SUPREME COURT COPY

No. S165195

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

ANTHONY NAVARRO

Defendant and Appellant.

Automatic Appeal from the Superior Court
of Orange County
Case No. 02NF3143
Honorable Francisco Briseño, Judge

APPELLANT'S REPLY BRIEF

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DEATH PENALTY

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INTRODUCTION

The introduction to the respondent's brief contains a statement which is echoed throughout respondent's brief:

> There was overwhelming evidence of Navarro's controlling role in the conspiracy to rob and murder, and the ultimate murder of Montemayor, including but not limited to, incriminating notes, phone records, gang status and relationships, and the use of a vehicle connected to Navarro by his coconspirators and actual killers, just to name a few.

(Respondent's Brief [RB] 4.)

Respondent's contention does not withstand even cursory scrutiny. The contention is contradicted by the defense evidence, much of which consisted of the testimony of law enforcement personnel, and by fact, logic, and common sense. It simply does not make sense that appellant would order his underlings to commit a crime he had already told his law enforcement handlers he had been asked to commit. It does not make sense that his so-called "crew" would undertake such a crime on behalf of a gang leader who was by then known on the street as an informant. It also does not make sense that appellant, a law enforcement informant whom the prosecution made out to be clever enough to "play both sides" and fool both his law enforcement handlers and the members of the gang on whom he was informing, allowed a vehicle registered to his home to be used to commit the crime. (36 RT 6377-6378.) It does not make sense that

appellant allowed a car rented to Armando Macias, one of the three perpetrators of the crime, to be left in front of his house during and even after the crime was committed. It does not make sense that appellant would dispatch a crew more than 50 miles to commit a murder which would have no local benefit for the gang, and which would potentially expose appellant and the three perpetrators to the death penalty, for nothing more than the vague promise of an unknown amount of cash which was only *rumored* to be hidden in the victim's garage. And it does not make sense that appellant somehow ordered and carried out the Montemayor murder after Edelmira Corona, the central person in the conspiracy, refused to give him Montemayor's name or address– a fact on which their testimony agreed.

Respondent recites a long litany of evidence showing that appellant and the perpetrators were members of the Pacoima Flats gang (RB 20-24), but other than guilt-by-association, this fact says nothing about appellant's alleged involvement in the killing of David Montemayor. Whether appellant was a member of the gang was never in dispute, and he never denied his ties to Martinez, Macias, or Lopez. Nor did he ever deny his efforts to curry favor with them while they were all awaiting trial in the Orange County jail. However, none of these facts even begin to resolve the critical questions in the case, namely: (1) whether he was involved in this

crime, as the prosecutor argued, or whether, as appellant contended, he had left Sunrose house and the relevant cell-phones behind and was moving to Las Vegas); (2) whether the three perpetrators knew appellant was an informant, and therefore would not have carried out such a crime at his behest; or (3) whether the perpetrators were actually committing the crime at the behest of Edilmira Corona and appellant's wife, Bridgette Navarro.

If the prosecution's evidence had shown that the crime served some gang-related purpose, the fact that appellant was a gang shot-caller and the perpetrators members of the gang would have had more relevance. However, the killing served no gang purpose, and there was another and far more logical explanation that was also consistent with this evidence: appellant was a law enforcement informant who was trying to maintain the appearance of being a gang shot-caller in order to obtain information for his law enforcement handlers. Not only did a series of law enforcement officers testify to this fact, but appellant's informant status was also established by ample documentary evidence.

The prosecutor repeatedly insinuated that appellant was "playing both sides" and using his informant status to have his gangland enemies arrested. (*E.g.*, 28 RT 5047; 36 RT 3678.) The short answer to this contention is that even if appellant had exploited his informant status for

his own benefit– an accusation the evidence does not support– that fact would be of no relevance to the Montemayor murder, which served no conceivable gang-related purpose.

Accordingly, respondent's litany of evidence connecting appellant with Martinez, Macias, and Lopez (RB 35) proves nothing about appellant's involvement in this crime. In view of the evidence establishing that appellant was a law enforcement informant who had alerted his handlers to the impending crime in advance, the jury's failure to find appellant not guilty can only have resulted from either its failure to understand and apply the court's instructions or from the cumulative errors of the court, errors that so undermined due process as to make a mockery of the trial.

Those errors appear to have occurred primarily because the trial judge was perturbed by defense counsel's behavior and demeanor. Throughout the trial in this case, the judge became increasingly – often justifiably – frustrated with appellant's trial counsel. This frustration caused the judge to become impatient with, and sometimes even hostile to, appellant's counsel. In an apparent attempt to guard against future claims of ineffective assistance of counsel, the trial judge repeatedly intervened and sought to micro-manage the defense.

The court's impatience with counsel became evident before trial began and grew in intensity as the case went on. The judge repeatedly expressed his frustration with counsel: 7 RT 1795 ["I think you are being less than candid with the court."]; 7 RT 1800 [expressing concern that on eve of trial counsel had still not complied with the court's order to supply written summaries of oral interviews of the witnesses the defense intended to present. (7 RT 1801 [telling counsel to not use fact that he had been in court the three previous days as an excuse not to know what witnesses would be available]; 20 RT 3733-3734; 23 RT 4230-4232 ["I have never in my entire career seen such a rude, disrespectful attorney as yourself."]; 33 RT 5937 ["Where we cross bridges is as the court is talking to you, . . . please don't interrupt the court, please don't distract other counsel that I'm addressing, and it's a matter of protocol, it's a matter of or lack of politeness, and I get very upset that I even have to get into this kind of dialogue with a professional, well-qualified advocate in this proceeding."].) Finally, appellant refers this court to the lengthy quotation in Appellant's Opening Brief, at pages 196-198, in which the trial court clearly expressed its frustration with counsel.

As appellant has noted, while the trial judge may have at times had justification for its reactions to defense counsel, it was improper for him to

permit that frustration to color his rulings and unfairly tilt the playing field in favor of the prosecution. Appellant was not at fault for his counsel's unprofessional conduct, but it was appellant who suffered the consequences. He was deprived of an impartial tribunal and due process of law, and reversal is required.

GUILT-PHASE ARGUMENTS

I. IN ASSESSING THE SUFFICIENCY OF EVIDENCE, THIS COURT MUST CONSIDER THE WHOLE RECORD, INCLUDING THE DEFENSE EVIDENCE, THAT IS CONSISTENT WITH AND UNCONTRADICTED BY THE STATE'S EVIDENCE

As appellant argued in his opening brief, each of the counts against him depended on proof that he had both entered into a conspiracy and that he had not withdrawn from it prior to commission of the crime. However, the evidence was insufficient to prove either proposition. Even viewed in the light most favorable to the prosecution, the evidence was insufficient to show that appellant took part in the crime, either as a co-conspirator or as a an aider and abetter. (AOB 80-99.) This is particularly so in view of the that the defense evidence, on the question of actual entry into and continuance in the conspiracy, was consistent with the state's evidence.

Respondent sets forth the law regarding a claim of insufficiency of the evidence, emphasizing that the court must presume the existence of every fact favorable to the judgement that a jury could reasonable infer. (RB 70-72; citing *People v. Lindberg* (2008) 45 Cal.4th 1, 27.) However, even when this presumption is applied, the evidence fails to prove beyond a reasonable doubt that appellant entered into or remained in a conspiracy. The gang-related and cell-phone-related facts marshaled by the respondent

(RB 74-75) show only that (1) appellant held himself out to be and acted as a shot-caller for a portion of the Pacoima Flats gang, a fact completely consistent with the defense evidence that he was a valuable law enforcement informant about the gang's activities; (2) appellant had distributed a number of cell phones among his fellow gang members; (3) some of those phones were in the hands of his fellow gang members; and (4) one of the phones appellant had used in the past, among the many that Detective Rodriguez testified that appellant used interchangeably, was at the Sunrose Place residence and in communication with the perpetrators on the day of the crime. While the prosecution made much of these facts, none of them were even disputed by the defense, because none of them establish appellant's connection to the Montemayor murder.

Respondent states that "the conduct, relationship, interests and activities of Navarro, Corona, Martinez, Macias, and Lopez before, during and after the murder provided a strong evidentiary basis from which to infer that these individuals had reached a tacit agreement to commit the murders." (RB 72.) No, they don't. All this evidence really showed was that appellant knew and had multiple contacts with the others mentioned. However, there was no proof that appellant ever agreed with Corona to launch the attack, and there was a great deal of evidence that he did not do

so, and never ordered Martinez, Macias, and Lopez to carry out such an attack.

The evidence showed that by the end of the summer of 2002, Corona had at least twice rebuffed appellant's attempts to find out the name of the proposed victim, evidence which can only mean that she had no further interest in his being involved.[1] (19 RT 3530-35319 [Navarro]; 14 RT 2710-2712 [Corona].) The fact that Corona did not intend to include appellant in the conspiracy to kill Montemayor is further underscored by the letter Corona received from Felipe Vivar (Chispa) three weeks after her trip with appellant to Pelican Bay, in which "Chispa" told Corona not to trust appellant. (25 RT 4441-4443.) While appellant recognizes that it was Detective Rodriguez, testifying for the defense, who interpreted the letter in this way, his testimony on this point cannot be disregarded; the sufficiency of the evidence is judged upon the whole record. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

The evidence also showed that law enforcement informants who acted as gang shot-callers gained information sought by law enforcement

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[1]Appellant testified that he was seeking Montemayor's name – which was not included in the note found in appellant's car's glove box – at the behest of Detective Rodriguez. That Corona suspected he was seeking the name as a law enforcement informant explains her refusal to disclose the name to him.

through such methods as distributing cell-phones to gang members, providing a place for gang members to gather, and displaying gang roll-calls in the shot-caller's garage. (23 RT 4208, 4211-4212; 25 RT 4444-4445, 4450-4451.) The jury was instructed that if circumstantial evidence is consistent with both innocence and guilt, it must decide in favor of innocence. (CALJIC 2.01; *People v. Merriman* (2014) 60 Cal.4th 1, 87.) Accordingly, the fact that appellant engaged in these activities could not be construed as evidence of guilt even if these acts had some logical connection with this particular crime, and they do not. Navarro is not contending that he did not engage in gang-related activities; he is contending that he did not engage in *this* activity. It was the prosecution's burden to prove that he did, and the evidence presented, after a review of the whole record, is insufficient to show that he did.

Like the prosecutor at trial, respondent emphasizes that the information appellant gave Detective Rodriguez prior to the crime was so vague and void of details that it left Rodriguez with nothing to go on. (RB 79.) But this misses the point: if appellant had actually been involved in a conspiracy, *any* advance reference to his handlers about a conspiracy to murder a victim in Orange County would obviously have placed him in jeopardy of prosecution should that crime be carried out. The very act of

telling law enforcement officers about the conspiracy in advance thus made it utterly implausible that a man the prosecution portrayed as a clever gang shot-caller would move forward with such a crime, and even more implausible that he would order known members of his gang to commit the crime. Moreover, even if there had been evidence that appellant had engaged in a conspiracy prior to that point, informing law enforcement officers of the impending crime prior to its commission would have constituted a withdrawal from the conspiracy. (*United States v. United States Gypsum Co.* (1978) 438 U.S. 422, 463-464.)

Respondent refers to 818-482-1600 (referred to throughout the trial and these briefs merely as "1600") as "his" (*i.e.*, appellant's) phone. However, this mischaracterizes the evidence. Detective Rodriguez testified that appellant used many different phones, and other evidence showed that he distributed phones to others, including other gang members and his wife, Bridgette. (23 RT 4258-4259; 9 CT 2315-2316, ¶¶ 1, 2, 5, 9; 9 CT 2371, ¶ 35.) Thus, within the Pacoima Flats gang, cell-phones were fungible and frequently changed. Indeed, respondent puts forward as evidence of appellant's association with the perpetrators the fact that evidence obtained from Martinez' house included an address book which contained 482-9592 as the telephone number for "Droops" (a form of

appellant's gang moniker). (RB 74.) This was *not* the 1600 number that respondent so vigorously ties to Navarro, nor even the phone that the prosecutor argued was its predecessor, 818-335-4994. (28 RT 5001; 9 CT 2371, ¶ 35.) This directly undercuts respondent's own argument.

Respondent also contends there was no evidence tying Corona to Macias, Martinez, or Lopez. (RB 72.) To the contrary, there was such evidence. Deborah Almodovar testified that Corona told her that she and Macias were lovers, and that Macias undertook to commit the killing for her. (19 RT 3647-3648.) This is entirely consistent with the defense theory that Corona, who admitted being friends with Bridgette Navarro, cooked up the plan to both get Macias and his cohorts to commit the crime and simultaneously to frame Anthony Navarro. (15 RT 2850 [Corona testimony that she spoke often with Bridgette]; 18 RT 3361 [appellant's testimony that Corona was a frequent visitor at his Sunrose Place residence, at least once sleeping in the guest room].)

The evidence also failed to tie Navarro to any other *crimes* committed by or with his alleged fellow conspirators. If appellant provided nothing more than cell-phones and a place for his fellow gang members to gather, how does this implicate him in the conspiracy? All of the criminal gang activity involving appellant and other gang members, such as that

described by Kris Jacubecy, took place at the Remick Avenue house, before appellant moved to Sunrose Place. No evidence linked Navarro to Macias, Martinez, and Lopez as his crime-committing crew. Instead, the prosecution's evidence showed only a series of unrelated events: appellant had relationships with the three perpetrators, a fact explainable by his status as a gang shot-caller and informant; Corona gave appellant a note with the victim's *home* address and phone number, though not with the victim's workplace, where he was accosted); appellant had a relationship with Corona and knew in turn that she had a relationship with an EME leader, a fact appellant tried to use to have a "green light" – a general order that he be murdered – removed; and both appellant and Corona testified that she never gave appellant the victim's name, let alone his work address. It bears repeating that circumstantial evidence has to be consistent only with guilt, not with guilt or innocence, and the circumstantial evidence in this case does not clear that hurdle.

II. THE COURT UNJUSTIFIABLY FORCED THE DEFENSE TO DELAY ITS OPENING ARGUMENT, SERIOUSLY PREJUDICING APPELLANT'S CASE

A. The Trial Court Abused Its Disretion when it Compelled the Defense to Delay Opening Argument

The trial court refused to allow defense counsel to mention in his opening statement that appellant told Agent Starkey and Detective Rodriguez about being asked to murder someone in Orange County. The court asserted in chambers with the defense that this would trigger a hearsay objection by the prosecutor, who was unaware that the defense planned to have appellant testify. Over the course of lengthy discussions, the court refused to rule that the statements were not hearsay. In his opening brief, appellant argued that the court abused its discretion when, on these grounds, it forced the defense counsel to delay his opening statement until after the prosecution rested. (See AOB 100-113.) The court's action, which was based on an erroneous hearsay ruling, was devastating to the defense.

As appellant explained (AOB 119-121), both standards and practices within the legal defense community and multiple studies of juror behavior demonstrate that without a clear and persuasive statement of the defense view of the evidence in an opening statement, jurors are likely to adopt the prosecution point of view as a fixed narrative and subsequently

reject evidence that contradicts that narrative. (*See*, e.g., Gianna, *Opening Statements 2d: Winning in the Beginning by Winning the Beginning* (West, 2004), at pp. 1-3; Kalven & Zeisel, *The American Jury* (1966), at pp. 1-6, 1-7.)

Respondent claims that the trial court acted well within its discretion, that a defendant does not have a right to present opening statements at the beginning of the trial, that the statements at issue were hearsay, and that any error was harmless. (RB 80-94.) Respondent is wrong on all counts.

