

# SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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 People of the State of California, )  
 )  
 Plaintiff and Respondent, )  
 )  
 v. )  
 )  
 Ruben Perez Gomez, )  
 )  
 Defendant and Appellant. )  
 \_\_\_\_\_ )

No. S087773

Superior Court No  
BA156930

SUPREME COURT  
FILED

DEC 19 2014

## APPELLANT'S REPLY BRIEF

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DEATH PENALTY



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## Table of contents

Introduction .....	1
Argument .....	2
I.    The evidence was insufficient to prove Mr. Gomez’s guilt of the first degree murder of Raul Luna .....	2
A.    There is no evidence that Ruben Gomez shot Raul Luna; respondent’s contention that a shotgun cartridge near Luna’s body was fired from the same shotgun used to kill Acosta, Dunton, and Escareno is wrong. .....	4
B.    There was no evidence at all to support Mr. Gomez’s conviction on an aiding and abetting theory. ....	7
C.    Mr. Gomez’s death sentences must be reversed. ...	21
II.   The evidence was insufficient to sustain Mr. Gomez’s convictions of the kidnaping, robbery, and murder of Rajandra Patel .....	24
III.  The evidence was insufficient to support Mr. Gomez’s convictions of first degree murder for the deaths of Robert Dunton and Robert Acosta .....	28
IV.  The trial court unconstitutionally foreclosed the possibility of self-representation, telling Mr. Gomez his decision to proceed with counsel was “final.” .....	35
A.    Mr. Gomez’s claim that the trial court unconstitutionally foreclosed the possibility of self- representation is not forfeited. ....	36
B.    The trial court unconstitutionally foreclosed the possibility of self-representation. ....	37
C.    Reversal is required. ....	42

V.	The trial court abused its discretion when it refused to sever the Patel and Luna homicide cases from each other and from the O'Farrell Street double homicide, the Escareno homicide, and the Salcedo robbery, violating Mr. Gomez's constitutional rights. . . . .	43		
	A.	The trial court abused its discretion in refusing to sever the Patel and Luna cases from the Escareno and Dunton and Acosta cases, and from each other. . . . .	44	
		1.	Evidence of the Patel and Luna homicides would not have been admissible in separate trials of the Dunton and Acosta and Escareno homicides and the Salcedo robbery, or vice versa, and evidence of the Patel homicide would not have been admissible in a trial of the Luna case, or vice versa. . . . .	44
		2.	The Dunton and Acosta and Escareno charges were particularly inflammatory. . . . .	49
		3.	The Luna and Patel cases were much weaker than the Salcedo robbery and the Escareno and Dunton and Acosta homicide cases. . . . .	51
		4.	The trial court abused its discretion in denying severance; it is reasonably probable that absent this error, the result would have been more favorable to Gomez. . . . .	52
		B.	Even if the trial court did not err when it refused to sever, the joint trial violated Mr. Gomez's constitutional rights to due process and a fair trial, requiring reversal. . . . .	54
VI.	The trial court's refusal to sever Mr. Gomez's trial from that of his co-defendant requires reversal . . . . .	59		

VII. The trial court erroneously required the presentation of evidence regarding Mr. Gomez’s refusal to come to court one morning, erroneously instructed jurors that they could consider that refusal as evidence of consciousness of guilt, and failed to perform the role of a neutral arbiter; these errors violated Mr. Gomez’s rights under California law and the State and Federal Constitutions . . . . . 60

A. The evidentiary and instructional errors are reviewable on appeal. . . . . 61

B. The trial court abused its discretion in arranging for the presentation of Deputy Ganarial’s testimony about Mr. Gomez’s refusal to come to court, in direct contravention of this Court’s cases establishing that a defendant’s absence from court is irrelevant. . . . . 63

1. Deputy Ganarial’s testimony was irrelevant. . . . . 63

2. Deputy Ganarial’s testimony was highly inflammatory. . . . . 70

C. The trial court erred in instructing the jurors that they could consider Mr. Gomez’s refusal to come to court as evidence showing a consciousness of guilt. . . . . 71

D. The trial court’s abuse of discretion in arranging for the presentation of Deputy Ganarial’s testimony and in refusing to strike it, and the erroneous instruction that jurors could consider it as evidence of consciousness of guilt violated Gomez’s federal constitutional rights. . . . . 72

E. The trial court failed to function as a neutral arbiter, violating Mr. Gomez’s right to due process and his right to counsel. . . . . 74

