No. S097558

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	
vs.	
TODD JESSE GARTON,	
Defendant and Appellant.	

APPELLANT'S REPLY BRIEF

Automatic Appeal from the Judgment of Death of the Superior Court for the County of Shasta

Honorable Bradley L. Boeckman, Judge

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INTRODUCTION

In this reply brief, appellant Todd Jesse Garton addresses specific contentions in respondent's brief, but does not reply to arguments that are adequately addressed in the opening brief. The absence of reply to any particular argument, sub-argument or allegation made by respondent, or of reassertion of any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by Mr. Garton (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects his view that the positions of the parties have been adequately presented and the issues fully joined.

The arguments in this reply brief are numbered to correspond to the argument numbers in appellant's opening brief. Unless otherwise noted all statutory references herein are to California codes. "AOB" refers to appellant's opening brief; "RB" refers to respondent's brief; "CT" refers to the clerk's transcript; and "RT" refers to the reporter's transcript. Carole Garton, and Lynn and Dean Noyes will be referred to by their first names, a convention adopted in both appellant's opening and respondent's briefs.

* * *

ARGUMENT

I. THE TRIAL COURT'S REFUSAL TO PERMIT APPELLANT TO WEAR HIS WEDDING RING DURING TRIAL WAS REVERSIBLE ERROR

Appellant argued in his opening brief that the trial court's refusal to permit him to wear his wedding ring during trial because it could result in a jail security problem was an abuse of discretion which violated his rights to a meaningful opportunity to present a complete defense, to wear civilian attire during trial, and to a reliable guilt and penalty determination. (AOB 151-168.)

Respondent contends that the trial court's order did not violate appellant's constitutional rights because the right to wear civilian clothing does not include the right to wear jewelry; the wedding ring was not relevant to any disputed issue at trial; and any error was harmless in light of the ring's lack of probative value and the overwhelming evidence of appellant's guilt. (RB 47-62.)

A. The Right to Wear Civilian Clothes Includes Jewelry

Respondent acknowledges that "forcing a defendant to wear prison clothes implicates equal protection principles by subjecting inmates who cannot afford bail to inferior treatment based on economic status," but claims, without citation of authority, that the constitutional right to wear civilian clothing at trial does not include the right to wear jewelry because the reasons for the rule "have nothing to do with personal expression." (RB 51-52.)

Respondent's concern with "personal expression" misses the mark. Appellant's complaint is not that he was prohibited from expressing himself, but that he was denied equal protection of the laws due solely to his custodial status. This Court has made clear that, "[a]part from the violation of due process inherent in requiring a defendant to attend trial attired in jail clothing, the practice also impinges on the tenets of equal protection" because it "'operates usually against only those who cannot post bail prior to trial. Persons who can secure release are not subjected to this condition. To impose the

condition on one category of defendants, over objection, would be repugnant to the concept of equal justice embodied in the Fourteenth Amendment. *Griffin v. Illinois*, 351 U.S. 12 (1956).' *(Estelle v. Williams, supra*, 425 U.S. at pp. 505-506 [48 L.Ed.2d at p. 131].)" (*People v. Taylor* (1982) 31 Cal.3d 488, 495.)

> A defendant who can afford bail appears for trial in the best array he can muster. He may be a veritable satyr clad like Hyperion himself. Imposition of jail clothing on a defendant who cannot afford bail subjects him to inferior treatment. He suffers a disadvantage as a result of his poverty. Our traditions do not brook such disadvantage.

(*Ibid.*, citing *People v. Zapata* (1963) 220 Cal.App.2d 903, 911.)

The trial court acknowledged that its refusal to permit appellant to wear his wedding ring because he was in custody was discriminatory: "[I]f the Defendant wasn't in custody, I'm not sure there would be any way I could compel him to take off his wedding band." (3 RT 1018-1019.) According to respondent, the trial court's statement is no different than an observation that appellant's custodial status prevented him from eating lunch outside the courthouse or spending more time with his attorney at the end of trial each day and, like not being able to wear a wedding ring, none of these circumstances infringes on a defendant's right to a fair trial. (*Ibid.*) Respondent, however, overlooks the fact that the jury presumably would not observe appellant at lunch or at the end of trial each day, while it did observe him testify without the wedding ring, and it was instructed to consider his demeanor while testifying, the manner in which he testified, and his attitude toward the action in determining his credibility. (CALJIC No. 2.20; Evid. Code §780, subd. (a) and (j); 29 CT 8394; 35 RT 10049-10050.)