Regarding appellant's right to present his opening statement at the beginning of trial, respondent cites a 1961 case, *People v Struve* (1961) 190 Cal.App.2d 358, 360, which in turn cites a number of Court of Appeal cases from the 1940's for the proposition that a defendant does not have an *"absolute* right to make his opening state" prior to the prosecution's case. (RB 90.)

The flaws in respondent's argument are apparent from respondent's ensuing paragraphs. First, respondent asserts, "'it is the duty of counsel to refrain from referring to facts which he cannot or will not be permitted to prove.' (*People v. Cooley* (1962) 211 Cal.App.2d 173, 215, disapproved on other grounds in *People v. Lew* (1868) 68 Cal.2d 774.) Second,

respondent quotes *Hawk v. Superior Court* (1974) 42 Cal.App,3d 108, 121, for the proposition that counsel should confine opening statement to "evidence he intends to offer which *he* believes in good faith will be available and admissible."[2] (Emph. added.) (RB 90.)

The flaw here is that there was *no* ground on which appellant's initial statements to Rodriguez and Starkey were inadmissible. Respondent claims, without any citation to authority, that the statements were hearsay and that their relevance depended on whether the statements were true. (RB 91) To the contrary, these statements were relevant because appellant made them, alerting law enforcement officers to a crime that he had been asked to commit, and therefore would not have been so foolish as to thereafter actually commit. This is not hearsay (AOB 122-127); nor was it otherwise inadmissible in the defense case, and thus neither of the quoted statements from *Cooley* or *Hawk, supra*, apply here.

As appellant argued (AOB 100), the trial court's interference with the defense constituted a violation of appellant's right to present a defense

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[2]This supports what defense counsel Kallen argued to the court, that the making of an opening statement is a tactical decision by the defense, despite the fact that if what is represented to the jury cannot later be supported by evidence, the defense will suffer. (12 RT 2301-2302, 2303-2304.)

and his right to due process. However, even if this court were to view the error as less than a constitutional deprivations the trial court's refusal to allow the statements in opening argument constituted a gross abuse of discretion which affirmatively appears on the record. (*People v. Moore* (1945) 70 Cal.App.2d 158, 162.)

B. The Error Was Not Harmless

Respondent first asserts that the error was harmless because the court admonished the jury to keep an open mind, and because "[t]here is a presumption that jurors perform their duty." (RB 92, citing *People v. Struve*, *supra*, 190 Cal.App.2d at p. 360.) This argument completely ignores the reality that since *Struve* – a case now more than half a century old – study after study has shown that jurors, and humans generally, become wedded to first narratives and resist attempts to dissuade them from beliefs about evidence they have already adopted. (See, *e.g.*, Kalvin and Zeisal, *supra*, discussed at AOB 120-121.) Indeed, in a recent Preface to the Georgetown Law Journal Annual Review of Criminal Procedure, Ninth Circuit Judge Alex Kozinski had this to say:

> Even more troubling are doubts raised by psychological research showing that "whoever makes the first assertion about something has a large advantage over

everyone who denies it later."[3] . . . .

To the extent this psychological research is applicable to trials, it tends to refute the notion that the prosecution pulls the heavy oar in criminal cases. We believe that it does because we assume juries go about deciding cases by accurately remembering all the testimony and weighing each piece of evidence in a linear fashion, selecting which to believe based on assessment of its credibility or plausibility. The reality may be quite different. It may be that jurors start forming a mental picture of the events in question as soon as they first hear about them from the prosecution witnesses. Later-introduced evidence, even if pointing in the opposite direction, may not be capable of fundamentally altering that picture and may, in fact, reinforce it.[4] And the effect may be worse the longer the prosecution's case lasts and, thus, the longer it takes to bring the contrary evidence before the jury. Trials in general, and longer trials in particular, may be heavily loaded in favor of whichever party gets to present its case first—the prosecution in a criminal case and the plaintiff in a civil case. If this is so, it substantially undermines the

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[3]Shankar Vedantam, *Persistence of Myths Could Alter Public Policy Approach*, WASH. POST (Sept. 4, 2007), http://www.washingtonpost.com/wp-dyn/content/ article/2007/09/03/AR2007090300933.html (discussing the results of a 2007 study by psychologist Norbert Schwarz); *see* Norbert Schwarz et al., *Metacognitive Experiences and the Intricacies of Setting People Straight: Implications for Debiasing and Public Information Campaigns*, 39 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 127, 152 (2007) ("[o]nce a statement is accepted as true, people are likely to attribute it to a credible source—which, ironically, may often be the source that attempted to discredit it—lending the statement additional credibility when conveyed to others") (citation omitted). [Footnote in original.]

[4]*Straight: Implications for Debiasing and Public Information Campaigns*, 39 ADVANCES IN EXPERIMENTALSOC. PSYCHOL. 127, 152 (2007); Eliot G. Disner, *Some Thoughts About Opening Statements: Another Opening, Another Show*, PRAC. LITIGATOR, Jan. 2004, at 61 ("there is substantial evidence that juries normally make up their minds long before closing argument"). [Footnote in original]

> notion that we seldom convict an innocent man because guilt must be proven to a sufficient certainty. It may well be that, contrary to instructions, and contrary to their own best intentions, jurors are persuaded of whatever version of events is first presented to them and change their minds only if they are given very strong reasons to the contrary.

(Kozinski, *Preface* (2015) 44 Geo.L.J.Ann.Rev.Crim.Proc. iii, ix-x)

Thus, it is one thing to make such a presumption with regard to legal rules and the application of facts to the law. However, it is another thing altogether to apply a presumption which contradicts what is now empirically known about the workings of the human mind. We now know that once a belief about a disputed issue is formed, the human brain tends to view all subsequently acquired evidence from the perspective of that belief, accepting evidence that supports it, rejecting evidence that does not. Respondent's contention that the jurors would follow the "open mind" instruction is contradicted by common sense and by social science. The reality is that they cannot. Instead, and especially in the absence of a defense opening statement, the strong likelihood is that all of the defense evidence was judged, and rejected, by jurors who had already formed firm beliefs, thereby improperly and unconstitutionally shifting the burder to the defense to overcome the prosecution's narrative.

Respondent cites cases in which defense counsel *chose* to delay opening argument where, "as here," the defense had a weak case. (RB 92-

93) Appellant will leave to the Court to assess the absurdity of respondent's contention that the defense here had a weak case. However, whether " 'reasonably competent counsel' may wait to hear the prosecution's case before presenting an opening statement," as arespondent contends, is irrelevant here. (RB 93, citing *People v. Mitcham* (1992) 1 Cal.4th 1027, 1059.) In *Mitcham* it was *counsel's* choice to delay opening argument. Here the court forced counsel to forego an opening statement solely on the basis of an improper hearsay ruling. *Mitcham* is accordingly inapposite.

As noted above, respondent's arguments that the prosecution case was strong are without merit. Respondent makes no reference to the defense case, nor does respondent acknowledge that *every* bit of circumstantial evidence was also consistent with innocence, and was shown to be so in the defense case. There was no evidence that appellant had the phone the prosecutor alleged was his at the time of the crime. Indeed, every call to or from the 1600 phone on October 1 and 2 could have been made by or to someone other than appellant. There is also ample evidence that prior to the Montemayor killing appellant's wife, Bridgette, knew that he was an informant, was angry enough about it to have reported his further criminal activities (third strike crimes) to DEA Agent Starkey, was jealous

of his relationship with Sarah Ochoa, did not want him in her life, and was far more likely to be working with her new friend Mira Corona than with appellant.

Respondent's citation to *United States v. Salovitz* (2d Cir. 1983) 701 F.2d 17 (RB 94) is disingenuous. Respondent may be correct that no historical precedent establishes a constitutional right for a defendant to make an opening statement, but respondent fails to mention that the court in *Salovitz* explicitly limited its holding to the facts of the case, noting that "[t]he case was short, the issues were simple, and neither the Government nor the accused made opening comments. Moreover, assuming for the argument only that the district court erred, the overwhelming evidence of defendant's guilt made the error harmless." (*Id.* at p. 21.) *Salovitz* clearly has no application here. The instant case was anything but short and the issues were anything but simple, relying as they did entirely on circumstantial and inflammatory gang evidence. Here, the court's rulings precluding a defense opening statement effectively created a presumption of guilt which even the many law enforcement officers testifying for the defense could not overcome. Appellant was accordingly prejudiced by the error, and reversal is required.

III. THE TRIAL COURT'S REFUSAL TO ALLOW DETECTIVE RODRIGUEZ TO CORRECT HIS TESTIMONY WAS ONLY ONE OF ITS MANY EVIDENTIARY ERRORS WHICH ADDED UP TO A DENIAL OF A FAIR TRIAL

In his opening brief, appellant argued that the court committed several errors in excluding proposed redirect and recall testimony of Detective Rodriguez regarding how much detail appellant supplied in his initial reporting of the impending hit in Orange County. After cross-examination, Rodriguez recalled additional details appellant had provided which further corroborated appellant's testimony. (AOB 131, *et seq.*)

Appellant argued: that the court's application of *Roland v. Superior Court* (2004) 124 Cal.App.4th 154 was error both because *Roland* itself was wrongly decided and because the trial court misapplied the case (AOB 147-158); that the statement at issue was not hearsay (AOB 158-162); that the court's purported reliance on the statements' unreliability was misplaced (AOB 162-164); and that the errors were prejudicial (AOB 164-169.) Respondent rejects all of these contentions. (RB 95 *et seq.*) Respondent is wrong.

Initially, it should be noted that what Detective Rodriquez recalled and proposed to tell the jury was not hearsay because it was not offered for the truth of its content. The prosecutor sought to persuade the jury that appellant purposely gave only the sketchiest details so that he could later

commit the crime with impunity. The defense counter to this theory was to show that appellant had actually provided more detail. The evidence was offered to show that appellant provided the details, not that the details themselves were true, and the statements therefore were not hearsay.

Both the trial court and respondent fundamentally misapplied the law of hearsay, and to that extent their analyses are flawed *ab initio*.

A. The Constitutional Issue Was Not Forfeited

Respondent first asserts that the constitutional issue, the denial of the right to present a defense, was forfeited by the failure to object. However, the purpose of the contemporaneous objection rule is to give the trial court the opportunity to consider and rule upon the constitutional question during trial, and if the court is clearly aware of the constitutional nature of the issue, no purpose is served in further constitutionalizing the objection. (*People v. Frank* (1985) 38 Cal.3d 711, 738, and authorities there cited.) The contemporaneous objection rule is also inapplicable if the error resulted in a denial of due process of law. (*Id.*, at p. 737, citing Assembly Judiciary Committee comment to Evidence Code section 353.)

In this case, the trial court indicated that it was not unaware of the rights in issue, specifically referencing "the defendant's right to be fully represented and to have the essential material evidence go to the jury."

This was followed by counsel's statement that "to sanction my client on a death penalty case for not allowing relevant evidence to come in would be a miscarriage of justice . . . ." (23 RT 4235-4236.) As explained in *People v. Partida* (2005) 37 Cal.4th 428, 435, what is important is that the court be informed of the issue so it can make an informed ruling. The court in this case was fully aware of the constitutional dimensions of the issues under discussion. Moreover, counsel's objection that the exclusion of evidence would result in a miscarriage of justice plainly advised the court that a due process issue had been raised, and Evidence Code section 353 is subject to an exception for due process errors.[5]

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[5]Evidence Code section 353 reads as follows:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:
>
> (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and
>
> (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

The Law Revision Commission comment to section 353 specifies that it is "subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law. *People v. Matteson* [(1964) 61 Cal 2d 466] (As amended in the Legislature.)"

B. Notwithstanding the Constitutional Issues, the Trial Court's Rulings With Regard to Hearsay and the Application of *Roland* Were Still Prejudicial Error

Whether or not it was a constitutional violation to preclude Rodriguez's proffered redirect testimony, respondent's ensuing argument relies on the same mistake made by the prosecutor and the court below – that this was inadmissible because it was hearsay. (RB 115.) As appellant explained above, it was not. Its entire importance lay in the breadth of its content, not its truth.

It must be remembered that it was the prosecution that made the statement's supposed lack of detail an issue, by contending that appellant concealed evidence from Rodriquez so appellant could later commit the crime with impunity. (AOB 167-168, quoting 27 RT 5044-5046.) The state should not be permitted to argue a defendant is guilty because he concealed information and then seek to prevent the defendant from showing that he in fact presented some of the very information the state argues he concealed.

The remainder of respondent's argument regarding the admissibility of Rodriguez's proffered testimony is hard to follow. The argument lacks subheadings and meanders through a tangle of questions of hearsay and the applicability of *Roland.* (RB 115-127.) To some extent respondent's

argument tracks the rambling, confused nature of the trial court's and counsel's many discussions of *Roland* and the trial court's constantly shifting justifications for excluding the testimony even as counsel's arguments changed. However, the short answer to respondent's argument is that this entire discussion is premised upon two fundamental misapprehensions: first, that appellant's statements to Rodriguez were hearsay (see, *e.g.*, RB 115-116); and second, that *Roland*, even if correctly decided, applied here. Because these premises are wrong, so, too, are the arguments upon which they are based.

Respondent next seeks to limit the impact of the trial court's exclusion of Rodriguez's follow-up testimony and to justify it by reference to cases which are not apposite. (RB 116-117.) For example, respondent cites *People v. Lamb* (2006) 136 Cal.App.4th 575, which concerned the common though inappropriate practice of asking expert witnesses not to reduce their findings to writings in order to prevent opposition experts from reviewing and critiquing them. There was no such gamesmanship or concealment here, and the case in inapposite.

Rodriguez's proposed testimony was that of a percipient witness and had just been conveyed to defense counsel outside the courtroom during trial, and counsel immediately reported the conversation to the prosecutor.

(23 RT 4302-4303.) Accordingly, the respondent's characterization of the proposed recall of Rodriguez as an attempt to "sandbag" the prosecution (RB 119) is not only hyperbole but completely wrong.

For the same reason, *Taylor v. Illinois* (1987) 484 U.S. 400, cited by respondent at RB 120, is also inapposite. Respondent quotes the *Taylor* court's language that "the inference that [defense counsel] was deliberately seeking a tactical advantage is inescapable . . . ." Counsel here first learned the new information after Rodriguez left that stand because the witness himself had only just recalled it. It was Rodriguez's wish to correct his testimony; there was no attempt by counsel to gain a tactical advantage.

Respondent is simply wrong on the facts in stating that "Rodriquez was not precluded from testifying; the court's sanction merely limited the scope of his testimony." (RB 121.) The court went far beyond merely limiting the "scope" of his testimony; to the contrary, the court prevented him from correcting his earlier, incorrect testimony after being reminded of what he formerly had said. *That* was the error here, as well as the error *ab initio,* that this was a hearsay statement.

Respondent is correct that as defense counsel's offer of proof evolved, it was unclear as to what Rodriguez would testify. (RB 121.) There was, however, a simple solution – an Evidence Code section 402

hearing at which Rodriguez would be asked what he would testify to. It is striking that when the trial court conducted such a hearing and had Rodriguez on the stand, it asked *only* what appellant had told him just *after* his arrest. (23 RT 4297.) At no time subsequently did the court seek to find out from Rodriguez how precisely his earlier testimony had been incorrect and how he wished to correct it, if he did, or when or under what circumstances his memory was refreshed. This is not limiting the scope; this is basing a decision crucial to the defense on legal error exacerbated by willful ignorance.

Moreover, this was not a discovery violation. Neither *Roland* itself or any other discovery case has any application when a witness, following his testimony, is reminded of or otherwise remembers what he earlier said that was inconsistent with this testimony, and seeks to correct it. By their terms, the discovery statutes and *Roland* refer to what the defense knows before the trial, not what it learns during the trial, and this was in no way a situation involving strategic maneuvering or a blatant or willful violation of the discovery rules that those rules seek to prevent. (*Taylor v. Illinois*, *supra,* 484 U.S. at p. 405.)