1. This issue is reviewable on appeal. . . . . 74

2.	The trial court failed to function as a neutral arbiter, violating Mr. Gomez’s federal constitutional rights. . . . .	76
F.	These errors were not harmless under any standard. . . . .	79
VIII.	The trial court’s erroneous admission of highly inflammatory evidence about the Mexican Mafia, which rendered jurors fearful for their own safety, deprived Mr. Gomez of his right to due process and a fair trial. . . . .	81
A.	This claim is reviewable on appeal. . . . .	81
B.	The trial court abused its discretion in permitting testimony about the history of the Mexican Mafia, about crimes committed by “hardcore” gang members in jail, about retaliatory crimes committed on behalf of the Mexican Mafia, and that Mexican Mafia members would use any means possible to obstruct criminal prosecution. . . . .	83
C.	The admission of the Mexican Mafia evidence violated Gomez’s right to due process. . . . .	85
D.	The error was not harmless. . . . .	87
IX.	The trial court’s admission of a note left by Robert Acosta in the pages of a Bible violated <i>Crawford v. Washington</i> . . . . .	89
A.	This error has not been forfeited. . . . .	89
B.	Acosta’s note was testimonial. . . . .	91
C.	The prosecution cannot prove this error harmless beyond a reasonable doubt. . . . .	96



X.	The trial court’s improper and unconstitutional instructions effectively required jurors to take notes and sternly discouraged readback of testimony — in fact, prohibiting it in the first two days of deliberations . . . . .	98
A.	This claim is not forfeited. . . . .	98
B.	The trial court’s instruction on notetaking was error. . . . .	99
C.	The trial court’s instructions on readback were erroneous. . . . .	104
D.	Respondent fails to address Mr. Gomez’s contention that the error was structural. . . . .	105
E.	Even if harmless error analysis applies, reversal is required. . . . .	106
XI.	The trial court erroneously and unconstitutionally instructed jurors during voir dire regarding the exchange of testimony for leniency, effectively telling them that prosecution witnesses were lesser participants and that the defendants were the “greater culprits.” . . . . .	109
A.	This claim has not been forfeited. . . . .	110
B.	The trial court’s explanation of prosecution testimony obtained by leniency violated Gomez’s rights under state law and the Federal Constitution. . . . .	113
C.	Reversal is required. . . . .	114
XII.	The CALJIC instructions defining the process by which jurors reach a verdict on the lesser offense of second degree murder, and the court’s failure to instruct the jury with CALJIC No. 17.11, unconstitutionally skewed the jurors’ deliberations toward first degree murder, requiring reversal. . . . .	117

XIII.	The trial court’s instruction of the jury with CALJIC No. 17.41.1 violated Mr. Gomez’s rights under the Sixth, Eighth, and Fourteenth Amendments . . . . .	121
XIV.	A series of guilt phase instructions impermissibly and unconstitutionally undermined and diluted the requirement of proof beyond a reasonable doubt . . . . .	123
XV.	The trial court’s instruction on kidnaping erroneously and unconstitutionally told jurors to consider the totality of the circumstances in determining whether the movement of the victim was substantial, requiring reversal . . . . .	124
XVI.	The definition of simple kidnaping announced by this court at the time of the kidnaping charged in this case was unconstitutionally vague . . . . .	129
XVII.	The prosecutor violated <i>Griffin v. California</i> when, in an effort to fill a crucial evidentiary gap in his case, he argued that there was no evidence that Mr. Gomez read certain newspaper articles; reversal is required . . . . .	130
	A. The <i>Griffin</i> issue was not forfeited. . . . .	130
	B. The prosecutor committed <i>Griffin</i> error. . . . .	132
	C. This error was not harmless beyond a reasonable doubt. . . . .	133
XVIII.	The trial court erred in denying Mr. Gomez’s Penal Code section 1118.1 motion regarding the Escareno case, and evidence of Mr. Gomez’s guilt of the murder of Jesus Escareno was insufficient; the trial court thus erred and violated Mr. Gomez’s constitutional rights when it instructed jurors that those who believed Mr. Gomez guilty of murdering Escareno could consider that murder at the penalty phase . . . . .	136

A.	The trial court erred in denying Mr. Gomez’s Penal Code section 1118.1 motion regarding the Escareno case; the evidence of Mr. Gomez’s guilt of the murder and robbery of Jesus Escareno was insufficient. . .	136
B.	Witness #1’s testimony, whether corroborated or not, was not substantial evidence. . . . .	140
C.	Because the evidence of Mr. Gomez’s guilt of the murder and robbery of Jesus Escareno was insufficient, the trial court erred in allowing those jurors who believed Mr. Gomez guilty of the Escareno crimes to consider them at the penalty phase; the death sentences cannot stand. . . . .	140
XIX.	The trial court not only erred by failing to instruct the penalty phase jurors that they could not consider the murder of Jesus Escareno as aggravation unless they found that Witness #1’s testimony was corroborated by independent evidence linking Mr. Gomez to the crime, but also by instructing jurors to disregard guilt phase instructions that were not repeated at the penalty phase . . . . .	141
A.	There is a reasonable likelihood that the penalty phase jurors understood the court’s penalty phase instructions to mean that they could consider the Escareno crimes without regard to the accomplice corroboration requirement. . . . .	141
B.	This error was not harmless. . . . .	148
XX.	The prosecutor’s elicitation, and the trial court’s admission, over objection, of evidence regarding the ethnic background of two jail guards Mr. Gomez was accused of assaulting, evidence which the prosecutor then employed in arguing for death, requires reversal . . . . .	151
A.	The constitutional claim is not forfeited. . . . .	151