Without respect to appellant's rights to personal expression, the trial court's refusal to permit him to wear his wedding ring during trial violated his equal protection right to be tried in civilian clothing.

B. The Wedding Ring Had Probative Value

Respondent contends that appellant's Sixth Amendment right to present evidence

was not infringed because, "as an article of clothing to be worn during the trial, the ring had no probative value in determining whether appellant had the intent or motive to kill Carole." (RB 53.)

Respondent concedes that "legal authority suggests that a defendant's attire can form part of his 'demeanor' that may be considered by the jury in evaluating his credibility when he testifies" (RB 54-55) and that the "thrust" of appellant's testimony was that he had no reason to want to kill Carole (RB 57), but argues, again without citation of authority, that the relevant factors in the jury's determination of whether or not appellant was telling the truth were limited to his tone of voice, his facial expression, and his body language. (*Ibid.*) Therefore, according to respondent, "the presence of a wedding ring on appellant's finger during trial would not have assisted the jury in evaluating his credibility" and "would not have been relevant to any disputed issue at trial." (*Ibid.*)

On the contrary, appellant's love for Carole and his unborn child was a critical disputed fact in this case. The prosecutor's theory of the case was that appellant did not love Carole and did not want a child, that he had her and her fetus killed so he could collect the proceeds of her life insurance policy, and that he attempted to kill Lynn's husband, Dean, so that he and Lynn could be together. In his closing argument the prosecutor put it this way:

> [I]t's very clear that Todd Garton wanted his wife dead for his own selfish purposes, to collect the money. He didn't want that baby. He either didn't believe it was his or he just didn't want the little pain around him. . . . He committed every one of these crimes. He did it with malice aforethought, he wanted them dead. He wanted to kill Dean so he could get together with Lynn. He wanted his wife dead, he wanted his baby dead.

(35 RT 10209-10210.)

As previously noted, the jury was instructed that, in determining appellant's credibility, it was to consider his demeanor while testifying, the manner in which he testified, and his attitude toward the action. (CALJIC No. 2.20; Evid. Code §780, subd.

(a) and (j); 29 CT 8394; 35 RT 10049-10050; *People v. Staten* (2000) 24 Cal. 4th 434, 465; *Waller v. United States* (8th Cir.1910) 179 F. 810, 812.) Respondent acknowledges that appellant's demeanor included his dress and appearance (RB 54-55; *Dyer v. MacDougall* (2d Cir.1952) 201 F.2d 265, 268-269; Timony, *Demeanor Credibility* (2000) 49 Cath. U. L. Rev. 903, 907.) Thus, any juror who believed that appellant's failure to wear a wedding ring showed his abandonment of Carole was permitted to decide that the prosecutor was right and to discount appellant's entire testimony and find him guilty solely because he was not wearing a wedding ring.

Given the testimony and argument, appellant was entitled to introduce evidence having any tendency in reason to prove his love for Carole and his unborn child and to disprove the prosecutor's theory of the case. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Washington v. Texas* (1967) 388 U.S. 14, 23; *People v. Babbitt* (1988) 45 Cal.3d 660, 684; *People v. Cunningham* (2001) 25 Cal.4th 926, 999.) The trial court's refusal to permit him to wear his wedding band during trial deprived him of these opportunities and violated his right to a fair trial and to a reliable guilt and penalty determination.

C. The Denial of Appellant's Request to Wear The Ring Was an Abuse of Discretion

Respondent contends that "the absence of a wedding ring on a young man's hand two years after the death of his wife would not be interpreted by most people as a sign of lack of love, past or present" and that "only an irrational juror would conclude that appellant was a liar (or murderer) simply because he was not wearing a wedding ring at the time of trial." (RB 58-59.) Any juror who did so would violate the court's instructions not to be "'influenced by pity or prejudice against Mr. Garton' or by 'sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.'" (RB 59.)