Neither was the court justified in denying the request on the grounds that "defense counsel's representation was suspect." (RB 122.)

Respondent references a declaration by District Attorney's Investigator Gomez regarding what Rodriguez told him in the hallway after Rodriguez had spoken with associate defense counsel Stacie Halpern. (RB 122; 7 CT 1776.) If the court were indeed relying on this declaration, the appropriate response would be to *voir dire* Gomez and Rodriguez. In any event, while the declaration may have been a proper subject for cross-examination, it was not grounds for exclusion.

Respondent's argument (RB 122-123) ultimately circles back to *Roland*, which, as appellant has argued, was either wrongly decided or incorrectly applied to this case. (AOB 147-158.) Even if *Roland* withstands appellant's challenge, it simply cannot be the law that a witness can be barred from correcting testimony when the witness later realizes he has made a mistake. And neither can it be the law – nor has respondent argued – that *any* prejudice to the prosecution resulted from introduction of additional facts regarding what appellant told Rodriguez before the crime. There was no element of surprise here. The prosecution was not "sandbagged," as might occur if surprise testimony could only be countered by further investigation or contrary expert testimony. Accordingly, respondent's lengthy recitation of the history of the court's colloquys with counsel regarding *Roland* (RB 123-124) is not relevant.

Similarly, respondent's ensuing discussion of unreliable hearsay and adoptive admissions (RB 124-125) is unavailing, because it proceeds from the erroneous assumption that the statement at issue was hearsay. Again, the fact of and content of the statement Navarro made to appellant did not rely on its truth for its relevance to the defense, and thus it was not hearsay.

Finally, respondent attempts to distinguish the cases appellant cites in his opening brief dealing with preclusion of witness testimony. (AOB 151-155; RB 126-127). While respondent is correct that Rodriguez was not precluded from testifying altogether, respondent incorrectly asserts that it was "only as to one discreet aspect of a conversation for which he had already accurately testified regarding his recollection of the conversation." (RB 127.) To the contrary, the accuracy of that testimony was precisely the point at issue. A criminal trial is supposed to be, above all else, a search for truth. The witness sought to correct his earlier incorrect testimony in order to make it accurate, and the court abused its discretion in preventing him from doing so.

C. The Errors Were Not Harmless

It is difficult to credit respondent's contention that the court's error here was harmless in view of the facts that so much of the trial court's and counsel's time was spent on the issue at trial, and that respondent spends so

much time in her brief discussing this "one discreet aspect of a conversation" in respondent's own brief. (RB 128.)

Respondent's discussion of whether the refreshed recollection was suspect, or whether Rodriguez's testimony was complete (RB 128), is not relevant to prejudice, and, more importantly, is speculative. The only way to have truly assessed either the accuracy of the refreshed recollection or the impact of the precluded testimony would have been to hear what Rodriguez had to say, either in a section 402 hearing or before the jury.

Furthermore, contrary to respondent's contention, the importance of the additional details was not merely that they showed appellant was attempting to thwart the conspiracy. (RB 128.) Indeed, even if appellant was unable to obtain the rest of the information requested by Rodriguez, the fact that he had provided law enforcement with as much information as he did regarding the impending hit severely undermined the prosecution's theory that appellant was involved in the Montemayor murder. No one with the supposed criminal sophistication the prosecutor attributed to appellant would have been so foolish as to participate in a murder he had previously disclosed to law enforcement.

Appellant has previously addressed respondent's contention that was not a close case (RB 129), and will not reiterate this material here. It will

suffice to say the contention is ludicrous. The federal constitutional error the error was not harmless, because respondent cannot show the error to have been harmless beyond a reasonable doubt.

IV. THE REMAINDER OF THE COURT'S MANY EVIDENTIARY – AND ESPECIALLY HEARSAY – ERRORS, AMOUNTED TO A DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHTS

A. Hearsay Errors

1. Appellant's Statement to Rodriguez

Appellant sought to introduce, through Detective Rodriguez, what appellant told Rodriguez when they spoke immediately after appellant's arrest, namely, that appellant said that he had been arrested for the crime that he had told Rodriguez about months earlier, in July.

Appellant argued in his opening brief that the court erred in excluding this statement as hearsay. (AOB 172-173). Respondent claims both that the statement was hearsay, and that it was inadmissible as a post-crime statement made by a defendant who has a compelling motive to deceive. (RB 133, citing *People v. Edwards* (1991) 54 Cal.3d 787, 818-821; *People v. Livaditis* (1992) 2 Cal.4th 759, 779.) Respondent is wrong on both grounds.

First, regarding hearsay, respondent asserts that the statement is only relevant if it is true. (RB 132.) Respondent is clearly wrong. The statement was obviously not presented to prove that appellant had been arrested for the Montemayor murder, which was self evident and not in issue. To the contrary, the statement was offered to show that appellant was

reminding Detective Rodriguez that appellant had previously told him about the crime in July.

In describing the three most common kinds of non-hearsay statements which judges and lawyers incorrectly identify as hearsay, Justice Bernard Jefferson wrote that the most common such error is a declarant's statement that is offered to prove information, knowledge, or belief on the part of the person to whom the statement is made. (B. Jefferson, *The Hearsay Rule - Determining when Evidence is Hearsay or Nonhearsay and Determining Its Relevance as One or the Other* (1999) 30 U. West L.A.L.Rev. 135, 142; quoted at AOB 171-172) The Court's hearsay error here was precisely the sort of error about which Justice Jefferson warned. The question before the court was the accuracy of Rodriguez's memory – in other words, Rodriguez's "information, knowledge, and belief" – and the question and answer were therefore non-hearsay. Put another way, neither the accuracy nor the reliability of appellant's statement were in issue, only whether the statement jogged Rodriguez's memory of the earlier, non-hearsay, statement.

Moreover, Rodriguez was a testifying witness who was subject to cross-examination on these matters. Indeed, appellant himself was in court and subject to cross-examination, had the prosecutor chosen to re-call him

on the matter. However, there was no reason to do so, because the truth of the post-arrest statement was both obvious to all and irrelevant to the purpose for which the statement was offered.

Because the statement was non-hearsay, respondent's references to *Edwards* and *Lividatis*, *supra*, are of no relevance. Both of those cases involved exceptions to the hearsay rule. Because the hearsay rule does not apply here, neither do the exceptions to that rule.

2. Bridgette Navarro's Calls to Detective Rodriguez

Respondent's misunderstanding of hearsay doctrine also infects respondent's argument regarding the court's error in sustaining the prosecutor's hearsay objections to questions to Detective Rodriguez about telephone calls from appellant's wife, Bridgette Navarro. (RB 133-137.)

The questions to Detective Rodriguez were intended to show that (1) Bridgette Navarro was looking for appellant because he was not at the house and she believed he was more likely with his girlfriend, Sarah; and (2) Bridgette Navarro was angry with appellant and jealous of Sarah. These out-of-court statements by Bridgette Navarro were not hearsay because they were not introduced for the purpose of proving that her statements were true. Rather, they were introduced for the non-hearsay purpose of showing that she was attempting to find her husband and may

have been upset at his relationship with his girlfriend. The truth of her questions was not in issue. Indeed, unless questions contain within them statements, it is difficult to see how they could contain the sort of "matter stated" that is subject to the hearsay rule. (Evid. Code sec. 1200.)

Furthermore, the questions did not ask for hearsay because they did not ask Detective Rodriguez what Bridgette Navarro had said. Rather, counsel's questions to Rodriguez were: (1) "What was she trying to find out, if anything;" (2) "What did she ask you about?"; and (3) "Did she say anything to indicate to you that she was suspicious that the defendant was messing around with other girls?" None of these questions asked for any specific statements from Bridgette Navarro, and even if they had, or if Rodriguez related her precise words, the statements would not have been hearsay because the truth of Bridgette's Navarro's questions was not in issue. The statements fall within Justice Jefferson's second and third categories of non-hearsay statements: (1) a declarant's statement stating facts other than declarant's state of mind but offered to prove, by inference, declarant's state of mind and her conduct in conformity therewith; and (2) a declarant's statement offered to prove the making of the statement as a relevant fact in the action. (Jefferson, *supra*, at p. 142.)

Moreover, Bridgette Navarro's questions to Detective Rodriguez were not even statements subject to the hearsay rule. Even if Rodriguez had said "She asked if I knew where Anthony was living," no facts would have been asserted by the declarant. The relevance of the statements was independent of the truth of the matter stated. (See Jefferson, *supra*, at p. 154.)

Respondent asserts that Bridgette Navarro's questions to Rodriguez were only relevant if they were true. (RB 135.) Respondent incorrectly focuses on the *subject* of the questions rather than their truth. Questions cannot be true or false; only answers can be.

Respondent cites *People v. Cowan* (2010) 50 Cal.4th 401 for the proposition that Ms. Navarro's statements were not verbal conduct. (RB 135; AOB 176.) *Cowan*, however, supports appellant's position. At issue in *Cowan* was the admissibility of statements the defendant made to the detective, offering to "come down right now" to discuss the case, offered to show a lack of consciousness of guilt. Although the *Cowan* opinion ultimately upheld the trial court's refusal to admit the detective's testimony about the Cowan phone call on other grounds, the statements were not hearsay:

> We agree that defendant's offer to speak with Detective Fraley was not hearsay. . . . Here, defendant's offer to talk to

> Detective Fraley was not hearsay but 'simply verbal conduct' consisting of a proposal to perform an act, and therefore was 'neither inherently true nor false.' (*People v. Curl* (2009) 46 Cal.4th 339, 362 [].)[6] Furthermore, the statement was 'offered of the nonhearsay purpose of demonstrating consciousness of innocence. (Citation.) Accordingly, sections 1200 and 1250 of the Evidence Code are inapplicable.

(*People v. Cowan, supra,* 50 Cal.4th at p. 472.)

Appellant also argued that even if the statements were somehow construed as hearsay, they were nevertheless admissible under the state-of-mind exception to the hearsay rule. (AOB 176-177; Evid. Code §1250.) Respondent claims both that this argument was forfeited and that even if not forfeited Ms. Navarro's statements were not relevant. (RB 135-136.) Specifically, respondent asserts that Bridgette Navarro's state of mind was not relevant to prove appellant's conduct, *i.e.*, whether he was still living at the Sunrose Place residence. (RB 136.)

Respondent's forfeiture argument is without merit. The contemporaneous objection rule merely requires an objection sufficient to notify the court of the asserted legal error. (Evid. Code §353.) It does not

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[6]At the point page shown in the text for *Curl,* it was held that telling an investigator to have someone get rid of a pair of boots constituted verbal conduct and was non-hearsay.

Please note also that throughout this brief, unofficial citations are omitted from quoted material, indicated by "[]".

require trial counsel to make every conceivable argument explaining why the court's proposed ruling is wrong. With respect to respondent's relevance argument, this too is without merit. As Justice Jefferson explained, "[i]f the nonhearsay use of a declarant's statement has some probative value on a party's theory of defense or cause of action, evidence of the statement should be admitted."[7] (Jefferson, *supra*, at p. 180.)

Finally, respondent goes to great lengths in an attempt to show that this particular error was not prejudicial. (RB 136-137.) Respondent asserts

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[7]The complete quote in which this sentence appeared emphasizes the admissibility of even marginally relevant non-hearsay statements:

> It is worth repeating that it is important that the trial judge keep in mind that in dealing with evidence of a declarant's statement, offered - not to prove the truth of the matter stated or asserted in the statement - but for the nonhearsay purpose of providing the hearer with information for the hearer to act upon, it is immaterial that the trial judge considers that a party's evidence will not be believed by the jury. This is a question of admissibility of evidence and not of the weight or persuasiveness of evidence. *If the nonhearsay use of a declarant's statement has some probative value on a party's theory of defense or cause of action, evidence of the statement should be admitted.* The trial judge must be careful not to allow the judge's opinion of the slight probative value of such evidence to blur correct analysis and cause a ruling sustaining a hearsay objection when the evidence has a relevant nonhearsay use, even though the probative value appears to be very slight."

(Jefferson, *supra*, at p. 180.; emphasis added.)

that the fact that appellant was not living at the Sunrose resident was unimportant because "Navarro often moved around and was in the process of moving to Las Vegas." (RB 137.) This mis-states the evidence. During the relevant period, appellant first lived at the Remick Avenue house; then moved to the Sunrose Place residence; and finally, wishing to distance himself both from his wife and from the risk of being killed as an informant, was in the process of moving to Las Vegas prior to the crime.

Respondent purports to support her prejudice argument with a long string of citations to the record, but most of these citations are irrelevant and others are from appellant's own testimony – indeed, from the very testimony appellant sought to corroborate with Detective Rodriguez's testimony. For example, respondent cites the testimony of Cris Jacubecy regarding appellant's gang activities on Remick Avenue (16 RT 2950-2952, 2960-2962); the testimony of both Detective Pelton and appellant's mother, Rosalinda Razo, regarding appellant's presence in Las Vegas (16 RT 2985-2991, 3010; 26 RT 4688, 4690); and appellant's testimony regarding activities at the Remick Avenue house, his move to the Sunrose residence in April, 2002, and his move to Las Vegas, and his presence there on October 2, the day of the crime (18 RT 334-3345, 3371-3372; 20 RT 3777-3779; 22 RT4138-4139). Apart from appellant's move to Las Vegas

and his deteriorating and increasingly hostile relationship with his wife, which is what he was trying to show with the questions to Detective Rodriguez, none of this was relevant.

The state ought not to be allowed on the one hand to argue to the jury that appellant's guilt was shown in part by his lies on the stand (28 RT 4992) and to argue now that the trial court's errors which prevented him from corroborating his testimony were harmless. Moreover, respondent cannot show that the trial court's pattern of errors excluding critical defense evidence did not deprive appellant of his right to present a defense, and that these errors were not cumulatively prejudicial.

3. Bridgette Navarro's Statements to Appellant's Mother in her Calls to Las Vegas

Respondent contends that the trial court did not err in upholding the prosecution's hearsay objections to questions to appellant's mother, Rosalind Razo, about calls to her from Bridgette Navarro on the day of the crime. (RB 137, *et seq.*) For the reasons discussed in the previous section, this contention is without merit. Questions about the nature of the calls, or even specifically about whether Bridgette was asking for appellant's whereabouts did not call for hearsay because they were not offered for the truth of the content of the statements. Rather, they were offered to show that Bridgette Navarro was looking for appellant and did not know where

he was, and also to support appellant's testimony that a 14-minute phone call to his mother's Las Vegas phone number from the 1600 phone number probably came from Bridgette, not from him. (26 RT 4692-4693; 19 RT 3607.) In both instances, they provided corroboration for appellant's testimony that he was not at the Sunrose Place residence; was in Las Vegas; and not using the 1600 cell phone on that day.[8]

Respondent is correct that, with regard to this particular set of errors, appellant did not object on constitutional grounds. (RB 138-139.) Appellant would note, however, that any such objection at this late point in the trial would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Prior to the questioning in issue – which began at 26 RT 4692 – the sheer number of ruling by the court sustaining prosecution objection and overruling defense objections shows that raising a constitutional objection would have been futile.[9]

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[8]There was no evidence, and no assertion by the prosecution, that the 1600 cell phone was used from Las Vegas on the day of the crime.

