IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. BILLY JOE JOHNSON, Defendant and Appellant.	**Case No. S178272** Orange County Superior Court Case No. 07CF2849 **DEATH PENALTY CASE**

APPELLANT'S REPLY BRIEF

On Automatic Appeal from the Judgment of the Superior Court of the State of California for the County of Orange

Honorable Frank F. Fasel, Judge Presiding

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In this reply brief, appellant addresses specific contentions made by respondent, but does not reply to arguments which are adequately addressed in Appellant's Opening Brief. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert 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), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.[1]

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[1] Unless otherwise indicated, all further statutory references shall be to the Penal Code. Appellant's Opening Brief will be cited "AOB" and Respondent's Brief will be cited "RB."As in Appellant's Opening Brief, the Clerk's Transcript will be cited "CT" and formatted "CT VOL-

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE FINDING THAT APPELLANT KILLED MILLER BY MEANS OF LYING-IN-WAIT EITHER AS A THEORY OF FIRST DEGREE MURDER OR A SPECIAL CIRCUMSTANCE

Appellant was found to have committed the first degree murder of Scott Miller. The jury had been instructed on lying-in-wait as one theory of first degree murder, and also found true a lying-in-wait special circumstance allegation.

Section 190.2, subdivision (a)(15), allows imposition of a lying-in-wait special circumstance if the jury finds the defendant "intentionally killed the victim by means of lying in wait." While the statutory language of the lying-in-wait special circumstance adds a requirement of intentionality, the remainder is in conformity with the language of section 189 which defines first degree murder, *inter alia*, as murder committed "by . . . lying in wait."

The elements of lying-in-wait first degree murder are concealment or a concealed purpose from the person killed; waiting and watching for an opportunity to act; and from a position of advantage, making a surprise attack on the person killed or aiding and abetting the person who made the surprise attack. (*People v. Ceja* (1993) 3 Cal.4th 1134, 1138-1140; CALCRIM No. 521.)

The prosecutor urged the jury to convict appellant of first degree murder under a lying-in-wait theory and also urged them to find the lying-

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UME:PAGE." In like manner, the one volume "Supplemental Clerk's Transcript on Appeal Re: Accuracy" will be cited "SCT" and formatted without a volume number, and the Reporter's Transcript will be cited "RT" and formatted "RT VOLUME:PAGE."

in-wait special circumstance allegation true.[2] The prosecutor argued that evidence showed appellant set up Miller's murder and drove Miller to the place where Michael Lamb executed him, and that these facts and inferences from them established lying-in-wait. Appellant contends that there was insufficient evidence to support either first degree murder or the special circumstance premised on lying-in-wait.

Respondent disagrees, contending initially that appellant "fail[ed] to assess the evidence under the applicable standard of review, insisting on viewing the facts in the light most favorable to himself and refusing to draw any reasonable inferences from the facts in support of the judgment." (RT 51.) In support of this position, respondent quotes from *People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1574, about an appellant's need to present all relevant evidence relating to a claim of insufficient evidence and baldly asserts that appellant has failed to do so without pointing to any evidence other than the evidence appellant presented and fully discussed. (RB 59-60.) In fact, a comparison of appellant's and respondent's briefs show that the parties present and discuss the same evidence, but differ dramatically on the interpretation the evidence reasonably permits.

First of all, the fact that evidence is to be presented in the light most favorable to the prosecution does not mean that uncontroverted evidence favorable to the defense may be ignored, especially when that evidence was presented by the prosecution during the direct examination of its own witnesses. Instead, "upon judicial review *all the evidence* is to be considered . .

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[2] The prosecutor also alleged, and the jury was instructed on, first degree murder based on a theory of premeditation and deliberation, a theory that is included within lying-in-wait and which is necessarily established if lying in wait is proven. (*See, e.g., People v. Stevens* (2007) 41 Cal.4th 182, 219 [lying in wait is a "kind of willful, deliberate, and premeditated killing"].)

. ." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, emphasis in original.) Moreover, if evidence is to be held legally "substantial," it must be sufficient to prove the alleged offense or special circumstance beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.)

This court has stated that when an appellate court considers whether there is a murder by lying-in-wait -- and in particular when the issue turns, as it does here, on the element of concealment or concealment of purpose -- the analysis "is often a difficult one which must be made on a case-by-case basis, scrutinizing all of the surrounding circumstances." (*People v. Morales* (1989) 48 Cal.3d 527, 558.) Appellant submits that when that assessment is done on the facts of this case, there is insufficient substantial evidence to support the interpretation sought by respondent.[3]

It is not mere concealment of purpose that is required for lying-in-wait murder; instead, lying-in-wait requires concealment of purpose that puts the perpetrator in a position of advantage that allows the jury to infer that lying-in-wait was part of the plan to take the victim by surprise. (*People v. Morales*, *supra*, 48 Cal.3d at p. 555.) Here, that mandated nexus between concealment of purpose and a surprise attack from a position of advantage is absent.