B.	The evidence of and argument relating to the ethnic background of Montoya and Millan violated state law and the California and Federal Constitutions. . . .	153
C.	Respondent misstates the applicable harmless error standard and cannot prove beyond a reasonable doubt that this error did not contribute to the verdict. . . .	156
XXI.	The trial court erroneously and unconstitutionally told penalty phase jurors that they were forbidden to “refer to biblical references,” requiring reversal. . . . .	160
A.	This claim is reviewable on appeal. . . . .	161
B.	The court’s instruction was incorrect and unconstitutional. . . . .	161
C.	This error was not harmless beyond a reasonable doubt. . . . .	168
XXII.	A sentence of death should not be permitted absent a jury finding that the defendant is guilty beyond all possible doubt . . . . .	171
XXIII.	Because the robbery and kidnaping special circumstances in this case permitted the jury to impose death for an accidental or unforeseeable killing, the death penalty is unconstitutional . . . . .	173
XXIV.	California’s death penalty statute, as interpreted by this court and applied at Mr. Gomez’s trial, violates the United States Constitution . . . . .	174
XXV.	The cumulative effect of the errors at Mr. Gomez’s trial undermines the reliability of the criminal judgment, requiring reversal. . . . .	175
Conclusion	. . . . .	177
Word count certification	. . . . .	178

## Table of authorities

### State Cases

<i>Boeken v. Philip Morris Inc.</i> (2005) 127 Cal.App.4th 1640 .....	167
<i>Buzgheia v. Leasco Sierra Grove</i> (1997) 60 Cal.App.4th 374 .....	166
<i>College Hospital Inc. v. Superior Court</i> (1994) 8 Cal.4th 704 .....	108
<i>In re Burdan</i> (2008) 169 Cal.App.4th 18 .....	48
<i>In re Shaputis</i> (2011) 53 Cal.4th 192 .....	48
<i>LeMons v. Regents of the University of California</i> (1978) 21 Cal.3d 869 .....	165
<i>People v. Abbaszadeh</i> (2003) 106 Cal.App.4th 642 .....	74
<i>People v. Abbott</i> (1956) 47 Cal.2d 362 .....	131
<i>People v. Albarran</i> (2007) 149 Cal.App.4th 214 .....	49, 56
<i>People v. Alcala</i> (1984) 36 Cal.3d 604 .....	31
<i>People v. Alfaro</i> (2007) 41 Cal.4th 1277 .....	74
<i>People v. Anderson</i> (1968) 70 Cal.2d 15 .....	31
<i>People v. Anderson</i> (2002) 28 Cal.4th 767 .....	30
<i>People v. Arias</i> (1996) 13 Cal.4th 92 .....	68
<i>People v. Ayala</i> (2000) 23 Cal.4th 225 .....	82, 113
<i>People v. Banks</i> (2014) 59 Cal.4th 1113 .....	91, 111, 121, 122
<i>People v. Bean</i> (1988) 46 Cal.3d 919 .....	55
<i>People v. Beeman</i> (1984) 35 Cal.4th 547 .....	8

<i>People v. Benavides</i> (2005) 35 Cal.4th 69 .....	63
<i>People v. Black</i> (2007) 41 Cal.4th 799 .....	91
<i>People v. Blacksher</i> (2011) 52 Cal.4th 769 .....	94
<i>People v. Bolin</i> (1998) 18 Cal.4th 297 .....	64
<i>People v. Booker</i> (2011) 51 Cal.4th 141 .....	31
<i>People v. Bowers</i> (2001) 87 Cal.App.4th 722 .....	108, 177
<i>People v. Boyer</i> (2006) 38 Cal.4th 412 .....	152
<i>People v. Brady</i> (2010) 50 Cal.4th 547 .....	122, 133
<i>People v. Brown</i> (1988) 46 Cal.3d 432 .....	21, 53, 88, 115, 149, 158
<i>People v. Burnell</i> (2005) 132 Cal.App.4th 938 .....	55
<i>People v. Burney</i> (2009) 47 Cal.4th 203 .....	30, 48
<i>People v. Butler</i> (2009) 46 Cal.4th 847 .....	48
<i>People v. Campos</i> (2007) 156 Cal.App.4th 1228 .....	126
<i>People v. Capistrano</i> (2014) 59 Cal.4th 830 .....	81, 82, 91, 161
<i>People v. Cardenas</i> (1982) 31 Cal.3d 897 .....	16, 43
<i>People v. Carrasco</i> (2014) 59 Cal.4th 924 .....	64
<i>People v. Carrington</i> (2009) 47 Cal.4th 145 .....	48
<i>People v. Castillo</i> (1999) 16 Cal.4th 1009 .....	99, 121, 161
<i>People v. Centeno</i> (Dec. 4, 2014, S209957) 2014 WL 6804508 .....	13
<i>People v. Champion</i> (1995) 9 Cal.4th 879 .....	49