[9]This is not suggest that *every* ruling went against the defense. On the other hand, many of the following pages cited contain multiple rulings favoring the prosecution. Thus, the sheer number of pro-prosecution, anti-defense rulings would have led any defense attorney to believe that a constitutional objection would be futile. (See, *e.g.,* 13 RT 2440, 13 RT 2517-2522; 14 RT 2583; 15 RT 2895-2899; 16 RT 2927-2928; 16 RT 3009; 17 RT 3103, 31 50-3151, 3161-3163; 3168, 3190-3193; 18 RT 3395-3398, 3424-3425, 19 RT 3438-3439, 3453; 19 RT 3488-3493, 3526-2529, 3492, 3526, 3529-

(continued...)

Finally, as appellant has argued previously, respondent's contention that evidence of appellant's guilt was "overwhelming" (RB 140) is simply ludicrous. In fact, the evidence was both thin and entirely circumstantial and was, moreover, countered by the testimony of law enforcement officers, much of which corroborated appellant's testimony, and which should have raised more than merely reasonable doubt in the mind of a rational juror.

B. The Trial Court's Failure to Limit Gang-Related Expert Testimony and Gang Predicates Infected the Trial with Unnecessary and Inflammatory Gang-Related Evidence that Bore Little or No Relationship to this Crime

1. Detective Booth's Testimony

In his opening brief (AOB 181-183), appellant argued that the court erred in overruling his objection to Detective Booth's inflammatory and irrelevant testimony regarding the nature of Hispanic gangs generally. (17 RT 3161-3162.)

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[9](...continued)
2539, 3604, 3606; 20 RT 3729-3730, 3774, 3786-3788, 3799-3800, 3809, 3856; 21 RT 3899, 3936, 3961-3963; 22 RT 4109, 4111-4113, 4115; 23 RT 4143-4144, 4146, 4148, 4163-4164, 4226-4241, 4248, 4297-4312, 4326-4328; 25 RT 4436-4437; 4448-4450; 4476, 4480-4481, 4487, 4500-4502, 4517, 4521, 4524-4528, 4568-4594.) The court had also, at this point in the trial, denied two motions for a mistrial. (20 RT 3824-3827; 23 RT 4739-4740.)

Respondent's first contends the issue was waived. Respondent argues that this testimony was in the outline previously provided to the defense, and that the defense waived objection by failing to object to the outline prior to trial. (RB 141.) Respondent is wrong.

Prior to trial, the defense was provided with the prosecutor's outline of the proposed expert testimony regarding gangs of Detective Booth (6 CT 1664-1678), and agreed with the court in an *in limine* hearing that most of the material on page two (6 CT 1665) – which outlined the general gang characteristics at issue here – appeared to be standard. (12 RT 2237.) The discussion then turned to material on page three (6 CT 1666) regarding the Pacoima Flats gang, and the defense focused on this material because Detective Booth was a detective in Buena Park, which is a considerable distance from Pacoima.

However, the objection at trial was that as the testimony mentioned on page two of the outline developed, much of it was irrelevant, inflammatory, and more prejudicial than probative because it concerned generalized gang behaviors that had no relevance to appellant's case.

Furthermore, appellant is aware of no case holding that the failure to object to an outline of expected testimony *in limine* precludes an objection to the actual evidence at trial, and of course respondent cites no case or

other authority to support this proposition. In the opposite situation, there are many cases which state that an objection *in limine* may not be sufficient to preserve the issue without a contemporaneous objection at trial. (*E.g.*, *People v. Morris* (1991) 53 Cal.3d 152, 190 [pretrial objection to any testimony about gun possession insufficient to preserve objection to actual testimony about two different guns].) It therefore appears that California law favors contemporaneous objections, such as that raised by counsel here, over pretrial objections *in limine*, as Evidence Code section 353 itself requires. (For full text of section 353, see fn. 5, *ante* at p. 24.)

Respondent's argument is further undermined by the following quote from an opinion of this Court:

> "If a motion to exclude evidence is made raising a specific objection, directed to a particular, identifiable body of evidence, at the beginning of *or during trial at a time when the trial judge can determine the evidentiary question in its appropriate context*, the issue is preserved for appeal without the need for a further objection at the time the evidence is sought to be introduced."

(*People v. Crittenden* (1994) 9 Cal.4th 83, 127; emphasis added.)

Crittenden involved the opposite situation discussed above. In that case, a *Miranda* objection was made pre-trial but not repeated during trial, and the *Crittenden* court held that the failure to object a second time at trial did not result in a forfeit of the issue on appeal. (*Id.*, at pp. 126-127.)

However, the significance of the case lies in the holding that an objection is sufficient to preserve an issue of appeal if it is made "at the beginning of or during trial at a time when the trial judge can determine the evidentiary question in its appropriate context . . . ." That is precisely what happened here, for the need for objection became clear during the testimony of the witness, and the trial judge was in a much better position to rule on it at that point than he had been prior to trial. The evidentiary objection was therefore raised in the most "appropriate context," the trial judge should have ruled on it, and the issue was preserved for appeal.

Gang evidence was only marginally relevant in this case. It was relevant to show the hierarchical structure of Hispanic gangs (in order to show why the three perpetrators might have followed appellant's orders) and to show that the perpetrators were capable of committing violence, including murder, in furtherance of their criminal activities on behalf of the gang. Thus, regarding Booth's testimony about falsely claiming a gang or denying gang membership (RB 141), the fact that the matter was referenced in the outline should not preclude a mid-trial objection. Regardless of what had taken place prior to trial, these matters were neither relevant nor admissible. (Evid. Code § 350 [irrelevant evidence is inadmissible].)

Additionally, the judge's statement explaining the ruling admitting this irrelevant evidence – that he was giving latitude to both sides to present their cases (RB 141, citing 17 RT 3170) – was inaccurate and disingenuous. As clearly shown in appellant's opening brief, the contrast between the trial court's treatment of the prosecution evidence and the defense evidence was stunning. (AOB 170-204.)

Thus, apart from respondent's statement that a trial court properly admits gang evidence when it is relevant to a material issue at trial (RB 142, citing *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049, and *People v. Martinez* (2003) 113, Cal.App.4th 400, 413) respondent's entire discussion of relevance and Evidence Code section 352 is largely beside the point. While respondent is correct that evidence of gang affiliation and activity is admissible when it is relevant to an issue such as motive, intent, or the truth of the gang enhancement (RB 142), such evidence must still be relevant to a material issue. As stated above, the matters to which defense counsel objected had no relevance to this case, even though a gang enhancement was alleged, and the cases cited by respondent are distinguishable. *Hernandez, supra*, involved whether a gang enhancement should have been bifurcated from the underlying charges. (33 Cal.4th at p. 1048.) Nor are the cases cited in *Hernandez* on which respondent also

relies relevant here. *People v. Mendoza* (2000) 24 Cal.4th 130, 178, involved only the issues of whether a trial court properly admitted a victim's testimony that the defendant said that he was a "homeboy" and whether the use of the term was relevant. In *People v. Williams* (1997) 16 Cal.4th 153, 193, the prosecution's theory was that the victim, clothed in blue like a Crip and having traveled into an area "claimed" by both Crips and Bloods, was shot by a Blood for his appearance as a Crip. (*Id.* at pp. 193-194.) These were, in contrast to this case, "classic" gang activities.

In *People v. Champion* (1995) 9 Cal.4th 879, also cited in *Hernandez*, two gang members were accused of murders and other crimes at houses within the territory claimed by their gang. (*Id.* at p. 902.) A Deputy who was an expert in juvenile gangs testified about the park that was defendants' gang's "prime hangout," and also testified that both defendants had admitted that they were members of the gang. The deputy also learned from others what the defendants' gang nicknames were, and testified that they were members of a subgroup of the gang called the "Old Gangsters" because they were long-time members. (*Id.* at pp. 919-920.) The deputy went on to discuss a car that was linked to the gang and the defendants, in which evidence stolen during the murders was discovered; the graffiti used by gang member to advertise their gang membership; other

gang indicia; and photographs, found in one of the defendant's bedrooms, all of which included one or the other of the defendants. (*Id.* at p. 920.)

In response to a defense argument that this evidence was irrelevant, this court noted that all the foregoing evidence was strongly related to the gang and the defendants' admission that they were members, and also explained how a fellow-gang member witness could have learned about the defendants' involvement in the crime. (*Id.* at pp. 921-922.) This court then discussed the language in *Hernandez*, *supra*, holding that gang evidence is relevant if it has a tendency in reason to prove or disprove a material fact. (*Id.*, at p. 922.) In response to the defendants' contention that the gang evidence should have been excluded under section 352, this court responded that the evidence tended to connect the defendants to the car in which property stolen from the murder victims was found, to link them to another gang member identified as a participant in the murders, and to demonstrate their relationship to one of the victim's sons, who as also a member of their gang. (*Id.* at p. 922-923.)

The kinds of logical connections this court found present in *Hernandez* are completely absent from this case. At the time of the objection, the jury had already heard a litany of evidence about the habits and customs, and criminal propensities, of Hispanic street gangs. They did

not need to hear (1) that the term "crazy" means willing to perform violent or foolhardy acts to prove bravado (17 RT 3160-3161), which triggered the first objection; or (2) that the gang not only glorified violence but that commonly a gang member will brag about violent acts to fellow gang members (17 RT 3164-3165); or (3) that a gang member will warn his fellow gang members when he has committed an act against a rival gang that might trigger retaliation (17 RT 3165); or (4) that a gang will lose the respect of other gangs if it does not immediately retaliate with greater violence. (17 RT 3165-3166.) There was no rival gang in this case and therefore none of this was relevant. Nor was the later post-objection testimony regarding "claiming" or "falsely claiming" gang membership (17 RT 3168-3170), or the meaning of "hit up," to which the defense again objected, in vain. "Hit up," Booth was allowed to testify, is when a gang member challenges someone he believes to be a possible gang member on the street to determine whether they are from a friendly or an enemy gang. (17 RT 3168.)

Booth was allowed to continue to discuss "representing," *i.e.*, the way gang members are expected to act in relation to rival gangs and the community in which they live, and "putting in work," *i.e.*, committing crimes for the benefit of the gang. (17 RT 3171-3172.) While some of the

testimony on the latter point, "putting in work," might have had some relevance to this case, nothing else between the initial objection and that testimony had any relevance at all. Some of the subsequent testimony regarding gang structure and the relative roles of younger and older gang members (17 RT 3173) also had some relevance, but the fact that some of Booth's testimony was relevant does not make all of it admissible and much of it was not only totally irrelevant but also highly inflammatory. This case did not involve any gang other than Pacoima Flats, and testimony about inter-gang violence and other matters was both irrelevant and prejudicial.

Indeed, of the five cases involving gang evidence cited by respondent on page 143 of her brief, four are clearly distinguishable on this basis and the fifth supports appellant. For example, *People v. Gardelay* (1996) 46 Cal.4th 605 involved a white man attacked by a Crips member while urinating in an apartment complex in Crips territory (*Id.*, at p. 611), while this case has no such territorial element. *People v. Valdez* (1997) 58 Cal.App.4th 494 involved an altercation between "Northern" and "Southern" Hispanic gang members (*Id.*, at p. 499), while this case involves members of one gang and a victim with no gang ties. *People v. Ochoa* (2001) 26 Cal.4th 398 involved rival gangs engaged in a gang war

(*id.*, at p. 416), and is obviously not pertinent here. *People v. Carter* (2003) 30 Cal.4th 1166 again involved members of a rival gang as some of the victims. (*Id.*, at pp. 1194-1195.) As for the fifth case respondent cites, *People v. Albarran* (2007) 149 Cal.App.4th 214, the Court of Appeal reversed the admission of gang evidence as mostly irrelevant, cumulative, and prejudicial (*id.*, at pp. 228, 232), and the case therefore supports appellant's position rather than respondent's.

Respondent seeks to justify Booth's irrelevant and inflammatory testimony by claiming it was necessary for the jury's understanding of why the three younger "soldiers" would follow appellant's supposed orders to commit the murder (RB 143), and appellant agrees that to the extent that it dealt with this limited point, Booth's testimony was relevant. However, as shown above, Booth's testimony went far beyond this limited purpose. The evidence also far exceeded what was necessary to show that appellant knew the gang and its pattern of criminal activity. (RB 144.) Indeed, once the structure of the gang and its actions to defend and control its turf were explained – all of which appellant agrees was relevant testimony – it would have been obvious to the jurors that appellant would know of the gang's criminal activities. The objectionable testimony was unnecessary to prove

that Navarro knew his gang's members "engage in or have engaged in a pattern of criminal gang activity." (Penal Code sec. 186.22(a).)

In sum, the objections were valid and not precluded by the failure to object *in limine* to the contents of Booth's proposed testimony. The court admitted far more than was relevant or necessary, and appellant was prejudiced by this inflammatory, gang-related evidence.

2. Material Found in Martinez's Residence

Regarding the admission of the material found in Martinez's apartment (RB 144, AOB 183-185), and contrary to respondent's contention, the evidence was not relevant to show any relationship between appellant and the three perpetrators. None of the photographs or documents depicted or mentioned appellant, and because Martinez was not before the court and not available to testify, there was no way for the evidence to be subjected to any adversarial testing. Furthermore, the evidence was unnecessary since other evidence, most obviously the roll-calls on the walls of appellant's garage and his own admission that he was a gang shot-caller, established that all the defendants were members of the Pacoima Flats gang.

The prejudice inherent in gang-related evidence is discussed in the next section. In this case, the evidence from Martinez' residence should

have been excluded under section 352 – it was entirely irrelevant to any material issue, and thus the prejudice necessarily outweighed the probative value of the evidence. When combined with the irrelevant portions of the prosecution's gang expert testimony, the resulting focus on the gang and appellant's gang membership diverted the jury's attention from the lack of evidence of his guilt. Whether viewed individually or, as discussed below, cumulatively, this erroneously admitted evidence was prejudicial.

3. The Court Erred in Denying Appellant's Motion to Exclude the Final Gang-Predicate Packet of Materials

In appellant's opening brief, he contends that the court should have sustained appellant's objection to the fourth "gang-predicate" packet of materials introduced to support Detective Booth's testimony that a primary purpose of the Pacoima Flats gang was the commission of crimes enumerated in Penal Code section 186.22, subdivision (e). (AOB 185-191.) Respondent cites a number of cases in support of the ruling, none of which are applicable here. (RB 145-149.)

As noted above, *People v. Albarran, supra*, 149 Cal.App.4th 214, 228, 232 actually found the gang evidence to have been irrelevant and prejudicial, and the case thus supports appellant's position, not respondent's. Moreover, the paragraph of *Alberran* to which respondent

apparently refers[10] has nothing to do with the introduction of predicate crimes to prove gang enhancements, as respondent asserts, but rather speaks generally of when gang evidence is relevant to show "motive, intent, or some fact *concerning the charged offenses* other than criminal propensity as long as the probative value of the evidence outweighs its prejudicial effect." (*Id.*, at p. 223, citing, *inter alia*, on page 224; Evid. Code sec. 352; emph. added.) This says nothing whatsoever about cumulative and prejudicial overuse of gang-predicate materials. Indeed, in the paragraph before the one containing the quoted language, the court emphasized the prejudice inherent in gang materials:

> California courts have long recognized the potentially prejudicial effect of gang membership. As one California Court of Appeal observed: "It is fair to say that when the word 'gang' is used in Los Angeles County, one does not have visions of the characters from the 'Our Little Gang' series. The word gang ... connotes opprobrious implications.... [T]he word 'gang' takes on a sinister meaning when it is associated with activities." (*People v. Perez* (1981) 114 Cal. App. 3d 470, 479 [].) Given its highly inflammatory impact, the California Supreme Court has condemned the introduction of such evidence if it is only tangentially relevant to the charged offenses. (*People v. Cox* (1991) 53 Cal.3d 618, 660 [].) In fact, in cases not involving gang enhancements, the Supreme Court has held evidence of gang membership should not be admitted if its probative value is minimal. (*People v. Hernandez* (2004) 33 Cal.4th

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[10]The *Alberran* language which respondent cites as taken from 149 Cal.App.4th at page 223 (RB 145) actually appears on page 224.