Instead, the jury heard evidence that Miller's media interview put him at risk of being killed by his gang at any time, including long after the interview aired on television, and that Miller was both aware of the potential consequences and was on his guard because of them. Prior to the night of the killing, Miller told Marnie Simmons on more than one occasion that

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[3] Respondent argues that there was a sufficient showing of intent to kill, an element of the lying-in-wait special circumstance. Respondent also argues that there was sufficient evidence of watching and waiting for an opportunity to act. For purposes solely of this argument, appellant does not contend otherwise.

he was concerned for his safety. At the party the night of the killing, Andrea Metzger observed Miller joking with appellant that Miller would have to keep up his guard. Similarly, after Miller left the party with appellant, ostensibly to purchase drugs, he left a voice message for Simmons in which he sounded concerned. In the message, Simmons may have heard appellant's voice in the background. Similarly, appellant's prior testimony -- as presented by the prosecution -- revealed that appellant told Miller at the party that he was going to kill him for breaking gang rules. The only reasonable inferences that can be drawn from this evidence are that (1) Miller knew his gang sought to kill him; (2) Miller was concerned because appellant was at the party and Miller had not seen him in the year since the interview was on television; and (3) Miller was specifically concerned he was to be killed that night because he was out with appellant.

Respondent seeks to marginalize this evidence by arguing that "[l]uring the victim 'to an isolated location on a pretext' constitutes a concealment of purpose," citing *People v. Webster* (1991) 54 Cal.3d 411, 448. (RB 56.) Appellant does not disagree with this general proposition, but that is not what occurred here.

Miller was a drug addict willing to accompany appellant to buy drugs even though he clearly knew appellant's real purpose. Miller knew the Public Enemy Number 1 gang wanted him dead. He had expressed that sentiment to others in the past, spoke about it with appellant at the party, and in the telephone call he made to Simmons while driving with appellant he was very worried. In his prior testimony that was uncontradicted at this trial, appellant testified that while at the party, Miller knew that appellant was going to kill him and appellant told Miller that he was going to kill him. (RT 5:1703.) Thus, while appellant may have used the promise of buying drugs as the inducement to get Miller to come with him because Miller would make a bad choice in order to obtain drugs, there was no con-

cealment of what appellant intended to do. Thus, the evidence was uncontroverted that Miller knew an attempt on his life could be made if he departed with appellant, but chose to go with him anyway because he had a primary purpose of acquiring drugs. This was not a question of concealment of purpose but instead of Miller's bad choice to go with appellant in spite of the fact that he understood the purpose.

The absence of concealment of purpose was further evidenced by Miller's lack of surprise when he heard the footsteps of Michael Lamb and Jacob Rump behind him at the shooting scene, asked, "Are those PEN1 guys," and appeared resigned that he was to be killed. The only reasonable inference from this uncontroverted evidence was that Miller knew all along what was going to happen to him that night, just not when and where.

Thus, while the ultimate time and place of his shooting were most likely unknown to Miller, there was no substantial evidence that appellant ever concealed his purpose, and ever reasonable inference from the evidence is to the contrary.

Respondent next asserts that there was sufficient evidence of a surprise attack from a position of advantage, requiring that a victim be "taken by surprise, with little or no opportunity to escape or fight back." (RB 58, citing *People v. Jurado* (2006) 38 Cal.4th 72, 120.) Respondent's argument is simple: Miller was isolated in the alley when he heard footsteps and asked whether gang members were behind him, and he had no opportunity to escape or fight back because he was already isolated and surrounded. Respondent's position is mistaken.

There was no evidence that Miller was surprised when Lamb and Rump came up behind him. Miller knew that something was likely going to happen to him that night when he departed the party with appellant, and he apparently asked whether the guys behind him were from the gang in a matter-of-fact tone that did not indicate surprise. The mere fact Miller was

shot in the back of the head, apparently after introductions to Lamb and Rump, does not indicate a surprise attack; instead -- it merely shows that Miller was resigned to being killed.

Respondent repeatedly asserts that it was mere seconds between the sound of footsteps and the shooting, or that the killing occurred instantaneously, thus precluding fighting back or escaping, but there was no evidence to support this contention, or any evidence at all of the time involved. In this regard, respondent is not urging inferences from the evidence, but instead is fabricating evidence that was not before the trier of fact.

In addition, respondent selectively utilizes only the evidence believed to fit into its idealized elements of lying-in-wait and ignores the complete evidentiary picture, an approached clearly disapproved in *Jackson v. Virginia*, *supra*, 443 U.S. 307. As previously noted, an appellate assessment of the sufficiency of the evidence to support lying-in-wait, either as a theory of murder or a special circumstance, must be done case-by-case and mandates "scrutinizing all of the surrounding circumstances." (*People v. Morales*, *supra*, 48 Cal.3d at p. 558.) Respondent has failed to do that.

When all of the surrounding circumstances are analyzed, the record discloses no evidence that was reasonable, credible, and of solid value, that appellant either: (1) concealed his purpose; or (2) that Miller was killed by a surprise attack from a position of advantage. As such, no reasonable trier of fact could find appellant guilty of first degree murder or a special circumstance premised on lying-in-wait to be true. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1126-1127.)

The findings of first degree murder by lying-in-wait and the true finding on the lying-in-wait special circumstance allegation must be reversed.

II. THE VERSION OF THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE PROVISION DESCRIBED IN SECTION 190.2(a)(15) IS NOW INDISTINGUISHABLE FROM THE LYING-IN-WAIT THEORY OF FIRST DEGREE MURDER, UNCONSTITUTIONALLY VAGUE, AND CREATES AN ARBITRARY AND CAPRICIOUS APPLICATION OF THE DEATH PENALTY BY FAILING TO NARROW THE CLASS OF DEATH-ELIGIBLE DEFENDANTS

In March, 2000, California voters passed Proposition 18, modifying section 190.2 subd. (a)(15), creating death qualification for a defendant committing a murder "*by means of* lying-in-wait," rather than "*while* lying-in-wait." This change made the special circumstance statute virtually identical to the first-degree murder lying-in-wait provision of section 189. By eliminating the former distinction, the electorate removed the definite guideline needed to prevent arbitrary and capricious enforcement of these laws as required by the Eighth and Fourteenth Amendments. *(Godfrey v. Georgia* (1980) 446 U.S. 420, 428; *Gregg v. Georgia* (1976) 428 U.S. 153, 188; and see *People v. Musslewhite* (1998) 17 Cal.4th 1216, 1265, & *People v. Caitlin* (2001) 26 Cal.4th 81, 90.) (AOB 59-62.)

