damaged appellant's ability to present a defense, and resulted in a trial that was fundamentally unfair.

In a close case with strongly conflicting evidence, such as this one, "'substantial and serious errors . . . must be regarded as prejudicial and grounds for reversal'" under state law. (*People v. Dail* (1943) 22 Cal.2d 642, 650; accord, *People v. Weatherford* (1945) 27 Cal.2d 401, 403.) The errors here are substantial and violate both state law and the federal Constitution. They include not only the

improper revocation of appellant's self-representation, but also the court's ill-considered order that appellant wear a stun belt, which was neither medically appropriate nor the least restrictive form or restraint; the erroneous admission of the irrelevant and incompetent gang expert testimony; the denial of defendant's right to present a defense; the improper introduction of speculative and irrelevant testimony; instructional errors (AOB Argument VI and VII); and the lack of procedural safeguards that are essential for the reliability of capital trials (AOB Arguments VIII.) Reversal is required.

In this brief, appellant replies to the State's arguments that necessitate an answer in order to present the issues fully to this Court. However, he does not address the arguments regarding each claim raised in the opening brief. (See, e.g., AOB, Arguments VII and VIII.) In large part, the State urges this Court to reject these claims because the Court has rejected similar claims before. (See, e.g., RB 201, 202, 203, 204, 206, 207, 208, 209.) On these matters, appellant believes that his arguments already have been adequately presented, and the positions of the parties fully joined. Nor does appellant reply to every contention made by the State with regard to the claims he does discuss. Rather, appellant focuses only on the most salient points not already covered in the opening brief. The failure to address any particular argument or allegation made by the State, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment, waiver or forfeiture of the point by appellant. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

//

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I

THE TRIAL COURT ARBITRARILY REVOKED APPELLANT'S SELF-REPRESENTATION FOR IMPERMISSIBLE REASONS AND WITHOUT WARNING IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS

Respondent argues that the trial court's termination of appellant's pro se status was not an abuse of discretion. (RB 65.) Its argument is premised on a misreading of the record. As shown in the AOB, a careful reading of the record and the applicable law establishes that the trial court violated the Sixth and Fourteenth Amendments by revoking appellant's right to self-representation. The trial court based its ruling on a factually unsupported finding that appellant was dilatory and a legally impermissible finding that appellant's self-representation was inadequate. Moreover, there is absolutely no basis in the record, and respondent makes no argument, that any of appellant's alleged misconduct was the type of deliberate, serious and obstructionist misconduct on which a trial court may rely in revoking a defendant's right to self-representation. This Court should reject respondent's argument, and find that the revocation of appellant's pro se status was both state and federal constitutional error.[1]

This Court also should reject the respondent's argument that any error in revoking appellant's right to self-representation that occurred before the preliminary hearing is subject to a harmless error test. Appellant

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[1] In this claim, the term "trial court" is used in its generic sense to refer to the lower court that revoked and refused to reinstate appellant's self-representation, rather than to designate the court that presided over the actual trial. It is clear from the record and the parties' arguments that the order was issued by the municipal court during pretrial proceedings before the preliminary hearing.

sought to represent himself for all stages of the proceedings, and the denial was equally for all stages, including trial. The violation of *Faretta v. California* (1975) 422 U.S. 806 requires automatic reversal. (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 174; *People v. Butler* (2009) 2009 WL 4673807, *7.) Respondent's argument to the contrary is based on the poorly reasoned alternative ruling in *People v. Tena* (2007) 156 Cal.App.4th 598, which does not take account of the unique interest protected by *Faretta* and addresses denial of self-representation in decidedly different circumstances, and also relies in large part on a mistaken reading of *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519.

A trial court denial of a defendant's Sixth Amendment right to self-representation is reviewed de novo. (*People v. Dent* (2003) 30 Cal.4th 213, 218; *People v. Danks* (2004) 32 Cal.4th 269, 295.) As this Court has noted, "'[w]hen, as here, the application of law to fact requires us to make value judgments about the law and its policy underpinnings, and when, as here, the application of law to fact is of clear precedential importance, the policy reasons for de novo review are satisfied and we should not hesitate to review the [trial] judge's determination independently.'" (*People v. Cromer* (2001) 24 Cal.4th 889, 899, quoting *People v. Louis* (1985) 42 Cal.3d 969, 988.) The historic facts at issue are reviewed under a deferential substantial evidence standard. (*People v. Salazar* (2004) 35 Cal.4th 1031, 1042.) However, the trial court's decision to revoke appellant's right to self-representation is reviewed de novo in accordance with "an appellate court's obligation to protect a criminal defendant's [constitutional] rights against deprivation in consequence of a trial court's erroneous determination . . ." (*People v. Ault* (2004) 33 Cal.4th 150, 1265.)

As shown in the AOB and below, the trial court's revocation order violated appellant's Sixth and Fourteenth Amendment rights and requires reversal.

A. The Trial Court's Reasons For Terminating Appellant's Self-Representation Were Factually Unsupported And Legally Impermissible, And None of Appellant's Alleged Misconduct Threatened The Integrity Of The Proceedings Or The Ability Of The Court To Conduct A Fair Trial

Respondent concedes, as it must, that in *People v. Carson* (2005) 35 Cal.4th 1, 7 this Court clearly articulated that the critical factor to consider in determining the appropriateness of a trial court's termination of pro se status is whether "the defendant's misconduct seriously threaten[s] the core integrity of the trial." (*Id.* at p. 9; RB 63.) In *Carson*, this Court eschewed an analysis based on the type or locus of any alleged misconduct by the pro se defendant, directing the analysis instead to the "effect of the misconduct on the trial proceedings, not the defendant's purpose." (*Carson*, *supra*, 35 Cal.4th at p. 11). Acknowledging but ignoring this legal standard, respondent misreads the record in order to argue that the revocation order was justified because appellant was "'dilatory' and was not 'follow[ing] the rules and substantive law.'" (RB 65, quoting III Supp CT 87.) More importantly, respondent completely fails to explain how appellant's alleged misconduct threatened the core integrity of the proceedings.

1. The Essential Facts Are Undisputed

The following facts are undisputed between the parties:

- The trial court granted appellant's motion to represent himself on May 19, 1995, prior to the setting of the matter for preliminary hearing, and prior to the completion of pre-preliminary hearing discovery. (1 CT Supp III 3; 8; AOB 23;

RB 43.)

- After appellant's initial pro se appointment, he appeared before the court at three hearings: June 2, July 10 and August 30, 1995. The primary focus of each was the production of missing discovery to the defense. (1 CT Supp III 48-51, 56-57, 62, 64; AOB 23; RB 45-46 [June 2]; I CT Supp III 71; AOB 23; RB 46-47 [July 10]; 1 CT Supp III 79-80; AOB 24; RB 47-48 [August 30].)
- At each of these three hearings, the district attorney acknowledged that there remained outstanding discovery. (1 CT Supp III 48-51, 56-57, 62, 64; AOB 23; RB 45 [June 2]; I CT Supp III 71; AOB 23; RB 46 [July 10]; 1 CT Supp III 79-80; AOB 24; RB 48 [August 30].)
- At each of these three hearings, the trial court acknowledged, either directly or indirectly, that the production of this discovery was necessary for appellant to prepare for the preliminary hearing. (1 CT Supp III 48-51, 56-57, 62, 64; AOB 23; RB 46 [June 2]; I CT Supp III 71; AOB 23; RB 46-47 [July 10]; 1 CT Supp III 79-80; AOB 24; RB 48 [August 30].)
- At no point during any of the hearings at which appellant appeared pro se did the prosecution request or the court seek to set the matter for preliminary hearing.
- On September 28, the trial court revoked appellant's right to self-representation (1 CT Supp III 87; AOB 25; RB 51); one stated basis for the revocation of appellant's self-representation was that his conduct in conducting discovery

prior to preliminary hearing was dilatory. (1 CT Supp III 97-99, AOB 29, RB 65.)

- At no point prior to the September 28, hearing did the trial court warn appellant that he was obstructing the process in any way, or that the court believed his requests for production of discovery were dilatory. (See 1 CT Supp III 35 - 85.)
- The trial court did not base its revocation of appellant's right to self-representation on his outburst subsequent to the revocation.
- Subsequent to the trial court's September 28 revocation of appellant's right to self-representation, appellant twice renewed his motion for self-representation, and each time was denied by the court. (1 CT Supp III 93; AOB 25; RB 54 [November 9 motion]; 1 CT Supp III 102; RB 59 [November 13 motion].)

2. The Trial Court's Finding That Appellant's Conduct Was Dilatory Is Not Supported by the Record, and Any Delay of the Preliminary Hearing Caused by Appellant's Efforts to Obtain Necessary Discovery Was Not Serious and Obstructionist Misconduct That Would Justify Terminating His Self-Representation

A careful analysis of the proceedings in municipal court in which appellant was allowed to represent himself clearly shows that the focus of those hearings was on the provision of missing discovery. (AOB 30-33.) As indicated above, respondent does not dispute that as of the September 28 hearing, appellant still had not received all of the discovery he had requested. Moreover, the trial court's repeated compliance orders had

indicated to both parties that the provision of this discovery to the appellant was necessary so appellant could adequately prepare for the preliminary hearing. Respondent's entire argument that appellant was dilatory rests on a single fact – that he made "continued and repeated discovery request for numerous and various items" when it "appears that for *some* matters, appellant's investigator or previous attorney had been provided with the requested discovery." (RB 67, italics added.) But respondent's choice of words is telling. Its assertion that "some discovery" had already been provided implicitly recognizes that other discovery had not, and thus that appellant's continued discovery motions were proper to assure that the necessary discovery was provided prior to the preliminary hearing.

At the August 30 hearing, in a passage quoted by respondent (RB 51), the trial court made known its view that appellant's discovery requests were appropriate and should be satisfied before the preliminary hearing and that appellant should be given sufficient time to obtain that discovery. After a discussion of the outstanding discovery, the following exchange occurred:

> The Court: Why don't we set the next date because I want to make sure that you have all those things before we go ahead with the prelim. [¶] Approximately 30 days from today's date? Will that be enough time, or do you need more time?
>
> [Appellant]: Yeah, that is fine.

(1 CT Supp III 83.) The trial court set September 28 for another discovery hearing, for setting a date for the preliminary hearing, and for hearing appellant's ex parte request for appointment of advisory counsel. (1 CT Supp III 83-84.) Nevertheless, the trial court terminated appellant's self-

representation at the very outset of the September 28 hearing. Appellant had asked for no further discovery orders and had not objected to setting a date for the preliminary hearing. (See 1 CT Supp III 87.) Given that the trial court itself recognized the need for the discovery appellant sought and was on schedule to set the preliminary hearing pursuant to its August 30 ruling, its finding that appellant was delaying the case – "everything you've done is dilatory" and that "the prelim will never occur" (1 CT Supp III 87) – is not supported by substantial evidence. Appellant's dogged diligence in seeking missing discovery pursuant to the trial court's own orders cannot reasonably be construed as dilatory conduct. The trial court's revocation order, which was based on a non-existent fact, was erroneous.

Moreover, respondent offers no answer at all to appellant's argument that even assuming, arguendo, that his attempts to enforce discovery compliance delayed the proceedings, these actions were not the type of serious obstructionist misconduct that would justify terminating his self-representation. (Compare AOB 34-40 with RB 65-71.) Respondent has not provided this Court with any facts that would support a finding that appellant's purportedly dilatory conduct threatened to subvert the trial, as required by this Court in *People v. Carson*, *supra*, 35 Cal.4th at p. 9.[2] At the September 28 hearing appellant did not ask to postpone the setting of the preliminary hearing, nor did his requests for discovery or advisory counsel prevent the trial court from setting a date for the preliminary

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[2] Indeed, respondent is silent about the fact that the deputy public defender who represented appellant before he asserted his *Faretta* right also encountered problems obtaining discovery from the district attorney and, as a result, in the four and a half months the attorney represented appellant – exactly the same amount of time that appellant represented himself – the case was not set for a preliminary hearing. (See AOB 32, fn. 9.)

hearing. Appellant told the trial court he "was ready to do my prelim," but needed time to understand the law because of restricted access to and limited resources in the jail law library which was missing, among other items, the Evidence Code. (1 CT Supp III 88; 1 CT 284-298.) To solve this problem, appellant sought the appointment of advisory counsel. (1 CT Supp III 88.) Appellant was working to facilitate, not seeking to thwart, the proceedings. In short, nothing appellant did "seriously threatened the core integrity of the trial" (*People v. Carson*, *supra*, 35 Cal.4th at p. 7) justifying the revocation of his self-representation.

3. Contrary to Respondent's Argument, the Trial Court Did *Not* Terminate Appellant's Self-representation Because He Failed to Follow the Rules and Substantive Law, but Rather Improperly Revoked Appellant's Self-representation Because the Court Believed He Was Unable to Defend Himself Adequately

Respondent argues that the additional ground for the trial court's termination order was appellant's failure to follow the rules and substantive law and urges this Court to reject appellant's argument that the second ground for termination was the trial court's finding that appellant was unable to defend himself adequately. (RB 65.) Twisting the trial record, respondent confuses the trial court's general statements about the permissible bases for revoking a defendant's pro se status with the trial court's specific grounds for terminating appellant's self-representation. This Court should reject respondent's fast and loose rendition of the trial court's ruling, as the record clearly shows that the findings relied upon by the trial court to justify terminating appellant's pro se status were that he

was dilatory and was providing himself inadequate representation.[3]

When the trial court revoked appellant's self-representation on September 28, its sole finding as to appellant's conduct was "that everything you've done is dilatory." (1 CT Supp III 87.) When the trial court denied appellant's first motion for reinstatement on November 9, the trial court made four findings: (1) the trial court restated that it had terminated appellant's self-representation because "[t]he Court felt you were dilatory (1 CT Supp III 97); (2) the court refused "to add appointed advisory counsel" because the public defender "will not act as advisory counsel [and] the Court is not going to appoint advisory counsel at the cost of the county" (1 CT Supp III 98); (3) the court would not allow appellant to "remain pro per when I feel that you are not conducting yourself in a manner that an attorney at law would conduct himself" (1 CT Supp III 99); and (4) the court found that "the quality of [appellant's] representation was not adequate" (1 CT Supp III 99). As appellant showed previously, these findings focus on two, and only two, features of appellant's representation – his alleged dilatory litigation and the quality of his representation. (See AOB 30-33, 40-43.) They do not encompass a conclusion that appellant was not following court rules and procedures.

To support its argument, respondent mistakenly relies on one fragment of a single sentence in the November 9 hearing on appellant's motion to reinstate his *Faretta* right. Respondent contends:

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[3] As this Court has recently noted, review of a trial court's decision to revoke a defendant's pro se status is limited to the grounds relied upon by the trial court. (*People v. Butler (*2009) 2009 WL 4673807, *8 ["In any event, we need not and do not decide whether defendant's out-of-court misconduct might have justified the revocation of his Faretta right, because ultimately the court did not rely on that ground"].)

> The court terminated appellant's in propria persona status during pretrial proceedings before the preliminary hearing on two grounds, that appellant was "dilatory" and was not "follow[ing] the rules and substantive law."

(RB 65.) However, the phrase respondent quotes about following rules and substantive law was embedded in the trial court's statement about the general law governing pro se representation, not about appellant's conduct. The trial court's actual statement was as follows:

> First of all, I wish to state, when I granted you pro per status, I did it with the understanding that you act as any other attorney would act, and that this Court would give you no special indulgences, and that you would follow the rules and substantive law.

(1 CT Supp III 97.) It was only after this prefatory statement that the trial court made its finding that "[t]he Court felt that you were dilatory." (*Ibid.*)

After this initial finding, the Court further discussed general law regarding the revocation of pro se status and, quoting from *People v. Lopez* (1977) 71 Cal.App.3d 568, again highlighted the requirement that the rules that apply to lawyers apply to a pro se defendant:

> "the defendant is entitled to and will receive no special indulgences by the court, and the defendant must follow all the technical rules of substantive law, criminal procedure and evidence in the making of motions and objections, the presentation of evidence, voir dire and argument . . . It should be made crystal clear that the same rules that govern an attorney will govern, control and restrict him, and that he will get no help from the judge. He will have to abide by the same rules that it took years for a lawyer to learn."

(1 CT Supp III 97-98.) Immediately after this quotation from *Lopez*, the court made its specific ruling that it would not appoint advisory counsel and then turned to appellant's motion to reinstate his pro per status:

> So the Court is left with the decision to make, and allowing

> you to remain pro per when I feel that you are not conducting yourself in a manner that an attorney at law would conduct himself – I reappointed the public defender's office.

(1 CT Supp III 98.)

The trial court went on to quote from footnote 46 of *Faretta v. California, supra*, 422 U.S. at p 834, and the portion of *Illinois v. Allen* (1970) 397 U.S. 337 that the footnote references. After these general statements regarding the governing law, the trial court once again returned to its specific findings in this case:

> [A]nd that is in fact what this Court is finding, that this case hasn't even gotten to prelim, because it has been put over and over and over and over by you and this Court, if it was reviewing your quality of representation by you, would find that the quality of representation was not adequate. For that reason, the Court's ruling will stand.

(1 CT Supp III 99.)

The trial court's findings are clear – revocation was based on its perception that appellant's conduct was dilatory and that he was failing to provide adequate representation. Nowhere in its statement of findings does the court refer to a failure to follow substantive and procedural law. Respondent's argument relies on a sleight of hand which disguises general statements of law as court findings. Such argument should be flatly rejected by this Court.[4]

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[4] Moreover, the record supports that appellant did follow the rules, procedure and substantive law. Appellant sought and was granted permission to hire an investigator and filed appropriate applications for funding (I CT 173, 230); filed preliminary and supplemental motions for discovery (I CT 174, 235); filed a motion for removal of restraints based on interference with his Sixth Amendment rights (I CT 203); filed a motion for appointment of advisory counsel (I CT 284); and filed applications for

(continued...)