> 1040, 1047 [].) "Gang evidence should not be admitted at trial where its sole relevance is to show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense." (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449 [].)

(*People v. Albarran, supra*, 149 Cal.App.4th at p. 223.)

Similarly unavailing is respondent's reliance on *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611. (RB 146.) *Alexander L.* involved a challenge to the sufficiency of the evidence of criminal activity, and the paragraphs quoted by respondent (RB 146) had to do with the *lack* of sufficient evidence. The issue in this case is not that evidence of gang membership was insufficient but rather that there was far too much of it and that most of it was both irrelevant and inflammatory, thus rendering *Alexander L.* inapposite.

Appellant is aware that some courts of appeal have found that even more predicate offenses than the four admitted here were acceptable. (*E.g.*, the cases cited at AOB 191: *People v. Rivas* (2013) 214 Cal.App.4th 1410, 1436 [six predicate crimes]; *People v. Hill* (2011) 191 Cal.App.4th 1104, 1137-1139 [eight]. However, as appellant argued at AOB 189-191, this amounted to twice the number of predicate offenses required in section 186.22, subdivision (e), and in view of the fact that this was not a case involving inter-gang activity and for the other reasons set forth in

appellant's opening brief, it was error to admit all these predicate offenses to prove gang membership, particularly since appellant had already admitted that fact, and especially in light of the court's error in admitting all the other prejudicial gang evidence, discussed above.

As appellant pointed out in his opening brief, the actions of appellant and his co-defendants in this very case were sufficient to provide the four predicate acts under section 186.22, subdivision (e). (AOB 190; *People v. Loeun* (1997) 17 Cal.4th 1, 10 [pattern of criminal activity can be established by evidence of offense committed by one or more persons on the same occasion]; *People v. Deloza* (1998) 18 Cal.4th 585, 598-599 [*Loeun* allows requisite "pattern" to be shown by defendant's commission of charged offense and by contemporaneous commission of a second predicate offense by a fellow gang member].) However, as noted above, this prosecutor was set on introducing as much gang material, relevant or not, as he could, to overcome the weaknesses in his case. This court, however, has long recognized both the inherently inflammable nature of even the mere membership in a gang *(People v. Williams*, *supra*, 16 Cal.4th at p. 194; *People v Pinholster* (1992) 1 Cal.4th 865, 945), and has cautioned against the presentation of cumulative and prejudicial gang evidence. (*People v. Cardenas* (1982) 31 Cal.3d 897, 905.) In this case,

the defense could have spoken up sooner. The fact that it didn't does not reduce the responsibility of the trial court to "carefully scrutinize" the objected-to gang evidence for it's "highly inflammatory impact on the jury." (*Williams, supra*, 16 Cal.4th at p. 193.)

All of the foregoing errors of over-admission of gang evidence were, taken together, highly prejudicial but irrelevant evidence, and inherently prejudicial. Absent it's erroneous admission, it is more than reasonably possible that the jury would have reached a different result. (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 918; *People v. Watson* (1956) 46 Cal.2d 818, 836.) This is even more true given the uneven and erroneous treatment by the trial court of the defendant's evidence.

C. While the Trial Court Erred on the Side of Admission of Prosecution Evidence, it Consistently Excluded Defense Evidence and Interfered with the Defense

1. The Trial Court's Refusal to Allow Defense Counsel Needed but Relatively Brief Extra Time to Interview Agent Thomerson before his Testimony

In his opening brief, appellant argued that the trial court erred in refusing to permit him a brief recess to interview FBI agent Thomerson before his testimony. Federal witnesses had not been made available to the defense in advance of trial, and the defense had not any opportunity to

interview Thomerson before he testified. By way of background, as early as April, 2005, defense counsel was noting for the court his difficulty in gaining access to FBI records and the federal agents he sought to have testify, even filing a sealed motion to compel their testimony. (1 RT 182-183; 2 RT 185-200, 203-206; Court Exhs. 4-7; 2 RT 389-390). The defense was required to submit questions to the federal agents *through the district attorney*. (Court Ex. 21.) The reason for the request from defense counsel for additional time to interview the witness was that the witness was not made available by the FBI, by phone or otherwise, before he appeared to testify. (20 RT 3676 ["As the court is probably aware of, we have never had an opportunity to speak with Mr. Thomerson personally . . . ."].)

Although counsel requested only a very reasonable recess on the morning Thomerson testified (20 RT 3676-3677), and again requested a brief recess before the witness was excused (20 RT 3730-3731), the court essentially denied both requests, permitting only 10 minutes for counsel to meet with the witness in advance of his testimony and only a few minutes later to review with the witness information pertaining to appellant's dealings with cars, but nothing else. (20 RT 3731.)

Respondent first appears to argue that the issue was waived for failure to cite "authority or legal reasoning" holding that a trial court is required to provide for such "accommodation." (RB 154.) Respondent is correct that appellant did not cite authority in this section of his brief. (RB 154-155), but that is because the situation was extremely unusual. Trial courts are rarely in a position of controlling defense counsel's pre-testimony access to the defense's own witnesses. Moreover, appellant's primary complaint throughout his opening brief was with the court's persistent pattern of interfering and micromanaging the defense. That contention was already fully briefed in the first four issues appellant raised, and authorities supporting appellant's position were discussed throughout those arguments. The fact that appellant has not repetitively cited the same authorities again is of no consequence. What is of consequence – and well known to the trial court and to respondent – is the right to present a defense. That embodies "the right to present *the defendant's version of the facts* as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the *right to present his own witnesses to establish a defense*. This right is a fundamental element of due process of law." *Taylor v. Illinois* (1988) 484 U.S. 400,

409, quoting *Washington v. Texas* (1987) 388 U.S. 14, 19; emphases added.) The right to present the defendant's own witnesses surely must include the right to have a reasonable amount of time prior to the testimony for counsel to interview the witness.

Respondent relies on cases supporting a trial court's inherent and statutory authority to control the proceedings. (RB 155.) However, this was a highly unusual situation involving federal law enforcement agents who were not made available to the defense prior to their arrival at court for their testimony. Some reasonable accommodation could have and should have been made even if it slightly inconvenienced the court and jury. Accordingly, respondent's reliance on cases involving continuances are inapposite. Defense counsel was not seeking a continuance, but a brief recess to permit counsel to meet with and prepare his witness. Counsel initially sought an additional 15 minutes before the start of proceedings, and later sought an early lunch recess in order to question the witness before redirect testimony. In view of the fact that this witness had never previously spoken with or met with counsel, this request was hardly unreasonable.

Furthermore, the cases respondent cites do not actually support respondent's positions. *People v. Gurule*, (2002) 28 Cal.4th 557, 618,

cited at RB 155, involved a request to delay the start of proceedings from 9:00 a.m. to 1:30 p.m. so that counsel could read the witnesses' direct testimony in the daily transcript, and is thus factually distinguishable from this unusual situation. More significantly, however, the case warns that a trial court's discretion "may not be exercised so as to deprive the defendant or his attorney of a reasonable opportunity to prepare." (*Id.*, at pp. 617-618.) Even more inapposite is the citation to *People v. Sakarias* (2000) 22 Cal.4th 596, 646, which involved the denial of a request for "a few more days" to prepare a motion for a new trial, 31 days after the verdict and agreement on the date of the hearing on the motion.

There was simply no valid reason for the trial court not to grant an additional 15 minutes at the beginning of the day, or the requested early recess for lunch before the defense redirect questioning of Thomerson, so that counsel could have time to go over the voluminous documentary materials he had seen but had not been able to discuss with the witness. It was, however, disturbingly consistent with the trial court's continuing hostility toward counsel and resulting rulings undercutting the defense.

2. The Exclusion of FBI Records (Defense Exhibit I)

Perhaps the clearest example of the trial court's unequal treatment of the prosecution and defense is the contrast between the court's blithe

admission of irrelevant and prejudicial gang evidence and its exclusion of the FBI records which provided the basis for Agent Thomerson's testimony. While the court improperly admitted clearly excesive and irrelcvant gang expert testimony and gang-predicate evidence to corroborate Detective Booth's description of the criminal activities of the Pacoima Flats gang, the court improperly refused to admit FBI records the defense sought to introduce to support the testimony of Agent Thomerson. These rulings, and the disparate treatment the court accorded to the prosecution and the defense, were constitutional error.

> Evidence Code section 352 *must bow* to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense. In *Chambers v. Mississippi, supra,* 410 U.S. 284, it was held that the *exclusion of evidence, vital to a defendant's defense, constituted a denial of a fair trial* in violation of constitutional due-process requirements.

(*People v. Reeder* (1978) 82 Cal.App.3d 543, 552-553 [emphasis added]; quoted with approval in *People v. Babbitt* (1988) 45 Cal.3d 660, 684; see also *Chambers v. Mississippi, supra,* 410 U.S. at pp. 302-303.)

The documentary evidence was critical to the defense because Agent Rees, appellant's San Diego FBI handler, was not available, and Agent Thomerson was limited in ability to testify about service as an FBI informant because he lacked personal knowledge of appellant's activities during the time when appellant worked with Agent Rees. For example,

when asked whether defendant had offered to go into Mexico to get information about the Arellano-Felix drug cartel in Tijuana, Thomerson could only say "I seem to recall that," explaining that he worked in the Los Angeles office while the Arellano-Felix investigation was conducted by the agency's San Diego office. (20 RT 3713-3714.) Asked whether appellant performed tasks that an FBI agent would have found difficult to do, Thomerson again equivocated: "Yes. I'm not as familiar with everything that he did with out San Diego office, but yes, he did, I would assume he did something that would be difficult for an FBI agent to do." Similarly, when asked whether appellant "went down [to San Diego] and helped you guys out in San Diego with a very important investigation . . . ," Thomerson could only answer, "Yes, he was working with our San Diego office." (20 RT 3714)[11]

For the same reason, respondent's assertion that the evidence of appellant's San Diego activities was "presented to the jury" is without merit. (RB 160.) Without Agent Rees's testimony during the guilt phase, it was vital for the defense to get before the jury the complete picture of

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[11]A more complete sense of the limited nature of Agent Thomerson's testimony about the value of appellant's services as an informant can be obtained by comparing Thomerson's testimony at 20 RT 3711-3715, with Agent Rees's penalty-phase testimony. (37 RT 6427-6446.)

appellant's activities on behalf of the San Diego office of the FBI. The only means by which the defense could accomplish this was to provide the jury with access to the entire file, which it offered as Defense Exhibit I.

The trial court refused to admit the proffered exhibit on the grounds that it was too lengthy and "contains many entries that are extraneous to this particular case," (20 RT 4798.) Taking her cue from the trial court, respondent cites *People v. Fudge* (1994) 7 Cal.4th 1075, 1103 for the proposition that "excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense." (RB 159.) However, evidence of appellant's activities as an informant for the FBI's San Diego office was hardly "minor" or "subsidiary." To the contrary, the exhibit was the best evidence of appellant's close and on-going working relationship as an informant for law enforcement – an activity in which appellant voluntarily engaged in spite of the fact that it that put himself and his family in danger. Far from being evidence on a "minor" point, the exhibit was vital to counter the prosecution's theory that appellant was acting only for his own benefit.

Respondent asserts that Exhibit I would have been time consuming and confusing to the jury. Not so. Admitting the exhibit would not have consumed any time for the court or counsel, nor would the exhibit have

cost the jurors an inordinate amount of time. Even the most cursory review would have sufficed to make the point that appellant was not simply a some-time informant trying to game the system for his benefit but an active and important soldier in the FBI's battle against a particularly dangerous Mexican drug cartel, and one who was risking his own and his family's lives in the process.

Respondent's contention that any error was harmless (RB 160) is meritless. The jury's recognition of the full extent to which appellant's work as an informant placed him in danger and assisted the FBI would have severely undermined the prosecution's theory that appellant was simply gaming the system for his own benefit and that the Montemayor murder was a gang activity he had ordered the three perpetrators to commit. Moreover, the error was of federal constitutional magnitude, and respondent has not shown and cannot show the error to have been harmless beyond a reasonable doubt. Appellant submits that reversal is required solely on the basis of this single error, but the case for reversal is even more compelling when this error is accumulated with the trial court's many other errors limiting the defense and micromanaging its case.

D. Cumulatively, the Court's Many Errors Require Reversal

In his opening brief, appellant argued that reversal was required due to the cumulative evidentiary errors committed by the court which individually and together deprived appellant of federal due process. (AOB 203-204.) Respondent disagrees, citing several cases which state only the general principle that simple evidentiary error rarely rises to a constitutional level (RB 162), but for the reasons explained in the opening brief and this brief, these cases are not relevant to the cumulative evidentiary errors asserted by appellant. (*People v. Hill* (1998) 17 Cal.4th 800, 844-847 [cumulative effect of multiple instances of prosecutorial misconduct and other errors was prejudicial]; *Johnson v. Tosco Corp.* (1991) 1 Cal.App.4th 123, 141 [reversal warranted where cumulative error was prejudicial].)]

With regard to Bridgette Navarro's phone calls to Detective Rodriguez, respondent claims that the trial court's ruling excluding her statements as hearsay were "well-founded." For the reasons set forth *ante* in section IV.A.2, this bald assertion is wrong. To the extent that respondent's discussion simply repeats respondent's improper denigration of appellant's claims of errors, those matters have been amply discussed herein and in appellant's opening brief.

Finally, respondent points to the fact that several law enforcement officers testified about appellant's work as an informant and implies that this evidence was sufficient to fulfill the constitutional guarantee of a complete defense. (RB 162-163.) However, as a matter of legal analysis, the question is whether prosecution evidence was improperly admitted, and whether defense evidence was improperly excluded. Furthermore, the prosecution's case against appellant was hardly overwhelming. Apart from the testimony of an admitted liar who turned state's evidence, the case was entirely built on circumstantial evidence that was largely consistent with innocence. The individual errors were sufficiently prejudicial to compel reversal, but the accumulation of errors by the trial court was not harmless under any standard.

V. THE TRIAL COURT'S UNWILLINGNESS TO REIN IN THE PROSECUTOR EXTENDED THE PERSISTENT PATTERN OF ITS RULINGS, AND THE FAILURE OF COUNSEL TO OBJECT REFLECTED THE FUTILITY OF DOING SO

Respondent contends that appellant has forfeited "some" of his prosecutorial misconduct claims by failing to object to the misconduct at trial. (RB 163.) Not so. Respondent concedes that appellant did object to "some" of the misconduct, and the court has also held that when repeated objections to misconduct have been denied, further objections would be futile and are therefore unnecessary. (People v. Hill, supra, 17 Cal.4th at p. 820 [a defendant will be excused from the necessity of timely objection if it would be futile].) Certainly, given the long litany of erroneous pro-prosecution and anti-defense rulings set forth in appellant's opening brief and in this reply, and given the trial court's barely-disguised hostility toward the defense, circumstances facing counsel had reached and far exceeded the threshold of futility.

Here, the futility of further objections was shown by the many times the defense *did* object to the prosecutor's misconduct, with disturbingly consistent, almost automatic denial from the court. Those instances were set forth in appellant's opening brief at pages 207-208 (18 RT 3412-3413); 209 (18 RT 3453); 210 (19 RT 3529); and 211-213 (19 RT 3533-3535), and see also the record citations set forth *ante*, in footnote 9 at page 42.

Respondent further argues that the issue is waived because defense counsel failed to request admonitions from the court for all the misconduct. However, *Hill* also teaches that the failure to request an admonition does not forfeit the issue if the trial court immediately overrules an objection to alleged prosecutorial misconduct and the defendant has no opportunity to make such a request. (Id., at pp. 820-821.) Because that is precisely what occurred here, this contention is also meritless. The issue is preserved for appeal.