Respondent does not address appellant's argument, but merely urges in highly abbreviated form that "[t]his Court has already rejected similar constitutional challenges to the lying-in-wait special circumstance." (RT 62-63, citing *People v. Streeter* (2012) 54 Cal.4th 205, 249-250, *People v. Livingston* (2012) 53 Cal.4th 1145, 1174, *People v. Lewis* (2008) 43 Cal.4th 415, 515-517, & *People v. Stevens*, *supra*, 41 Cal.4th at pp. 203-204.) Respondent then quotes *People v. Stevens*, *supra*, 41 Cal.4th at p. 204, for the proposition that the lying-in-wait special circumstance narrows the category of those eligible for death because it has a requirement of intention to murder, while lying-in-wait murder does not. According to respondent, "[appellant] fails to acknowledge or discuss these decisions which defeat his

claim. (See AOB 59-62.) As such, [appellant] offers no reason to reconsider or revisit this issue and the judgment should be affirmed." (RB 63.)

Appellant initially notes that none of the four cases cited by respondent actually support the proposition cited. While all the cases rejected a constitutional challenge to the lying-in-wait special circumstance, each case involved a murder that occurred prior to enactment of Proposition 18 in March, 2000, at which time the lying-in-wait special circumstance set forth in section 190.2, subdivision (a)(15), applied to a defendant committing a murder "*while* lying-in-wait." This court has yet to rule on the constitutionality of the current version of the statute applicable to a defendant committing murder "*by means of* lying-in-wait." Appellant submits that the complete failure to respond to his argument acts as a concession of the point. (*People v. Grimes* (Jan. 5, 2015, S076339) ___ Cal.4th ___, ___ [2015 WL 47493, 18] ["respondent's failure to address an argument raised by an appellant may, under some circumstances, be interpreted as a concession."]; *People v. Bouzas* (1991) 53 Cal.3d 467, 480.)

To the extent that this court finds that respondent has adequately replied to the issue raised in Appellant's Opening Brief, respondent is incorrect.

In a case cited by appellant and ignored by respondent, the Ninth Circuit addressed the issue as it read prior to the 2000 amendment and found that the only reason section 190.2, subd.(a)(15), was not void for vagueness was the fact that the statute required that the defendant kill "while" lying-in-wait rather than "by means of" lying-in-wait. (*Houston v. Roe* (9th Cir. 1999) 177 F.3d 901, 906-907.) The following year that very distinction was eliminated by the enactment of Proposition 18. Accordingly, under the reasoning of *Houston v. Roe*, the amendment rendered the special circumstance void for vagueness and thus unconstitutional.

To date, the only published case which analyzes the constitutionality of the amended version of section 190.2, subdivision (a)(15), is *People v. Superior Court (Bradway)* (2003) 105 Cal.App.4th 297, 306-307 ("*Bradway*"). In that case the Court of Appeal for the Fourth Appellate District, Division One, relied on the requirement of intent to kill found in the special circumstance, but not in section 189, and found this distinction adequately narrowed the class of persons to whom the special circumstance could be applied and thus rendered the provision constitutional. However, as Justice Kennard said in her dissent in *People v. Ceja*, *supra*, 4 Cal.4th at pp. 1146-1157, and as Justice McDonald repeated in his dissent in *Bradway*, *supra*, 105 Cal.App.4th at pp. 311-314, the concept of lying-in-wait as both a theory of murder and the special circumstance are now identical because lying-in-wait is the functional equivalent of intent to kill. For this reason, appellant respectfully urges this court to disapprove *Bradway*.

Even if this court agrees with the holding in *Bradway,* it does not apply to the present case. *(Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362 [the constitutionality of a statute is judged on an "as applied basis"].) The *Bradway* court noted the defendant's intent to kill his victim was an inescapable conclusion given the facts of that case. *(Bradway*, *supra*, 105 Cal.App.4th at p. 310.) However, because appellant did not personally commit the murder, section 189 required the prosecution to prove appellant's intent to kill the victim to find him guilty of murder premised on lying-in-wait. (*People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1265.) Given the facts of this case, there was no meaningful distinction between the statutes. Respondent appears to acknowledge this problem in the counter-argument to appellant's contention that there was insufficient proof to sustain the lying-in-wait allegations of both statutes. Respondent asserts that "where '"the evidence supports the special circumstance, it necessarily supports the theory of first degree murder."' [Citations omitted.]" (RB 54.)

Once the jury reached its verdict under section 189, accepting that appellant intended to kill Miller and did so by lying-in-wait, its additional finding that appellant qualified for the death penalty under the lying-in-wait special circumstance was inevitable because the jury was not required to consider any additional information in making its decision. This is in violation of the Eighth Amendment's requirement that factors making a defendant eligible for the death penalty must properly channel the jury's discretion and narrow the class of first degree murders for which a jury may impose capital punishment. The lying-in-wait special circumstance finding must be reversed.