Respondent tries to dismiss the trial court's clear statement that the revocation was based on the inadequacy of appellant's representation as just "[s]ome statement made by the court to appellant." (RB 71.) Its attempt fails. Even the most tortured reading of the record cannot disguise the trial court's plain words. The court prefaced its finding of inadequate representation with the phrase, "[a]nd that is what this Court is finding. . .". (1 CT Supp III 99.) The court directly stated its finding that "the quality of representation was not adequate." (*Ibid.*) And, in case there was any doubt about the grounds of the revocation order, immediately after stating its finding, the trial court concluded, "For that reason, the Court's ruling will stand." (*Ibid.*)

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[4] (...continued)
telephone funds (I CT 211, 231, 263), to have his photograph taken by his investigator in order to display it to witnesses (I CT 259) and to have the crime scene photographs put on a CD (1 CT 216). Significantly, as to those motions and applications which the court considered and ruled on, there was never a concern raised as to the form or content. (I CT Supp III 46 [court orders parties to proceed on initial discovery motion]; 65 [court rules on initial application for telephone funds]; 71 [court orders parties to confer on supplemental discovery motion]; 73 [court signs application for additional investigator funds]. The record is also clear that appellant issued subpoenas for the production of documents, for which he was able to obtain at least partial compliance. (I CT 221, 260; I CT Supp III 73, 81.) Finally, and perhaps most tellingly, the only support respondent offers for the proposition that appellant did not comply with the rules and procedures is that his discovery requests included items that had been provided to his previous attorney or investigator, and that he may have not followed proper procedures in the issuance of subpoenas. (RB 70.) Although it is not clear from the record that appellant, in fact, committed either of these errors, even if he had, these errors are not the type that would justify termination of appellant's pro se status, as they cannot rationally be construed as having an impact on the core integrity of the trial. (*Carson, supra,* 35 Cal.4th at p. 9.) Indeed, what the record does clearly establish is that appellant was, in fact, conducting himself according to the procedure and substantive law.

The trial court's statements are clear. The trial court's decision to revoke appellant's self-representation was based on the unsupported factual finding that he was dilatory and the impermissible legal ground that his representation was inadequate and, accordingly, was erroneous.

4. Viewed in the Totality of the Circumstances, Appellant's Conduct Prior to Preliminary Hearing Did Not Justify Termination of His Right to Self-Representation

Appellant's opening brief addressed in detail the factors identified in *People v. Carson, supra*, 35 Cal.4th 1, and *Illinois v Allen, supra*, 397 U.S. 337, as determining when a trial court's revocation of a defendant's self-representation is lawful. (AOB 44-47.) As respondent concedes, foremost among these is the requirement that there be a showing that appellant's alleged misconduct had an "impact on the core integrity of the trial." (RB 63, citing *People v. Carson, supra,* 35 Cal.4th at p. 9.) In the AOB, appellant argued that even if there were a basis in the record to show that appellant's alleged misconduct could have justified termination, in this case the revocation still would have violated the Sixth and Fourteenth Amendments because (1) the trial court was at least partially responsible for the delay; (2) the trial court neither considered, nor attempted, less drastic sanctions; and (3) the trial court failed to warn appellant prior to revocation of his pro se status. (AOB 44; *Gray v. Moore* (6th Cir. 2008) 520 F.3d 616, 623 [state court's revocation of defendant's self-representation absent a prior warning is an unreasonable application of clearly established precedent as articulated in *Illinois v. Allen, supra,* 397 U.S. 337].)

Respondent not only failed to address any of these arguments, it failed to provide any support for a finding that appellant's alleged misconduct in any way adversely affected the core integrity of the

proceedings. For all the reasons stated in the AOB and above, the trial court's termination of appellant's self-representation violated the Sixth and Fourteenth Amendments.

B. The Erroneous Revocation Of Appellant's Right To Self-Representation Requires Automatic Reversal

Respondent argues that even if the trial court abused its discretion in terminating appellant's pro se representation, *Faretta* error that occurs in pretrial proceedings in municipal court should be subject to harmless error analysis. (RB 72.) Drawing largely from an alternate ruling in *People v. Tena, supra*, 156 Cal.App.4th 598, respondent argues that the holdings in *Coleman v. Alabama* (1970) 399 U.S. 1, and *People v. Pompa Ortiz* (1980) 27 Cal.3d 519, require the application of harmless error analysis to *Faretta* error committed before the preliminary hearing. (RB 74-77.) Respondent's argument is seriously flawed. First, the record is clear that appellant's assertion, and the trial court's grant, of self-representation was not limited to the preliminary hearing but was for all purposes, including the trial. Regardless of when in the proceeding the revocation occurred, the impact was to deny appellant the right to represent himself at trial. Second, respondent's argument overlooks the unique interests protected by the Sixth Amendment right to self-representation, "which are independent of concern for the objective fairness of the proceeding" (*Flanagan v. United States* (1984) 465 U.S. 259, 267-268), and thus ignores the reason that *Faretta* violations are subject to automatic reversal. Finally, respondent erroneously applies the standard of review set forth in *People v. Pompa-Ortiz, supra*, 27 Cal.3d 519 for error occurring at the preliminary hearing to error arising in pre-preliminary hearing proceedings. This Court should reject appellant's arguments, and the dictum in *People v. Tena, supra*, on which they are

based.

1. The Erroneous Revocation Requires Automatic Reversal Because Appellant Asserted His *Faretta* Right for the Purpose of Investigating, Developing and Controlling His Own Defense Throughout the Entire Trial

Contrary to respondent's misunderstanding, the trial court's erroneous revocation of appellant self-representation was not "confined to the preliminary hearing." (RB 73.) Rather, the record clearly shows that appellant asserted his right to represent himself for all purposes and that his self-representation was improperly revoked as he was attempting to investigate the state's case against him and develop a defense. The trial court's erroneous revocation and repeated refusal to reinstate appellant's *Faretta* right denied appellant the right to investigate, manage and ultimately conduct his own defense. This erroneous ruling affected the framework within which the trial proceeded and fits squarely within the definition of a structural error as articulated by the Supreme Court in *Arizona v. Fulminante* (1991) 499 U.S. 217, 309, and further explained in *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 148-149. Because this denial prohibited appellant from controlling his own defense, and having his voice heard, the error is reversible per se. (*McKaskle v. Wiggins, supra*, 465 U.S. at pp. 175, 177 fn. 8.)

On May 17, 1995, appellant informed the trial court, "I know my right to propria persona, and I would like to exercise my 6th Amendment right as of this moment." (1 CT Supp III 30.) The court asked appellant to prepare a letter "telling me how much you know about this case and how you intend to represent yourself . . . I want him to tell me what he's charged with. I want him to tell me how he's going to represent himself." (1 CT

Supp III 31-32.) In response, appellant filed a letter with the court in which he explained how he would "manag[e] the defense investigation." (CT 3175 [unsealed].) This letter establishes that from the very start of his self-representation, appellant's eyes were on his defense at trial, as his stated purpose was to "determine who was responsible for the death of the victims and to develop evidence tending to corroborate my position." (CT 3176 [unsealed].) Appellant identified specific constitutional trial rights he intended to use in developing his defense:

> To facilitate the defense investigation I would do the following:
>
> A. Move the court to appoint an investigator (John Jensen Sr.) (Former Police Lt. – I have already met with him to discuss the case.)
>
> B. Seek Rap sheets on the "suspects" I have identified, both for credibility use and for clues as to the character for violence over other people who had the opportunity to commit the charged crimes.
>
> C. File a motion for discovery
>
> D. File a motion for telephone funds and supplies
>
> E. Subpenas [*sic*] the hotel records and records regarding violent crime committed by "Case" suspects.

(*Id.* At pp. 2176-3177.) Moreover, appellant's stated preliminary hearing strategy – to "use a combination of experts' testimony and witness testimony to establish that I did not have an opportunity to commit the charged crimes in light of the actual time of death" – affirms that he was pursuing an affirmative defense and thinking strategically about how and

when to present his defense. (CT 3177 [unsealed].)[5]

Also at the municipal court's request, appellant filled out both municipal court and superior court forms asserting his *Faretta* right and waiving his right to counsel. (I CT 202 [municipal court form, signed on May 15, 1995]; I CT 196 [superior court form, signed on May 18, 1995].) The superior court form specified that appellant wanted to conduct his own defense at trial including bringing preliminary motions, impaneling the jury, making an opening statement, cross-examining witnesses, issuing subpoenas for and presenting his own witnesses, making objections during trial, submitting jury instructions, and making a final argument. (I CT 196-201.) Without a doubt, this superior court form establishes that appellant invoked his right to represent himself at trial.

During his period of self-representation, appellant actively tried to investigate and develop a defense to the crimes charged, at least as to the guilt phase. Appellant sought discovery of exculpatory information. (I CT 174-195 [discovery motion seeking impeachment evidence of potential prosecution witnesses and information on potential alternate suspects]; I CT 235-256 [supplemental discovery motion seeking additional exculpatory information].) He availed himself of the right to compulsory process in an attempt to obtain exculpatory records from third parties. (I CT 221, 260; 1 CT Supp III 73, 81.) And he sought the appointment of investigators to conduct guilt-phase investigation under his direction. (I CT 173, 230.) Appellant's focus clearly was on developing an overall defense for the trial.

Appellant's motion for appointment of advisory counsel, submitted

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[5] At appellant's preliminary hearing, appointed counsel employed a different strategy than the one proposed by appellant, and chose to call neither lay nor expert witnesses.

while he was representing himself, similarly shows he was actively working to prepare a defense for trial. Appellant stated that he believed "trial is unavoidable" and sought funds from the court to configure a "defense team." (CT 287 [unsealed].) Appellant's enumeration of the areas in which he sought the assistance of advisory counsel reflects his diligence in trying to organize and manage his defense: he sought help on issues relating to the admissibility of evidence; a strategy for the selection of a death-qualified jury; and assistance in preparing and presenting pretrial motions, in limine motions, and motions for the appointment of experts. (CT 289-290 [unsealed].) Appellant's motion also addressed the importance of the assistance of advisory counsel in the preparation of a penalty phase defense. (CT 292 [unsealed].) Moreover, the motion clarified that appellant sought to represent himself to assure that the necessary investigation was completed before evidence and memories were lost. (CT 291 [unsealed].) Again, appellant's obvious purpose in representing himself was not simply to prepare for the preliminary hearing or handle some other pretrial proceeding, but rather was to mount a defense to the murder charges at trial.

As the record shows, appellant sought to represent himself early in the prosecution so he could immediately and effectively exercise his Sixth Amendment right to manage and conduct the defense with a particular focus on the guilt phase. From the outset of his self-representation, appellant strove to control his defense, and at the time his self-representation was improperly revoked, he was actively involved in preparing a defense at least as to the guilt phase.[6] Regardless of when in the

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[6] Appellant's conduct in beginning preparation of his defense to the charged crimes immediately upon being granted his *Faretta* right is (continued...)

trajectory of the case the revocation occurred, it eviscerated the core purpose of *Faretta* – appellant's right to have his case tried as he wished and to have his voice heard. Because the erroneous revocation, which denied appellant the right to "control the organization and content of his own defense" (*McKaskle v. Wiggins*, supra, 564 U.S. at p. 174), affected the framework within which the trial proceeded, it is reversible per se (*Arizona v. Fulminante*, *supra*, 499 U.S. at p. 309).

2. The Right to Self-representation Is Rooted in the Autonomy of the Individual, Rather than in Concern with a Fair Trial, and Thus the *Faretta* Violation Here, Unlike the Denial of Right to Counsel, Is Not Amenable to Harmless Error Analysis

Respondent's argument that *Faretta* error at the preliminary hearing should be subject to harmless error analysis is premised on a flawed analogy: it erroneously equates the right to counsel with the right to self-representation. Respondent asserts that since under *Coleman v. Alabama*, *supra*, 399 U.S. at p. 11, the denial of counsel at the preliminary hearing is reviewed under the federal constitutional harmless error standard (*Chapman v. California* (1967) 386 U.S. 18), the denial of self-representation at the preliminary hearing also must be subject to the same standard. (RB 74-75.) Otherwise, in respondent's view, there will be incongruous results: "'a

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[6] (...continued)
precisely what counsel in a capital case are required to do upon their appointment. (See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 11.41.A (1989) p. 13 ["Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously "].)

defendant wrongfully *denied* the advantages of counsel at the preliminary hearing would be obliged to carry a heavier burden on appeal than a defendant who wrongfully *received* these advantages.'" (RB 75, quoting *People v. Tena*, *supra*, 156 Cal.App.4th at p. 614, original italics.)[7] As shown below, this reasoning is fundamentally flawed.

Both the right to counsel and the right to self-representation emanate from the Sixth Amendment's Counsel Clause, but they serve distinct interests, and their violations have different consequences. The right to counsel exists "to ensure that criminal defendants receive a fair trial" (*Strickland v. Washington* (1984) 466 U.S. 668, 689), which is a trial leading to a just and reliable result. (*Id.* at pp. 685- 687; accord, *United States v. Cronic* (1984) 466 U.S. 648, 658 [the right to counsel "has been accorded . . . not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial"].) Therefore, denial of the right to counsel at any critical stage of the proceeding, not just the preliminary hearing, is subject to harmless error analysis. (See *Satterwhite v. Texas* (1988) 486 U.S. 249, 256-257 [denial of right to counsel at critical stage of proceeding is reviewed under the *Chapman* harmless error standard; see, e.g., *People v. Hogan* (1982) 31 Cal.3d 815, 849 [applying *Chapman* to denial of right to counsel when judge alone responded to deliberating jury's request for exhibits]; *People v. Wright* (1990) 52 Cal.3d 367, 403 [applying *Chapman* to denial of counsel when judge had ex parte communication with juror]; *People v. Jennings* (1991) 53 Cal.3d 334, 384 [applying *Chapman* to

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[7] The other case relied upon by respondent for the proposition that denial of the right to proceed pro se prior to preliminary hearing is subject to a harmless error analysis, *People v. Johnson* (1970) 13 Cal.App.3d 1, predates *Faretta*, and is decided without the benefit of that Court's reasoning regarding the nature of the right to self-representation.

denial of counsel during court's ex parte communication with jury about effect of inability to reach a unanimous verdict]; *People v. Horton* (1995) 11 Cal.4th 1068, 1137 [applying *Chapman* to denial of counsel at proceeding about jury deadlock].) Only the total deprivation of the right to counsel requires reversal per se. (*Arizona v. Fulminante*, *supra*, 499 U.S. 279, 310.) As these cases indicate, the fair trial interest implicated by the denial of the right to counsel generally can be remedied through harmless error review, because the impact of the denial may be "quantitatively assessed in the context of other evidence presented in order to determine whether its admissions was harmless beyond a reasonable doubt." (*Arizona v. Fulminante, supra*, 499 U.S. at p. 308.)

Unlike the right to counsel, the right of self-representation does not emanate from the concern for a fair trial. It is the right "to make one's own defense personally" (*Faretta v. California, supra*, 422 U.S. at p. 819) and as such "is a personal liberty that is rooted in the dignity of the individual, which is "'the lifeblood of the law'." (*Id.* at p. 834). The right to self-represent "exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense." (*McKaskle v. Wiggins*, *supra,* 465 U.S. at pp. 176-177.) It serves a constitutional goal that is independent of the fair trial guarantee underlying the right to counsel. As our state's Second District Court of Appeal explained soon after *Faretta* was decided:

> Unlike the right to the assistance of counsel, the right to dispense with such assistance and to represent oneself is guaranteed not because it is essential to a fair trial but because the defendant has a personal right to be a fool. This right is afforded the defendant despite the fact that its exercise will almost surely result in detriment to both the defendant and the administration of justice.

(*People v. Salazar* (1977) 74 Cal.App.3d 875, 888, citing *People v. McDaniel* (1976) 16 Cal.3d 156, 166 [*Faretta* does not apply retroactively because its new rule was not intended "to enhance the reliability of the truth-determining or fact-finding process"]; see *Moon v. Superior Court* (2005) 134 Cal.App.4th 1521, 1533 ["'The purpose of the [*Faretta*] right is to protect the defendant's personal autonomy . . .'"].) In sum, the right to counsel and the right to self-represent, although both found in the Sixth Amendment's Counsel Clause, should not be conflated as respondent has done. (See *People v. Chadd* (1981) 28 Cal.3d 739, 751 ["[T]he scope of the right of self-representation is not the mirror-image of the right to counsel"].)

Because the self-representation right serves the unquantifiable and indeterminate interest of the defendant's autonomy in controlling his own defense, its denial defies evaluation in harmless-error terms, i.e. whether the error prejudiced the reliability of the trial's result. For this reason, this Court rejected the harmless error standard for *Faretta* error in *People v. Joseph* (1983) 34 Cal.3d 936, 946.[8] A year later, the High Court reached

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[8] As this Court explained:

> [A] trial court's error in denying an accused the opportunity to plead his own cause cannot be rectified by a "Monday morning quarterback" determination that no prejudice ensued by forcing an accused to go to trial represented by counsel. Any rule which purported to assess the quality of a would-be Faretta accused's representation by the harmless error standard would inevitably erode the pro se right itself. Moreover, an assessment of why or how an accused's trial was disadvantaged by injecting an undesired attorney into the proceedings would require an impossibly speculative comparison between the accused's undisclosed pro se strategy

(continued...)

the same conclusion in *McKaskle v. Wiggins, supra,* 465 U.S. at p. 177, fn. 8. Indeed, as respondent fully acknowledges, the High Court ruled that "[s]ince the right to self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to a harmless error analysis. The right is either respected or denied; its deprivation cannot be harmless." (*Ibid.*; see RB 73.) Thus, a *Faretta* violation is among the limited class of errors treated as "structural" and subject to automatic reversal. (*Neder v. United States* (1999) 527 U.S. 1, 8, citing *McKaskle v. Wiggins, supra,* 465 U.S. 168; *Flanagan v. United States, supra,* 465 U.S. at pp. 267-268.) This is true no matter when in the criminal prosecution the self-representation violation occurs. Whether before, during or after the preliminary hearing, the right is the same; the interests it serves are the same; and the impossibility of assessing prejudice is the same. Respondent has offered no cogent argument to the contrary.