A. The Prosecutor's Pattern of Objections to Appellant's Testimony Was an Improper Stratagem and Constituted Misconduct

Appellant argued that the prosecutor committed misconduct in persistently objecting to appellant's answers to the prosecutor's questions. (AOB 207-215.) Respondent claims that the prosecutor properly objected to appellant's answers because they were nonresponsive to the question posed. (RB 165.) Respondent is wrong.

Respondent's reliance on *People v. Davis* (1963) 217 Cal.App.2d 595, 598, is misplaced. In *Davis*, an undercover officer who had bought narcotics from the defendant on multiple occasions was asked by defense counsel on cross-examination "And then you speak of another time across the street from Casa Blanca." The officer answered, "Yes, we bought

some narcotics." The trial court denied defense counsel's motion to strike everything after "Yes." The Court of Appeal agreed that the answer went beyond the "Yes" that was responsive to the question, but found the error harmless. (*Ibid.*)

Davis has no relevance here. The prosecutor's questions in this case were far more than questions, they were statements – often dripping with sarcasm – that were designed to unfairly impugn appellant's character. For example, in inquiring about the money appellant might receive from his work as an informant, the prosecutor sought to challenge any non-self-interested reason: "Is that how you view this. I'll trade my friends in so I can have a few dollars for myself?" (18 RT 3413). This was both a question and a sarcastic comment, and appellant was entitled to explain his answer. The same is true of the other examples raised in appellant's opening brief. (AOB 209-215.) Like "have you stopped bearing your wife?" these question were unfair rhetorical traps, and appellant was entitled to give more complete answers.

Far more on point than *People v. Davis, supra*, is a more recent case, *People v. Lewis and Oliver* (2006) 39 Cal.4th 970. A witness named Johnson had been outside a church waiting for his daughter and niece when the crime occurred. Defense counsel had asked whether the witness had a

better recollection of the events at trial than he had during earlier police interviews. On redirect, the prosecutor asked whether a police officer had spent much time with him at the crime scene. The witness answered "no," and then explained that he and his family wanted to leave quickly because his daughter had been shaken by what she had seen. Defense counsel objected to the answer as nonresponsive and also objected to several followup questions as irrelevant. This court held that the trial court properly overruled the objection, explaining that the challenged testimony sought to refute an implication in defense questioning that Johnson was inventing facts on the witness stand that he had not related to the police before. Thus, Johnson's answer was both responsive and relevant. (*Id.*, at p. 1026.)

The same principles the court applied in *Lewis and Oliver* also apply here. When an attorney's questions are laden with unfair implications, often sarcastic, and designed to trap the witness, the witness has a right to fully explain his answers.

B. The Prosecutor's Improper Conduct Ought Not Be Countenanced by This Court

Appellant claimed in section V, B of his opening brief that the prosecutor repeatedly engaged in argumentative, sarcastic, and improper remarks in his cross-examination of appellant. (AOB 216 *et seq.*) Respondent again asserts forfeiture, for failure to object. (RB 166.) For the reasons set forth above, the trial court's persistent rulings permitting the prosecutor permitting the prosecutor to run roughshod over appellant made such objections futile. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.)

People v. Harris (1981) 28 Cal.3d 935, 953, which respondent cites in support of her argument that no error occurred has nothing to do with appellant's claims in this case. In *Harris*, the defendant asked an evidence technician about the purpose of swabs the technician was taking from his hand, and learned they were to be tested for gunshot residue. He explained to the technician that he had done some shooting the day before in the Porterville area. However, on the stand, he changed the location to the San Diego area. The prosecutor pursued this conflict until the defendant, realizing he was being backed into a corner, blurted out that he was an ex-felon and on parole. (*Id.*, at pp. 951-952.) The prosecutor, surprised by the answer, assured the court during a bench conference that he had not sought to elicit information about the defendant's ex-felon status and that he did

not intend to ask any more questions about the matter. After a bench conference, the trial court instructed the jury to ignore the defendant's comment. This court held that the scope of the questioning had been proper and that any error had been cured by the court's instruction. (Id., at p. 953.)

Thus, in *Harris*, the issue concerned only the permissible subject matter of the cross-examination, not the unfair and improper use of questions laden with innuendo and insinuation, but which are phrased as yes-or-no questions in order to block the witness from providing a complete answer. Moreover, unlike the situation in *Harris*, there was no admonishment from the bench and the court's repeated rejection of the defense objections actually appeared to endorse the prosecutor's misconduct.

People v. Jacobs (1987) 195 Cal.App.3d 1636, cited by respondent to excuse the prosecutor's sarcasm and argumentative remarks, is also inapposite. (RB 169.) The four instances of alleged misconduct in *Jacobs* included only two which occurred during testimony – the other two occurred during argument – and no objections were ever made. Moreover, the alleged instances of misconduct do not come close either in number or

egregiousness to the examples cited by appellant. (See *id.*, at pp. 1657-1658.)

In *People v. Chatman* (2006) 344 Cal.4th 344, this court described an argumentative question:

> An argumentative question is a speech to the jury masquerading as a question. The questioner is not seeking to elicit relevant testimony. Often, it is apparent that the questioner does not even expect an answer. . . . An argumentative question that essentially talks past the witness, and makes an argument to the jury, is improper because it does not seek to elicit relevant, competent testimony, or often any testimony at all.

(*Id.*, 344 Cal.4th at p. 364 [argumentative question was improper, but failure of counsel to object was not ineffective assistance].)

The many instances set forth in section V, B of appellant's opening brief show exactly what is described in *Chatman* – statements to the jury, often sarcastic, masquerading as questions. (See items quoted at AOB 216-228.)

C. The Prosecutor's Question to Appellant About Summer Sherwood Was Indefensible Misconduct

In his opening brief, appellant showed that it was misconduct for the prosecutor to ask appellant whether Summer Sherwood was "the girl who went upstate for threatening Mira Corona." (AOB 228-231.) Respondent claims that the prosecutor's question was both justified and harmless. (RB 171-174.) Respondent is wrong.

Respondent contends that the information about Summer Sherwood was in discovery, and that she was listed as a potential prosecution witness. (RB 172.) This has no relevance to the question of whether the prosecutor committed misconduct. Sherwood had not been called as a witness and was not on the list of witnesses likely to be called by the prosecutor, nor had Corona herself testified about her. Nor was the question asked in good faith, as respondent claims. (RB 173.) The defense specifically contended that the question was *not* asked in good faith but was instead asked "to poison the jury." (20 RT 3825.) Respondent's weak contentions that the question was permissible because discovery had been provided on the witness and that there was no order prohibiting the question are meritless. With or without an *in limine* order, neither party has free rein to inquire about any matter in discovery, particularly when the question is irrelevant, prejudicial, and designed to falsely impugn the character of the defendant.

The question was also profoundly prejudicial. The net effect of the prosecutor's misconduct was that the jury heard not merely from a witness but from the prosecutor himself that a friend of appellant's had threatened Corona, and had been convicted of the crime. Jurors look to the prosecutor as an impartial official who seeks only to do justice. "[T]he prosecutor represents 'a sovereignty whose obligation to govern impartially is as

compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Berger v. United States* (1935) 295 U.S. 78, 88.)

Worse, the implication was left that appellant was somehow involved in the threat, and the jury may well have concluded that appellant had ordered the threat to silence Corona or to prevent her from testifying. That implication, of course, would have suggested a consciousness of guilt. Contrary to respondent's contention (RB 174), such a bell cannot be unrung merely by a general instruction that questions are not evidence. A mistrial should have been granted as the defense requested.

In view of the pervasive pattern of prosecutorial misconduct in this case it is difficult to credit respondent's contention that this particular incident of misconduct was unintentional (RB 173), but even if the question had been asked innocently that fact would not alter the analysis. (See, *e.g., People v. Bolton* (1979) 23 Cal.3d 208, 214 [overruling prior cases emphasizing intentionality].) Whether the question was inadvertent or by design, the damage to appellant was the same. The error warrants reversal by itself, but when combined with the other errors the cumulative prejudice is unmistakable.

D. The Prosecutor's Questions Regarding the Stabbing by Appellant's Co-Defendants Were Simply More Speculative Statements Masquerading as Questions

In his opening brief, appellant showed that the prosecutor committed misconduct in repeatedly asking appellant about possible reasons that appellant's three co-defendant's attacked and stabbed him in a court holding cell in February, 2003. (AOB 231-235.) Even though the trial court sustained several defense objections to this line of questioning, respondent contends no error occurred. (RB 174-182.) This contention is without merit.

In a hearing out of the presence of the jury just before the offending questions, the trial court permitted the prosecutor to inquire about two limited areas: First, the court permitted the prosecutor to ask whether appellant had considered that his codefendants might have had other reasons to attack him. Second, the court permitted the prosecutor to ask the whether appellant had considered that his codefendants felt he had lied to them. (22 RT 4167.)

The prosecutor's questions, set forth in both appellant's and respondent's briefs, went far beyond the two limited questions the court said it would allow. (22 RT 4171-4173, quoted at AOB 232-234 and RB 180-182.) Appellant is at a loss to understand how the prosecutor's

questions – including at least two questions to which to which the court sustained objections – even resembled the only two questions that the court had just ruled could be asked.

Moreover, "The rule is well established that the prosecuting attorney may not interrogate witnesses solely 'for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given.' [Citations.]" (*People v. Wagner* (1975) 13 Cal.3d 612, 619–620.) Similarly, it "was improper to ask questions which clearly suggested the existence of facts which would have been harmful to defendant, in the absence of a good faith belief by the prosecutor that the questions would be answered in the affirmative, or with a belief on his part that the facts could be proved, and a purpose to prove them, if their existence should be denied. (Citations.)" (*People v. Perez* (1962) 58 Cal. 2d 229, 241.) As defense counsel noted at trial (22 RT 4173), the questions were asked in bad faith. The prosecutor plainly sought not to obtain answers from appellant but rather to insinuate to the jury his own speculative theory of why appellant had been stabbed by his co-defendants.

Furthermore, the questions were not only objectionable because they were speculative, but because they could not be subjected to an adversarial

testing by the defense. As defense counsel had explained to the court and the prosecutor, efforts to determine whether the three co-defendants had seen discovery materials or other evidence suggesting other motives for the attack on appellant had proved unproductive, and appellant could not compel his codefendants to testify. The prosecutor thus sought to ring a bell that could not be unrung. The error not only deprived appellant of due process but his Sixth Amendment right to confront the witnesses against him.

Respondent asserts that the questions were proper because "the prosecutor was simply trying to establish that it was possible Navarro's co-defendants did not stab him because of the green light." (RB 184.) Appellant agrees that the court had permitted the prosecutor to ask this limited question. (22 RT 4167.) However, the prosecutor far exceeded the scope of this simple question. Knowing full well that there would be no evidence to support his speculative theory, the prosecutor asked whether the reason for the stabbing was retaliation for appellant lying to his codefendants about the reasons for undertaking the Montemayor killing. In view of the fact that appellant had already testified and repeatedly denied having anything to do with the Montemayor killing, the question was argumentative, speculative, baseless, and in view of the prosecutor's

responsibility to represent an impartial sovereign, simply reprehensible. (*Berger v. United States,supra,* 295 U.S. at p. 88.)

Respondent's prejudice argument is not credible. Respondent contends that the evidence of a longstanding green light was weak and speculative (RB 184), apparently forgetting that the Los Angeles office of the FBI had terminated its contractual relationship with appellant precisely for that reason. (27 RT 3714.) Respondent also forgets that appellant had been fired upon while driving his car in one incident and in a second a friend driving his car had been shot at. (18 RT 3355-3356.) Respondent also further ignores the fact that, after the visit to and letter from Chispa, Corona refused to give appellant the prospective victim's name.[12] Respondent absurdly argues that "the fact that Navarro's soldiers carried out his order in committing the crime refutes any inference that they knew

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[12]On this point. Corona's testimony aligned with appellant's. Corona testified that in Debbie Perna's presence, she called appellant, and that when he told her he had lost the note, she never asked Perna for the address again (14 RT 2710-2714). Appellant testified that after their trip to Crescent City, Corona would not give him the victim's name, even after he eventually returned her page and told her he had lost the note. (19 RT 3539-3540, 3554.) Although their testimony differed about the reasons for the split, both Corona and appellant agree that by September, 2002, they were no longer cooperating with each other. In view of the agreement between the testimony of these two adverse witnesses, and for the other reasons set forth in the text, the prosecutor's speculative theory that the codefendants attacked appellant because he lied to them about the purpose of the Montemayor murder is absurd.

about the green light." (RB 185.) Respondent stubbornly refuses to acknowledge the fact that the evidence more strongly supports the inference that the crime was committed at the behest of Corona and Bridgette Navarro in a in a manner designed to frame appellant. If appellant's three codefendants knew of the "green light" at the time they killed Montemayor, that simply gave them an additional motive.

Finally, respondent again baselessly asserts that the evidence against appellant was "overwhelming." (RB 185.) Appellant has answered that repeatedly, both in his opening brief and in this reply, and will not simply reiterate this material again here. Suffice to say here that appellant has a very different view of the evidence.

The error was once again profoundly prejudicial. The prosecutor exploited his status with the jury to unfairly imply an evidentiary link between the jail stabbing and the Montemayor killing, an implication which the prosecutor knew the defense could not confront, and which the court itself had warned the prosecutor not to pursue beyond the two limited questions the court ruled were permissible. The incident is yet another indicator of an out-of-control prosecutor who would not even follow the court's instructions in one of the rare instances when the court actually attempted to rein him in.

Like all the instances of prosecutorial misconduct appellant has raised, the error is of federal constitutional magnitude and is reversible because respondent cannot show the error to have been harmless beyond a reasonable doubt. (*Chapman v. California* (1968) 386 U.S. 18, 24.) Moreover, as appellant will discuss in the following section, the error contributed to cumulative prejudice that plainly compels reversal.

VI. UNDER BOTH THE FEDERAL AND STATE STANDARDS, REVERSAL IS REQUIRED DUE TO THE CUMULATIVE PREJUDICE OF THE COURT'S NUMEROUS ERRORS

Respondent's answer to appellant's cumulative error claim is essentially a dismissive shrug. Respondent simply asserts that there is no error, and even if there were, it is not possibly prejudicial but merely of the sort that makes a trial imperfect but unfair. (RB 186-187.) Appellant has already set forth his view of the facts, the errors, and the applicable law in his opening brief (AOB 238-244), and will not reiterate all this material here. However, a few points require emphasis.

Appellant's premise is that the trial court inflicted on the defense the death of a thousand cuts, beginning with its ruling forcing the defense to forego opening statement and continuing throughout its many subsequent erroneous evidentiary rulings. The court's rulings consistently favored the prosecution and disfavored the defense, tilting the playing field inexorably toward guilt. Appellant agrees that defense counsel was disorganized and unprepared, and it is abundantly clear from the record that the court was often justifiably exasperated by his conduct and performance. However, even justifiable exasperation does not excuse the errors committed here. It was appellant who suffered the prejudice from counsel's unprofessional

performance, and the court's rulings, while apparently intended to punish counsel, instead deprived appellant of a fair trial and due process of law.

Respondent would have this court believe that the prosecution's case against appellant was strong, but as appellant has shown throughout his opening brief and in this reply, that case was in fact built on a string of suspicions and circumstantial inferences from facts that are equally consistent with innocence. Even a brief review of that evidence demonstrates the inadequacy of the prosecution's case.