III. THE TRIAL JUDGE PREJUDICIALLY ERRED BY INSTRUCTING THE JURY WITH CALCRIM NO. 400 THAT AN AIDER AND ABETTOR OF A CRIME IS EQUALLY GUILTY WITH THE ACTUAL PERPETRATOR

The trial judge instructed the jury with a version of CALCRIM No. 400 that stated an aider and abettor is equally guilty of a crime with the actual perpetrator. As appellant argued in his opening brief (AOB 63-74), this instruction was erroneous because an aider and abettor's culpability may be greater or lesser than the actual perpetrator depending on the mens rea of the aider and abettor. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1121; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164-1165.) After both the decision in *Samaniego* and the trial in this case, CALCRIM No. 400 was amended to delete the phrase "equally" in situations such as this one.

It was error to instruct on equal culpability in this case because there was a clear difference in culpability level between appellant and Michael Lamb. In the prosecutor's theory of the case, Lamb actually killed Scott Miller by shooting him in the head, while appellant was less culpable because he merely escorted Miller to the scene. Appellant submits that his jury believed the prosecutor's theory that he directly aided and abetted Lamb in the killing, which in turn necessarily led to a verdict of first degree murder under the erroneous "equally culpable" language of the instruction in CALCRIM No. 400.

Respondent disagrees, but for the reasons discussed below, respondent is mistaken.

Respondent first contends that appellant has forfeited this claim because appellant's trial counsel did not object to the instruction as given, and because the former version of CALCRIM No. 400 given in this case is a correct statement of the law merely subject to clarification or modification. (RB 64-65.) Respondent misses the mark on both counts.

First, an appellate court may review any claim of instructional error affecting a defendant's substantial rights irrespective of whether there was an objection in the trial court. (§ 1259; *People v. Hudson* (2006) 38 Cal.4th 1002, 1012; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.) Whether appellant's substantial rights were affected can only be determined by deciding if the instruction as given was flawed and, if so, whether the error was prejudicial. That is, if the claim has merit, it has not been forfeited.[4]

Moreover, the general rule that a party may not complain about an instruction that is legally correct but needs clarification or amplification "does not apply when . . . the trial court gives an instruction that is an incorrect statement of the law." (*People v. Hudson*, *supra*, 38 Cal.4th at pp. 1011-1112.) Respondent fails to respond to appellant's argument that while *Samaniego* found the claim to be waived in that case (*People v. Samaniego*, *supra*, 172 Cal.App.4th at p. 1163), *Samaniego* changed the law in April, 2009, and in cases like this one that were tried after *Samaniego*, a trial court is required to instruct correctly even when it has no *sua sponte* duty to do so. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1275; *People v. Fudge* (1994) 7 Cal.4th 1075, 1110; *People v. Castillo* (1997) 16 Cal.4th 1009.) Here, however, the trial court had a *sua sponte* duty to instruct on aiding and abetting culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560-

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[4] The flaw in respondent's forfeiture argument is demonstrated by the cases relied on by respondent, none of which involve failure to object to or request clarification of a jury instruction incorrect on the law. (See *In re Seaton* (2004) 34 Cal.4th 193, 198 [three claims relating to prosecutorial decision to seek death penalty and one claim of deliberate manipulation of racial composition of jury panel]; *People v. Rogers* (1978) 21 Cal.3d 542, 548 [admission of evidence based on unreasonable search]; *People v. Partida* (2005) 37 Cal.4th 428 [admission of evidence]; *People v. Scott* (1994) 9 Cal.4th 331, 353 [reasons for sentencing choice].

561.) Respondent's argument that appellant's argument is forfeited is not well taken.

Shifting to the substance of appellant's claim, respondent asserts that the jury was correctly instructed. In so doing, respondent misdescribes the holding of *People v. McCoy*, *supra*, 25 Cal.4th 1111, and ignores both *People v. Samaniego*, *supra*, 172 Cal.App.4th 1148 and *People v. Nero* (2010) 181 Cal.App.4th 504, both premised on *McCoy*. According to respondent, the equally guilty language of CALCRIM No. 400 is inapplicable in this case because the case was not prosecuted under a natural and probable consequences theory of aiding and abetting culpability, so "the jury was required to find [appellant] had the specific intent to kill to be liable as an aider and abettor[.]" (RB 66.)

For reasons explained below, respondent is wrong.

> [N]either *McCoy* nor *Samaniego* involved the natural and probable consequences doctrine. Each reached its conclusion only for aiders and abettors of a target offense. *McCoy* expressly stated, "Nothing we say in this opinion necessarily applies to an aider and abettor's guilt of an unintended crime under the natural and probable consequence doctrine." (*McCoy, supra,* 25 Cal.4th at p. 1117, 108 Cal.Rptr.2d 188, 24 P.3d 1210.) Its analysis was only to apply "when guilt does not depend on the natural and probable consequences doctrine...." (*Id.* at p. 1118, 108 Cal.Rptr.2d 188, 24 P.3d 1210.)"

(*People v. Canizalez* (2011) 197 Cal.App.4th 832, 851.)

Instead, the "equally guilty" language in CALCRIM No. 400 "misdescribes the prosecution's burden in proving the aider and abettor's guilt of first degree murder by eliminating its need to prove the aider and abettor's own (1) intent, (2) willfulness, (3) premeditation and (4) deliberation, the mental states for murder." (*People v. Samaniego*, *supra*, 172 Cal.App.4th at p. 1165.) In this case, the differences between appellant's and Lamb's intent and mental states were the most critical issues, and the

improper instruction misinformed the jury on the central issues they were called upon to resolve.