Appellant's analysis finds substantial support in United States v. Gonzalez-Lopez, supra,) 548 U.S. 140. Respondent cites *Gonzalez-Lopez* for the definition of trial error and structural error (RB 72), but ignores the decision's distinction between the right to retained counsel of choice and the general right to counsel that ensures a fair trial. That decision provides an apt analogy for this case. In *Gonzalez-Lopez*, the trial court erroneously

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[8] (...continued)
and that of counsel. No appellate court can or should engage in that kind of analysis when such fundamental rights hang in the balance.

(*People v. Joseph, supra*, 34 Cal.3d at p. 946.)

denied defendant's post-arraignment request to substitute his retained counsel. Relying on effective assistance of counsel cases, the government argued that the error should be judged under harmless error analysis because the purpose of the right to counsel is to ensure a fair trial. The high court rejected this approach and, drawing in part on *McKaskle v. Wiggins*, *supra*, 465 U.S. 168, held that the error was subject to automatic reversal. (*Gonzales-Lopez*, *supra*, 548 U.S. at pp. 148-151.)

As the High Court explained, the Sixth Amendment right to counsel of choice does not derive from the Sixth Amendment's purpose of ensuring a fair trial. (*Id.* at p. 147.) In adopting an automatic reversal standard, the Court repeatedly counseled against confusing the right to counsel of choice, which does not serve to ensure a fair trial, with the right to effective assistance of counsel, which does (*id.* at p. 148; see also *id.* at p. 151, fn. 5), and explained that the difficulties in assessing prejudice from the two violations "are not remotely comparable." (*Id.* at p. 151.) The distinction between these rights was crucial to its holding: "the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation 'complete.'" (*Id.* at p. 146.) In short, the question of harmlessness was simply irrelevant. (*Id.* at p. 149, fn. 4, citing *MicKaskle v. Wiggins*, *supra*, 465 U.S. at p. 177, fn. 8.) *Gonzalez-Lopez* thus reaffirms and illuminates the rationale underlying *McKaskle's* rule – the denial of self-representation, like denial of counsel of one's choice, impacts the defense in a myriad of incalculable ways and thus is structural error "affect[ing] the framework within which the trial proceeds" that is reversible per se. (*Arizona v. Fulminante, supra*, 499 U.S. at p. 309.)

Respondent, relying on *People v. Tena*, *supra*, 156 Cal.App.4th 598, erroneously equates a violation of the right to self-representation with a violation of the right to counsel and consequently confuses their different standards for reversal. As a result, respondent, like the court in *Tena*, mistakenly worries about divergent results – that a denial of self-representation at a preliminary hearing will result in automatic reversal, but a denial of counsel at the preliminary hearing will not. (RB 75.) Yet this is precisely what cases applying *McKaskle* hold – denial of counsel at a critical stage of the proceeding is reviewed under harmless error, but denial of self-representation at a similar stage requires reversal per se. For example, in *Frantz v. Hazey* (9th Cir. 2008) 533 F.3d 724, the trial court included advisory counsel in, but excluded the pro se defendant from, an in-chambers discussion of a jury note. The court reasoned that the exclusion of the pro se defendant without his consent would constitute a *Faretta* violation, and would require reversal per se. (*Id.* at p. 732.) This decision stands in marked contrast to cases holding that exclusion of counsel from an in-chambers discussion of a jury note violates the Sixth Amendment right to counsel and requires reversal unless it is harmless beyond a reasonable doubt. (*United States v. Frazin* (9th Cir.1986) 780 F.2d 1461, 1469; *United States v. Barragan-Devis* (9th Cir. 1998) 133 F.3d 1287, 1289.) Contrary to respondent's assertion, these differences are not difficult to reconcile. They simply reflect that the right to self-representation arises from a different aspect of the Sixth Amendment than does the right to counsel and that the individual liberty and autonomy interest served by self-representation is not amenable to harmless error review, while the fair trial interest served by the assistance of counsel is.

To be sure, at times the right to self-representation must be balanced against the State's interests in a fair trial and orderly administration of justice. In two circumstances, the high court has restricted the right to self-representation when necessary to ensure the fairness or integrity of the judicial proceeding. (See *Indiana v. Edwards* (2008) 128 S.Ct. 2379, 2387 [a state may deny the right of self-representation to a "gray area" defendant, who is competent to stand trial but not competent to conduct his own defense and whose "lack of capacity threatens an improper conviction or sentence"]; *Martinez v. Court of Appeal of California, Fourth Appellate Dist.* (2000) 528 U.S. 152, 162 [a state may conclude that the government's interest in the fair and efficient administration of justice outweighs a criminal defendant's interest in self-representation on direct appeal]; see also *People v. Windham* (1977) 19 Cal.3d 121, 128-120 [this Court limited the "unconditional right to self-representation" to requests made "within a reasonable time prior to the commencement of trial" in order to prevent unjustifiable delays or obstruction of the orderly administration of justice].) That is not the case here. Appellant's self-representation, asserted prior to the preliminary hearing, did not challenge the orderly administration of justice or risk an improper conviction of a defendant who was not competent to represent himself, and respondent has not even attempted to argue otherwise.

Applying the well-established *McKaskle* rule here requires automatic reversal of the entire judgment. At bottom, respondent contends that appellant asserted his *Faretta* right too early. Respondent does not contest that the scope of the self-representation right includes pretrial preparation. (See RB 63; *Faretta, v. California, supra*, 422 U.S. at pp. 818, 832, 834, 835.) Indeed, the Sixth Amendment's Counsel Clause does not address

representation at trial but in a "criminal prosecution," which often begins long before the actual trial. The ability of a pro se defendant, no less than the ability of counsel, to mount a defense at trial requires that the defendant be accorded the "specific rights" necessary to develop his trial strategy, which obviously must occur well before the actual trial. (*McKaskle v. Wiggins, supra*, 465 U.S. at p. 174 & fn. 4 [a pro se defendant's right "to control the organization and content of his own defense" carries with it specific subsidiary rights like seeking discovery and making pretrial motions]; *People v. Chadd, supra,* 28 Cal.3d at p. 751 [the rights categorized by *Faretta* as necessary for a full defense include both pretrial and trial rights]; see also *United States v. Gonzalez-Lopez, supra*, 548 U.S. at p. 150 [right to counsel of choice includes extensive pretrial activity, including strategies relating to investigation, discovery, development of a theory of defense, whether or not to cooperate with the prosecution, and plea bargain negotiations].) These specific rights enable the defendant "to present his case in his own way" and thus "form the core of a defendant's right of self-representation." (*McKaskle v, Wiggins*, *supra*, 465 U.S. at p. 177.)

The arbitrary revocation of appellant's right to represent himself as he was diligently trying to conduct discovery and prepare his own defense is reversible per se. It is impossible to quantify the impact of this denial on the defense presented at trial, and to attempt to do so would be a "speculative inquiry." (*Gonzales-Lopez*, *supra*, 548 U.S. at p. 150.) Appellant was entitled to represent himself and that right was unlawfully revoked. No additional showing of prejudice is required to make the *Faretta* violation complete. (*Id.* at p. 146; *McKaskle*, *supra*, 465 U.S. at p. 177, fn. 8.)

3. *Pompa-Ortiz* Is Inapplicable to this Claim and Does Not Support Respondent's Contention That the Erroneous Revocation of Appellant's Self-representation Is Subject to Harmless Error Review

Respondent argues that the reasoning of *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, supports its assertion "any alleged pretrial *Faretta* error involving the municipal court judge's alleged abuse of discretion in terminating appellant's right of self-representation before the preliminary hearing should be subject to harmless error analysis." (RB 77.) As respondent correctly points out (*ibid.*), under *Pompa-Ortiz* when an error committed at the preliminary hearing is raised post-trial, reversal is required only if the defendant can show prejudice as a result of the error, but when an error committed at the preliminary hearing is challenged pretrial, first by way of a section 995 motion and then by way of an extraordinary writ, the error is reversible per se. (*Pompa-Ortiz*, *supra*, at p. 529.) What respondent overlooks is that, by its very terms, *Pompa-Ortiz* applies only to errors denying a substantial right *at* the preliminary hearing (*Pompa-Ortiz, supra*, at pp. 523, 529), and not to errors, as here, that occurred *before* the preliminary hearing.

This distinction makes complete sense given the limited scope of a section 995 motion to challenge the legality of a defendant's commitment. As this Court has reiterated, "the term 'legally committed' pertains to the preliminary examination and the order holding the defendant to answer." (*People v. Standish* (2006) 38 Cal.4th 858, 882.) This rule is in keeping with a long line of cases holding that on a section 995 motion, "the record to be reviewed is solely the preliminary hearing transcript." (*Stanton v. Superior Court* (1987) 193 Cal.App.3d 265, 270; accord, *Merrill v.*

Superior Court (1994) 27 Cal.App.4th 1586, 1595 [motion to set aside the information based on failure to disclose exculpatory information cannot be brought under section 995 because the error is "not visible within the 'four corners' of the preliminary hearing transcript"]; *Currie v. Superior Court* (1991) 230 Cal.App.3d 83, 91 [motions to dismiss based on prosecutor's failure to provide material discovery on a prosecution witness at preliminary hearing could not have been brought pursuant to section 995, because it is based on matters outside the preliminary hearing record]; *Aguirre v. Superior Court* (1987) 193 Cal.App.3d 1168, 1171 fn. 1 [motion to dismiss based on failure to provide discovery may not be considered pursuant to 995, as it concerns items outside of the preliminary hearing record]; *People v. Crudgington* (1979) 88 Cal.App.3d 295, 301-303 [sufficiency of the information charging welfare fraud could not be reviewed under section 995, where the determination of the issue would require consideration of evidence outside the transcript of the preliminary hearing]; *People v. Superior Court* (*Kusano*) (1969) 276 Cal.App.2d 581, 585 [in bringing motion under section 995, defendant is limited to the facts as they appear in the preliminary hearing or grand jury transcript].)

As this law demonstrates, the *Pompa-Ortiz* standard does not apply here. It is undisputed that the revocation of appellant's right to self-representation, as well as his repeated requests for reinstatement of that right, occurred weeks prior to the preliminary hearing. Moreover, the revocation of appellant's *Faretta* right does not appear in the "'four corners' of the preliminary hearing transcript,'" (*Merrill v. Superior Court*, *supra*, at p. 1595; see I CT 29-160], so appellant could not have availed himself of a section 995 motion to remedy the violation of his *Faretta* rights. This plain fact underscores the inapplicability of *Pompa-Ortiz*.

Respondent's attempt to distinguish *Moon v. Superior Court* (2005) 134 Cal.App.4th 1521 fails to grasp the full import of the decision. (See RB 77-78.) Unlike the revocation here, the denial of Moon's right to self-representation occurred *during* the preliminary hearing. (*Moon v. Superior Court, supra,* 134 Cal.App.4th at p. 1524.) Therefore, Moon was able to pursue the section 995 remedy that was foreclosed to appellant – a key point respondent disregards. The superior court denied Moon's section 995 motion, reasoning that *Faretta* error at preliminary hearing is subject to a harmless error analysis and Moon had failed to show prejudice. (*Id.* at p. 1528.) Reversing, the Court of Appeal underscored the difficulty of assessing prejudice from the denial of the right to self-representation and held the violation was structural error that was not subject to harmless error analysis. (*Id.* at pp. 1533-1534.) *Moon* does not support, but rather cuts against, respondent's argument. Not only did Moon enjoy a pretrial remedy that was not open to appellant, but the Court of Appeal recognized that "'[a]pplication of harmless error analysis is particularly inappropriate to denial of the right of self-representation because a harmless error standard would, in practical effect, preclude vindication of the right.'" (*Id.* at p. 1533, quoting *Myers v. Johnson* (5th Cir. 1996) 76 F.3d 1330, 1338.)

Respondent provides no analysis as to why, in light of *Pompa-Ortiz*'s explicit reference to error at the preliminary examination, this Court should apply the *Pompa-Ortiz* standard of review to errors in other proceedings. Instead, respondent simplistically asserts that since *Faretta* error during a preliminary hearing should be subject to harmless error analysis, *Faretta* error before the preliminary hearing also should also be subject to harmless error analysis. (RB 79.) Respondent's position not only plainly disregards the clearly-delineated scope of *Pompa-Ortiz*, but it

ignores the consequences of its argument, which essentially would render irremediable a *Faretta* violation early in a criminal prosecution even though, as here, the defendant promptly requested and diligently pursued the "unconditional right to self-representation" (*People v. Windham*, *supra*, 19 Cal.3d 121, 127) with the goal of defending himself at trial.

Finally, respondent's attempt to draw support for application of a harmless error standard from appellant's failure to file an extraordinary writ challenging the revocation of his right to self-representation is also flawed. (RB 79.) Review by extraordinary writ is not generally a prerequisite to preservation of appellate review. As has been noted, "[a] petition for writ of mandate asks for extraordinary relief: it is outside normal channels of appellate review where issues are examined with slow deliberation on a full record after the trial is over when the transcripts are cold." (*Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 100.) In *People v. Batts* (2003) 30 Cal.4th 660, this Court reaffirmed its rule in *People v. Memro* (1985) 38 Cal.3d 658, 675, and rejected as "both unwarranted and unprecedented" writ review as a prerequisite to raising a double jeopardy claim on appeal. (*People v. Batts*, *supra,* at p. 678.) Quoting *Memro*, this Court explained:

> "Respondent's argument also fails to recognize the unwarranted consequences which might result from a pretrial writ requirement. In addition to unnecessary delay and added expense [citation], such a requirement would limit the exercise of this court's appellate jurisdiction, particularly in death penalty cases. [Citation.] This court's constitutional responsibility in such cases should not be so easily circumscribed by procedural barriers, especially where the people of this state have not clearly spoken on the issue."

(*Id.* at pp. 677-678, quoting *People v. Memro*, *supra*, at p. 675.) The same concerns apply here to appellant's *Faretta* claim. Further, the only

appellate court to address this issue, *People v. Freeman* (1977) 76 Cal.App.3d 302, considered and rejected a proposed "new rule of criminal procedure . . . whereby claimed Faretta error would be reviewable on appeal only if the appealing party initially challenged the granting or denial of a pro se motion by pretrial extraordinary writ." (*Id.* at pp. 310-311.) The *Freeman* court concluded that "no compelling reason appears for the creation of such a novel rule" and rejected the suggestion out of concern for the "delay and cost attendant upon such an engrafted procedure." (*Id.* at p. 311.) This Court should similarly reject respondent's proposal that appellant's failure to file an extraordinary writ challenging the erroneous pretrial denial of his *Faretta* right precludes appellate review of the claim.

The law and facts in this case are clear. From early in the prosecution's case, appellant sought to represent himself; appellant's request and the court's grant of pro se status were made in contemplation of his conducting a full defense up to and including trial. The trial court's revocation of appellant's right to self-representation violated the Sixth and Fourteenth Amendments. The law of this Court and the United States Supreme Court are unmistakable that denial of an unequivocal, timely assertion of the right to self-representation requires per se reversal. Respondent has offered no coherent argument to the contrary.

4. Appellant Did Not Abandon His Invocation of His Right to Self-representation

Respondent suggests that appellant abandoned his earlier desire to represent himself by "acquiesc[ing] in being represented by attorneys Garber and Taylor during the guilt phase of the trial." (RB 80.)[9] This claim

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[9] Respondent argues that appellant's purported abandonment (continued...)

is contradicted by the record. Far from abandoning his wish for self-representation after the improper revocation, appellant twice renewed his unequivocal request to represent himself and twice was rebuffed by the court – facts that respondent does not dispute. (See *ante* at pages 5-6.) Appellant's actions were more than enough to make clear that he was serious about his request for self-representation for purposes of the entire trial. His failure to risk the ire of the trial court with further self-representation motions does not constitute abandonment and does not support respondent's misguided argument that the *Faretta* violation does not require reversal.

Appellant's submission to the trial court's second statement that its "ruling will stand" cannot reasonably be interpreted as abandonment of his prior unequivocal assertion of his right to represent himself. To do so would conflate compliance with a court's repeated assertions of its ruling with abandonment of the *Faretta* right appellant unsuccessfully asserted. Appellant's conduct is exactly what respondent characterizes it to be – acquiescence, i.e., acceptance of an adverse and erroneous ruling. This Court has never relied on such conduct to find abandonment of a prior unequivocal assertion of the right to self-representation. (See, e.g., *People v. Dent* (2003) 30 Cal.4th 213, 219.)[10]

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[9] (...continued)
supports a finding that any alleged error was harmless. (RB 80.) As appellant has shown, application of such a standard is inapplicable to claimed violations of the Sixth Amendment right to self-representation.

[10] Acquiescence is not the same as abandonment. To acquiesce is "to accept or comply tacitly or passively: accept as inevitable or undisputable" (*Webster's Third New International Dictionary of the*

(continued...)

Respondent's assertion that a defendant who does not "ma[k]e *Faretta* motions all throughout his guilt phase trial and repeatedly express[] his fervent desire to represent himself during trial" has abandoned his request to proceed pro se (RB 83) is fundamentally unsound. A requirement that a defendant must constantly renew his *Faretta* request at each proceeding or before each new judge would be plainly inconsistent with this Court's ruling that "[w]e do not require trained counsel to repeatedly make a motion that has been categorically denied; how much more should we require of an untrained defendant seeking self-representation?" (*People v. Dent*, *supra*, 30 Cal.4th 213, 219, citations omitted; see *United States v. Arlt* (9th Cir. 1994) 41 F.3d 516, 523-524 [after judge has conclusively denied defendant's pre-trial request for self-representation, "a defendant need not make fruitless motions to that same effect or refuse to cooperate with defense counsel"].) Such a rule also would impose an unwarranted and irrational burden on a defendant's exercise of his right to self-representation. (See *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833, 877 [state law which places an undue burden on the exercise of a fundamental right is invalid].)