The evidence showed that at some point in the early-to-mid Summer of 2002, Mira Corona passed a note to appellant on which was written the victim's home address and telephone number. However, the note did not contain either the victim's name nor the work address from which the perpetrators followed him home, and it was found buried in the midst of other paperwork in the glove-box of appellant's car, as if it had never been removed from the vehicle after Corona gave it to appellant. Both Corona and appellant testified that by September, 2002, appellant was longer returning Corona's calls, and when they did finally speak and appellant asked Corona for the victim's name, she did not tell it to him.[13] Instead,

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[13]This fact alone supports the inference that Corona had been told of the Mexican Mafia's suspicions about Navarro's being an informant, which in turn supports the inference that his codefendant's were motivated by a

(continued...)

she apparently gave it to Armando Macias. (See 19 RT 3647-3648 [Deborah Almodovar testifying that Corona told her she was having sex with some guy named Pirate and "they were, whatever they were going to do with Deborah's brother."].

The evidence also showed that there were many calls to one of the nine cell-phones registered to either appellant's or his girlfriend's address – *i.e.*, the 1600 number – however, appellant distributed phones to other gang members and to his wife, Bridgette, and there was no proof that appellant was using that particular phone on the days in question. Detective Rodriguez testified that he received calls from appellant from any of the phones at anytime; appellant never consistently used a single phone. Moreover, both appellant and his mother testified that he was in Las Vegas on the day of the killing, but there was no evidence that any of the phone calls made to for from the 1600 number or any of the other cell phones were made from or received at Las Vegas on that day. Thus, the phone call evidence was perfectly consistent with the defense theory that the calls were to appellant's wife, Bridgette, who, the evidence shows, was so angry with appellant both for being an informant and for filing for divorce that

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[13](...continued)
desire to frame him, rather than to follow his orders, in carrying out the Montemayor killing.

she reported to Agent Starkey that he had committed two third-strike felonies.

The evidence showed that the appellant's name and the names of the three perpetrator's were written on dry-wall in appellant's Sunrose Place garage. However, while this evidence was certainly relevant to show the four were all in the same gang, there was no evidence that any gang-related criminal activity was either initiated at or took place there, and there was no evidence of prior crimes by this "crew," whether or not ordered by appellant.[14] The penalty-phase testimony of Paul Parent also showed that Valles ("Villian"), who was living behind the Remick Avenue house, began to suspect appellant of being an informant from the day in March, 2002, that appellant was picked up on a felon-in-possession charge – a third-strike offense – but was then released the same night. (33 RT 5891.)

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[14]There was no guilt-phase evidence that the three perpetrators had together been part of the gang activities at appellant's previous, Remick Avenue, residence. During the penalty phase, Paul Parent made reference to "Pirate" participating in gang violence at that residence, and "Pirate" was a gang moniker for Macias. However, there was no evidence that either Martinez (Crook) or Lopez (Sniper) were ever involved in gang activity there. (*E.g.,* 33 RT 4841, 5845, 5874). It is difficult to imagine that the prosecutor would have failed to present evidence of any prior crimes attributable to this "crew" if such evidence existed. The evidence thus shows this so-called "crew" had no other history with appellant prior to the the Montemayor incident, another fact which strongly suggests that, far from being a "crew" for which appellant was the shot-caller, the three acted on their own without appellant's involvement.

Parent also testified that both Valles and Macias were among the regulars at that house. (33 RT 5842 [Valles]; 33 RT 4841, 5845, 5874 [Macias]. If Valles had those suspicions, it is unlikely he would have conveyed them to Parent but not to Macias.

Although the prosecutor and respondent both attempt to portray appellant as clever enough to "play both sides" as an informant and an active shot-caller in the gang, there was no evidence at all that showed any shot-caller activities after he moved from the San Fernando Valley to the Sunrose Place residence in Santa Clarita in April, 2002. More importantly, respondent has not proposed any alternate explanation for the evidence, discussed in detail in appellant's opening brief (AOB 27, 55), that completely contradicts the theory that appellant was the shot caller in this crime. Respondent makes no effort to explain why, if appellant was such a clever shot-caller, he had informed his law enforcement handlers that he had been asked to commit a murder in Orange County, making it highly unlikely that he would thereafter participate in the commission of same crime. Respondent also fails to explain why a clever shot-caller would allow a vehicle registered to his Sunrose Place address to be used in the crime, or why he would allow a car rented to one of the perpetrators, Macias, to be parked at the Sunrose Place residence during the crime and

then left there after the crime. Indeed, the fact that the car remained outside appellant's former residence after the crime suggests strongly that appellant was, as he testified, elsewhere. It is simply not believable that if appellant was at the Sunrose residence when the perpetrators were caught, and he was the clever shot-caller the prosecution claimed he was, he would have allowed the rental car to remain where it might connect him to the crime.[15]

The State cannot have it both ways. The prosecutor consistently portrayed appellant as a clever manipulator who was smart enough to "play both sides" with several law enforcement agencies and officers solely to gain advantage for himself. Respondent adopts this theme, claiming that appellant's "informant history shows how situational, self-serving and calculated his information to law enforcement usually was." (RB 78.) But if appellant was so clever as to dupe experienced local and federal law enforcement officers, on one hand, and the entire EME gang structure on the other, how could he have suddenly become so inept as to use a cell phone that could be traced to him, particularly when he had nine cell-phones from which to choose. Why would he permit his supposed "crew" to use the Chevy Blazer as a "G-ride" to commit the crime when he knew

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[15]Detective Rodriquez testified that, in his opinion, given his extensive conversations with appellant about cars and his history with him, appellant would have had the ability to hot-wire the car left by Macias in front of his house and move it from there. (23 RT 4318-4319.)

that it was registered to his home address? Why would he allow Macias to leave a car rented to his name in front of appellant's house if he knew Macias was going off to commit a murder at his behest, and why then would he permit the car to remain there after Macias had been arrested? Most baffling at all, why would a shot-caller clever enough to dupe the FBI and the EME hierarchy send a crew out to commit a murder he had already told law enforcement that he had been asked to arrange? These facts not only undermine but completely demolish the prosecution's theory.

Thus, contrary to respondent's repeated and unsupported contentions, the evidence against appellant was neither strong nor "overwhelming." To the contrary, the evidence so clearly established reasonable doubt that there is simply no question that the court's errors and the prosecutor's misconduct were prejudicial under any conceivable standard.

"Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial." (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) Generally, federal constitutional errors require reversal unless the beneficiary of the error proves beyond a reasonable doubt that the errors are harmless. (*Chapman* v. *California*, *supra*, 384 U.S. at p. 24.) In applying the *Chapman* test, the

Supreme Court has long made clear that "the whole record be reviewed in assessing the significance of the errors." (*Yates* v. *Evatt* (1991) 500 U.S. 391, 409; *accord, e.g., Rose* v. *Clark* (1986) 478 U.S. 570, 583; *Delaware* v. *Van Arsdall* (1986) 475 U.S. 673,681; *United States* v. *Hasting* (1983) 461 U.S. 499, 509 (1983). This court too has recognized that *Chapman* requires the reviewing court to consider the *entire* record, not just evidence supporting the conviction. *(See People* v. *Mil* (2012) 53 Ca1.4th 400,417-418; *People* v. *Taylor* (1982) 31 Ca1.3d 488,499-500*; People* v. *Rodriguez* (1986) 42 Ca1.3d 1005, 1013.)

Given the closeness of the case, the inconsistent and circumstantial nature of the state's evidence, and the compelling evidence pointing to appellant's innocence, respondent simply cannot show that the errors were harmless beyond a reasonable doubt under *Chapman v. California*.

Appellant recognizes that this court has held that ordinary evidentiary error does not implicate the federal constitution or *Chambers v. Mississippi* (1973) 410 U.S. 284). (*People v. Cudjo* (1993) 6 Cal.4th 585, 611 [ordinary evidentiary error does not implicate federal Constitution]; *but see, contra, Cudjo v. Ayers* (9th Cir. 2012) 698 F.3d 752, 754 [*Chambers* clearly established that the exclusion of trustworthy and exculpatory

evidence at trial violates a defendant's due process right to present a defense].)

However, for the reasons shown above, the errors in this case were not ordinary evidentiary errors but were of federal constitutional magnitude.

Moreover, even if viewed as mere evidentiary error, the cumulative prejudice from the errors nevertheless compels reversal under any standard. Unlike this case, *Cudjo* did not involve a constellation of errors involving prosecutorial misconduct and numerous erroneous court rulings that were consistently pro-prosecution and anti-defense. Appellant maintains that each of the errors set forth in his opening brief and this reply individually compel reversal. However, as this court has often held, a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. (*People v. Purvis* (1963) 60 Cal.2d 323, 348, 353 [combination of "relatively unimportant misstatement[s] of fact or law," when considered on the "total record" and in "connection with the other errors," required reversal]; *People v. Herring* (1993) 20 Cal.App.4th 1066, 1075-1077 [cumulative prejudicial effect of prosecutor's improper statements in closing argument required reversal]; see *In re Jones* (1996) 13 Cal.4th 552, 583, 587 [cumulative prejudice from

defense counsel's errors requires reversal on habeas corpus]; *People v. Ledesma* (1987) 43 Cal.3d 171, 214-227 [same]; but see *People v. Samayoa* (1997) 15 Cal.4th 795, 844 [prosecutorial misconduct does not require reversal "whether considered singly or together"]; *People v. Bell* (1989) 49 Cal.3d 502, 534 [considering "the cumulative impact of the several instances of prosecutorial misconduct" before finding such impact harmless]; *cf. People v. Espinoza* (1992) 3 Cal.4th 806, 820 [noting the prosecutorial misconduct in that case was "occasional rather than systematic and pervasive"].)

In *People v. Hill, supra,* this court found a pattern of prosecutorial misconduct to be "so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process." (*Hill, supra,* 17 Cal.4th at p. 819.)

Thus, even if the errors in this case were viewed as being of less than federal constitutional magnitude, prejudice from the accumulated errors certainly more than meet the state standard for reversal because it is reasonably probable, and more than an abstract possibility, that the jury would have reached a different result absent the many errors. (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 918; *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

PENALTY PHASE ARGUMENTS

VII. NO RATIONAL JUROR COULD FIND BEYOND A REASONABLE DOUBT THAT APPELLANT HAD COMMITTED THE THREE FACTOR (b) OFFENSES CHALLENGED IN APPELLANT'S OPENING BRIEF

A. The Trial Court's Abuse of Discretion Arose Not From a Failure of Procedure, but Rather of Substance

In his opening brief, appellant challenged the sufficiency of the evidence of three alleged instances of prior violent conduct under factor (b) of Penal Code section 190.3. (AOB 280 *et seq.*) Respondent argues that the trial court did not abuse its discretion in admitting the evidence of the offenses, and cites *People v. Jones* (2011) 51 Cal.4th 346, 380 for the proposition that the propriety of admitting factor (b) offenses against a claim of insufficiency of the evidence is reviewed for an abuse of discretion. (RB 187.) Appellant agrees that the ruling is reviewed for abuse of discretion. (AOB 280.) However, as *Jones* itself states, the court must still determine whether the "evidence was sufficient to allow a rational trier of fact to determine beyond a reasonable doubt that the defendant" was guilty of the factor (b) offenses. (*Ibid.*, citing *People v. Hart* (1999) 20 Cal.4th 546, 650.) If it is not, the court abuses its discretion by permitting the evidence to go to the jury.[16]

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[16]Insofar as respondent refers to the appropriate standard for review under (continued...)

Respondent also relies on *People v. Yeoman* (2003) 31 Cal.4th 93, 132-133, for the proposition that factor (b) evidence is generally admissible over a claim of insufficiency "in view of the need to place before the jury all evidence properly bearing on its capital sentencing decision, and in view of the rule that no juror may consider such evidence unless first convinced of its truth beyond a reasonable doubt." (*Id.*, at p. 132, quoted at RB 188.)

Yeoman and the other cases cited have primarily to do with the procedure used by the trial court in admitting the factor (b) evidence. (*People v. Jones, supra*, 51 Cal.4th at p. 380 [failure to hold evidentiary hearing prior to admitting factor (b) evidence]; *People v. Yeoman*, *supra*, 31 Cal.4th at p. 132 [challenge to admission of factor (b) evidence without foundational hearing]; *People v. Hart, supra*, 20 Cal.4th at pp. 650-651 [failure to instruct on elements of factor (b) crimes].) That is not the issue here. The trial court in fact did consider the sufficiency of the evidence of the factor (b) incidents that the prosecutor proposed to admit, over the course of several discussions. This culminated in a point-by-point discussion of each factor (b) allegation, in the context of the jury instructions to be given, and the court heard and rejected appellant's

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[16](...continued)
Evidence Code section 352 (RB 188), appellant can only note that he made no claim under section 352 as regards the three factor (b) incidents.

objections. (31 RT 5493 [whether hearing the name "Droopy" at Laurie Fadness's house was hearsay]; 35 RT 6240 [defense objects to sufficiency of evidence of appellant's involvement in incident at Laurie Fadness's house]; 35 RT 6242-6243 [sufficiency re: the shooting of Paul Parent]; 35 RT 6244-6246 [alleged solicitation letter addressed to Niño through Bridgette Navarro].)

Again, appellant is not arguing that the *procedure* the court used was insufficient; appellant's claim is that the court's findings of sufficiency in admitting the three incidents challenged in his opening brief were abuses of discretion.

Moreover, *Yeoman's* reliance, regarding sufficiency, on the jury instruction that a factor (b) offense may not be considered unless each juror is convinced of its truth beyond a reasonable doubt (31 Cal.4th at p. 132), is misplaced. Appellant again relies on the wise cautionary words of Judge Kozinki on the presumption that juries follow instructions:

> This is a presumption – actually more of a guess – that we've elevated to a rule of law.[17] It is, of course, necessary that we do so because it links the jury's fact-finding process to the law. In fact, however, we know very little about what juries

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[17]*See* Weeks v. Angelone, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions."); Richardson v. Marsh, 481 U.S. 200, 211 (1987). [Fn. in orig.]

> actually do when they decide cases.[18] Do they consider the instructions at all? Do they consider all of the instructions or focus on only some? Do they understand the instructions or are they confused? We don't really know. We get occasional glimpses into the operations of juries when they send out questions or someone discloses juror misconduct, and even then the information we get is limited. But we have no convincing reason to believe that jury instructions in fact constrain jury behavior in all or even most cases.[19]

(Kozinski, *supra*, 44 Geo. L.J. Ann. Rev. Crim. Proc. at p. viii.)

Appellant is cognizant of the necessity of following the presumption – as Judge Kozinski says, it is followed out of necessity. It should not be followed blindly, however, to the extent that it undercuts the need to be scrupulously cautious in the standards of death penalty jurisprudence. The constitutional mandate is for "heightened reliability" in death penalty judgments. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.) *Yeoman* falls below that standard, and appellant urges the court to reconsider it, clarify it, or at least harmonize it with the no-rational-juror standard of *People v. Jones, supra,* and *People v. Hart, supra.*

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[18]*See* David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 Stan. L. Rev. 407 (2013). [Fn. in orig.]

[19]*See id.*; Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . , all practicing lawyers know to be unmitigated fiction."). [Fn. in orig.]

B. The Evidence of the Three Uncharged Offenses was Not Sufficient to Go to the Jury

The trial court abused its discretion in allowing the introduction of the three prior offenses discussed in appellant's opening brief at pages 280-308. Appellant will discuss the prejudice from the admission of three factor (b) incidents after first reviewing the evidence of the incidents themselves.

1. The February 2, 2002 Beating at Laurie Fadness's House

With regard to this incident, respondent claims forfeiture of the issue because the objection at trial was not on the same grounds raised on appeal. (RB 189.) Not so.