Respondent argues that CALCRIM NO. 401 required the jury to find appellant had the specific intent to kill required for aider and abettor culpability for first degree murder and that the "equally guilty" version of CALCRIM No. 400 was therefore correct in his case. (RB 66) Respondent is wrong. CALCRIM No. 401 merely sets for the basic elements of direct aiding and abetting, requiring appellant to know Lamb intended to commit a murder, intended to aid him in doing so, and aided him in doing so. It makes no reference to lesser degrees of culpability, and more importantly, CALCRIM No. 400, as erroneously given, required the jury to find appellant equally guilty if he directly aided and abetted Lamb.

Respondent concedes that the error in this case must be analyzed pursuant to the standard of *Chapman v. California* (1967) 386 U.S. 18, 24 (RB 66), requiring reversal unless respondent can demonstrate beyond a reasonable doubt that the jury verdict would have been the same absent the error. (*Neder v. United States* (1999) 527 U.S. 1, 15; *People v. Nero*, *supra*, 181 Cal.App.4th at pp. 518-519.) Respondent's only position on prejudicial error is simple: either appellant conceded or admitted the contested elements of the crime, or they were by necessity resolved adversely to appellant under other instructions. (RB 66-67.)

Respondent asserts that appellant's intent to kill was otherwise resolved through appellant's admission to Donald McLachlan that he wanted Lamb to shoot Miller in the face, and appellant's prior testimony that he would kill fellow gang members that do not abide by the gang's rules and considered Miller a "dead man" after Miller's televised interview over one year prior to the killing. (RB 66-67.)

To the extent that respondent urges appellant's gang related testimony as proof of intent, respondent ignores the crux of this issue and con-

fuses motive with intent. The fact that gang members were expected to kill other gang members who violated gang rules was itself a gang rule, but it provided no more than a reason to kill and did not demonstrate appellant's intent at the time Miller was actually killed. Similarly, appellant's testimony that he considered Miller a "dead man" after the interview did not demonstrate his intent to kill him at the time of the homicide. The statement to McLachlan was contested at trial and in any event was not an admission of intent but, if anything, merely an after-the-fact proclamation of bravado. In neither instance did the evidence to which respondent points prove that appellant had the required *mens rea* at the time of the killing to convict him of murder, nor did it provide sufficient evidence and to determine the degree of the crime.

Critically, appellant's prior testimony and his statement to McLachlan differed in almost every important respect. According to McLachlan, appellant said that Lamb was the shooter, but in his own testimony appellant claimed he acted alone. The prosecutor chose to rely on the statement to McLachlan's version and characterized appellant's prior testimony as an attempt to exculpate Lamb because that theory would permit the conviction of Lamb and Rump in addition to appellant, who at the time of his testimony was already serving a life sentence for a prior murder. Respondent now seeks to adopt parts of both McLachlan's and appellant's testimony, picking and choosing those portions which supposedly show intent while ignoring both the prosecutor's own theory and the totality of the evidence.

Relying on *People v. Cortez* (1998) 18 Cal.4th 1223, 1231-1232 ("*Cortez*"), respondent contends that because appellant was also convicted of conspiracy to murder Scott Miller, the issues of intent to kill and the mental states of premeditation and deliberation were necessarily resolved adversely to appellant under the conspiracy instructions. Respondent misreads *Cortez*. Respondent misreads *Cortez*.

In *Cortez*, this court concluded that "all conspiracy to commit murder 'is necessarily "conspiracy to commit [premeditated] first degree murder."' (*id.* at p. 609) and is therefore punishable in the same manner as first degree murder pursuant to the provisions of Penal Code section 182." (*Cortez*, *supra*, 18 Cal.4th at p. 1226.) The court also concluded that because "conspiracy to commit murder is a unitary offense punishable in every instance with the penalty prescribed for first degree murder, there is no occasion or requirement for the jury to further determine the 'degree' of the underlying target offense of murder, and thus no need for specific instruction on premeditation and deliberation respecting the conspiracy charge." (*Id.* at pp. 1226-1227.) Respondent has conceded that appellant's jury was not instructed on premeditation and deliberation as part of the conspiracy to murder instructions. (RB 67.) Hence, whether or not the mental states required for conspiracy to murder necessarily establish premeditation and deliberation, as urged by respondent, the jury did not by necessity resolve the issue adversely to appellant under the instructions they were given.

Beyond addressing whether the elements of the crime were resolved by other instructions, respondent does not contest prejudice arising from the error. With nothing further in dispute, appellant will not reargue prejudice, but will rely on the argument in his opening brief.

Finally, with respect to appellant's alternative claim that trial counsel rendered ineffective assistance in failing to object to the improper instruction, respondent contends the claim should be rejected because there was neither error nor prejudice. In so doing, respondent relies on the same arguments advanced previously. Appellant will not reassert those portions of his argument other than urging that there is support in the record for ineffective assistance of counsel in failing to assure that a properly modified version of CALJIC No. 400 was given at trial.

Here the jury was allowed to premise appellant's level of culpability on that of his co-defendant without ever considering appellant's personal *mens rea*. Respondent has not demonstrated that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Reversal of appellant's conviction of first degree murder is mandated.