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[10] (...continued)
English Language, Unabridged (2002) p. 18, col. 3), while to abandon is "to cease to assert or exercise an interest, right or title to esp. with the intent of never again resuming or reasserting it" (*Id.* at p. 2, col 1). Although this Court recently noted that "the Faretta right may be waived . . . by abandonment *and acquiescence* in representation by counsel," (*People v. Butler*, *supra*, 2009 WL 4673807, *7, italics added), it has not ruled, and should not rule, that a defendant's mere acquiescence in an adverse ruling on his motion for self-representation, which necessarily includes acquiescence in representation by counsel, constitutes abandonment of his Faretta right and forfeiture of any claim of Faretta error on appeal

Moreover, respondent's constant-renewal rule would be inconsistent with this Court's holding that the assertion of the right to self-representation and the concurrent waiver of the assistance of counsel made before the preliminary hearing continues throughout the entirety of the proceeding. (*People v. Crayton* (2002) 28 Cal.4th 346, 362 [once a defendant validly waives the right to counsel and represents himself, the waiver "continues through the duration of the proceedings unless it is withdrawn or is limited to a particular phase of the case," and there is no federal constitutional requirement that defendant be re-advised of his right to counsel and the risks of self-representation after arraignment and before the start of the trial]; accord, *United States v. Springer* (9th Cir. 1995) 51 F.3d 861, 864-865 [valid election to self-represent "carries forward through all further proceedings in that case unless appointment of counsel for subsequent proceedings is expressly requested by the defendant or there are circumstances which suggest that the waiver was limited to a particular stage of the proceedings"].)[11] In *Crayton,* this Court expressly followed a long line of federal court authority holding that changes in courtroom or jurists are irrelevant for purposes of analyzing the validity of a Sixth Amendment waiver. (*People v. Caryaton, supra,* 28 Cal.4th at pp. 362-263.) Pursuant to *Crayton*, this Court must examine the record of appellant's criminal prosecution as a single especially because under the due process clause of the state constitution and the federal constitution, this rule must apply with equal force to both the assertion and the denial of a

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[11] It should be noted that defense counsel waived arraignment in superior court. (1 RT A-2.) As a result, appellant was in no way put on notice that the prosecution formally had entered a new stage where he again might have asked to represent himself.

Faretta request. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 474.)[12] Here, appellant thrice sought to represent himself, and was thrice denied. This record is abundantly clear that appellant did not abandon his desire to represent himself.

The cases relied upon by respondent to support its untenable argument that appellant abandoned his request to represent himself at the preliminary hearing and guilt phase are clearly distinguishable. In each case the defendant either was given an opportunity to renew his request for self-representation prior to trial, which he failed to exercise, or he failed to make an unequivocal request to exercise his right to self-representation. (*People v. Tena*, *supra*, 156 Cal.App.4th at p. 606 [the court invited defendant to renew his request at a subsequent hearing and appellant failed to do so]; *People v. Dunkle* (2005) 36 Cal.4th 861, 908 [defendant stated on the record that he did not want to represent himself and wanted the lawyer to take full responsibility for the case]; *People v. Kenner* (1990) 223 Cal.App.3d 56, 58-59 [defendant was removed from jurisdiction prior to court's consideration of request for self-representation and upon defendant's return he failed to renew his request]; *People v. Stanley* (2007) 39 Cal.4th 913, 932 [defendant's request for self-representation was

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[12] Further, as respondent tacitly concedes (RB 82), appellant's request to represent himself at the penalty phase of the trial has no bearing on the fact that it was the legally erroneous and unequivocal denial of his right to self-representation prior to the preliminary hearing, which foreclosed appellant from exercising his right to self-representation at the preliminary hearing and guilt phase of his trial. (See *People v. Dent, supra*, 30 Cal.4th at p. 219 [court's erroneous and categorical denial of defendant's request to proceed pro se "effectively prevented defendant from making his invocation unequivocal"].)

equivocal and conditional].) No similar circumstances exist in this case where appellant unequivocally asserted and did not abandon his right to self-representation.

* * *

In conclusion, prior to the preliminary hearing, appellant asserted and never abandoned his right to self-representation for all purposes including trial. The trial court erred in revoking appellant's right to self-representation on factually unsupported and legally impermissible bases. Regardless of the stage of the proceeding, the impact of the denial was to deny appellant the opportunity to "control the organization and content of his own defense." (*McKaskle v. Wiggins, supra,* 564 U.S. at p. 174.) The trial court's error violated appellant's Sixth and Fourteenth Amendment rights and requires reversal per se.

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II

THE TRIAL COURT ERRONEOUSLY FORCED APPELLANT TO WEAR A REACT BELT RESTRAINT DURING THE GUILT PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF STATE LAW AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

In his Opening Brief appellant showed that despite his early objection to restraints and record evidence of his heart condition, the court below abdicated any decision of the use of restraints to the Sheriff and later unjustifiably required appellant to wear a stun belt throughout the guilt phase. (See AOB 50-71.) Respondent does not dispute key facts underlying the claim including the following:

- Prior to the preliminary hearing, appellant lodged an objection to the use of restraints. (I CT 203-210; AOB 51; RB 114-115.)
- The court refused to rule on appellant's objection and regarded any decision regarding the use of restraints as within "the sheriff's jurisdiction." (I CT 13; AOB 51; RB 115.)
- Appellant wore a stun belt through the guilt phase of the trial. (12 RT 1487-1489; AOB 53; RB 85, 99.)
- From the beginning of the proceedings, the court was aware that appellant suffered from high blood pressure. (I CT 12; AOB 51; RB 93.)

Respondent urges this Court to disregard appellant's prompt objection to the use of restraints, forgive the trial court's abdication of any decision regarding restraints to the Sheriff, and hold that the claim is forfeited. Barring this, respondent urges this Court to ignore the well-settled principle that an appellate decision governs all cases still pending on

direct review when the decision is rendered and not apply *People v. Mar* (2002) 28 Cal.4th 1201 to the instant case. Finally, respondent argues that any error that may have occurred is harmless. This Court should reject respondent's contentions, as each relies on a flawed reading of the record, fails to comprehend the governing law, and does not respond fully to appellant's arguments.

A. Appellant's Claim Is Not Forfeited Because Appellant Made A Timely Objection To The Use Of Restraints And The Court In Record Correction Ruled That There Was No Hearing Prior To The Imposition Of the Stun Belt In Appellant's Case

Respondent argues that any claim of error relating to the stun belt is forfeited for (1) lack of a timely objection to any ruling by the trial court that appellant be required to wear the stun belt during the guilt phase and (2) lack of a record showing that appellant specifically objected to the use of the stun belt on the basis of his medical condition. (RB 92.) Respondent's argument is based on a skewed reading of the record and misapprehends what is required to preserve an issue of unlawful restraint for appellate review.

As a preliminary matter, respondent concedes, as it must, that appellant objected to the use of *any* restraints prior to the preliminary hearing, claiming that the restraints violated his Sixth Amendment rights as they affected his ability to concentrate and prepare his defense. (RB 114; 1 CT 203-210.) Appellant's objection to the use of any restraints necessarily included an objection to the use of a stun belt. After appellant's objection and the court's (Judge Horwitz's) delegation of the matter to the sheriff, the court (Judge Smith) imposed the use of a stun belt without any further proceedings. This record is plainly sufficient to decide the issues before

this Court and, contrary to respondent's assertions, does not require this Court to assume facts that were not established below. (See RB 90.)[13]

In an attempt to obscure appellant's clear objection, respondent argues that appellant's objection before Judge Horwitz and the ruling on that objection is "separate" from the decision by Judge Smith to impose a stun belt. (RB 114-116.) Sidestepping the legality of Judge Horwitz's action (see RB 115), respondent argues that the ruling by the Municipal Court cannot be "combined" with the Superior Court's subsequent decision to impose a stun belt.[14] Respondent's argument is simply unsupported by the law. Indeed, its proposition runs contrary to the general rule "that the power of one judge to vacate an order made by another judge is limited" (*In re Alberto* (2002) 102 Cal.App.4th 421, 427 [order of second judge correcting bail setting of first judge was in error]), and calls for precisely the kind of forum shopping this rule is designed to prohibit (*People v.*

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[13] Respondent's reliance upon *People v. Tafoya* (2007) 42 Cal.4th 147, 164 (see RB 89-90) is misplaced, because counsel's failure in that case to make a record of the ethnicity of the prospective jurors made it impossible for the appellate court to rule on his claim of a denial of a representative-cross-section jury, whereas the record here is sufficient to decide appellant's claim of unlawful use of a stun belt. Respondent's reliance upon *People v. Ward* (2005) 36 Cal.4th 186, 206, is similarly misplaced. In that case, the claim raised on appeal focused specifically on the jury's observation of defendant in restraints, and this Court declined to assume that the jury saw the defendant's leg braces when he agreed to stand by counsel table and take off his shirt so a witness could identify his tattoos. In contrast to these cases, appellant is not asking the Court to assume any fact not presented in the trial court.

[14] For the reasons given in Argument I, *ante* at pages 31-34, because the erroneous ruling complained of here occurred prior to, rather than at, the preliminary hearing, the procedures of *Pompa-Ortiz, supra,* 27 Cal.3d 519 do not apply.

Scofield (1967) 249 Cal.App.2d 727, 734 [ruling by first judge upholding search warrant was binding on the second, and to hold otherwise would lead to "a rule of man rather than a rule of law"].) Respondent also fails to address appellant's argument that once he was categorically informed by the court that it had delegated all decisions regarding the use of restraints to the sheriff, appellant could reasonably believe any further objection would be futile, and he was thus left without judicial recourse. (See AOB 60-61.) This omission tacitly concedes the futility of a renewed objection.

In another attempt to minimize appellant's objection, respondent mistakenly argues for forfeiture of the claim on the grounds that appellant failed specifically to object to the use of the stun belt based on a medical condition. Respondent's argument confuses the obligation of the defendant to raise an objection and the obligation of the trial court, once an objection has been made, to determine the least restrictive form of restraint that is safe and appropriate. (*People v. Mar, supra*, 28 Cal.4th at p. 1226.) Here, appellant's objection to the use of restraints required the court to decide if there was a manifest need for restraints, and if so, to determine the least restrictive restraints possible. (*People v. Duran* (1976) 16 Cal.3d 282, 291; *People v. Mar, supra,* 28 Cal.4th at p. 1217; see RB 95.)

People v. Cleveland (2004) 32 Cal.4th 704, 740, upon which respondent relies, is inapposite. In *Cleveland*, defense counsel made a specific objection to the use of shackles solely because of the possible juror bias arising from the use of visible restraints. The trial court ordered that the defendants wear leg braces and made a record that these restraints were not visible to the jury. (*Ibid.)* This Court held that because of the narrowness of the objection at trial, any objection to the use of the leg braces was forfeited. (*Ibid.)* In contrast, appellant here objected to the use

of all restraints because they infringed on his Sixth and Fourteenth Amendment rights. That objection having been made, it was incumbent upon the court to determine if a manifest need for restraints had been shown, and to find the least restrictive, safest and most appropriate restraint. This the trial court did not do. Thus, unlike *Cleveland*, there was no trial court ruling in this case, let alone one that resolved appellant's concerns about physical restraints.

As this Court has explained, there are a number of "distinct features and risks concerning the use of a stun belt that properly should be taken into account by a trial court under the *Duran* standard, before compelling a criminal defendant to wear such a device at trial." (*People v. Mar, supra*, 28 Cal.4th at p. 1226.) One factor that the court must consider is the risk that the stun belt poses to persons with particular medical conditions. (*Id.* at p. 1229.) Attention to this factor is a requisite part of the trial court's analysis regardless of the type of restraints being considered and is not dependent on any particular objection from appellant. (*People v. Vance* (2006) 141 Cal.App.4th 1104, 112 [trial court must make independent determination of need and appropriateness of restraints, and general objection from defense counsel is sufficient to preserve this issue on appeal].)

The record is clear that appellant had high blood pressure or hypertension, which is a serious medical condition defined as:

> abnormally high arterial blood pressure that is usually indicated by an adult systolic blood pressure of 140 mm Hg or greater or a diastolic blood pressure of 90 mm Hg or greater, is chiefly of unknown cause but may be attributable to a preexisting condition (as a renal or endocrine disorder), that typically results in a thickening and inelasticity of arterial walls and hypertrophy of the left heart ventricle, and that is a

> risk factor for various pathological conditions or events (as heart attack, heart failure, stroke, end-stage renal disease, or retinal hemorrhage)

(http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=hypertension .) In individuals with high blood pressure, the heart is under additional strain, as it must pump harder to maintain the circulatory system. (Beers & Jones, Ed., The Merck Manual of Health and Aging (2004) pp. 612-614.) Using a stun belt runs a serious risk of further raising a defendant's blood pressure (Cusac, *Life in Prison: Stunning Technology: Corrections Cowboys Get a Charge Out of Their New Sci-Fi Weaponry* (July 1996) The Progressive, p. 20), which, in turn, can be dangerous to his health. High blood pressure, a known risk factor for heart disease and stroke, is clearly the type of serious medical condition that should be considered by the court prior to saddling a defendant with a stun belt.

Finally, respondent attempts to craft a forfeiture argument from appellant's failure to settle a proceeding that, during a record correction hearing, the trial court ruled did not occur. (RB 89-91.) Just stating the argument reveals its fatuousness. Specifically, respondent argues that once it became evident that court personnel were unable to locate a transcript of any ruling by the court regarding the use of the stun belt, appellate counsel should have made further efforts to determine the date of the proceeding through conversation with trial counsel, or should have sought to settle the record after having asked for a certificate indicating that a transcript could not be obtained. (RB 91.) On the contrary, the court's rulings in the record correction process establish that there was no hearing prior to the court's order that appellant wear the stun belt during the trial proceedings.

Because there was no hearing, there was nothing to settle.[15]

Review of the record proves this obvious point. At the August 13, 2003, record correction proceeding, there was a discussion regarding a number of proceedings for which appellate counsel had not received a transcript, including any pretrial proceedings regarding the use of the stun belt. Appellate counsel sought an order from the court for an affidavit from the reporter that the transcript could not be obtained. The court refused appellate counsel's request, indicating its belief that there was no transcript because there had been no proceeding:

> She doesn't have an affidavit to tell what her belief is if it's reported. I went over that with her. Whatever you have on the transcript is what you have. There's nothing else . . . Ms. Grace is one of the best reporter's in the State of California. Trust me, she is just great. She's now on the grand jury. She and I both went over this. [¶] If you and Ms. Kim assume there's other things, there are not, she's telling you that, and that's what I'm telling you, there is nothing else. It may appear there is, but she says it's in those transcripts, those letter pages and dates, that's all you have.

(8/13/03 RT 13-14.) Subsequent to this ruling, the trial court agreed to a further date to allow the parties to confer and try to determine with more specificity the dates for proceedings that they believed had occurred, but

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[15] In any event, this Court should not apply the prior objection rule to claims regarding the unlawful restraint of criminal defendants, because the harm this rule is designed to prevent is inapplicable to claims alleging the improper use of restraints. This Court has long held that the improper imposition of restraints is inherently prejudicial (*People v. Harrington* (1871) 42 Cal. 165, 168) and that it is uniquely the role of the court to determine if and how restraints are to be imposed in a particular case (*People v. Duran, supra,* 16 Cal.3d at p . 293 fn. 12). By operation of these rules, the trial court is, by matter of law, on notice of the prejudice associated with physical restraints, and uniquely positioned to prevent it.

had not been transcribed. The trial court continued to maintain its position that appellate counsel was incorrect and there were no proceedings that had not been transcribed (8/13/03 RT 19), but agreed that having specific dates would be helpful to the court for a final resolution of the matter. (*Ibid.*)

At the next proceeding, on December 10, 2003, there was a more specific discussion regarding any transcript of the proceeding involving the trial court's ruling on the use of the stun belt. At that proceeding, appellate counsel informed the court that she required the assistance of the court reporter to determine with greater specificity the dates at which any proceeding regarding the use of the stun belt had occurred. (12/10/02 RT 4.) The trial court refused appellate counsel's request for assistance, stating that it would not order the reporter to conduct a global search of her notes for the phrase "stun belt" in an attempt to determine the date of the proceeding. (12/10/03 RT 3-4.) The trial court again indicated its belief that the court reporter had transcribed every hearing that was held and had provided counsel with transcripts of every hearing. (*Ibid.*)

At the next hearing, on January 13, 2004, the court again informed appellate counsel that the court reporter had provided to counsel all the transcripts of every proceeding. (1/13/2004 RT 22.) The court did not agree to issue an affidavit that there was a proceeding that was not transcribed, and again stated that the court reporter "is very good." (*Ibid.)* Throughout these proceedings, appellate counsel was diligently conferring with court personnel and the trial attorneys in an attempt to determine the dates of any hearing that may have been held regarding the imposition of the stun belt. (12/10/02 RT 4; 1/13/2004 RT 22.)

As respondent concedes (RB 91), pursuant to this Court's ruling in *Marks v. Superior Court* (2002) 27 Cal.4th 176, prior to settlement there

must be an affidavit from the court reporter that a proceeding occurred for which there is no transcript. The record here is clear: the court refused to order production of such an affidavit, as the court agreed with the reporter's statements that there was no missing transcript because there had been no proceeding at which the court had made a ruling regarding the use of restraints in general or a stun belt in particular. (8/13/03 RT 19; 1/13/2004 RT 22.)

Certainly, as respondent states, appellant must make "all reasonable efforts to provide the appellate court with a record of the proceedings during which the alleged error occurred." (RB 91.) Appellant has clearly done so. In response to appellate counsel's diligent efforts, the court presiding over record completion proceedings ruled that there was no hearing about the use of a stun belt. This ruling ended the matter; there was nothing to settle.

B. The Decision In *People v. Mar* Applies To This Appeal And Fully Supports The Conclusion That The Trial Court's Actions Compelling Appellant To Wear A Stun Belt Violated His Constitutional Trial Rights

Respondent argues that this Court's holding in *People v. Mar*, *supra*, 28 Cal.4th 1201 should not be applied to this case, which was pending on appeal when *Mar* became final. (RB 105-106.) Respondent's concern about retroactivity is unfounded for three reasons: (1) *Mar* does not establish a new rule of law; (2) there was no old rule in place governing the use of stun belts; and (3) because *Mar* is based on federal constitutional principles, its holding must be applied to cases still pending on appeal at the time it was decided.