Respondent relies on unfounded assumptions that "only an irrational juror" would have a sharply negative reaction to the absence of the wedding ring and that the absence of the ring would not be interpreted by "most people" as sign of lack of love. As noted

above, the jury was instructed to consider appellant's demeanor while testifying (including his dress and appearance), the manner in which he testified, and his attitude toward the action in determining his credibility. The mere absence of a wedding ring may not cause a typical juror to discount appellant's testimony, but any juror who believed that appellant's failure to wear a wedding ring showed his lack of devotion to his wife was permitted by these instructions to credit the prosecutor's theory of the case and discount appellant's testimony and find him guilty at least in part because he was not wearing a wedding ring.

Respondent also contends that "the record clearly shows that the trial court did not abandon its decision-making authority but rather sought information from the marshal before making an independent determination of the risk to jail security." (RB 60.) The record shows, however, that the trial court stated it had conferred with a representative of the marshal's office, and the *marshal* viewed the ring "as a significant security risk, and outside jail policy." (3 RT 1074.)

Denying appellant the opportunity to exercise his right to the presumption of innocence and to present crucial evidence on a critical issue because it was too onerous for the bailiff, who was already securing a belt and tie, to also perform a cursory visual examination of appellant's hand and make sure he was not wearing a ring was, as counsel observed, "absurd." (3 RT 1075.) It was also a manifest abuse of discretion.

D. The Error Was Prejudicial

Respondent contends that the "error should be reviewed under the standard of *People v. Watson* (1956) 46 Cal.2^{d} 818, 836 which precludes reversal unless it is reasonably probable that appellant would have obtained a more favorable verdict had defense counsel been permitted to introduce the proffered evidence." (RB 61.) Because the trial court's ruling violated appellant's federal constitutional rights, it is respondent who must establish beyond a reasonable doubt that the jury would have convicted appellant absent the error. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v.*

Taylor, supra, 31 Cal.3d at pp. 499-502)

Respondent argues that any error was harmless because the defense introduced into evidence a small gold pocket watch which contained a photograph of Carole on the inside cover. (RB 62.) In an effort to show that appellant loved Carole and would not have killed her, defense counsel played a video tape of appellant's interview at the end of his closing argument which showed appellant looking at Carole's photo inside the pocket watch after detectives left the interview room. (*Ibid.*) According to respondent, this was far more probative of any feelings appellant might have had toward Carole than whether he wore a wedding ring two years later. Given that the jury was not persuaded by the argument, it would have reached the same conclusion if appellant had been allowed to wear this wedding ring at trial. (*Ibid.*)

Showing that the jury was unmoved by the video tape does little, if anything, to establish beyond a reasonable doubt that none of the jurors noticed the absence of a wedding ring and viewed it as a significant factor in determining that appellant was guilty. It does not follow that the effect *vel non* of one piece of evidence predicts the effect of a different piece of evidence. Likewise, it does not follow that two items will have no more effect than one. Finally, the pocket watch was in the past; the ring would say something about how appellant felt at the time of trial.

Respondent cannot show that the jury would have convicted appellant absent the error. Accordingly, the error was not harmless (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Taylor, supra*, 31 Cal.3d at pp. 499-502) and the judgment and sentence must be reversed.

* * *

II. ALLOWING THE PROSECUTOR'S CASE AGENTS TO BYPASS COURTHOUSE METAL DETECTORS DURING TRIAL VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND WAS REVERSIBLE ERROR

Appellant argued in his opening brief that allowing the prosecutor's designated investigating officers to bypass metal detectors as they entered the courthouse while requiring his counsel and the jurors to submit to the security measure violated his constitutional rights. (AOB 169-181.)

Respondent contends that appellant has forfeited his right to challenge the trial court's ruling by failing to accept the trial court's offer to admonish the jury against drawing any inferences from the officers' exemption from security screening. (RB 65-66.) Even so, according to respondent, allowing the officers to bypass the metal detectors was not an inherently prejudicial practice (RB 67-72) and the trial court did not abuse its discretion by refusing to require the officers to relinquish their weapons upon entering the courthouse. (RB 73-74.)