IV. THE "TRUE" FINDING ON THE PRIOR MURDER SPECIAL CIRCUMSTANCE MUST BE STRICKEN BECAUSE THE INTERPRETATION OF PRIOR MURDER IN THIS CASE VIOLATES THE FEDERAL CONSTITUTION

In his opening brief, appellant argued that the true finding on the prior murder special circumstance must be stricken as violative of the federal constitution because the prior murder on which it was based was committed after the capital murder in this case, even though appellant was convicted of that prior murder before the trial in this case. (AOB 75-78.) Respondent relies on this court's previous decisions which rejected similar claims and urges this court to decline appellant's invitation to reconsider its prior rulings. (RB 71-72.)

Accordingly, the issue is joined and no reply is necessary to respondent's argument.

V. THE TRIAL COURT ERRED BY FAILING TO LIMIT THE SCOPE OF VICTIM IMPACT EVIDENCE TO THE CAPITAL OFFENSE, MANDATING REVERSAL OF APPELLANT'S DEATH VERDICT

Over defense objection, the prosecutor was permitted to introduce victim impact evidence relating to the noncapital murder of Cory Lamons. That secondary murder was used both as the predicate crime for the prior murder special circumstance and as an aggravating factor pursuant to section 190.3, factor (b), which permits the presentation of evidence of "other violent criminal activity." The failure to limit victim impact evidence to the circumstances of the capital offense exceeded the scope of aggravating evidence allowed under *Payne v. Tennessee* (1991) 501 U.S. 808, and the jury was improperly influenced in its penalty determination by evidence that was irrelevant but highly emotional and prejudicial. Respondent's protestations to the contrary are unavailing.

A. THE CLAIM WAS NOT FORFEITED

Respondent first urges that the claim on appeal was forfeited due to defense counsel's failure to raise it in the trail court. According to respondent, while defense counsel objected to introduction of the factor (b) victim impact evidence on relevance grounds, the failure to object specifically that victim impact evidence is limited to the circumstances of the capital offense forfeited appellant's claim on appeal. (RB 73-75.) Respondent's position vis-à-vis forfeiture is unfounded.

Appellate courts will not insist upon an objection where the objection would have been futile at the time. This exception is applicable where the statutory or case law binding the lower court at the time would have precluded the claim. (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648-649; *People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6.) As noted in

both appellant's opening brief and respondent's brief, this court has consistently held the effects of a defendant's violent criminal activity under section 190.3, factor (b), on victims and survivors of that activity are admissible in the penalty phase of a capital crime. It would have been pointless to object when the proffered evidence and trial court ruling complied with then current binding authority of this court.

Moreover, the objection raised by defense counsel was sufficient to protect the claim from forfeiture on appeal. In response to the prosecutor's written motion seeking introduction of victim impact evidence relating to the collateral murder pursuant to section 190.3, factor (b), the defense filed an opposition titled: "The Defense Objects to Victim Impact Statements of Factor (b) Crimes." Included in the paragraph that followed the title, the defense wrote: "The impact that a crime has on a victim's mental state is not admissible absent its relevance to prove that the crime fits within the guidelines set forth by 190.3 (b)." (CT 15:3774.) This relevancy objection is entirely consistent with *Payne v. Tennessee*, *supra*, 501 U.S. 808, which held that in a penalty phase, victim impact evidence about the capital murder is relevant and not *per se* barred by the Eighth Amendment if a state chooses to permit its introduction. (*Id.* at p. 827.) The issue here addresses both the overall relevance of victim impact evidence under section 190.3, factor (b), and whether California has actually permitted victim impact testimony about crimes unrelated to the capital crime. Both aspects of the issue are fairly included within the defense trial objection.

To the extent that the instant issue raises a federal issue, defense counsel set forth the basis for exclusion and sought the same result urged here, but did not identify the federal constitutional basis for the remedy sought: appellant's Fifth, Sixth and Fourteenth Amendment rights to due process of law and trial before a fair and impartial jury, and the requirement of a reliable determination in a capital case under the Eighth Amendment.

Accordingly, these constitutional objections are not forfeited despite failure to specifically urge them in the trial court. (*People v. Partida* (2005) 37 Cal.4th 428, 433-439; *People v. Guerra* (2006) 37 Cal.4th 1067, 1085, fn. 4.)

B. TESTIMONY ABOUT THE IMPACT OF THE CORY LAMONS KILLING WAS INADMISSIBLE UNDER CALIFORNIA LAW

In *People v. Boyd* (1985) 38 Cal.3d 762, this court held that aggravating evidence proffered by the prosecution must be premised on one of the three statutory aggravating factors found in section 190.3. Three years later, in *People v. Boyde* (1988) 46 Cal.3d 212, this court relied on the reasoning in *Boyd* in holding that testimony by victims of non-capital offenses relating to the impact of the crime on their lives was improperly admitted as a matter of state law. (*People v. Boyde*, *supra*, 46 Cal.3d at p. 249.)

Only two years later, in *People v. Benson* (1990) 52 Cal.3d 754, 797, this court reached the opposite result, holding that state law permitted introduction of evidence and argument on the impact on the victims of other crimes, but noted that it was not allowing evidence of the emotional impact on their family members because at that time such evidence and argument had been held to violate the federal constitution in *Booth v. Maryland* (1987) 482 U.S. 496, and *South Carolina v. Gathers* (1989) 490 U.S. 805. This court reasoned that the other crime victim impact evidence was admissible as part of the "nature and circumstances of other criminal activity involving the use or threat of force or violence or the effect of such criminal activity on the victims." (*People v. Benson*, *supra*, 52 Cal.3d at p. 797.) *Benson* did not discuss the contrary holding in *Boyde*.