<i>People v. Chism</i> (2014) 58 Cal.4th 1266 .....	81, 91, 122
<i>People v. Chiu</i> (2014) 59 Cal.4th 156 .....	8, 9, 12, 28, 31, 127
<i>People v. Clair</i> (1992) 2 Cal.4th 629 .....	162
<i>People v. Coddington</i> (2000) 23 Cal.4th 529 .....	166
<i>People v. Coffman</i> (2004) 34 Cal.4th 1 .....	131, 132
<i>People v. Contreras</i> (2013) 58 Cal.4th 123 .....	142
<i>People v. Crandell</i> (1988) 46 Cal.3d 833 .....	66
<i>People v. Cravens</i> (2012) 53 Cal.4th 500 .....	20
<i>People v. Crittenden</i> (1994) 9 Cal.4th 83 .....	147
<i>People v. Cudjo</i> (1993) 6 Cal.4th 585 .....	156
<i>People v. Danks</i> (2004) 32 Cal.4th 269 .....	165
<i>People v. Davis</i> (2013) 57 Cal.4th 353 .....	13
<i>People v. Dennis</i> (1998) 17 Cal.4th 468 .....	99
<i>People v. Dent</i> (2003) 30 Cal.4th 213 .....	37, 39-41
<i>People v. DeSantiago</i> (1969) 71 Cal.2d 18 .....	91
<i>People v. Dunkle</i> (2005) 36 Cal.4th 861 .....	111
<i>People v. Edwards</i> (2013) 57 Cal.4th 658 .....	91
<i>People v. Engelman</i> (2002) 28 Cal.4th 436 .....	122, 168, 170
<i>People v. Forster</i> (2010) 50 Cal.4th 1301 .....	112
<i>People v. Geier</i> (2007) 41 Cal.4th 555 .....	64, 94

<i>People v. Gonzales</i> (2011) 52 Cal.4th 254 .....	14, 32
<i>People v. Gonzalez</i> (2012) 54 Cal.4th 1234 .....	94
<i>People v. Green</i> (1980) 27 Cal.3d 1 .....	127
<i>People v. Guiton</i> (1993) 4 Cal.4th 1116 .....	127
<i>People v. Gunder</i> (2007) 151 Cal.App.4th 412 .....	117-119
<i>People v. Gutierrez</i> (2009) 45 Cal.4th 789 .....	83, 93, 152
<i>People v. Hajek</i> (2014) 58 Cal.4th 1144 .....	22
<i>People v. Halvorsen</i> (2007) 42 Cal.4th 379 .....	48
<i>People v. Hamilton</i> (1989) 48 Cal.3d 1142 .....	131
<i>People v. Hannon</i> (1977) 19 Cal.3d 588 .....	79
<i>People v. Harris</i> (2005) 37 Cal.4th 310 .....	79
<i>People v. Harris</i> (2013) 57 Cal.4th 804 .....	91
<i>People v. Hartsch</i> (2010) 49 Cal.4th 472 .....	50
<i>People v. Harvey</i> (1984) 163 Cal.App.3d 90 .....	12, 13, 19
<i>People v. Hawkins</i> (1995) 10 Cal.4th 920 .....	78
<i>People v. Heard</i> (2003) 31 Cal.4th 946 .....	112
<i>People v. Hernandez</i> (2003) 30 Cal.4th 835 .....	22
<i>People v. Hill</i> (1992) 3 Cal.4th 959 .....	1
<i>People v. Hillhouse</i> (2002) 27 Cal.4th 469 .....	22, 99, 121
<i>People v. Howard</i> (2010) 51 Cal.4th 15 .....	112



<i>People v. Hughes</i> (2002) 27 Cal.4th 287 .....	132
<i>People v. Jackson</i> (2010) 189 Cal.App.4th 1461 .....	65
<i>People v. Johnson</i> (1980) 26 Cal.3d 557 .....	29
<i>People v. Kelly</i> (1992) 1 Cal.4th 495 .....	162
<i>People v. Kitchens</i> (1956) 46 Cal.2d 260 .....	91
<i>People v. Koontz</i> (2002) 27 Cal.4th 1041 .....	33
<i>People v. Lancaster</i> (2007) 41 Cal.4th 50 .....	35-37, 39, 41
<i>People v. Laskiewicz</i> (1986) 176 Cal.App.3d 1254 .....	162
<i>People v. Lee</i> (2011) 51 Cal.4th 620 .....	48
<i>People v. Leonard</i> (2007) 40 Cal.4th 1370 .....	48
<i>People v. Letner</i> (2010) 50 Cal.4th 99 .....	94
<i>People v. Lewis</i> (1983) 144 Cal.App.3d 267 .....	68
<i>People v. Lewis</i> (2001) 26 Cal.4th 334 .....	160, 163, 164
<i>People v. Lewis</i> (2006) 39 Cal.4th 970 .....	48
<i>People v. Lewis</i> (2008) 43 Cal.4th 415 .....	48
<i>People v. Lewis</i> (2009) 46 Cal.4th 1255 .....	171, 172
<i>People v. Loy</i> (2011) 52 Cal.4th 46 .....	94
<i>People v. Lucas</i> (2014) 60 Cal.4th 153 .....	48, 55
<i>People v. Maciel</i> (2013) 57 Cal.4th 482 .....	48, 84, 121, 122
<i>People v. Mahoney</i> (1927) 201 Cal. 618 .....	79