First, this Court's holding in *People v. Mar, supra,* 28 Cal.4th 1201, did not establish a new rule of law, but only clarified its prior decisions, so

no problem of retroactivity arises from applying *Mar* to this appeal. As this Court has repeatedly noted, the general rule is that "'convictions should ordinarily be tested on appeal under the law then applicable, not the law prevailing at the time of trial.'" (*People v. Welch* (1999) 20 Cal.4th 701, 732, fn. 5, citations omitted [holding that the rule of *Godinez v. Moran* (1993) 509 U.S. 389 should be applied retroactively to case where trial predated but appeal postdated the decision]; *People v. Charles* (1967) 66 Cal.2d 330 [holding that the rule of *People v. Aranda* (1965) 63 Cal.2d 518 is to be applied to cases pending on appeal when the decision became final].) If a decision does not establish a new rule of law, "'no question of retroactivity arises' because there is no material change in the law." (*People v. Guerra* (1985) 37 Cal.3d 385, 199, citation omitted.) A decision that explains or refines the holding of a prior case or applies an existing precedent to a different fact situation does not establish a new rule of law. (*Ibid.*)

Applying these principles, it is clear that this Court's holding in *People v. Mar, supra,* 28 Cal.4th 1201, did not establish a new rule of law, but instead applied the holdling of *People v. Duran, supra,* 16 Cal.3d 282 to the use of stun belts. This Court specifically stated that its holding in *Duran* "properly governs a trial court's decision to compel defendant in a criminal case to wear a stun belt at trial." (*People v. Mar, supra,* 28 Cal.4th at p. 1219.) This Court then applied the "general standard and procedural requirements set forth in *Duran*" to review the trial court's decision to compel the use of the stun belt. (*Id.* at p. 1220.) Finally, this Court provided additional explication of how the "distinct features and risks concerning the use of a stun belt" should be evaluated by a trial court under the *Duran* standard. (*Id.* at pp. 1225-1226.) Thus, *Mar* did not represent a

material change in the law, but simply applied this Court's *Duran* holding to a new fact situation – stun belts.

Examination of decisions establishing a new rule further shows that the decision in *Mar* did not do so. New rules are those that present "a clear break with the past." (*Donaldson v. Superior Court* (1983) 35 Cal.3d 24, 37.) As this Court has explained, this type of decision arises only in limited situations:

> when the decision (1) explicitly overrules a precedent of this court [citation], or (2) disapproves a practice impliedly sanctioned by a prior decision of this court [citation], or (3) disapproves a longstanding and widespread practice expressly approved by a near-unanimous body of lower-court authorities [citation].

(*People v. Guerra, supra,* 37 Cal.3d at p. 401.) None of these factors is present in *Mar*, which did not explicitly overrule a prior decision or disapprove a prior precedent or widespread practice. In short, this Court should reject respondent's retroactivity argument as contrary "the historic pattern of applying the court's current expression of a basic principle to cases pending on appeal." (*People v. Charles, supra,* 66 Cal.2d at p. 334.)

Respondent's argument that specific language in the *Mar* decision mandates that the decision may only be applied prospectively should also be rejected. (RB 106.) Respondent cites no authority for the proposition that this Court's instructions in a decision intended to provide guidance to the trial courts in future cases renders the decision a "clear break with the past" so that its decision is excepted from the established rule that convictions should be tested under the law applicable on appeal, and not the law prevailing at the time of trial. (*People v. Charles*, *supra,* 66 Cal.2d at p. 335.) Such guiding language reflects this Court's recognition that it is applying existing precedent to a new factual pattern, which clearly

requires that the holding be applied to cases pending on appeal. (*People v. Guerra, supra* 37 Cal.3d at p. 199.) This is particularly true when, as in *Mar,* the Court identifies significant issues that will confront the trial court at retrial, but are not addressed within the confines of the Court's holding.[16] This Court's holding regarding such procedures, although clothed in the language of guidance, is clearly applicable to cases pending on appeal at the time of the decision.

The point is illustrated by *People v. Aranda, supra,* 63 Cal.2d 518, in which this Court reversed both defendants' robbery convictions because the erroneous admission of one defendant's confession also prejudiced his codefendant. (*Id.* at pp. 526-527.) To assist trial courts in future trials, this Court provided guidance on the admissibility of a codefendant's confession at a joint trial (*Id.* at p. 527.) This Court later ruled that "failure to follow the procedure we set forth in *Aranda* may be raised on appeal even by defendants whose trials took place before *Aranda* was decided." (*People v. Charles, supra,* 66 Cal.2d at p. 337.) The same conclusion applies to *Mar* and its instructions for future trials: the failure to follow the procedure set forth in *Mar* for use of a stun belt applies to cases, including appellant's case, that occurred before *Mar* was decided.

Second, even assuming arguendo that this Court were to find that *Mar*'s list of factors to be considered prior to compelling the use of stun

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[16] In *Mar,* this Court reversed the conviction based on a finding that the imposition of restraints was unlawful because there had not been a showing of manifest need to impose the use of the stun belt for security reasons. (*People v. Mar, supra,* 28 Cal.4th at p. 1223.) This Court recognized, however, that it was necessary to identify the proper procedures for trial courts to employ in determining whether or not stun belts were a safe and appropriate restraint in order to guide the trial court in retrial and avoid further error.

belts did amount to a new rule, the decision would still apply to appellant's case because there was no old rule on the use of stun belts. If a case establishes a new rule of law, but there was no prior rule to the contrary, "the new rule applies to all cases not yet final." (*People v. Guerra, supra,* 37 Cal.3d at p. 399 [applying decision excluding hypnotically-induced testimony to all cases not yet final on appeal].) As this Court has explained, "[t]his is so for the obvious reason that there cannot have been any *justifiable* reliance on an old rule when no old rule existed." (*Ibid.*, original italics.) This Court has reasoned that if a case resolves a conflict between lower court decisions or addresses an issue that has not been previously presented, there was no prior rule to the contrary, and the holding will apply to cases not yet final. (*People v. Donaldson, supra,* 35 Cal.3d at p. 37.) Applying this analysis, it is clear that there was no prior rule on the use of stun belts, let alone a rule contrary to that announced in *Mar*, so the *Mar* decision applies to this case.

Third, insofar as this Court's decision in *Mar* relies on federal constitutional principles, the decision must apply to appellant's appeal. (*Griffith v. Kentucky* (1987) 479 U.S. 314 [holding that involving federal constitutional principles decisions shall be applied retroactively to all cases pending on direct review or not yet final, regardless of whether the decisions present a new rule.) This Court has previously declined to adopt the *Griffith* rule for rules of criminal procedure founded on state constitutional or statutory laws. (*People v. Carrera* (1989) 49 Cal.3d 291, 327.) However, this Court has noted that as to federal constitutional claims, the state courts would be required to follow *Griffith* and apply a new decision to all cases pending on appeal, regardless of the nature of the rule announced. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 409, fn. 4.)

The rights protected by this Court's holding in *Mar* include federal due process concerns. In *Deck v. Missouri* (2005) 544 U.S. 622, 633, the United States Supreme Court held visible shackling of a defendant during a capital trial's penalty phase, as well as during the guilt phase, violated the Due Process Clause of the Fourteenth Amendment unless such shacking was justified by an essential state interest. In reaching this decision, the high court emphasized that the defendant's right to participate in his own defense and communicate with counsel is impaired through the use of physical restraints. (*Id.* at p. 631.) As this Court has recently noted, these are precisely the constitutional rights it sought to protect in its decision in *Mar,* limiting the use of stun belts. (*People v. Stevens* (2009) 47 Cal.4th 625, 633)

For all these reasons, *People v. Mar, supra*, 28 Cal.4th 1201 applies to this case.

C. The Trial Court's Abuse Of Discretion And Violation Of The Federal Due Process Clause In Requiring Appellant To Wear The Stun Belt Without Considering His Medical Condition Was Prejudicial And Requires Reversal

Appellant has explained that the trial court abused its discretion and violated his due process rights under the state and federal constitutions in three separate but related actions regarding physical restraints: (1) delegating all decisions about restraints to the sheriff; (2) failing to make an independent determination about whether a stun bet was the least restrictive and medically appropriate restraint; and (3) requiring appellant to wear stun belt during the guilt phase despite his serious heart condition. (AOB 50-51, 58-63.) Respondent's answer focuses on establishing that there was a manifest need for restraints. (RB 98-105.) That question is not in dispute. Appellant's position has never been that there was no showing of manifest

need for some kind of restraint. (AOB 59.) In litigating the question of manifest need, respondent does not adequately address the crux of appellant's claim – the trial court's errors summarized above. Respondent says nothing at all to defend the trial court's delegation of decision about restraints to the sheriff. Respondent argues that *Mar*'s requirement that the trial court make an independent determination that a stun belt is the least restrictive and medically appropriate restraint does not apply to this case (RB 105-106), a position that appellant has shown to be wrong (see *ante* at pages 49-53), and alternatively, argues that the record does not establish that the trial court was aware of appellant's heart condition until shortly before the penalty phase (RB 106), another position that appellant has shown to be wrong (see *ante* at pages 45-46 and AOB 51-54).

Respondent's principle argument is about prejudice. (RB 107-114.) Contrary to respondent's assertion, appellant was prejudiced under both the state and federal harmless error standards by being compelled to wear the stun belt during the guilt phase of the trial, particularly during his testimony. Respondent contests neither that the guilt phase case was a credibility contest between appellant and the prosecution's witnesses, nor that the prosecutor emphasized appellant's demeanor on the witness stand and urged the jury to rely on his demeanor as evidence of his guilt. (Compare AOB 67 with RB 109-114.) Nor does respondent contest that during his testimony appellant was told to calm down and slow down. (Compare AOB 69 with RB 107.)

Instead, in arguing that the stun belt did not prejudice appellant, respondent points to a colloquy between appellant and the trial court, immediately prior to the court's imposition of the death sentence. During this exchange, appellant argued that the prosecution's conduct in

introducing irrelevant evidence about gangs and preventing appellant from telling his version of events, led to an unfair trial. (RB 107-108; 16 RT 1959-1960.) Quoting portions of this colloquy out of context, respondent argues that appellant's failure to mention that the stun belt made him nervous while he testified defeats any claim that the stun belt prejudiced his ability to testify freely. (RB 108.) However, a review of the full colloquy reveals the speculative and ill-reasoned nature of respondent's argument. This exchange was appellant's final opportunity to address the judge and any spectators before being sentenced to death. In it, appellant made a final case for why the evidence the jury heard was unfair and biased the jury against him. Appellant did not inventory all the problems in the trial, but instead focused on what he perceived to be the prosecutor's misconduct. Given his focus, it is not surprising that appellant did not mention the impact of wearing the stun belt, which had nothing to do with prosecutorial misconduct. This Court should reject respondent's argument, and instead should examine appellant's testimony, which evinces the same nervous characteristics as that of the defendant in *People v. Mar*, *supra*, 28 Cal.4th at p. 1213. (AOB 68-69.) Clearly, the use of the stun belt negatively impacted appellant, making him extremely nervous and adversely affecting his demeanor before the jury.

For all the reasons given here and in the AOB, the order that appellant wear a stun belt was prejudicial under both the state (*People v. Watson* (1956) 46 Cal.2d 818, 835-837) and federal (*Chapman v. California* (1967) 386 U.S. 18, 24) harmless error standards and warrants reversal.

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III

THE ERRONEOUS ADMISSION OF THE PROSECUTION'S INCOMPETENT AND IRRELEVANT EXPERT TESTIMONY ABOUT GANGS IMPERMISSIBLY BOLSTERED THE PROSECUTION'S THEORY OF THE CASE AND DENIED APPELLANT A FAIR TRIAL

Respondent's argument that the gang expert testimony was properly admitted suffers from the same flaw as the trial court's ruling. Like the trial court, respondent latches onto the fact that appellant was an admitted gang member and urges this Court to rely on this fact alone to uphold the admission of expert testimony from drug dealer Wilson Berry and police sergeant Richard Valdemar about the violent nature of gangs. This argument, however, disregards the fact that appellant's gang membership was not connected to the case at hand. Not only was there no competent evidence to suggest that appellant received his drugs from a gang (see AOB 87-90), but the prosecution's theory of the case – that appellant was retaliating for the theft of his drugs – was centered around a possible motive that applied to all drug dealers, regardless of the source of their drugs. (See AOB 86, 96.) Careful analysis of the facts establishes that the expert testimony about gangs was irrelevant, cumulative, and highly prejudicial evidence. The admission of this evidence violated state evidentiary rules and appellant's rights to due process, a fair trial, and a reliable determination of guilt and penalty as guaranteed by the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and by article I, sections 15 and 17 of the California Constitution. (AOB 72-73.)

Respondent's argument relies on broad, general precedent without rigorously applying that law to the facts of this case. Surveying cases in which gang expert testimony was admissible, respondent attempts to

establish a rule that gang expert testimony is always admissible in cases involving a gang member regardless of the specific facts of the case. Such a rule, if accepted, would permit the admission of inflammatory and prejudicial gang evidence whenever a person associated with a gang is accused of any crime. It is precisely this outcome – that the law treat gang members more severely simply because they are gang members – that Justice Moreno warned against in his dissenting opinion in *People v. Medina* (2009) 46 Cal.4th 913, 928 (diss. opn. of Moreno J., joined by Kennard and Werdegar, JJ. [asserting that, because of appellant's gang membership, the majority expanded the natural and probable consequences doctrine to hold appellant liable for any crime that was a "natural and possible consequence of the target crime"].) In order to avoid disparate and unjust applications of the law, trial courts must carefully scrutinize the competence of a gang expert and the relevance of his testimony before deciding to admit such highly inflammatory evidence. The trial court here failed to do so. As a result, the erroneous admission of Wilson Berry's and Richard Valdemar's testimonies impermissibly bolstered the prosecution's case against appellant and deprived him of his right to a fair trial and other constitutional rights.

A. The Testimonies Of Berry And Sergeant Valdemar Were Not The Proper Province Of An Expert Witness Because They Did Not Discuss Evidence That Is Beyond The Common Experience Of The Jury

Respondent argues that the testimonies of the experts Valdemar and Berry were admissible because they "concerned how gangs perceived disrespect, humiliation, and 'saving face'": and "the use of drug sales by gangs," which was beyond common experience. (RB 140.) Respondent's characterization of the scope of the testimony approved by the trial court is

misleading. The specific question the expert testimony was offered to answer was "if someone is selling dope, how they get it back." (5 RT 533-534.) Respondent has offered no argument as to why knowledge about gangs is required to answer this question. Nor has respondent answered how, given the trial court's observation that "every juror would probably know" that "[i]f you lose dope, to get it back you use muscle" (5 RT 534), the issue before the jury required expert testimony in order to make "comprehensible and logical" that which would otherwise be beyond the common knowledge of the jury. (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551.)

Instead, respondent cites a series of cases in which experts were allowed to testify about drug and gang related practices. (RB 140-41). Appellant does not contest that this Court has upheld admission of expert testimony about gangs when such testimony provided information necessary for an inference that was otherwise unfathomable to the jury. (See AOB 82-85.) However, respondent's citations to cases on the introduction of expert testimony overstates their holdings and fails to take into account their inapplicability to the specific narrow question at issue in this case. (See RB 140-141, citing *People v. Gardeley* (1996) 14 Cal.4th 605, 619-620 [expert testimony admissible to explain why an assault on an unarmed man who was urinating in a carport was "gang related activity" under Penal Code section 186.22, former subdivision (c)]; *People v. Gonzales* (2006) 38 Cal.4th 932, 944-45 [expert testimony that a gang would retaliate against one of its own members who testified against a member of a rival gang was appropriate expert testimony]; *People v. Ferraez*, (2003) 112 Cal.App.4th 925 (2003) [in prosecution for street terrorism and allegation that drug sales were committed to benefit a criminal street gang in violation of Penal Code

section 186.22, subdivision (b)(1), expert testimony was admissible to explain to the jury how drug sales by a single gang member enhance a gangs reputation]; see also *People v. Harvey* (1991) 233 Cal.App.3d 1206, 1226 [in conspiracy prosecution, expert testimony was admissible to identify how defendants' travels and meetings were "consistent or indicative of narcotics trafficking" and reflected the defendant's participation in Columbian cocaine distribution cell]; *People v. Douglas* (1987) 193 Cal.App.3d 1691, 1694 [expert testimony admissible to establish that possession of 14 bindles of marijuana and 44 dollar bills was consistent with evidence of possession for sale, rather than personal use].)

In this case, the crux of Berry and Sergeant Valdemar's testimony was that all drug dealers, including those who are gang members or receive their drugs from gangs, are likely to retaliate when their drugs are stolen. This is not a fact that was beyond the common experience of the jury and thus, the trial court erred in allowing this testimony to come in as expert opinion.

B. The Testimonies Of Berry And Sergeant Valdemar Were Not Relevant To Either Appellant's Motive Or Credibility

Respondent argues that the testimony of both Valdemar and Berry were properly admitted as each of their testimony was relevant to appellant's motive and credibility. (RB 141.) Respondent's argument is defeated by its implicit and explicit concessions. First, by its silence respondent concedes that the question of motive was undisputed in this case – appellant was angry that his drugs had been stolen, and was willing to threaten and use violence to get their return. (Compare AOB 86-87 with RB 118-119.) Second, although respondent asserts the expert testimony was relevant as to appellant's credibility, it fails to address both that the

expert testimony was admitted prior to appellant's testimony, and that the vast majority of the expert testimony was inadmissible on credibility, as it did not impeach appellant's testimony. Third, respondent does not dispute that Donna Meekey's testimony was insufficient to draw a connection between appellant's drugs and a gang, particularly the Mexican Mafia. (Compare AOB 89-90 with RB 144-145.) Finally, respondent implicitly concedes that the trial court admitted Berry's and Valdemar's testimonies simply because appellant was a gang member rather than based on a consideration of the specific facts in the case. (Compare AOB 85-92 with RB 139-141.)