The following year, in *People v. Mickle* (1991) 54 Cal.3d 140, this court held "other crime" victim impact evidence admissible "as circumstances of the prior crimes bearing on defendant's culpability." (*Id.* at p. 187.) The court noted parenthetically that its decision was contrary to its earlier holding in *Boyde*, but did not otherwise discuss *Boyde*.

Since that time, this court has consistently held that "other crime" victim impact evidence is admissible as a circumstance of the prior violent conduct, but has never addressed the specific issue of statutory construction raised here on appeal: whether in adopting section 190.3 the electorate intended to permit introduction of victim impact testimony about other crimes, in view of the fact that it utilized very different language in factor (a) ["the circumstances of the crime of which the defendant was convicted in the present proceeding"] and factor (b) ["the presence . . . of criminal activity by the defendant which involved the use or attempted use of force or violence . . ."]. (AOB 80-88.)

Respondent disagrees with appellant's assertion of state law error but does not address the merits of appellant's argument. Instead, in a one paragraph argument, respondent relies on prior holdings of this court upholding other crime victim impact evidence as admissible pursuant to section 190.3, factor (b). (RB 75-76.) Accordingly, appellant has nothing to which to reply.

Based on the argument in his opening brief, appellant reiterates that his argument on the statutory construction of section 190.3 is well-taken and not previously ruled upon by this court. Appellant submits the court should take up the issue and reverse the penalty judgment on this basis.

C. INTRODUCTION OF VICTIM IMPACT EVIDENCE RELATING TO THE NON-CAPITAL MURDER OF CORY LAMONS WAS FEDERAL CONSTITUTIONAL ERROR

In his opening brief, appellant argued that the admission of victim impact evidence relating to the non-capital murder of Cory Lamons, introduced pursuant to section 190.3, factor (b), was federal constitutional error and urged this court to reconsider its prior contrary holdings. (AOB 88-95.) Respondent relies on this court's previous decisions rejecting the issue appellant has raised in asking this court to decline appellant's invitation to reconsider its prior rulings. (RB 76-77.)

Accordingly, the issue is joined and no reply is necessary to respondent's argument.

D. THE ERROR WAS PREJUDICIAL

As respondent concedes, federal constitutional error must be analyzed pursuant to the standard of *Chapman v. California*, *supra*, 386 U.S. 18, 24 (RB 77), which requires reversal unless respondent can demonstrate beyond a reasonable doubt that the jury verdict would have been the same absent the error. (See *People v. Clark* (1990) 50 Cal.3d 583, 629; *Payne v. Tennessee*, *supra*, 501 U.S. at p. 824.) Respondent urges that any error in the introduction of victim impact evidence related to the Lamons killing was harmless because there was "overwhelming evidence of aggravation" independent of the erroneously admitted evidence. (RB 78, citing *People v. Russell* (2010) 50 Cal.4th 1228, 1265.)

Respondent misses the point. In conducting a prejudice analysis of penalty phase error under *Chapman*, this court must ascertain how the error would have affected "a hypothetical 'reasonable juror.'" (*People v. Ashmus* (1991) 54 Cal.3d 932, 984.) This analysis necessarily requires examination

of the prosecutor's argument to the jury at the conclusion of the penalty phase.

Here, the prosecutor repeatedly referred to the impact of the non-capital murder on Lamons' mother and urged that it must be given the highest value when weighing the aggravating and mitigating factors. At the end of his argument, the prosecutor urged a verdict of death by asking the jurors whether they felt what Lamons' mother and her daughter felt. In doing so, the prosecutor focused the penalty phase on the character of the victim of a non-capital crime and his family as opposed to the circumstances of the capital crime and the character of the defendant.

Here, the federal due process error in admitting highly emotional and prejudicial improper victim impact evidence cannot be harmless. Reversal of appellant's death penalty is mandated.

VI. PROSECUTORIAL MISCONDUCT MANDATES REVERSAL OF APPELLANT'S DEATH SENTENCE

During his penalty phase summation to the jury, the prosecutor unmistakably addressed his argument to each juror, asking them one-by-one whether they were indignant about appellant's behavior before asking the entire jury to return a verdict of death. (RT 9:2723-2724.) Referring to jurors individually in argument is an improper appeal to the passions and prejudices of the jurors. (*People v. Wein* (1958) 50 Cal.2d 383, 395-396; *People v. Talle* (1952) 111 Cal.App.2d 650, 675.)

With reference to the asserted error, respondent contends that there was no error because penalty phase jurors are required to personally assign weight to aggravating and mitigating factors, and personally weigh whether the aggravating substantially outweighs the mitigating to warrant a death sentence. According to respondent, the argument was proper because the prosecutor was "impress[ing] each juror with his or her personal and individual responsibility to arrive at an appropriate penalty by addressing them separately." (RB 84.)

Despite respondent's attempt to put an innocent spin on the prosecutor's argument, it is clear from the record that the prosecutor was not asking the jurors to deliberate individually in weighing the appropriate penalty, for he made no mention of that responsibility either shortly before or after the offending remarks. Moreover, it is clear from the context and the words that the prosecutor used that he was using this rhetorical style to stir the emotions of the jury as a whole to return his desired verdict. In any event, even if the purpose of the argument was proper, the prosecutor used a technique universally forbidden by this court and all other courts to reach the issue in both guilt and penalty phase trials. Using an improper means to this end was still misconduct.