<i>People v. Mai</i> (2013) 57 Cal.4th 986 . . . . .	48
<i>People v. Majors</i> (1998) 18 Cal.4th 385 . . . . .	68, 89
<i>People v. Marshall</i> (1997) 15 Cal.4th 1 . . . . .	171
<i>People v. Martin</i> (1973) 9 Cal.3d 687 . . . . .	25
<i>People v. Martin</i> (2000) 78 Cal.App.4th 1107 . . . . .	162
<i>People v. Mason</i> (1991) 52 Cal.3d 909 . . . . .	55
<i>People v. McCoy</i> (2001) 25 Cal.4th 1111 . . . . .	9
<i>People v. McCullough</i> (1979) 100 Cal.App.3d 169 . . . . .	126
<i>People v. McKinnon</i> (2011) 52 Cal.4th 610 . . . . .	48, 121
<i>People v. McLain</i> (1988) 46 Cal.3d 97 . . . . .	147
<i>People v. Medina</i> (1995) 11 Cal.4th 694 . . . . .	63, 64, 68, 69, 71, 139
<i>People v. Mendoza</i> (1998) 18 Cal.4th 1114 . . . . .	7, 8
<i>People v. Mendoza</i> (2000) 24 Cal.4th 130 . . . . .	57
<i>People v. Mendoza</i> (2011) 52 Cal.4th 1056 . . . . .	48
<i>People v. Mendoza Tello</i> (1997) 15 Cal.4th 264 . . . . .	82, 113
<i>People v. Merriman</i> (2014) 60 Cal.4th 1 . . . . .	45, 54
<i>People v. Modesto</i> (1967) 66 Cal.2d 695 . . . . .	134
<i>People v. Monterroso</i> (2004) 34 Cal.4th 743 . . . . .	134
<i>People v. Moore</i> (2011) 51 Cal.4th 386 . . . . .	118, 119
<i>People v. Morgan</i> (2007) 42 Cal.4th 593 . . . . .	129

<i>People v. Morris</i> (1988) 46 Cal.3d 1 .....	13
<i>People v. Musselwhite</i> (1998) 17 Cal.4th 1216 .....	45
<i>People v. Nunez</i> (2013) 57 Cal.4th 1 .....	3, 9
<i>People v. Ochoa</i> (2001) 26 Cal.4th 398 .....	65
<i>People v. Osband</i> (1996) 13 Cal.4th 622 .....	147
<i>People v. Parra</i> (1999) 70 Cal.App.4th 222 .....	25
<i>People v. Partida</i> (2005) 37 Cal.4th 428 .....	62, 73, 83, 112, 152
<i>People v. Pearson</i> (2013) 56 Cal.4th 393 .....	21, 91, 107, 112, 127, 135
<i>People v. Pescador</i> (2004) 119 Cal.App.4th 252 .....	117
<i>People v. Posey</i> (2004) 32 Cal.4th 193 .....	162
<i>People v. Prettyman</i> (1996) 14 Cal.4th 248 .....	8, 9
<i>People v. Prieto</i> (2003) 30 Cal.4th 226 .....	17
<i>People v. Prince</i> (2007) 40 Cal.4th 1179 .....	108, 150, 158, 169, 176
<i>People v. Ramirez</i> (2006) 39 Cal.4th 398 .....	48
<i>People v. Redd</i> (2010) 48 Cal.4th 691 .....	90
<i>People v. Riccardi</i> (2012) 54 Cal.4th 758 .....	22, 90, 91
<i>People v. Richardson</i> (2008) 43 Cal.4th 959 .....	18
<i>People v. Riel</i> (2000) 22 Cal.4th 1153 .....	131
<i>People v. Roberts</i> (1992) 2 Cal.4th 271 .....	9, 23
<i>People v. Robinson</i> (1964) 61 Cal.2d 373 .....	17