As appellant has argued, although evidence of motive is generally relevant, evidence that addresses an undisputed fact is not relevant even if it goes to appellant's motive. (See AOB 86-87.) From opening statements, appellant conceded that the theft of his narcotics made him upset and angry (5 RT 553), and this concession was repeated throughout the trial. (9 RT 1190, 1191, 10 RT 1228, 1265, 1267, 1270.) Respondent fails to address this crucial point when arguing for the admissibility of Berry's and Sergeant Valdemar's testimonies. Instead, respondent relies on a series of cases in which gang or drug expert testimony was admissible to show motive. (RB 142-143.) None of these cases, however, addresses the admissibility of evidence that relates to an undisputed fact.[17] Indeed, the law is clear that

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[17] In contrast to this case, in each of the decisions cited by respondent the expert testimony was admitted to explain a disputed fact, which tended to show motive. (*People v. Ward* (2005) 36 Cal.4th 186, 210 [gang expert may testify as to why someone in defendant's position would enter rival gang territory and how he would be likely to react to certain actions and language, all of which were disputed facts]; *People v. Carter* (2003) 30 Cal.4th 1166 [gang evidence was admissible on disputed issue of (continued...)

evidence tending to show motive is not excepted from the requirement that it be offered to prove a disputed fact. (*People v. Waidla* (2000) 22 Cal.4th 690, 718 [in order to be relevant, testimony must have at least some tendency in reason to prove a disputed material fact which would tend to show a motive]; *People v. Price* (1991) 1 Cal.4th 324, 418-419 [evidence tending to show motive of alternate suspect was properly excluded because it addressed an undisputed fact which the defense had "amply established, and the prosecution effectively conceded"]; *People v. Reyes* (1976) 62 Cal.App.3d 53, 64 [evidence tending to show defendants knowledge properly excluded when fact was undisputed].)

Respondent attempts to distinguish the testimony offered by Valdemar and Berry as focusing specifically on the fact drug dealers who receive their drugs from a gang retaliate violently if those drugs are stolen. (RB 143-144.) However, as the trial record shows, violent retaliation for the theft of drugs is the practice of all drug dealers, not just those whose drugs are supplied by a gang. Each expert testified that when drugs are stolen, the drug dealer needs to engage in some kind of violent action to

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[17] (...continued)
identity and motive where victim was member of non-rival gang]; *People v. Williams* (1997) 16 Cal.4th 153 [evidence of defendant's membership in a Blood gang was admissible to prove that a Blood would have a motive to shoot someone dressed like a Crip, even if that person was not in fact a gang member, which was a disputed fact]; *People v. Gonzales* (2005) 126 Cal.App.4th 1539 (2005) [police officer may testify about the way members of the Mexican Mafia were likely to act in jail, a disputed fact that went to defendant's motive]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370 (1994) [gang expert may testify as to gang member's motive to respond violently to someone who crossed out his graffiti, which was a disputed fact]; *People v. Funes*, (1994) 23 Cal.App.4th 1506, 1519 [evidence of disputed fact of defendant's gang membership was relevant to show motive of retaliation as part of a gang rivalry].)

maintain his position. (See 9 RT 986 [Berry testifies that drug dealer whose drugs are stolen must make an example out of the person who stole their drugs so that others don't do the same]; 8 RT 1009 [Valdemar testifies that drug dealer who received drugs from a gang would have to retaliate against person who took the drugs to show that he was not irresponsible and save face].) Respondent's attempt to distinguish the response to theft of drugs from a dealer whose drugs were fronted by a gang and a dealer whose drugs were not fronted by a gang is further belied by the trial court's finding that "[i]f you lose dope, to get it back you use muscle. I don't think it's unique, different. Every juror would probably know about it." (5 RT 534.) In short, the gang gloss was an irrelevant ruse for the admission of highly prejudicial expert testimony.

Respondent's argument that Valdemar's and Berry's testimonies were relevant to impeach appellant's credibility also should be rejected. The contention is built on the false assumption that appellant had already testified and thus could be impeached by the gang evidence. (RB 144-45.) But Berry and Sergeant Valdemar both testified *before* appellant, so their testimony could not properly have been offered for impeachment, and thus respondent's post-hoc relevance rationale fails.

Moreover, had the prosecution offered Berry and Valdemar to impeach appellant, the testimony of each witness would have been limited to those matters that directly contradicted specific assertions in appellant's testimony. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 10 [evidence offered to impeach a witness must "meet" the testimony it is offered to impeach; female apartment manager's testimony that she had not given witness permission to be on the roof did not impeach witness' testimony that he had been given permission by a man].) The content of appellant's testimony

therefore would have significantly limited the scope of Valdemar's or Berry's testimony.

In his testimony, appellant admitted his gang membership, his use of violence and his drug dealing. Specifically, he testified that he was a member of the 18th Street gang and had tattoos that reflected his membership (9 RT 1096 - 1099, 1178); that his membership in the 18th Street gang made him a Sureno (10 RT 1182); that the 18th Street gang was involved in drug sales (10 RT 1179-1181); that 18th Street gang members, including himself, used violence against rival gangs and people who disrespected them (10 RT 1190); that being disrespected made him angry (10 RT 1191, 1268); that the theft of his cocaine made him feel disrespected and angry (10 RT 1270, 1271); and that he used violence and the threat of violence in an attempt to get his cocaine back because the theft made him feel disrespected and angry (10 RT 1130, 1158, 1173, 1265). The prosecution could not have used either expert to testify on these topics to attack appellant's credibility. (*People v. Rodriguez, supra,* 20 Cal.4th at p. 10.) Moreover, because appellant was never asked (1) whether he was aware of the Mexican Mafia's reputation for violence; or (2) whether his reaction to the theft of his drugs was in part out of concern about retaliation from the Mexican Mafia, neither expert could have offered testimony on either of these subjects under the guise of impeachment. (*Id.*).

Similarly, respondent's contention that the expert testimony disputed appellant's assertion that he did not receive the drugs from a gang (RB 145) is mistaken. Neither Berry nor Valdemar testified that frantically searching for lost drugs is more consistent with having lost drugs supplied by a gang than simply having lost a large quantity of drugs. To bolster its contention, respondent only cites the prosecutor's closing argument in which she makes

this baseless connection between frantic searching and receiving drugs from a gang. (RB 145.) But, of course, the prosecutor's summation is not evidence and cannot justify the trial court's evidentiary ruling. (CALJIC 1.02.) There is nothing in the witnesses' testimonies or in any of the other evidence to suggest that frantic searching is not consistent with having lost drugs that were not supplied by a gang.

On the contrary, Berry's testimony demonstrates the opposite point – that appellant's frantic searching for his cocaine was as consistent with him receiving the cocaine from a non-gang source as from a gang. (See *ante* at pages 61-62.) Berry explicitly testified that any drug dealer, regardless of where he receives his drugs, can be substantially harmed by the theft of those drugs. Without any reference to the source of drugs, Berry testified that "if I was selling dope and I let you take my dope and just walk around in my face with it, then why should anybody else buy it when they can just take it and walk around in my face with it." (8 RT 975.) Later, again without any mention of receiving drugs from a gang, Berry testified that if someone "disrespects" a drug dealer by stealing his drugs, "you have to do something to stay in business. You have to basically do something to them. You have to influence them, make an example out of them or influence them not to do it or influence everyone else not to do what they did." (8 RT 986.)

Berry's testimony thus explains the serious consequences for a drug dealer of allowing someone to steal drugs. If the dealer does not recover those drugs and does not "make an example" of the thief, the dealer is likely to lose his drug business and faces an increased likelihood of having more drugs stolen from him. This testimony establishes that any drug dealer, regardless of the source of his drugs, has a reason to search frantically for

lost drugs to protect his business and reputation. Because appellant would have reason to frantically search for his drugs even if those drugs were not obtained from a gang, the testimonies of Berry and Valdemar on this point do not impeach appellant's contention that he did not obtain the drugs from a gang and thus are in no way relevant to his credibility.

Respondent also fails to address appellant's argument that the gang expert testimony was not relevant because there was an insufficient evidentiary link between the gang evidence and the issues at trial. Respondent simply asserts that "Meekey's testimony . . . provided the 'evidentiary link' that appellant obtained his narcotics from a gang." (RB 144.) Notably, respondent offers no response whatsoever to appellant's argument that Meekey's testimony was neither clear enough nor sufficient to support a reasonable inference that appellant was fronted the drugs from the Mexican Mafia, or any other gang. (See AOB 88-90.) Its silence on this key point suggests a tacit concession that Meekey's vague reference to appellant saying something about "Mafia associated" in relation to his drugs was simply too insubstantial to provide the evidentiary foundation necessary to make all the gang evidence, including that about the Mexican Mafia, probative of either of the bases respondent advances for its admission - motive and credibility. Indeed, respondent nowhere asserts that Meekey's testimony establishes that the cocaine appellant lost came from the Mexican Mafia, stating only that the testimony links appellant to "a gang." (See RB 144.)

As was the case at trial, the bulk of respondent's argument for admissibility of the gang evidence is based simply on appellant's admitted status as a gang member. The fact that appellant was an admitted member of the 18th Street gang does not give the prosecution license to present any

gang evidence that it wishes. That evidence must still follow the state evidentiary rules. In this case, the prosecution's gang expert testimony presented was not relevant, and the trial court abused its discretion by admitting it.

C. Regardless Of Whether Berry Is Called A "Narcotics" Expert Or A "Gang" Expert, He Was Asked To Testify About The Internal Operations Of Gangs, A Field In Which He Had No Expertise

Wilson Berry was not competent to testify as an expert witness about gang culture. Respondent does not even try to dispute this essential fact. (See RB 134-139.) Instead, respondent attempts to establish Berry's competence to testify by arguing that he was called as a drug expert, not a gang expert. (RB 134-39.) However, regardless of the title respondent gives to Berry, the fact remains that he testified about gang culture.

An expert's competence must be determined on the basis of his qualifications, the facts of the case, and the questions posed to him. (*People v. Davis* (1965) 62 Cal.2d 791, 801 (1965); *People v. King* (1968) 266 Cal.App.2d 437, 445 [expert's competence is "relative to the topic and fields of knowledge about which the person is asked to make a statement"].) In determining competence, "the field of expertise must be carefully distinguished and limited." (*Ibid.*)

Contrary to the State's characterization of Berry as a drug expert, the record shows that Berry was asked to testify about gangs – a field in which he has no expertise. Berry was asked how things are handled "if a dope seller gets a whole bunch of dope from his gang" and that dope is stolen. (8 RT 987.) In response, he explained how gang members react when drugs they have supplied to someone are stolen. He testified that "they are going to exert pressure on you," that "they want to know why didn't you do

anything to the person that took it from you," and that, if the dealer does not retaliate against the thief, "they're going to do something to you. . . . They're just not going to accept this as a loss . . ." (8 RT 987.) These statements go far beyond testimony about one aspect of the drug trade. Berry testified not only about the conduct of drug dealers who are supplied by a gang, but also about the conduct of higher-up gang members when they learn that drugs they have supplied are stolen. His testimony about the conduct of gang suppliers who are at least one step removed from the street drug trade in which Berry operates was clearly beyond his expertise. (See AOB 94-95.)

The cases cited by respondent do nothing to aid his argument, since they are not analogous to this case. (See RB 135-136, citing *People v. Doss* (1992) 4 Cal.App.4th 1585, 1595-96 [agent of the Bureau of Narcotics Enforcement was qualified to testify as an expert about pharmaceutical drugs]; *People ex rel Dept. of Public Works v. Alexander* (1963) 212 Cal.App.2d 84, 90-92 (1963) [business owner who had researched land and business values in the area was qualified to testify to the "highest and best use" of that area]; *State v. Espinoza* (Utah 1986) 723 P.2d 420, 421 [police officer who had worked for several years as an investigator, and had experience with "drug culture" prior to joining law enforcement, was qualified to testify as an expert about drug paraphernalia].) Both *Doss* and *Espinoza* concern the testimony of trained law enforcement agents, one of whom worked specifically in narcotics enforcement. These witnesses, who observed, regulated, and analyzed drug culture in a professional capacity, cannot be compared to Berry, whose only experience was using and selling drugs. On the contrary, the fact that Berry was a member of this subculture centered around mind-altering substances and frequently used drugs himself

suggests that he was incapable of providing an accurate and objective account of the practices of that culture. The witness in *Alexander*, although not a professional real estate agent, testified to conducting extensive investigation in the field in which he testified. There is no evidence that Berry's so-called expertise was based on any similar investigations into or analyses of drug culture.

The prosecutor's closing argument, which respondent cites at length, further belies the attempt to minimize the importance of the gang aspect of Berry's testimony. In each passage that respondent cites, the prosecutor discusses Berry's testimony about gang culture, underscoring that this was the main thrust of his testimony. (RB 137-138.) Respondent asserts that "the prosecutor spoke about the importance of 'accountability' to the gang if it is the source of the narcotics," and then cites a portion of the closing argument in which the prosecutor describes Berry's testimony. (RB 138, citing 11 RT 1342-43.) Respondent further cites the prosecutor's rebuttal, in which she states that "Berry testified about . . . what gang members do when their drugs are lost of stolen." (RB 138, citing 11 RT 1403.)

Respondent's further discussion of Berry's testimony demonstrates that Berry was called to testify about gang culture. In explaining the relevance of Berry's testimony, respondent argues that "the expert narcotics testimony of Berry, specifically concerning the repercussions when the source of a seller's narcotics is a gang, was relevant . . . because it showed appellant's motive for the instant crimes." (RB 144). Additionally, respondent contends that Berry's testimony was relevant because it attacked appellant's credibility by showing that his frantic search for drugs was "more consistent with having been supplied the cocaine by a gang." (RB 144-45.) In this way, respondent's own argument concerning relevance

reveals that the key portion of Berry's testimony was about gangs.

Regardless of the title respondent gives to Berry, the trial record and respondent's own appellate argument make clear that Berry was called to give an expert opinion about gang culture. Because Berry was not competent to testify about this field, the trial court abused its discretion in admitting his testimony.

D. Berry's Testimony About The Internal Operation Of Gangs Was Cumulative Of Other Less Prejudicial Evidence, While Sergeant Valdemar's Testimony Was Far More Prejudicial Than Probative

Respondent contends that the testimonies of Berry and Sergeant Valdemar were not cumulative and were more probative than prejudicial. Respondent's argument is flawed, as the probative value of each witness was outweighed by the prejudicial impact of their testimony. Regardless of the nomenclature assigned to witness Berry (see section C, *ante*), Berry's testimony focused on gang culture, and was cumulative of the less prejudicial testimony that all drug dealers retaliate for the theft of their drugs. Even if this Court were to accept respondent's argument that Sergeant Valdemar's testimony was not cumulative because it went to motive for killing in a particularly gruesome manner (RB 146), the trial court nevertheless erred in admitting it because its prejudicial effect far outweighed its probative value.

Respondent disputes neither that Sergeant Valdemar presented extensive and highly inflammatory evidence about the Mexican Mafia, nor that appellant, although a member of the 18th Street gang, was not a member of the Mexican Mafia. As appellant detailed in his opening brief, the Mexican Mafia evidence was substantial and prejudicial and entirely

tangential to any valid evidentiary reason to admit gang expert testimony. (AOB 97-101.) This evidence included repeated references to the Mexican Mafia's use of sexual degradation and rape as a means of retaliation and to other violent behavior described in the fictional movie, American Me. Respondent attempts to justify the admission of the Mexican Mafia evidence with one statement: "it explained to the jury the gangs' perceptions of disrespect, humiliation, and 'saving face,' which was important in this case given the way the victims were strangled and killed with cords." (RB 147.) The State's justification rests on a provocative theory: all gangs are interchangeable, and the violent misdeeds of one gang may be introduced against any member of any other gang. Even more radical, under the State's theory, any killing by strangulation (or other "gruesome" method) suggests that the murder may be gang-related and opens the door to expert testimony not just about gangs in general, but about the Mexican Mafia in particular. This type of prosecutorial smear campaign cannot be what Evidence Code section 352 permits.[18]

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[18] The two cases cited by respondent in support of this argument do not justify the admission of Valdemar's testimony. (See RB 146.) In *People v. Martinez* (2003) 113 Cal.App.4th 400, 413, the court held that evidence of how gangs treat a member who testifies against the gang was relevant to explain a witness's reluctance to testify, and that the probative value outweighed the prejudicial impact. In *People v. Funes*, *supra*, 23 Cal.App.4th at p. 1519, the court held that evidence of prior conflict between two gangs was admissible to explain appellant's motive for retaliation against another gang, and that the probative value outweighed the prejudicial impact. However, the fact that some prejudicial gang evidence is admissible does not imply that all prejudicial gang evidence is admissible. In *Martinez* and *Funes* the expert testimonies were far more probative than, and not nearly as prejudicial as that of Sergeant Valdemar.

The prejudicial impact of Sergeant Valdemar's highly inflammatory and detailed testimony about the gruesome, sexualized practices of the Mexican Mafia also greatly outweighed the minimal probative value of this testimony. In response to the Deputy District Attorney's initial hypothetical seeking to show that the manner of murder and condition of the bodies evinced gang involvement, Valdemar's response provides, at best, a loose and unsupportable connection between the manner of death and gang membership. He testified that "there might be other reasons" that would explain pulling down the victim's pants, such as looking for valuables that may be hidden in the rectal stash. (8 RT 1021.) His testimony itself, thus, casts doubt on the prosecution's theory that the manner in which the victims were killed in this case is consistent with the practices of gang members, and limits the probative value of the testimony.

Moreover, the government's own investigation negates that these crimes involved sexual degradation. Detective Russell Long, the lead investigator in this case and the prosecution's own witness, testified that although he observed a dildo at the crime scene, he made the decision not to fingerprint it because there were over 2,000 items in the room, and he had to be selective about which items he would fingerprint. (8 RT 934.) The clear inference is that based on the Detective's observation of the crime scene, and familiarity with the investigation, he did not believe that the dildo was relevant to the crime or the investigation. Any testimony by Sergeant Valdemar regarding the sexual degradation practiced by the Mexican Mafia only served to prejudice the jury against appellant as an admitted gang member; it had no probative value in explaining the nature of the crime. The negligible probative value of Sergeant Valdemar's testimony is thus completely outweighed by its significant prejudicial effect, as

elaborated in appellant's opening brief. (AOB 98-99.)