After acknowledging that this court has previously forbidden argument addressing individual jurors, respondent urges that the prosecutor did not violate that rule because he "*address[ed] each of the twelve jurors in generic fashion with the same rhetorical question* . . . in effect addressing the jury as a whole." (RB 85, italics in original.) Respondent appears to be contending that the misconduct was somehow corrected because the prosecutor committed it with all twelve of the jurors instead of just one, or two, or eleven. This argument is absurd. The additional misconduct did not alleviate the problem; it compounded it. Each time the prosecutor addressed another juror individually he committed new misconduct and made the situation worse.

Respondent next contends that any penalty phase prosecutorial misconduct was harmless. Respondent's short argument on prejudice centers on the "overwhelming" nature of the case in aggravation and the "unconvincing" case in mitigation. (RB 86-87.) But the defense was not unconvincing; it asked the jurors to look at appellant's relationships with his family and friends, his life history, and institutional failure.

The prosecutor's improper argument came near the end of his summation and had the obvious purpose or increasing the individual anger of each juror so they would set aside their rational weighing process instead of focusing on it. The prosecutor's argument was one more link in the chain the prosecutor sought to build leading to a sentence of death, and plainly contributed to the death verdict. Accordingly, the error cannot be held harmless.

Finally, respondent urges that to the extent appellant's counsel provided ineffective assistance of counsel, it should be rejected because there was neither error nor prejudice. In so doing, respondent relies on the same arguments advanced on error and prejudice earlier in this portion of respondent's brief. Appellant submits that those arguments were in error and

will therefore not reassert those portions of this argument apart from noting that the record amply supports the conclusion that counsel was ineffective in failing to object to this highly prejudicial misconduct.[5]

Respondent has not demonstrated that the error was harmless beyond a reasonable doubt and appellant's sentence of death must be reversed.

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[5] Failure to object to prosecutorial misconduct does not necessarily waive the error. (*People v. Hill* (1998) 17 Cal.4th 800, 820-821.)

VII. THE CUMULATIVE EFFECT OF THE ERRORS IN THE GUILT AND PENALTY PHASES WAS PREJUDICIAL AND REQUIRES REVERSAL OF THE VERDICT OF DEATH

Even where individual errors do not result in prejudice, the cumulative effect of such errors may require reversal of the guilt phase. By and large, those same errors impacted the penalty phase in addition to other errors that were unique to the penalty phase. The discussion of each individual error identifies the way in which the error prejudiced appellant and requires reversal of the death judgment.

The combined effect of all the errors must be considered apart from the cumulative effect at the guilt phase, since the jury's consideration of all the penalty factors results in a single general verdict of death or life without the possibility of parole. Multiple errors, each of which might be harmless had it been the only error, can combine to create prejudice and compel reversal. (*Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *People v. Holt* (1984) 37 Cal.3d 436.)

Respondent counters that "there were no errors in either the guilt or penalty phase. Even assuming for purposes of argument a technical violation of the *Wein* rule in penalty phase argument, there would be nothing to aggregate." (RB 89.) While respondent repeats this refrain throughout the brief, respondent fails to fully appreciate the allocation of the parties' respective burdens in prejudice analysis. First, to the extent that there is federal constitutional error in the guilt phase, it is analyzed for prejudice pursuant to *Chapman*. Second, to the extent that appellant has shown penalty phase error, the burden of demonstrating prejudice is respondents, not appellant's. The applicable test of prejudice from state law error in a penalty trial is the same as the analysis for federal constitutional error under *Chapman v. California*, *supra*, 386 U.S. at p. 24; the state law standard of a showing of a "reasonable possibility" the error affected the penalty verdict

is the equivalent of the federal constitutional standard requiring respondent to demonstrate that the error was harmless beyond a reasonable doubt. (*People v. Jones* (2003) 29 Cal.4th 1127, 1264, fn. 11.)

Here, respondent has merely offered up the various assignments of error made by appellant and stated that there was no resultant error or prejudice resulting from any individual error. To the extent that this court holds that there were multiple guilt and penalty phase errors, respondent has made no attempt to meet the burden of demonstrating that the errors were harmless beyond a reasonable doubt.

Accordingly, because the compound errors in this case rendered the sentence unreliable, appellant's judgment of death must be reversed.

VIII. 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 set forth various deficiencies relating to the application of the California death penalty statute. (AOB 107-143.) Respondent relies on this court's previous decisions rejecting the issues appellant has raised in urging this court to decline appellant's invitation to reconsider its prior rulings. (RB 89-93.)

Accordingly, the issues are joined and no reply is necessary to respondent's argument.

CONCLUSION

For the reasons set forth in Appellant's Opening Brief and this reply brief, appellant respectfully requests that this Honorable Court reverse his judgment of conviction and sentence of death.

Dated: January 20, 2015.

Respectfully submitted,

MARK D. LENENBERG
Attorney for Appellant
BILLY JOE JOHNSON

CERTIFICATE OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.360(b)

I certify that this Appellant's Reply Brief contains 7,655 words, including footnotes, but not including this page, attachments, and tables, as counted by Microsoft Word for Windows 2007.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration is executed this 20th day of January, 2015, at Simi Valley, California.

MARK D. LENENBERG
Attorney for Appellant
BILLY JOE JOHNSON

DECLARATION OF SERVICE BY MAIL

I, MARK D. LENENBERG, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 940327, Simi Valley, California; I served one copy of the attached APPELLANT'S REPLY BRIEF on the following, by placing same in an envelope addressed as follows:

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Each envelope was then, on January 20, 2015, sealed and deposited in the United States mail at Simi Valley, 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 January 20, 2015, at Simi Valley, California.

MARK D. LENENBERG
Declarant