A. The Claim Is Cognizable on Appeal

"A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. (*People v. Arias* (1996) 13 Cal.4th 92, 159, 51 Cal.Rptr.2d 770, 913 P.2d 980; *People v. Noguera* (1992) 4 Cal.4th 599, 638, 15 Cal.Rptr.2d 400, 842 P.2d 1160.)" (*People v. Hill* (1998) 17 Cal.4th 800, 820-21.) Respondent alleges that the trial court would have advised jurors that the officers were not required to pass through the metal detectors because they were authorized to carry weapons and jurors should not draw any inferences about the officers' credibility as witnesses based on that circumstance. (RB 66.) However, as defense counsel explained to the trial court, appellant declined its offer to admonish the jury because "this is the type of situation that . . . an admonition would do more harm than good." (20 RT 5695.) Indeed, informing the jury that the officers were granted extraordinary privileges because they occupied a special place of trust in the court's own weapons-screening policy (20 RT

5693-5695) would have exacerbated, not alleviated, counsel's concern that the officers would have a false aura of credibility when they testified. Respondent concedes as much by admitting that it would have been reasonable for the jury to infer that "the detectives were trusted not to pose a threat to the security of the courthouse because of their status as law-enforcement officers. *Aside from that*, there was no reason for jurors to conclude that the trial court believed they were entitled to more deference or credibility than any other witness in the case." (RB 69; emphasis added.) In short, however the trial court worded an admonition, jurors could only have believed that the court trusted the officers, two of the primary witnesses against appellant, more than it trusted either counsel or themselves. An admonishment would have been futile under these circumstances and a request for one was unnecessary.

B. Allowing the Officers to Bypass Metal Detectors Was an Inherently Prejudicial Practice and an Abuse of Discretion

Respondent contends that allowing the officers to bypass metal detectors was neither an inherently prejudicial practice that required a case-specific showing of need nor an abuse of discretion. (RB 67-72.) According to respondent, screening all who enter the courthouse for weapons except authorized law-enforcement personnel is a routine security and decorum procedure that does not run the risk of prejudice. (RB 69.)

"Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. . . . Whenever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play,' *Williams*, 425 U.S., at 505, 96 S.Ct., at 1693." (*Holbrook v. Flynn, supra*, 475 U.S. at p. 570.) Allowing the prosecutor's investigating officers to bypass the weapons-screening process in the jurors' presence created an "an unacceptable risk" to appellant's right to the presumption of innocence by clothing the state's agents

who had brought the charges against him with a "false aura of veracity." (*People v. Beagle* (1971) 6 Cal.3d 441, 453.)

Given the breadth and significance of their testimony, the officers' believability was crucial to the case. Their testimony gave credence to uncorroborated testimony about the existence of a plan to kill Dean, attempts to take his life, and appellant's connection with that plan or attempts. It also bolstered uncorroborated testimony about a conspiracy to kill Carole and her fetus and appellant's connection to their murder, particularly evidence about The Company; the articles and other materials in The Anarchist's Cookbook; Daniels' purchase of the murder weapon; the package, wax seal, and "Doorway" he allegedly received; and the label maker found in the Sacramento river. (See AOB, pp. 212-218.) The procedure was therefore inherently prejudicial and the trial court was required to make a showing of manifest need for the courtroom security measures. (*People v. Stevens* (2009) 47 Cal.4th 625, 637-638.)

Respondent argues that requiring the officers to submit to the weapons-screening process or taking appropriate measures to ensure that jurors did not observe them bypassing the process would not have cured any harm because the officers' weapons would still have been visible to jurors in the courtroom. (RB 72.) This, however, misapprehends appellant's argument. Appellant does not complain that jurors were able to observe the officers' weapons in the courtroom, but rather that jurors observed the officers bypassing the weapons-screening process which was applicable to everyone else involved in the trial and that this created an unacceptable risk of impermissible factors coming into play, namely lending the officers a false aura of credibility. This risk easily could have been averted simply by requiring the officers to enter the courthouse through another door.

The trial court saw no prejudice and did not think that jurors would draw improper inferences, but failed to explain why or to otherwise address the defense concern that allowing the officers "to pass through [the security process] without the proper search"

gave them an "impermissible appearance of credibility" on the witness stand. (20 RT 5690.) This Court has made it clear that, under the circumstances, the trial court's denial of appellant's request based on the general courthouse policy of exempting on-duty law enforcement officers from the weapons screening procedures is an abuse of discretion, and that it will not examine the record in search of valid, case-specific reasons to support the order. (*People v. Hernandez* (2011) 51 Cal.4th 733, 744.)

C. The Error Was Prejudicial

Applying the *Watson* standard, respondent argues that "even if [the officers] were required to submit to the regular courthouse screening procedures it is not reasonably probable that appellant would have obtained a more favorable verdict in any respect. Nor was a better result for appellant reasonably probable if the trial court had required the investigators to enter the courthouse outside the presence of jurors. . ." (RB 74.)