Respondent attempts to dispute appellant's argument that this highly prejudicial evidence was the cornerstone of the prosecution's case (see AOB 99-100) by quoting a single sentence from the rebuttal of the prosecutor's closing argument (RB 147). However, an examination of the prosecutor's entire closing argument reveals that much of it was devoted to a discussion of gang evidence. In the closing argument in the guilt phase alone, the prosecutor mentioned the word "gang" a total of forty-two times in forty three pages of argument; and mentioned the Mexican Mafia an additional three times. In her closing in the penalty phase of the trial, the prosecutor mentioned "gang" three more times and made another reference to the Mexican Mafia. The prosecutor's own words to the jury plainly belie the State's attempt on appeal to downplay the centrality of the gang evidence to its case.

Because Berry's testimony was cumulative of less prejudicial evidence and Sergeant Valdemar's testimony was far more prejudicial than probative, the trial court abused its discretion in admitting this evidence. By allowing this testimony to be heard, the trial court permitted the jury to judge appellant based not on the evidence, but on his status as a gang member and on the violent conduct of members of a gang to which he did not belong.

E. Reversal Is Required Because The Erroneous Admission Of Berry's And Valdemar's Testimonies Resulted In A Miscarriage of Justice And A Fundamentally Unfair Trial

The trial court's error in admitting the irrelevant and inherently prejudicial gang testimony not only violated state law, but resulted in a a miscarriage of justice under article VI, section 13 of the State Constitution

and rendered appellant's trial fundamentally unfair in violation of the due process clause of the Fourteenth Amendment to the federal Constitution. Similarly, respondent's claim that the error was harmless under any standard misunderstands the facts of this case. Whether analyzed as state law or federal constitutional error, the erroneous admission of the gang expert testimony was prejudicial.

Once again what respondent does *not* argue indicates that the introduction of the irrelevant and highly prejudicial gang evidence rendered the trial fundamentally unfair. Respondent does not dispute that the admitted testimony was highly emotionally charged. (RB 150-152.) Indeed, respondent simply evades appellant's assertions that the expert gang testimony pervaded the prosecution's case and that the prosecutor exploited this highly emotional evidence and the jury's fear of gangs in her closing argument. (Compare AOB 104-105 with RB 150-152.) Respondent attempts to gloss over the prosecutor's pervasive reliance the gang evidence by citing one line from the closing argument, but fails to address the balance of the argument. (See RB 152.)

As to the question of prejudice, respondent does not dispute that, absent the gang expert testimony, the case against appellant relied on four things: (1) the only physical evidence, two fingerprints found at the crime scene, which were as consistent with appellant's exculpatory explanation as the prosecution's inculpatory theory (AOB 67, RB 113-114); (2) appellant's access to cutting tools and wires, none of which were ever linked to the crime scene (AOB 67-68; RB 112); (3) appellant's ransacking of George McPherson's room in the days preceding the murders, as he searched for his drugs (AOB 68, RB 109); and (4) the often contradictory testimony of admitted long time crack cocaine users: Donte Vashaun, who admitted to

smoking crack cocaine every day as well as many other drugs at the time of the crime, and whose testimony was riddled with inconsistencies, particularly as to his discovery of the victims (AOB 7; RB 111); Darlene Miller, admitted heavy user of crack cocaine, who frequently experienced paranoid delusions as a result of her substance abuse, and who gave conflicting accounts as to her interactions with appellant. (AOB 9, 14; RB 109-110); and Donna Meekey, who admitted to smoking crack cocaine and drinking with appellant over an approximately twenty hour period (RB 112). Respondent's characterization of the case against appellant as "strong" (RB 150) should be rejected, given the paucity and questionable quality of the evidence linking appellant to the crimes.

Finally, this Court should reject respondent's argument that any prejudice from the improper introduction of the irrelevant and inflammatory gang testimony was rendered harmless by the jury's receipt of instructions regarding the evaluation of expert testimony. (RB 151-152.) These instructions defining expert and lay opinion testimony as well as hypothetical questions and giving the jury discretion to accept or reject opinion testimony, did nothing to undercut the irrelevant but inflammatory nature of the erroneously admitted evidence. (*People v. Matteson* (1964) 61 Cal.2d 466, 469-470 [admission of incompetent evidence cannot be cured by striking it and instructing the jury to disregard it when it goes to a main issue of the case and when other evidence of guilt is not clear and convincing].)

The erroneous admission of the irrelevant and highly prejudicial gang expert testimony resulted in a miscarriage of justice and rendered the trial fundamentally unfair. This evidence encouraged the jury to convict appellant based on who the prosecution purported he was and with whom

he purportedly associated, rather than what the prosecution was able to prove he had done. Whether judged under the state miscarriage of justice standard (*People v. Watson, supra,* 46 Cal.2d 818, 835-837) or the federal harmless error standard (*Chapman v. California, supra*, 386 U.S. 18, 24) reversal is required.

F. The Claim Is Not Forfeited

Respondent's suggestion that this claim has been forfeited is wrong and misunderstands this Court's application of its holding in *People v. Partida* (2005) 37 Cal.4th 428. Respondent mistakenly argues that *Partida* does not apply in this case because the scope of the complained of constitutional error exceeds the issues raised by appellant's objections at trial. (RB 148.) In *Partida*, this Court held that where a defendant's objection sufficiently alerted the trial court to the nature of his federal constitutional claim, he may raise that claim on appeal. (*People v. Partida, supra,* 37 Cal.4th at p. 433; AOB 102, fn. 29.) This Court has applied *Partida*, and found no forfeiture, in those instances in which

> the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as it was wrong for the reasons actually presented to that court, had the additional *legal consequence* of violating the Constitution. To that extent, defendant's new constitutional arguments are not forfeited on appeal.

(*People v. Boyer* (2006) 38 Cal.4th 412, 441 fn. 17, original italics [on appeal defendant could raise allegations that trial court error violated his Fourteenth Amendment right to due process, Sixth Amendment right to jury trial and to present a defense and Eighth Amendment right to a reliable determination of guilt because resolution of these claims did not involve facts or legal standards different from those raised by defendant's objection

to trial court's use of law of the case doctrine to preclude defendant from relitigating suppression motion based on new evidence]; accord, *People v. Halvorsen* (2007) 42 Cal.4th 379, 407-408 [objection at trial to improper question in violation of Penal Code section 29 and refusal to reinstruct jury did not forfeit claim that error "infringed various of his constitutional rights to a fair and reliable trial" as the new arguments add legal consequences to the same error complained of at trial.]; *People v. Albarran* (2007) 149 Cal.App.4th 214, 229-230 [defendant's claim on appeal that introduction of gang evidence violated right to due process and rendered trial fundamentally unfair is not forfeited, as it is subsumed within the 352 objection lodged at trial].)

Here, counsel's Evidence Code section 352 objection at trial, and the corresponding analysis engaged in by the trial court, mirror the analysis necessary to determine appellant's fundamental fairness argument: that the challenged evidence had limited or no probative value, was highly prejudicial, pervaded the prosecution's case, and the evidence against appellant was solely circumstantial and not weighty. (AOB 101-102; *McKinney v. Rees* (9th Cir. 1995) 993 F.2d 1378, 1382-1385.) The claim is not forfeited

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IV

THE TRIAL COURT'S EXCLUSION OF RELEVANT EVIDENCE THAT WOULD HAVE RAISED A REASONABLE DOUBT IN THE MINDS OF THE JURORS AS TO APPELLANT'S GUILT DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL AND TO PRESENT A DEFENSE AND REQUIRES REVERSAL

In his opening brief, appellant showed that the trial courtly improperly excluded evidence that impeached and contradicted the prosecution's theory of appellant's guilt. The excluded evidence would have shown (1) that a day or two prior to the murders, Donte Vashaun severely beat Donna Meekey and left her naked in room 416 because she would not cooperate in his scheme to steal the cocaine he believed had been returned to appellant (see AOB 114-115) and (2) that appellant was angry at Harding not over the theft of his cocaine, but over his failure to prevent Vashuan's brutality toward Meekey (see AOB 124-125.) Respondent argues that the trial court's exclusion of the proffered third party culpability evidence regarding witness Donte Vashaun was proper, because the proffered testimony was evidence only of "mere motive or opportunity" which, without more, "is not sufficient to raise a reasonable doubt about a defendant's guilt." (RB 171.) Respondent then baldly asserts that the inadmissibility of the evidence of Vashaun's beating of Meekey renders inadmissible the testimony of appellant as to the true basis for his anger at Fontain, because the evidence is "linked." (RB 177.) Respondent's arguments misstate appellant's claim, the facts of the case, and the relevant law, and should be rejected.

A. The Excluded Evidence Of Donte Vashaun's Beating Of Donna Meekey Was Relevant To The Disputed Issues Of Motive And Identity, And Its Exclusion Was Erroneous And Prejudicial

Respondent elsewhere concedes that evidence of appellant's alleged motive for the crimes was central to the prosecution's case. (RB 142-143.) Here, however, respondent tries to avoid the implications of that concession which support the relevance of appellant's proffer showing Donte Vashaun's motive and opportunity and linking him to the murders of which appellant was convicted. Respondent's argument is notable for its omissions. Respondent fails to address appellant's arguments that (1) given the specific facts of this case, appellant's proffer provided circumstantial evidence linking Vashaun to the actual perpetration of the crime as required under *People v. Hall* (1986) 41 Cal.3d 826, 833 and (2) the trial court compounded its initial error by failing to reconsider its ruling in light of new evidence that was revealed as the trial progressed. (Compare AOB 116-118 with RB 167-173.) Respondent's omissions should reasonably be understood as concessions that the trial court erred in excluding appellant's third party culpability evidence. (*Akins v. State* (1998) 61 Cal.App.4th 1, 18, fn. 10 [failure by defendant in its opening brief to address plaintiff's argument that judgment was based on federal constitution is a concession of the issue].)

Misstating both the record and appellant's argument, respondent attempts to dismiss appellant's proffer as evidence of a motive shared by "almost everybody at the Pacific Grand Hotel, including Vashaun" (RB 167) and evidence of opportunity showing only that Vashaun was present at the Pacific Grand Hotel at the time of the murders (RB 169). On the contrary, the proffered evidence was admissible because: first, it identified a

particular individual, Donte Vashaun, with a specific motive, rather than a theoretical motive on the part of someone else and linked him by his own violent act to the murders (AOB 116, citing *People v. Hall, supra,* 41 Cal.3d at p. 833; *People v. Sandoval* (1992) 4 Cal.4th 155, 176); second, it was temporally and physically close to the underlying murder (AOB 117, citing *People v. Mendez* (1924) 19 Cal 53; *People v. Robinson* (2005) 37 Cal.4th 592, 624); and third, it involved the very same cocaine that, according to respondent, provided the underlying motivation for the murders in this case. (AOB 116, citing *People v. Avila* (2006) 38 Cal.4th 491, 578; *People v. Harris* (2005) 37 Cal.4th 310, 340.)

Respondent misstates the record as to the proffered evidence, maintaining that because the Pacific Grand Hotel was filled with drug dealers and users, they all had the same motive as Vashaun to kill Harding and Fontain in the hopes of gaining for themselves the remainder of appellant's stolen narcotics. (RB 168-169.) To be sure, if the proffer had been only that because Vashaun was a drug dealer and user, he had a motive to kill Harding to steal the drugs, this would not have been sufficient to create a reasonable doubt as to appellant's guilt. (*People v. Hall, supra,* 41 Cal.3d at p. 833.) However, as shown above and in the AOB, appellant's evidence established more than motive. His proffer linked Vashaun to the commission of the murders through his own violent act, which focused on the same drugs that the prosecution insisted were the motivation for the murders and occurred in the same place as, and close in time to, the murders. It is precisely Vashuan's conduct – the beating of Donna Meekey – that was the subject of the proffer and distinguishes him from all the other users and/or sellers at the Pacific Grand Hotel, who, as respondent correctly notes, also may have had some motive to commit these murders.

Respondent also mischaracterizes the proffered evidence as focusing on Vashaun's attempted theft from appellant, rather than his brutal beating of Meekey. (RB 172; ["to make the leap from theft to murder is speculative and, on this record, unsupported by the facts."] As defense counsel's proffer and appellant's opening brief make abundantly clear, the evidence was not offered to show Vashaun's prior intent to steal the drugs, but to show that in the hours preceding the murders, Vashaun was willing to use extreme violence in order to obtain the drugs. (AOB 108.) Contrary to respondent's assertions, the brutality that Vashaun evinced in beating Meekey was not a far leap from the murders of Harding and Jackson. (RB 172.)

The cases cited by respondent to support the exclusion of the evidence are clearly distinguishable from the facts in this case. (RB 172-172.) Indeed, these cases explicate the rule that closeness in time and proximity to the underlying offense, specificity of a particular individual and motive, and commonality between the proffered conduct and the underlying crime are all circumstantial evidence linking a third party to the actual perpetration of the crime. (*People v. Geier* (2007) 41 Cal.4th 555, 582; [trial court properly excluded evidence that third party had been with the victim the night of her murder, as the evidence showed only that a third party had the opportunity to commit the crimes, but was not evidence of motive and provided nothing to connect that person to the actual commission of the crimes]; *People v. Guttierez* (2002) 28 Cal.4th 1083, 1137 [trial court properly excluded evidence of a third party's motive and possible opportunity to commit the murders, because it did not link a third party to the victim in the time prior to her death]; *People v. Kaurish* (1990) 52 Cal.3d 648, 685 [trial court properly excluded evidence that a third party

had a motive to be angry with the victim as the result of an incident that occurred weeks before the murder, because it did not sufficiently link a third party to the crime]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1018 [trial court properly excluded evidence that victim was a narcotics dealer, because at most it showed only a possible motive, but did not identify a possible suspect or link a specific person to the crime].) The clear teaching of these decisions is that where, as here, there is evidence that another person had motive, capacity and opportunity to commit the crime and also was closely connected in time and location to the actual perpetration of the crime, the third-party culpability evidence should be admitted.

Respondent further fails to address appellant's argument that the trial court not only failed to consider the facts of the proffered evidence, but also applied the wrong legal standard. (AOB 118-121.) Respondent concedes that in ruling on the admissibility of the proffered evidence, the trial court relied on the strength of the prosecution's evidence. (RB 156). This was error. As appellant has explained, in so doing, the trial court required appellant to make a higher showing than mere relevance, insisting instead that the proffered evidence present "substantial proof of a probability of another's guilt." (*People v. Hall, supra,* 41 Cal.3d at p. 833; AOB 118.) This ruling violated state law, and requires reversal. (*People v. Robinson* (2005) 37 Cal.4th 592, 626, fn 17 [under California rule, admissibility of third party culpability evidence is not evaluated based on the strength of the prosecution's case].) Respondent offers no answer to this argument which suggests a tacit admission of error.

In addition, respondent fails to address adequately appellant's argument that the trial court's exclusion of the proffered evidence violated appellant's right to present a defense as articulated by the Supreme Court's

holding in *Holmes v. South Carolina* (2006) 547 U.S. 319. (AOB 119-121.) The fact that the South Carolina rule regarding the admissibility of third party evidence at issue in *Holmes* was "'very restrictive'" (RB 175) does not answer the claim presented here. The dispositive question is not whether the California rule is more or less restrictive than that addressed in *Holmes*, but whether the trial court's ruling to exclude third party culpability evidence, which was premised in part on the strength of the prosecution's proof, denied appellant his federal constitutional right to a meaningful opportunity to present a complete defense. (See AOB 120.) Respondent nowhere explains why this is not so and why the trial court's ruling did not, factually and legally, infringe on appellant's Sixth and Fourteenth Amendment rights to present a defense.[19]

As shown in the AOB and above, the trial court's exclusion of the Vashaun evidence violated both state law and the federal Constitution.

B. The Trial Court Abused Its Discretion In Excluding Appellant's Testimony As To The Basis For His Anger At Fontain Because This Evidence Would Have Called Into Question The Prosecution's Theory Of The Case

In his opening brief, appellant demonstrated that the trial court erroneously excluded appellant's testimony that he was angry at Fontain not for the theft of his drugs, but because Fontain had allowed Meekey to be

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[19] As appellant has argued, the trial court violated *Hall* by excluding his proffered third party culpability evidence. Contrary to respondent's apparent suggestion (RB 175), the High Court's reference to *People v. Hall, supra*, 41 Cal.3d at p. 833 in *Holmes,* amid a footnoted string citation to 24 states' decisions, did not give a constitutional seal-of-approval to California's third party culpability rule and does not render the trial court's ruling in this case immune from constitutional challenge. (See *Holmes v. South Carolina, supra*, 347 U.S. at p. 327.)

brutally beaten by Vashaun and that his testimony would have called into question the major thrust of the prosecution's case. (AOB 124-127.) The prosecution's theory was that appellant committed the murders to exact revenge for the theft of his drugs, which somehow were connected to appellant's gang membership. In support of this theory, the prosecution emphasized repeatedly that appellant was angry because he had been disrespected as a gang member and, thus, had to exact revenge. (AOB 125; 11 RT 1139, 1340, 1341, 1343, 1349.) The exclusion of appellant's evidence as to an alternate theory for his anger denied him an opportunity to counter the prosecution's proof on the substantial, disputed issue of motive. Appellant has shown this error violated both state law and the federal Consitution because it excluded relevant evidence, arbitrarily restricted his testimony, and deprived him the opportunity to be heard on a central issue in the case. (AOB 127.)

Respondent does not respond to any of appellant's arguments regarding this error. Instead, respondent baldly asserts that because the trial court did not abuse its discretion in excluding the third party culpability evidence regarding Donte Vashaun, it also did not err in excluding evidence that appellant's anger was based on Harding's failure to prevent the beating. (RB 177.) Respondent cites no authority for this proposition. Even if this Court were to find the evidence regarding Vashaun's beating of Meekey was not admissible as third party culpability evidence, such a ruling would not preclude the admissibility of the same evidence as proving the basis of appellant's anger at Harding. (*Ault v. International Harvester Co.* (1974) 13 Cal.3d 113, 121-122 [evidence excluded under statutory scheme may be admissible to impeach the testimony of a witness]; *Daggett v. Atchison, T. & S. F. Ry. Co.* (1957) 48 Cal.2d 655, 665 ["[t]he rule is well settled that if

evidence is admissible for any purpose it must be received, even though it may be highly improper for another purpose"]; *Norton v. Superior Court* (1994) 24 Cal.App.4th 1750, 1760 [evidence excluded under the collateral source rule may be admitted for some other purpose].) In lieu of any legal analysis, respondent simply rehashes at length the evidence showing that appellant was angry at Harding and supporting the prosecution's theory of why appellant was angry. (RB 177-179.) Respondent is knocking at an open door: there is no dispute that there was prosecution evidence on both points. The question is whether appellant was entitled to refute this evidence with his own explanation of the reason for his anger, and on this issue respondent is silent. This Court should deem respondent's failure to address respondent's arguments as a concession of error. (*Akins v. State*, *supra*, 61 Cal.App.4th at p. 18, fn. 10.)