<i>People v. Robinson</i> (2005) 37 Cal.4th 592 .....	48, 106
<i>People v. Rodriguez</i> (1998) 17 Cal.4th .....	25
<i>People v. Rogers</i> (2006) 39 Cal.4th 826 .....	168, 169
<i>People v. Rogers</i> (2013) 57 Cal.4th 296 .....	18, 122
<i>People v. Romero</i> (2008) 44 Cal.4th 386 .....	111
<i>People v. Sandoval</i> (1992) 4 Cal.4th 155 .....	163
<i>People v. Sandoval</i> (2007) 41 Cal.4th 825 .....	48
<i>People v. Silva</i> (1988) 45 Cal.3d 604 .....	22
<i>People v. Simpson</i> (1954) 43 Cal.2d 553 .....	126
<i>People v. Smallwood</i> (1986) 42 Cal.3d 415 .....	55
<i>People v. Soojian</i> (2010) 190 Cal.App.4th 491 .....	108, 177
<i>People v. Soper</i> (2009) 45 Cal.4th 759 .....	55
<i>People v. Souza</i> (2012) 54 Cal.4th 90 .....	121, 122
<i>People v. Stankewitz</i> (1990) 51 Cal.3d 72 .....	18
<i>People v. Sturm</i> (2006) 37 Cal.4th 1218 .....	48, 74, 75
<i>People v. Sully</i> (1991) 53 Cal.3d 1195 .....	63, 64, 68, 69, 71, 139
<i>People v. Thomas</i> (2012) 53 Cal.4th 771 .....	45, 49
<i>People v. Trevino</i> (1985) 39 Cal.3d 667 .....	16
<i>People v. Trujillo</i> (2010) 181 Cal.App.4th 1344 .....	25
<i>People v. Tully</i> (2012) 54 Cal.4th 952 .....	112, 163

<i>People v. Valdez</i> (2004) 32 Cal.4th 73 .....	37
<i>People v. Valdez</i> (2012) 55 Cal.4th 82 .....	81
<i>People v. Vargas</i> (1973) 9 Cal.3d 470 .....	134
<i>People v. Waidla</i> (2000) 22 Cal.4th 690 .....	13
<i>People v. Watkins</i> (2012) 55 Cal.4th 999 .....	64, 65
<i>People v. Watson</i> (1956) 46 Cal.2d 818 .....	88, 127, 150, 169, 177
<i>People v. Westbrook</i> (2007) 151 Cal.App.4th 1500 .....	126
<i>People v. Whalen</i> (2013) 56 Cal.4th 1 .....	48
<i>People v. Whitt</i> (1984) 36 Cal.3d 724 .....	102, 104
<i>People v. Wilkins</i> (2013) 56 Cal.4th 333 .....	53, 108
<i>People v. Williams</i> (1997) 16 Cal.4th 153 .....	15, 16
<i>People v. Wilson</i> (2008) 44 Cal.4th 758 .....	121, 147
<i>Richardson v. Superior Court</i> (2008) 43 Cal.4th 1040 .....	108
<i>Rodenberry v. Roddenberry</i> (1996) 44 Cal.App.4th 634 .....	13
<i>State v. Jensen</i> (Wis. 2007) 727 N.W.2d 518 .....	95
<i>State v. Monday</i> (Wash. 2011) 257 P.3d 551 .....	155, 157
<i>State v. Sanchez</i> (Mont. 2008) 177 P.3d 444 .....	96
<i>Williams v. Superior Court</i> (1984) 36 Cal.3d 441 .....	50, 52, 56