As set forth above, however, allowing the officers to bypass the screening procedures in the jury's presence was an inherently prejudicial practice and error must be evaluated under the *Chapman* standard. (*People v. Hernandez, supra*, 51 Cal.4th at p. 746.) Respondent cannot establish beyond a reasonable doubt that none of the jurors believed the officers were exempt from the weapons-screening procedures because the court thought they were entitled to more deference and trust than anyone else who entered the courthouse, including the other witnesses in this case, and, based on that belief, credited them and their testimony with a "a false aura of veracity." The procedure posed such a high risk of unfairness that it violated due process and deprived appellant of a fair trial and rendered the guilt and penalty determinations unreliable. Accordingly, reversal is required.

* * *

III. PERMITTING THE PROSECUTOR TO INTRODUCE TESTIMONIAL STATEMENTS OF THE DOCTOR WHO PERFORMED THE AUTOPSY ON CAROLE GARTON THROUGH THE TESTIMONY OF A DOCTOR WHO DID NOT PERFORM OR OBSERVE THE AUTOPSY VIOLATED APPELLANT'S RIGHT TO CONFRONTATION AND TO A RELIABLE GUILT AND PENALTY DETERMINATION AND WAS REVERSIBLE ERROR

Appellant argued in his opening brief that his Sixth Amendment right to confront and cross-examine Dr. Harold Harrison, the pathologist who performed the autopsy on Carole and her fetus, was violated when the trial court allowed Dr. Susan Comfort, who did not perform the autopsy, to testify about the cause of their deaths. (AOB 182-183.)

Respondent maintains that the claim has been forfeited by appellant's failure to object to Dr. Comfort's testimony on Sixth Amendment grounds at the time of trial, that it lacks merit because the observations in Dr. Harrison's autopsy report are not testimonial and Dr. Comfort formed her own independent conclusions on the cause and circumstances of death, and that any error was harmless beyond a reasonable doubt because evidence regarding the cause of death was undisputed. (RB 74-88.)

Respondent is wrong about forfeiture. This Court has held explicitly that *Crawford* is retroactive and that the constitutional claim is not forfeited by failing to object to admission of a statement on federal constitutional grounds. (*People v. Chism* (2014) 58 Cal.4th 1266, 1289, fn. 8 (citing *People v. Cage* (2007) 40 Cal.4th 965, 975 fn. 4, and *People v. Pearson* (2013) 56 Cal.4th 393, 461-462).)

With respect to the remainder of respondent's argument, appellant considers the issue to be fully joined by the briefs on file with this Court. For all of the reasons set forth in the opening brief, appellant's Sixth Amendment right to confront and cross-examine Dr. Harold Harrison was violated by permitting Dr. Susan Comfort to testify about the cause of death.

* * *

IV. THE FLAW IN THE CONSPIRACY INSTRUCTION (CALJIC NO. 8.69) RELIEVED THE PROSECUTOR OF THE BURDEN OF PROVING THE INTENT ELEMENT OF THE CRIME OF CONSPIRING TO MURDER AND DEPRIVED APPELLANT OF HIS RIGHT TO DUE PROCESS

Appellant argued in his opening brief that instructing the jury with a flawed version of CALJIC No. 8.69 relieved the prosecutor of the burden of proving the intent element of the crime of conspiring to murder and deprived appellant of his right to due process. (AOB 204-211.) Respondent acknowledges that the version of CALJIC No. 8.69 with which the jury was instructed is "flawed" but argues that the error did not reduce the prosecutor's burden of proof or deprive appellant of due process because "other parts of the instruction" made clear that he "had to be among those who had the requisite intent" (RB 91) and,

> Even if the jury understood the phrase 'at least two of the persons' to mean that a conspiracy could exist even if one or two members who entered into the agreement to kill the victims did not actually intend to kill them, the remainder of the instruction made clear that appellant could not be found guilty of conspiracy unless he was among those who entered into the agreement to kill another person or fetus and intended to carry out that plan.

(RB 92-93.) Further, according to respondent, any error in the instruction was harmless in light of the overwhelming evidence of appellant's intent, the lack of any evidence to support his theory, and the jury's verdicts on the murder charges and the special circumstance allegations. (RB 96-102.)