C. The Erroneous Exclusion Of Evidence Was Prejudicial

Appellant has shown that whether considered singly or together, the exclusion of the third party culpability evidence about Vashaun and the exclusion of appellant's own testimony about the reason for his anger at Harding harmed his chances for an acquittal or hung jury. (AOB 129-138.) Respondent counters this showing of prejudice with bald but unsupported assertions. As a preliminary matter, respondent's contention that there was strong evidence of appellant's guilt (RB 176) overstates the record. (See AOB 129-138.) In addition, respondent's argument that defense counsel was able to argue to the jury that others at the hotel possessed a motive to commit these murders (RB 176-177) has two blatant deficiencies. First, it is axiomatic that counsel's argument is no substitute for evidence. (CALJIC 1.02; *People v. Stankewitz* (1990) 51 Cal.3d 72, 102 [counsel may not argue facts or conclusions that are unsupported by the evidence].)

Second, respondent ignores the plain fact that the prosecutor's response to the defense closing argument augmented the prejudicial effect of the erroneous exclusion of the evidence. As appellant has argued, in her rebuttal argument the prosecutor repeatedly emphasized that the defense had failed to present evidence that anyone other than the defendant had the motive, means or opportunity to commit these murders. (AOB 131-132.)

The prosecutor's repeated assertion of this failure to present any third party culpability evidence, coupled with her repeated assertions of the importance of appellant's anger as a gang member for the theft of his drugs, establishes that the error was prejudicial. Once again, respondent avoids responding to the crux of appellant's claim, underscoring by this omission the strength of appellant's argument.

D. None Of Appellant's Federal Constitutional Claims Is Forfeited

Contrary to respondent's assertion (RB 164), trial counsel's objections to the trial court's rulings preserved all of appellant's federal constitutional claims. (See AOB 109-114.) During the trial proceedings, defense counsel repeatedly objected to the court's exclusion of the evidence on the basis that it denied the opportunity to present a defense (5 RT 536 [counsel argues for admissibility of evidence as it shows that parties other than appellant had motivation to kill Harding]; 10 RT 1291 [counsel argues for admissibility of evidence as it shows that appellant's anger was not motivated by a desire for drugs, but at Harding allowing Meekey to be beaten by Vashaun].) Counsel complained that the trial court's ruling denied appellant the right to fully cross examine witnesses. (6 RT 689 [counsel objects that trial court's ruling denies the right to cross examine].) Finally, counsel attempted to object to the court's ruling preventing

appellant from testifying as to the reason for his anger, but was told by the court that the ruling was "the end of the issue." (10 RT 1294.) This record establishes that trial counsel's repeated objections to the exclusion of this evidence put the trial court on notice that the erroneous exclusion of this evidence implicated appellant's right to testify on his own behalf, to present a defense, present relevant evidence, and his right to reliable sentencing.

Respondent's characterization of the claims in appellant's motion for a new trial as asserting a limited federal constitutional objection is also flawed. (RB 164.) The motion clearly asserted as a grounds for granting a new trial that "the Court denied the defendant the right to present evidence that the People's witness Donte Vashaun, had a motive to kill the victims." (X CT 3112; *People v. DePriest* (2007) 42 Cal.4th 1, 42 [defense counsel's mention of alternate theories in support of presentation of third party culpability evidence preserves issue for appeal].)

* * *

The exclusion of appellant's proffered evidence was prejudicial error, violating both state law governing the exclusion of relevant evidence and appellant's federal constitutional guarantee of the right to a fair trial, including the right to testify on his own behalf, present a defense, present relevant evidence, and the right to reliable sentencing.

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V

THE COURT ERRED IN ADMITTING SPECULATIVE AND IRRELEVANT EXPERT TESTIMONY THAT UNREADABLE FINGERPRINTS AT THE MURDER SCENE MIGHT POSSIBLY BELONG TO APPELLANT

Appellant has shown that the speculative testimony of expert witness Wendy Cleveland that it was "possible" that three unreadable latent prints recovered from the crime scene belonged to appellant was both improper expert testimony and irrelevant and should have been excluded. (AOB 139-145.) Respondent does not contest that the testimony was outside the scope of proper expert testimony. (See RB 190.) Respondent maintains, however, that the evidence was not irrelevant, because it contested a defense argument that the police investigation into the murders was "sloppy." (RB 189-190.) Respondent also argues that the claim is forfeited and that any error was harmless. (RB 186, 190.) These arguments should be rejected.[20]

Respondent's argument as to the admissibility of the evidence is

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[20] Although respondent does not contest that Cleveland's testimony was improper, it does cite two cases, *People v. Gonzalez* (2006) 38 Cal.4th 932 and *People v. Mickey* (1991) 54 Cal.3d 612. Both support appellant's position that the court should have excluded Cleveland's testimony. In *Gonzalez,* this Court noted that in determining whether an expert's opinion was properly admitted, the reviewing court should evaluate whether the sum of the information relied upon by the expert was reliable. (*People v. Gonzalez, supra,* 38 Cal.4th at p. 944.) In *Mickey*, this Court reasoned that in order to be admissible, the information upon which an expert bases his or her opinion must be reasonably reliable and of the type relied upon by others in the field. (*People v. Mickey, supra,* 54 Cal.3d at p. 688.) As appellant has shown, Cleveland's testimony regarding the three unreadable prints was based entirely on unreliable evidence, was precisely not the type of evidence permitted to be relied upon by experts in the field, and thus should have been excluded. (AOB 140-144.)

simply wrong. As appellant has shown, the law is clear that evidence which is purely speculative, as Cleveland's testimony was, is not relevant because it can not have a "tendency in reason to prove or disprove any disputed fact which is of consequence to the determination of the action." (Evid. Code, § 210; see AOB 144.) Respondent does not explain, or cite any legal authority for, its novel proposition that speculative testimony, which by its nature is not relevant, becomes relevant when it purportedly contests an aspect of an adversary's argument. First, the admissibility of evidence is based on the state of the record at the time of its proffer, and is not controlled by counsel's subsequent argument. (*People v. Harrison* (2005) 35 Cal.4th 208, 230 [improper argument does not defeat relevance of evidence at the time of its proffer to show identity].) Second, Cleveland's speculations linking unreadable prints to appellant does not counter the argument that the police work was shoddy. Finally, even if the evidence had some possible relevance, the testimony should have been excluded because it was improper expert testimony, a point respondent does not contest. (AOB 139-144; RB 190.)

Respondent's argument that regardless of any error, the introduction of the evidence was not prejudicial fails to address both the particularly inculpatory nature of the three unreadable prints and the extent to which the prosecution relied upon this evidence in closing argument. (See AOB 146-148; RB 190.) As appellant has shown, Cleveland's testimony was highly prejudicial because in its closing argument, the prosecution relied upon her speculation as the sole physical link between appellant and the murder weapon. (AOB 147.)

Finally, contrary to respondent's argument, this claim is not forfeited. (RB 187-188.) Respondent's argument is based on a

misinterpretation of the record and a misunderstanding of the law. Respondent does not contest that trial counsel objected to Cleveland's testimony regarding the unreadable prints, or that the objection alerted the trial court to the speculative nature of the evidence. Rather, respondent asserts the claim is forfeited because trial counsel's objection failed to refer to Evidence Code, sections 210 and 801(b) or mention "expert opinion" or "relevance," and because the objection was only to the form of a question. (RB 187-188.)

First, this Court has never asserted a "magic words" test in its evaluation of forfeiture. As this Court has stated, "[e]vidence Code section 353 does not exalt form over substance. No particular form of objection or motion is required; it is sufficient that the presentation contain a request to exclude specific evidence on the specific legal ground urged on appeal." (*People v. Morris* (1991) 53 Cal.3d 152, 187.) It is only when the objection interposed at trial does not alert the trial court to the nature of the error, and thus does not allow the trial court to correct the error, that the claim is forfeited. (*Ibid.*) Although trial counsel's objection that "anything is possible" was perhaps not the most artful, it clearly alerted the trial court to the speculative nature of the testimony. In short, the objection met the longstanding rule that "[t]he party, as the authorities say, must lay his finger on the point of his objection to the admission or exclusion of evidence." (*Kiler v. Kimbal* (1858) 10 Cal. 267, 268.)

Trial counsel's statement that "anything is possible" clearly alerted the court that the complained of testimony was speculative and should have been excluded. As appellant has shown, speculative expert testimony is excluded precisely because it is irrelevant. (AOB 143-144.) Therefore, respondent's argument that appellant's relevance argument was forfeited is

mistaken because his objection to speculative evidence, by necessity, included an objection based on relevance.

The cases cited by respondent do not support its forfeiture argument. In *People v. Gonzalez, supra*, 38 Cal.4th 932, defendant asserted that the trial court both abused its discretion in allowing the expert witness to make unqualified assertions about how gang members would behave and erred in denying a defense motion to strike the expert witness testimony as unreliable. (*Id.* at pp. 944-949.) This Court ruled that trial counsel's prior statement to the court that it would not attack the qualifications of the witness forfeited any issue regarding qualifications of the witness, particularly when an insufficient record was laid as to the witnesses' qualifications. (*Id.* at p. 948.) However, this Court rejected respondent's argument that the objection as to the error in allowing introduction of unqualified assertions by the witness was forfeited by the failure to state a particular word. (*Id.* at p. 945.) This Court reasoned that when trial counsel's "many objections" made "reasonably clear" that he was objecting on the grounds stated in the appeal, the claim is not forfeited. (*Ibid.*)

Respondent's argument does not get any more support from *People v. Farnam* (2002) 28 Cal.4th 107, in which this Court reasoned that defendant's in limine motion, which challenged the relevance of the proffered evidence and its admissibility under *Kelly/Frye*, failed to preserve his unrelated claims that the evidence was introduced without proper authentication and was more prejudicial than probative. (*Id.* at p. 159.) Here, appellant's objections to the introduction of the speculative and irrelevant testimony were consistent from trial through this appeal.

Finally, because trial counsel's objection alerted the court to the problem with Cleveland's speculative testimony regarding the three

unreadable prints, counsel's preface to the objection with the term "form of the question" is of no import and does not require forfeiture. The critical issue is not the niceties of the language employed, but whether counsel's objection alerted the trial court to the problem thus allowing an opportunity to correct the error. (*People v. Morris*, *supra*, 53 Cal.3d at p. 187.) Here, appellant's trial objections sufficiently alerted the trial court to the nature of his federal constitutional claim, so they are not forfeited. (*People v. Partida, supra,* 37 Cal.4th at p. 433.) This Court has applied *Partida*, and found no forfeiture, in those instances in which

> the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as it was wrong for the reasons actually presented to that court, had the additional *legal consequence* of violating the Constitution. To that extent, defendant's new constitutional arguments are not forfeited on appeal.

(*People v. Boyer* (2006) 38 Cal.4th 412, 441 fn. 17, original italics.)

For all these reasons as well as those presented in the AOB, this Court should find that the trial court prejudicially erred in admitting Wendy Cleveland's speculation that three unreadable fingerprints could have belonged to appellant.

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VI

THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT IT COULD DRAW ADVERSE INFERENCES FROM APPELLANT'S FAILURE TO EXPLAIN OR DENY EVIDENCE AGAINST HIM WAS PREJUDICIAL ERROR

Appellant has explained that the trial court erroneously instructed the jury pursuant to CALJIC No. 2.62 because there were no prosecution facts or evidence within appellant's knowledge that he failed to explain or deny. (AOB 148-153.) Respondent counters that the contested instruction was properly given because appellant denied that (1) he knew how the 18th Street gang conducted drug sales in the downtown area and (2) he knew that stealing drugs from his connection, Augie, put him in great danger. (RB 195-196.) Respondent's argument mistakenly focuses on small excerpts pulled from appellant's extensive testimony and, as a result, distorts the import of what appellant said. When appellant's testimony is viewed in its entirety, it is clear that he did not fail to explain the prosecution's evidence, and consequently it was error to instruct the jury with CALJIC No. 2.62.

Contrary to respondent's contention, appellant did not simply deny that he knew how the 18th Street gang conducted drug sales in the downtown area. On this subject, appellant testified that:

- he became a member of the 18th Street gang when he was 14 or 15 years old and was living on the streets in the downtown area of Los Angeles (9 RT 1097, 1204);
- as an 18th Street gang member he engaged in gang related violence but was not involved with drug sales (9 RT 1099);
- he knew the areas of Los Angeles where the 18th Street gang controlled drug sales (9 RT 1179), but was not familiar with how the 18th Street gang handled drug sales (9 RT 1180), although

based on his experience with the gang, he agreed with Sgt. Valdemar's characterization of how the 18th Street gang handled drug sales in the areas they controlled (9 RT 1108-1109);

- because the area around 4th and Spring Streets was not controlled by the 18th Street gang, he did have any knowledge as to how sales were handled, or how the gang that controlled the area handled drug sales (9 RT 1180-1181, 10 RT 1319); and
- the only time he ever was involved in the sale of drugs was in the days immediately preceding the murders (9 RT 1197, 10 RT 1220, 1288), and his plan was to sell the drugs, get what money he could, and get out of town (9 RT 1103, 10 RT 1288).

The district attorney did not offer any evidence of any prior convictions or conduct related to narcotics sales to contradict appellant's assertions that he had not been involved with drug sales prior to these instances. Given the state of the evidence, it is not reasonable to find that appellant failed to explain information within his knowledge. Moreover, a careful examination of the testimony respondent cites evinces that appellant was focused not on denying knowledge about 18th Street gang practices, but on asserting that 4th and Spring Streets, the location of the Pacific Grand Hotel, was not within 18th Street gang territory. (9 RT 1179-1181, 10 RT 1319.)

Respondent also incorrectly asserts that appellant denied that he knew stealing drugs from his connection, Augie, put him in great danger. A review of the entirety of appellant's testimony shows that he testified that:

- he stole the drugs from his "connection" Augie (9 RT 1103, 1205, 10 RT 1221) during a cocaine binge that began a week and a half after getting out of prison (9 RT 1208, 10 RT 1222);

• at that time he was willing to get the cocaine any way he could (10 RT 1221); and

• when he stole the cocaine, he knew that it was not the right thing to do (9 RT 1103, 10 RT 1227), that it was a big deal (9 RT 1205), and that there might be some repercussions, but he just went ahead and "stealed it" (10 RT 1228.)

Taken in context, appellant's testimony was not that he was unaware of the potential consequences from his theft of the cocaine, but that he simply did not care about the consequences. This testimony, about the understanding of an admitted cocaine addict in the middle of a binge, cannot reasonably be characterized as a failure to explain evidence.

Finally, respondent's argument that this claim is forfeited should be rejected. (See RB 191, 194.) As appellant has already explained, instructional error is cognizable on appeal even in the absence of an objection by trial counsel because it affected appellant's substantial rights. (AOB 150, fn. 36, citing § 1259 and other authorities; see *People v. Coffman* (2004) 34 Cal.4th 1, 108 fn. 34 [failure to object below does not forfeit claims of instructional error affecting defendants' substantial rights].) *People v. Valdez* (2004) 32 cal.4th 73, 137, on which respondent relies is inapposite to the instant case, as there this Court relied on its reasoning in *People v. Bolin* (1998) 18 Cal.4th 297, 326, and found that counsel's conduct invited the error by agreeing that the evidence supported the giving of the instruction. *People v. Farnam* (2002) 28 Cal.4th 107, 165 is also inapposite, as there this Court reasoned that the prior objection rule forfeits consideration of a claim of instructional error on appeal that advances a different argument from that presented at trial.

* * *

As shown above and in the AOB, the evidence presented did not support the giving of CALJIC No. 2.62 and instructing the jury that it may draw adverse inference from appellant's purported but nonexistent failure to explain evidence against him was both state and federal constitutional error that affected appellant's substantial rights and prejudiced his chances of a more favorable verdict.

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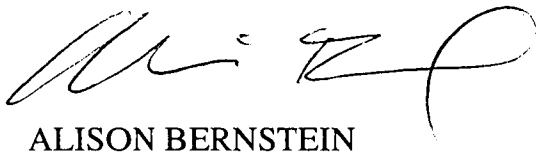
CONCLUSION

For all the reasons stated above and in his opening brief, the judgment of conviction and sentence of death in this case should be reversed.

Dated: December 23, 2009

Respectfully Submitted,

MICHAEL J. HERSEK
State Public Defender



ALISON BERNSTEIN
Deputy State Public Defender

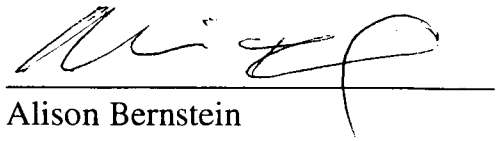
Attorneys for Appellant

CERTIFICATE OF COUNSEL

(CAL. RULES OF COURT, RULE 36(B)(2))

I, Alison Bernstein, am the Deputy State Public Defender assigned to represent appellant, Frank Kalil Becerra, in this automatic appeal. I 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 29,302 words in length excluding the tables and certificates.

Dated: December 23, 2009



Alison Bernstein

DECLARATION OF SERVICE

Re: People v. Frank Kalil Becerra CA. Supreme Court No. S065573

I, GLENICE FULLER, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. I served a true copy of the attached:

APPELLANT'S REPLY BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Office of the Attorney General
Attn: Susan Kim, D.A.G.
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Frank Becerra
(Appellant)

Each said envelope was then, on December 23, 2009, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 23, 2009, at San Francisco, California.

Glenice Fuller
DECLARANT