**Federal Cases**

*Barclay v. Florida* (1983) 463 U.S. 939 ..... 151, 153, 154

*Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073 ..... 56

*Beck v. Alabama* (1980) 447 U.S. 625 ..... 171

*Bollenbach v. United States* (1946) 326 U.S. 607 ..... 169

*Boyde v. California* (1990) 494 U.S. 370 ..... 145, 162

*Calderon v. Coleman* (1991) 525 U.S. 141 ..... 162

*Chapman v. California* (1967) 386 U.S. 18 ..... passim

*Cosby v. Jones* (11th Cir. 1982) 682 F.2d 1373 ..... 19

*Crawford v. Washington* (2004) 541 U.S. 36 ..... 89-91, 93, 96

*Cross v. United States* (D.C. Cir. 1963) 325 F.2d 629 ..... 67

*Cudjo v. Ayers* (9th Cir. 2012) 698 F.3d 752 ..... 156

*Dawson v. Delaware* (1992) 503 U.S. 159 ..... 153

*Deck v. Missouri* (2005) 544 U.S. 622 ..... 70, 71, 73, 80

*Dow v. Virga* (9th Cir. 2013) 729 F.3d 1041 ..... 79

*Estelle v. McGuire* (1991) 502 U.S. 62 ..... 86, 145, 162

*Estelle v. Williams* (1976) 425 U.S. 501 ..... 70

*Faretta v. California* (1975) 422 U.S. 806 ..... 35-37, 39, 41

*Griffin v. California* (1965) 380 U.S. 609 ..... 130, 132-134

*Holbrook v. Flynn* (1986) 475 U.S. 560 ..... 70, 71, 73, 79, 80

*Jackson v. Virginia* (1979) 443 U.S. 307 ..... 20, 29, 126, 171

<i>Johnson v. Louisiana</i> (1972) 406 U.S. 356 .....	126
<i>Juan H. v. Allen</i> (9th Cir. 2005) 408 F.3d 1262 .....	9, 14, 15, 18
<i>Maryland v. Craig</i> (1990) 497 U.S. 836 .....	98
<i>McFarland v. Smith</i> (2d Cir. 1979) 611 F.2d 414 .....	155, 157, 159
<i>McKaskle v. Wiggins</i> (1984) 465 U.S. 168 .....	42
<i>Melendez-Diaz v. Massachusetts</i> (2009) 557 U.S. 305 .....	56, 64
<i>Michigan v. Bryant</i> (2011) 131 S.Ct. 1143 .....	92
<i>Montana v. Egelhoff</i> (1996) 518 U.S. 37 .....	85, 86
<i>Morgan v. Dickhaut</i> (1st Cir. 2012) 677 F.3d 39 .....	19
<i>Ohio v. Roberts</i> (1980) 448 U.S. 56 .....	89
<i>O’Laughlin v. O’Brien</i> (1st Cir. 2009) 568 F.3d 287 .....	19
<i>Sullivan v. Louisiana</i> (1993) 408 U.S. 275 .....	135
<i>Taylor v. United States</i> (1973) 414 U.S. 17 .....	63, 139
<i>United States v. Burgos</i> (1st Cir. 2012) 703 F.3d 1 .....	19
<i>United States v. Doe</i> (D.C. Cir. 1990) 903 F.2d 16 .....	156, 157
<i>United States v. D’Amato</i> (2d Cir. 1994) 39 F.3d 1249 .....	19
<i>United States v. Flores-Rivera</i> (1st Cir. 1995) 56 F.3d 319 .....	19
<i>United States v. Goldtooth</i> (9th Cir. 2014) 754 F.3d 763 .....	18
<i>United States v. Gonzalez-Lopez</i> (2006) 548 U.S. 140 .....	106
<i>United States v. Harris</i> (7th Cir. 1991) 942 F.2d 1125 .....	19

<i>United States v. Jackson</i> (7th Cir. 1989) 886 F.2d 838 .....	65
<i>United States v. Manfre</i> (8th Cir. 2004) 368 F.3d 832 .....	92, 93
<i>United States v. Sanchez</i> (5th Cir. 1992) 961 F.2d 1169 .....	19
<i>United States v. Santillana</i> (5th Cir. 2010) 604 F.3d 192 .....	19
<i>United States v. Scheffer</i> (1998) 523 U.S. 303 .....	98
<i>United States v. Strayhorn</i> (4th Cir. 2014) 743 F.3d 917 .....	17
<i>United States v. Webster</i> (5th Cir. 1998) 162 F.3d 308 .....	157
<i>Vasquez v. Hillery</i> (1986) 474 U.S. 254 .....	106
<i>Waller v. Georgia</i> (1984) 467 U.S. 39 .....	106
<i>Witherspoon v. Illinois</i> (1968) 391 U.S. 510 .....	160, 165
<i>Withrow v. Larkin</i> (1975) 421 U.S. 35 .....	79
<i>Yates v. Evatt</i> (1991) 500 U.S. 391 .....	21
<i>Zant v. Stephens</i> (1983) 462 U.S. 862 .....	157

**Federal Constitution**

Fifth Amendment .....	62, 73
Sixth Amendment .....	41, 62, 73, 89, 121
Eighth Amendment .....	62, 73, 121
Fourteenth Amendment .....	41, 62, 70, 73, 121, 126



<b>State Constitution</b>	
Article I, section 7 .....	62, 73
Article I, section 15 .....	62, 73
Article I, section 16 .....	62, 73
Article I, section 17 .....	62, 73
 <b>State Statutes</b>	
Evidence Code section 352 .....	61, 85
Evidence Code section 1250 .....	89
Penal Code section 190.2(a)(16) .....	154
Penal Code section 1111 .....	141
Penal Code section 1118.1 .....	136
Penal Code section 1259 .....	63, 99, 110, 112, 121, 161



## Introduction

In appellant's opening brief, Mr. Gomez made twenty five arguments, seeking reversal of his convictions for the robbery of Xavier Salcedo; the murder of Robert Dunton and Robert Acosta; the kidnaping, robbery, and murder of Rajandra Patel; and the murder of Raul Luna; and reversal of the death sentences for the murders of Patel and Luna.

In this reply brief, Mr. Gomez incorporates by reference and reaffirms the arguments made in his opening brief. Mr. Gomez replies to contentions by respondent that necessitate an answer in order to present the issues fully to this Court. The absence of a reply to any particular argument, sub-argument, or allegation made by respondent, or of a reassertion of any particular point made in the opening brief, does not constitute a concession, abandonment, or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13), but reflects his view that the issue has been adequately presented and the positions of the parties have been joined.

## Argument

### I.

#### **The evidence was insufficient to prove Mr. Gomez's guilt of the first degree murder of Raul Luna.**

In appellant's opening brief, Gomez contended that the evidence was insufficient to support his conviction of the first degree murder of Raul Luna because there was not substantial evidence that he was at the scene at the time of Luna's shooting, and because even if there were substantial evidence that he was at the scene, there was not substantial evidence that he either shot Luna or that he aided and abetted the shooter.