Respondent fails to identify the other parts of the instruction which allegedly make clear that appellant could not be found guilty of conspiracy to commit murder unless he had the specific intent to commit murder. The jury was instructed that a conspiracy to commit murder is an agreement entered into between *two or more persons* with the specific intent to agree to commit the crime of murder and with the further specific intent to commit that murder. (CALJIC No. 8.69; 29 CT 8439-8440; 35 RT 10072-10074; emphasis added.) This instruction did not inform the jury of the fact that, while a conspiracy to commit murder may exist if "at least two" of the participants intended to kill

(*People v. Swain* (1996) 12 Cal.4th 593, 613), for appellant to be guilty of the crime, he had to be one of the participants who harbored the specific intent to kill. (See *People v. Morante* (1999) 20 Cal.4th 403, 416.) Instead, the jury was told that there were three accomplices in the alleged conspiracy to kill Carole and her fetus, and four in the alleged conspiracy to kill Dean (CALJIC No. 3.16; 29 CT 8417; 35 RT 10061), and that *at least two* of the participants in each charged conspiracy must have intended to kill. It never specified that appellant must have been one of them.

Respondent maintains that the error is immaterial because the non-flawed portion of the instruction required the prosecutor to establish that the conspirators harbored express malice aforethought, namely *the specific intent to kill* unlawfully another human being or fetus and, in addition to the proof of an unlawful agreement and specific intent, the jury had to find that one of the alleged overt acts had been committed. (RB 91-92.) The problem with these arguments, of course, is that the flawed portion of the instruction permitted the jury to find appellant guilty even if it believed that Lynn and Daniels - but not appellant - harbored express malice aforethought. The instructions, as a whole, failed to convey that appellant could not be found guilty of conspiracy to commit murder unless he was among those who entered into the agreement to kill another person or fetus and intended to carry out that plan. (*People v. Petznick* (2003) 114 Cal.App.4th 663, 681.)

Respondent argues:

> For the jury to have concluded that appellant lacked the requisite intent to kill Carole and her fetus, as alleged in counts 3 and 4, it would have had to find that he never entered into an agreement with Lynn and Daniels to kill his pregnant wife. Likewise, for the jury to have concluded that appellant lacked the requisite intent to kill Dean, as alleged in count 5, it would have had to find that he never entered into an agreement with Lynn, Daniels and Gordon to do so.

(RB 94.) The law does not support this assertion. Conviction requires both intent to agree and intent to kill. (CALJIC No. 8.69.)

Respondent contends that the error should be analyzed under the *Watson* standard,

whether it is "reasonably probable that the trial's outcome would have been different in the absence of the trial court's instructional error," because there is no reasonable likelihood that the jury interpreted the flawed instruction as not requiring the prosecution to establish appellant's intent to kill. (RB 92, 98; *People v. Prettyman* (1996) 14 Cal.3th 248, 274.) But this is not a case of applying or misapplying instructions. Instead, this is a case where the jury was specifically instructed that only two of the participants in each charged conspiracy must have intended to kill. There was nothing for the jury to misapply. And, of course, jurors are presumed to follow the instructions they are given. (*Yates v. Evatt* (1991) 500 U.S. 391, 403.)

The admittedly flawed instruction relieved the prosecutor of the burden of proving beyond a reasonable doubt each element of the charged offense (*Sullivan v. Louisiana, supra,* 508 U.S. at pp. 277–278; *Carella v. California, supra*, 491 U.S. at p. 265; *People v. Kobrin, supra*, 11 Cal.4th at pp. 422–423 & fn. 4), violated the exclusive domain of the trier of fact (*Carella v. California, supra*, 491 U.S. at p. 265; *People v. Kobrin, supra*, 11 Cal.4th at p. 423), and prevented the jury from finding that the prosecution failed to prove a particular element of the crime beyond a reasonable doubt. (*United States v. Gaudin* (1995) 515 U.S. 506, 510–511, 522–523; *People v. Kobrin, supra*, 11 Cal.4th at pp. 423–424; *People v. Hedgecock* (1990) 51 Cal.3d 395, 407; *People v. Flood* (1998) 18 Cal.4th 470, 491.)

Respondent cannot establish "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained' *(Neder v. United States, supra*, 527 U.S. at pp. 9, 15, quoting *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Flood, supra*, 18 Cal.4th at p. 502.)." The erroneous instruction rendered appellant's criminal trial fundamentally unfair and both the conspiracy and first degree murder verdicts unreliable. (*People v. Petznick, supra*, 114 Cal.App.4th at p. 681.) The error was therefore not harmless beyond a reasonable doubt and reversal is required.

* * *

V. ACCOMPLICE TESTIMONY WAS INSUFFICIENTLY CORROBORATED

Appellant argued in his opening brief that the evidence was insufficient to sustain his convictions because accomplice testimony was uncorroborated. (AOB 212-222.) Respondent acknowledges that any corroborating evidence must connect appellant with the offenses without interpretation and direction from the accomplices' testimony (RB 103-104) and contends that, under this standard, the prosecutor introduced sufficient evidence to corroborate the testimony. (RB 104-115.) On the contrary, the evidence, without reference, direction or interpretation in light of the accomplices' testimony, fails to connect appellant to any crime, and no rational trier of fact could have found the elements of the offenses beyond a reasonable doubt. There is no evidence connecting appellant to the conspiracies independent of the accomplices' statements. In fact, the little independent evidence that exists casts doubt on their testimony. Appellant considers the issue to be fully joined by the briefs on file with this Court. For all of the reasons set forth in his opening brief, the evidence lacks adequate independent corroboration, and the judgment and sentence as to both the conspiracy and murder counts must be reversed.

* * *

VI. CALIFORNIA LACKED TERRITORIAL JURISDICTION OVER THE CONSPIRACY CHARGE IN COUNT 5

Appellant argued in his opening brief that California lacked territorial jurisdiction over the alleged conspiracy to murder Dean Noyes in Gresham, Oregon. (AOB 223-232.) Respondent contends that the trial court had jurisdiction over the conspiracy because the evidence shows that the conspirators began their attempt to commit murder while in California. (RB 116-128.)

Respondent claims there was "overwhelming evidence of appellant's intent to kill Dean before he set out for Portland on February 7, 1998." (RB 122.) Given this evidence, "the prosecution was required to demonstrate only 'slight acts' in furtherance of that design in California to show that an attempt was made in this state." (RB 125.) Respondent fails to note that the "evidence" is all uncorroborated accomplice testimony. Thus, nothing in the record corroborates testimony that appellant and Gordon began discussing plans to kill Dean in January 1997, that they ever discussed Dean's life insurance proceeds, or that they traveled to Portland in October 1997 to plan Dean's death. Similarly, nothing corroborates the testimony that appellant offered to have Dean killed if Lynn wanted or that she sent appellant keys to her house and vehicles and a photograph of Dean. Finally, nothing corroborates testimony that appellant told Daniels there were several contracts out on Dean's life and appellant was planning to kill Dean to collect on them; that Daniels met with appellant and Gordon about a week or two before driving to Portland at the Moose Lodge in Anderson where he was provided with additional details of the murder plot; that appellant and Daniels went to factory outlet stores to buy clothing to help them look like Oregon residents; that they test-fired weapons or calibrated the scope on appellant's rifle; or that appellant ever showed Daniels a photo or keys. More importantly, the only evidence that Gordon, Daniels, and appellant took weapons to Portland came from Gordon and Daniels. Appellant's alleged co-conspirators easily could have fabricated all this "evidence."

Respondent acknowledges that "[b]ecause of the great distance between appellant's home in Shasta County, California, and the intended victim's location in Portland, Oregon the attempt in this case spanned hundreds of miles and many hours" but argues that appellant's "actions of loading up his Jeep with weapons and other equipment and driving north on Interstate 5 toward Oregon - after months of planning - were acts that constituted the beginning of the attempt to kill Dean." (RB 128.) Respondent fails to explain why this case is not governed by *People v. Miller* (1935) 2 Cal.2d 527. There, after threatening to kill the victim, the defendant went with a rifle to a field where the victim was working, walked toward the victim, stopped to load his rifle, then walked toward a constable who took the gun from him without resistance. This Court found that, "up to the moment the gun was taken from the defendant no one could say with certainty whether the defendant had come into the field to carry out his threat to kill [the victim] or merely to demand his arrest by the constable. Under the authorities, therefore, the acts of the defendant do not constitute an attempt to commit murder." (*Id.* at p. 532.) The considerable period of time that elapsed between the threat to kill and the rifle march through the hop field was an important factor in determining that there was no attempt. (*Id.* at pp. 529, 532.) The time that elapsed between appellant's alleged departure from Shasta County and the alleged attempt on Dean's life in Portland was greater than that involved in *Miller*. Accordingly, for the same reasons, departing for Portland could not have constituted an attempt.