The state's response is wrong on the facts and wrong on the law. In support of its contention that evidence showed that Gomez was at the scene and either shot Luna or aided and abetted the shooting, respondent mistakenly asserts that the weapon used to kill Luna was the same weapon used to kill Dunton and Acosta (RB 60), a weapon that was in Gomez's possession when he was arrested and bore his fingerprints. (See 11RT 1754-1756; 18RT 2741-2749; 19RT 2859-2863, 2869-2872; 21RT 3099-3100, 3119.) There is no evidence to support this assertion, and in fact, the prosecution conceded in summation that Luna was *not* killed with the same weapon that was found in Gomez's possession on his arrest. (27RT 3838-3840 [in discussing Luna case, prosecutor states, "it's the same gauge,

although not the same shotgun, that was used — that Ruben Gomez was arrested with”].)

Respondent also contends that a first degree murder conviction may be supported on an aiding and abetting theory with only “the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense.” (RB 63.) Respondent is mistaken. In the context of direct aiding and abetting liability for murder (as opposed to natural and probable consequences liability), the aider and abettor “must know and share the murderous intent of the actual perpetrator.” (*People v. Nunez* (2013) 57 Cal.4th 1, 43.)

Finally, respondent states that the jury’s not-true finding as to the firearm allegation in the Luna case “makes no difference” because the jury could have convicted Gomez without agreeing about whether he was the shooter or an aider and abettor. (RB 56, 62-63.) Gomez does not contend that the jury had to unanimously agree on a theory of guilt. He does, however, contend that to uphold the conviction, there must be sufficient evidence to support at least one theory of guilt. Here, there was not sufficient evidence to support either theory. As set forth in appellant’s opening brief and below, there was not sufficient evidence that Gomez was the actual shooter — as the jury itself recognized. (29RT 4348; 3CT 840.)

Nor was there sufficient evidence to support a rational conclusion, beyond a reasonable doubt, that Gomez aided and abetted whoever shot Luna.

Indeed, the evidence was not sufficient even to place Gomez at the scene of the crime. Therefore, Gomez's conviction of the first degree murder of Raul Luna must be reversed.

- A. There is no evidence that Ruben Gomez shot Raul Luna; respondent's contention that a shotgun cartridge near Luna's body was fired from the same shotgun used to kill Acosta, Dunton, and Escareno is wrong.**

Respondent contends:

[A]n *unspent* 12-gauge shotgun cartridge was found about 15 feet from Luna's body. (11RT 1701-1703.) *This spent cartridge* [sic] was fired from the same shotgun used to kill Acosta, Dunton, and Escareno. (18RT 2745-2749.) Witness One saw this shotgun being delivered to appellant. Moreover, Witness One helped appellant saw off the barrel, and Rubin, the firearms expert, opined that the five-inch metal tube recovered from Dunton's home could have been part of a shotgun barrel. (18RT 2749, 2761.) Accordingly, a reasonable fact-finder could conclude that appellant had the murder weapon at the time of the killing and that appellant, or his copetrator, killed Luna with that shotgun.

(RB 60 [emphasis added].)

Respondent is incorrect in multiple respects. There is no evidence that Luna was killed with the same shotgun used to kill Dunton and Acosta or with the same shotgun used to kill Escareno.<sup>1</sup> Respondent is correct that

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<sup>1</sup> With respect to the Escareno homicide, a criminalist testified that  
(continued...)

an unspent cartridge was found 15 feet from Luna's body. (11RT 1701-1703 [Detective Lancaster identifying Prosecution Exh. 12D, a photograph of a 12 caliber shotgun cartridge, a live (as opposed to spent) round lying 15 feet east of Luna's body]; see 11RT 1710.) But obviously, an unspent cartridge could not have been a "spent cartridge . . . fired from the same shotgun used to kill Acosta, Dunton, and Escareno." (RB 60.)<sup>2</sup>

More, the prosecutor conceded in summation that the shotgun used to kill Luna was not the same shotgun found in Gomez's possession when he was arrested. (27RT 3838-3840 ["[A] shotgun was used as the murder weapon [in the Luna case]. It's the same gauge as the one used, the 12-gauge shotgun is the one used in the Escareno, the Dunton and Acosta murders. And it's the same gauge, *although not the same shotgun*, that was used — that Ruben Gomez was arrested with." (emphasis added)]; see also

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<sup>1</sup>(...continued)

two projectiles consistent with soft shell "double aught" buckshot, typically fired by a 12-gauge shotgun, were found in the car in which Escareno was killed. (15RT 2393-2395.) There was no evidence that Escareno was shot with the same weapon used to kill Luna or that he was killed with the same shotgun used to kill Dunton and Acosta.

<sup>2</sup> Two firearms examiners, Daniel Rubin and Anthony Paul, testified. Paul testified about the firearms evidence in the Patel case. (14RT 2131-2145.) Rubin testified that the spent cartridges in Prosecution Exhibits 21B, 21C, 21D, and 21F — which were all found at the Dunton/Acosta crime scene (see 21RT 3119) — were fired from Prosecution Exhibit 50, a shotgun. (18RT 2746-2747.) Neither firearms expert testified about the live cartridge found at the Luna crime scene.