This case is unlike *People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, where the defendant hired an undercover police detective posing as an assassin to murder his sister and provided him with the information necessary to commit the crimes and a $5,000 payment. (*Id.*, at pp. 7-9.) By aiming an armed professional who had agreed to commit the murder at the victims, there was nothing more for the defendant to do to bring it about. Thus, it was clear that he was actually putting his plan into action. These facts would lead a reasonable person to believe that a crime was about to be consummated absent an intervening force, and thus that the attempt was underway. (*Id.* at p. 14.) In contrast, even

if the uncorroborated testimony of appellant's alleged accomplices is credited, there was much to be done after appellant departed California to bring about Dean's murder, namely traveling several hundred miles over several hours, spending the night in a motel in Oregon, and finding Dean. Thus, it was not clear that appellant was putting a plan into action or that a reasonable person would believe that a crime was about to be consummated absent an intervening force.

No "appreciable fragment of the crime" was accomplished in California and there was no "direct movement toward its commission." (*People v. Memro* (1985) 38 Cal.3d 658, 698.) Accordingly, the state lacked territorial jurisdiction to prosecute appellant for conspiracy to murder Dean in California and the judgment and sentence as to Count 5 must be reversed.

* * *

VII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

In his opening brief, appellant argued that many features of California's capital-sentencing scheme, both on their face and as applied in this case, violate the United States Constitution and international law. (AOB 233-248.) Respondent disagrees. (RB 128-136.) Appellant considers this issue to be fully joined by the briefs on file with this Court. For all of the reasons set forth in the opening brief, appellant's death judgment violates international law and the federal Constitution and must be reversed.

* * *

VIII. THE CUMULATIVE EFFECT OF THE ERRORS UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Appellant argued in his opening brief that the cumulative effect of the errors in his case requires reversal of his judgment and sentence, even if the errors are harmless individually. (AOB 24-250.) Respondent disagrees. (RB 136-138.) Appellant considers the issue to be fully joined by the briefs on file with this Court. For all of the reasons set forth in the opening brief, the cumulative effect of the errors undermined the fundamental fairness of the trial and the reliability of the death judgment and the judgment and sentence below must be reversed.

* * *

CONCLUSION

For the foregoing reasons, as well as those stated in appellant's opening brief, the judgment and sentence herein must be reversed.

DATED: May 12, 2015

Respectfully submitted,

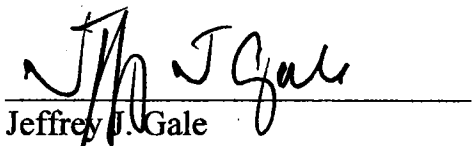
JEFFREY J. GALE
Attorney at Law

Attorney for Appellant

CERTIFICATION OF WORD COUNT
(Cal. Rules of Court, Rule 8.630(b))

I certify that appellant's reply brief uses a 13 point Times New Roman font and contains 7,235 words.

DATED: May 12, 2015



Jeffrey J. Gale
Attorney for Appellant

DECLARATION OF SERVICE

Re: PEOPLE V. GARTON **No. S097558**

I, Jeffrey J. Gale, declare that I am over 18 years of age, and not a party to the within cause; my business address is 5714 Folsom Blvd., No. 212, Sacramento, CA 95819. I served a copy of the attached:

REQUEST FOR RELIEF FROM DEFAULT AND APPELLANT'S REPLY BRIEF

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

TODD JESSE GARTON
P.O. Box T-16423
San Quentin, CA 94974

CALIFORNIA APPELLATE PROJECT
101 Second Street, Suite 600
San Francisco, California 94105

HON. BRADLEY BOECKMAN
Shasta County Superior Court
1500 Court Street
Redding, California 96001

DANIEL BERNSTEIN
Deputy Attorney General
P. O. Box 944255
Sacramento, CA 94244-2550

Each said envelope was then, on May 12, 2015, sealed and deposited in the United States mail at Nevada City, California with the postage thereon fully prepaid.

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

Executed on May 12, 2015, at Nevada City, California.

Jeffrey J. Gale