As noted in appellant's opening brief (AOB 286), despite its less-than-artful construction, counsel's second objection was tantamount to an insufficiency objection:

> I would be objecting to the introduction of this out-of-court statement being made by a third party which may have been overheard by the witness the prosecution intends to present, because it's introduced to establish circumstantially that Mr. Navarro was the Droopy supposedly referred to and that he was present.

(31 RT 5493.)

An inartful objection is still a valid objection. The requirement of Evidence Code section 353 "must be interpreted reasonably, not

formalistically . . . . [T]he objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility." (*People v. Partida, supra*, 37 Cal.4th at pp. 434-435.)

Though phrased as a foundational objection, this was also an insufficiency objection, and the *Partida* standard is met. It is clear that the defense was that the alleged use by someone present of the name "Droopy" twice during the incident was insufficient to prove that appellant was the person being referred to, or was otherwise involved in the incident. Contrary to respondent's assertion that the totality of the evidence "established" appellant's involvement (RB 190), the evidence showed (1) he was not present (132 RT 5633-5637, 5722); (2) the perpetrators were from the Vineland gang, not the Pacoima Flats gang (32 RT 5662.); and (3) there was no evidence that the "Droopy" mentioned was appellant. Indeed, it is far more likely that this gang moniker referred instead to a member of the Vineland gang.

Respondent's comparison of this case to *Jones, supra*, does not withstand even the most cursory scrutiny. (RB 191-192, quoting *Jones*, 51 Cal.4th at p. 380.) In *Jones*, one of three eyewitnesses identified the

defendant's photograph from a photo lineup, though with only 50 percent certainty. However, as this court explained, there was also other evidence which connected the defendant to the crime. The defendant and another person were apprehended in a nearby residence a short time after the crime, and property from the robbery was in the same residence. By contrast, in this case, the only evidence connecting appellant to the Fadness incident was the alleged fact that two people heard the use of the name Droopy. However, the witnesses also affirmatively testified that appellant was *not* present (32 RT 5633-5637, 5722; 37 RT 6487), the incident involved only members of a different gang (32 RT 5662), and there was no other evidence to suggest that appellant had any involvement in the incident.

This evidence was far from "sufficient to allow a rational trier of fact to determine beyond a reasonable doubt that the defendant" was guilty. (*Jones*, *supra*, 51 Cal.4th a p. 380.) To conclude otherwise would so warp the due process requirement of sufficient evidence beyond all recognition. Furthermore, in a capital case, the Eighth Amendment requires "heightened reliability." The evidence here fell far short of that threshhold.

The standard of prejudice will discussed below.

2. The Shooting of Paul Parent

In contending that the evidence of the Paul Parent shooting incident was sufficient, respondent focuses almost entirely on what occurred prior to April 18, 2002, the day of the shooting. (RB 193-195.) However, for purposes of sufficiency analysis, all that matters is the evidence purporting to connect appellant to the offense. The only evidence linking appellant to the shooting was Parent's testimony that appellant called Parent before the shooting to warn him that "Rudy" was about to come to shoot him. Notwithstanding Parent's characterization of appellant's tone of voice (33 RT 5831), there was no evidence of appellant's involvement in the shooting. (33 RT 5831, 5904.) The irony here is that had Navarro not called Parent to warn him of the impending shooting – an act completely inconsistent with the prosecution theory that appellant had ordered the shooting – there would be no evidence whatsoever of any connection between appellant and the Parent shooting. Instead, appellant's act in calling Parent to warn him of the impending assault – the act of a Good Samaritan seeking to save his a life – was actually used by the prosecution as an reason to execute him.

Irony aside, Parent's testimony was insufficient to show appellant's participation.

3. The Solicitation Letter to Niño

With respect to the use as factor (b) evidence of the "attempted solicitation" of violence against Niño, even the trial court itself found – after the fact, on post-verdict review – that the evidence was insufficient. (AOB 305; 39 RT 6804-6805.) Appellant argued that this was obvious before the fact, and that the evidence should never have gone to the jury. (AOB 294-305.)

Respondent never even acknowledges that the trial court found the evidence insufficient during its post-verdict review of appellant's motion to modify the verdict. Respondent's failure to address this fact does not add to the credibility of respondent's argument. However, appellant will briefly address what little substance there is in respondent's contentions.

Respondent claims that (1) solicitation is a violent offense, completed upon the solicitation; (2) the letter contained two phrases which at least one witness per phrase concluded were solicitations to violence; and (3) an attempted solicitation is sufficient to satisfy the requirement of factor (b) for a violent offense. (RB 195-201.)

The crime of solicitation, defined in Penal Code section 653f, requires that a person, with the intent that a crime be committed, solicits another to commit or join in the commission of a crime. "The crime of

solicitation is complete when the solicitation is made, i.e., when the soliciting message is *received by its intended recipient.*" *People v. Saephanh* (2000) 80 Cal.App.4th 451, 460.) Here, there was no evidence that the letter (Exh. 151) was ever received by Niño. The letter is dated December 11, 2002, and the envelope is both marked with a discovery number (N373) and a sheriff's stamp that it was filed December 20, 2002. (21 RT 4026.) Accordingly, the letter must have been obtained from the mail-cover copies of appellant's mail sent from the Orange County jail. While that strongly suggests the letter was, after being copied, placed in the mail by the jail staff, there is no proof of this, nor of Bridgette Navarro's receipt of the letter. More important, there is no evidence either that she actually forwarded the enclosed letter to Niño, or that he ever received it. Therefore, the crime of solicitation clearly did not occur. That would leave only attempted solicitation as the possible factor (b) crime, and that does not qualify for factor (b) treatment.

Attempted solicitation to murder or commit crimes other than assault is a crime in California. (*People v. Saiphanh, supra,* 80 Cal.App.4th at p. 461.) However, for the reasons appellant stated in his opening brief, neither solicitation nor attempted solicitation are violent crimes, and neither qualifies as factor (b) evidence. Furthermore, the language of the letter in

question is vague, subject to the varied interpretations by the translating witnesses, and does not clearly express an intention that a crime be committed.

Respondent's argument that solicitation is a violent, factor (b) offense relies upon the following quote from *People v. Grant* (1988) 45 Cal.3d 829, 851: "Section 190.3, factor (b), includes more than offenses that are defined in violent terms; specifically, it includes 'all crimes that were perpetrated in a violent or threatening manner.' " (RB 198-199.) However, the language of *Grant* suggests a crime or attempted crime the *perpetration* of which itself involves force. Attempted solicitation is perpetrated without force of violence. This is confirmed by the language of section 190.3, subdivision (b), which requires "[t]he presence of absence of criminal activity which *involved* the use or attempted use of force or violence or the express or implied threat to use force or violence." (Emphasis added.) It is clear that an attempted *solicitation*, for which there was no evidence of receipt by its intended recipient, could not by itself have "involved" the use or attempted use of force or violence. Nor is it an "express or implied threat to use force or violence", both because there is not evidence that the person allegedly threatened was ever in fact threatened, but because, again, there is no evidence that the alleged

threatener, Niño, ever received the solicitation. Accordingly, *Grant* does not support respondent's contention because there was no crime that was perpetrated in a violent or threatening manner.

The trial court erred in even letting the jury decide whether the letter was ever delivered. For the jury to so find, it would have had to rely entirely upon speculation. As noted above, Exhibit 151 was a copy of the letter made by jailhouse staff. However, there was no testimony or other evidence that the letter was in fact placed in the mail by the jail staff, that it was received by Bridgette Navarro, that she forwarded the enclosed letter intended for Niño to him, or that he received it. (35 RT 6244-6245.)

Moreover, even if the mere writing of a letter that may or may not have ever been seen by its intended recipient could constitute a crime committed in a violent or threatening manner, the evidence was still legally insufficient to meet California's standard of proof. The final, fatal, flaw in respondent's argument is demonstrated by *People v. Phillips* (1985) 41 Cal.3d 29, a case discussed and relied on in both briefs. (AOB 302-305; RB 199-201.) *Phillips* points out that the crime of solicitation requires the testimony of two witnesses, or of one witness and corroborating circumstances. (*Id.*, at p. 75.) In *Phillips*, the accused's letters themselves, without the accused's testimony, were sufficient direct evidence to permit

introduction of the evidence. (*Id.*, at p. 76.) By contrast, in this case, appellant testified and denied the meaning attributed to the words by the prosecutor. The remainder of the testimony was ambiguous as to the meaning of the words.

In short, the record shows that appellant wrote a letter containing words of ambiguous meaning which he may or may not have initially intended to be a solicitation of a crime. However, there is no evidence that the letter was even received by its intended recipient and thus did not constitute a solicitation. Even if it had been, however, either a solicitation or an attempt to solicit a crime, neither crime would have satisfied the factor (b) requirement of a crime that was *perpetrated* in a violent manner. The trial court's post-conviction finding that the evidence was insufficient was entirely correct. It should never have gone to the jury, and its admission was clearly error.

C. The Errors, Whether Considered Individually or Cumulatively, Were Not Harmless Beyond a Reasonable Doubt

Errors of federal constitutional dimension are reversible unless the beneficiary of the error, in this case respondent, can show the errors to have been harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S., at p. 24.) The improper admission of insufficient factor (b)

evidence here deprived appellant of his Eighth Amendment right to a reliable penalty phase, and respondent cannot show the error to have been harmless beyond a reasonable doubt. Reversal of the penalty judgment is therefore compelled.

This court has held that state law error occurring at the penalty phase "must be assessed on appeal by asking whether it is reasonably possible the error affected the verdict[,]" and that this standard is, "in substance and effect," the same as the federal *Chapman* standard."[20] (*People v. Abilez* (2007) 41 Cal.4th 472, 526; citing *People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11; *People v. Ochoa* (1998) 19 Cal.4th 353, 479.)

In an attempt to minimize the prejudice from these penalty-phase errors, respondent claims that the evidence in aggravation "overwhelmingly outweighed any possible mitigating evidence." (RB 202.) Nothing could

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[20]While appellant understands that this court has held the state and federal standards to be equivalent, the "reasonable possibility" language of the state standard fails to convey two critical components of the *Chapman* standard which the United States Supreme Court requires this state's courts to apply in assessing federal constitutional error. The state standard's language makes no reference either to the fact that the burden rests upon respondent to show the error to have been harmless, or the fact that respondent's burden is to show harmlessness beyond a reasonable doubt. Thus, even if the two standards are the same in the eyes of this court, the language of the state standard is substantially likely to lead to confusion and should be abandoned in favor of the *Chapman* construction.

be further from the truth. In fact, appellant in this case presented mitigating evidence far beyond what is usually presented in capital cases.

Appellant presented the testimony of family members who testified about the positive effect appellant had on them, underscoring the social utility of a life sentence rather than death. The jury heard from his daughter that appellant had been instrumental in keeping her out of the gang life and maintaining her success in school. (36 RT 6340-6350.) They heard from his brother Demetrius, who explained that the impetus for appellant's joining the gang in the first place was to protect his younger brother from school bullies, and that appellant had been like a father to him after their parents' divorce.[21] (35 RT 6288-6314.) The jury also heard from a film producer and from a youth counselor that appellant had voluntarily participated in numerous school and youth assemblies

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[21]Demetrius Navarro, asked if attributed his success in movies and television to some degree on appellant's influence, gave this answer:

> You need a solid foundation to grow. Anthony gave me that foundation, and let me know it doesn't matter where we are at, what you want to do, you can achieve it, and yeah, that's a big part, because Anthony let me see even though I couldn't walk, I could do anything. You like Elvis on TV, Bro, you can be on TV. You can be in movies, Bro. And fortunately we worked together in major motion pictures and on major television episodes. (35 RT 6299.)

advocating anti-gang and anti-teen-pregnancy themes. (35 RT 6261-3272; 35 RT 6274-6285.)

Most significantly – and most unusual in any criminal prosecution – the jury heard from a string of federal and state law enforcement personnel about appellant's important work as a law enforcement informant who had helped them clear cases and prevent crimes. They further testified that, even after being formally terminated as an informant, and even after being jailed, appellant continued to voluntarily assist them and other agencies. These witnesses included Detective Rodriguez, who specifically said that appellant "absolutely" should be allowed to live (35 RT 6209-6211); FBI Agent Thomerson, who reiterated how much danger appellant had exposed himself to during his work for the FBI (36 RT 6353-6372); FBI Agent Steven Rees, who testified about appellant's extensive, highly dangerous activities in Tijuana and San Diego (36 RT 6427-6459); and Department of Corrections Special Services Unit Officer Dan Evanilla, who testified that when Agent Thomerson was unavailable, appellant would contact Evanilla with informant information, which included information leading to five or six arrests. (36 RT 6466-6467.) This extraordinary law enforcement testimony on behalf of a capitally charged defendant was so remarkable that the trial judge observed in an in-chambers conference with the defense

that, " . . . of all the capital cases I've ever handled, it's amazing that we have officers or agents coming in and testifying in behalf of the person that's on trial." (35 RT 6337 [in originally sealed transcript.[22]])

Respondent's contention that "no possible mitigating evidence" could have overcome the evidence in aggravation is simply absurd. (RB 202.) Appellant submits that the mitigating evidence outweighed the aggravating evidence, but even a pro-prosecution but fair-minded observer would have to agree that the aggravating and mitigating evidence in this case were much closer to equipoise than in the vast majority of death penalty cases. Accordingly, whether viewed under the correct *Chapman* standard or the state's "reasonable possibility" test, respondent cannot show the errors in admitting the factor (b) evidence discussed in this section to have been harmless.

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[22]The many sealed transcripts were transmitted to this court separated from the transcript volumes in which they otherwise would have appeared. By an order following appellant's motion to unseal all but one of the transcripts, the Court unsealed them. (Order to Unseal, November 13, 2013.)

VIII. THE JURY SHOULD HAVE BEEN REQUIRED TO APPLY THE REASONABLE DOUBT STANDARD IN DETERMINING THE TRUTH OF PRIOR CONVICTION ALLEGATIONS WHEN THOSE CONVICTIONS ARE OFFERED IN AGGRAVATION UNDER FACTOR (b)

As explained in appellant's opening brief (AOB 309-315), the trial court erred in instructing the jury that, for purposes of section 190.3, subdivision (b), they did not have to apply the reasonable-doubt standard to the two incidents for which appellant had been convicted. Appellant asserted that once the facts underlying the prior convictions had been presented to the jury as factor (b) offenses, appellant was entitled to have that evidence assessed under the reasonable doubt standard applicable to other factor (b) evidence.

Relying on *People v. Rowland* (1992) 4 Cal.4th 238, 259, respondent first claims the lack of an objection precludes raising this issue on appeal. (RB 206, citing.) However, *Rowland* does not concern an instruction but a failure by defense counsel to secure a ruling on a point of evidence, and the case has no application here.. The rules are clear that factor (b) evidence requires a *sua sponte* reasonable doubt instruction. (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 132). No objection at trial is necessary to preserve for appeal a trial court's failure to give a *sua sponte*

instruction. (*People v. Ervine* (2009) 47 Cal.4th 745, 771, fn. 12; *People v. Avila* (2006) 38 Cal.4th 491, 527, fn. 22.)

Respondent correctly cites cases which hold that a single instance of adjudicated violent conduct can be presented to the jury under both factors (b) and (c). (RB 207, citing *People v. Melton* (1988) 44 Cal.3d 713, 764; accord, *People v. Babbitt* (1988) 45 Cal 3d 660. 719.) However, neither case concerned or discussed the standard of proof required when factor (c) prior convictions are offered as factor (b) violent conduct. Moreover, as both cases explain, the reason for allowing violent adjudicated factor (c) conduct to also be introduced under factor (b) is that the two subsections serve two different purposes. Factor (c) looks to the defendant's failure to respond to correction, and thus allows the introduction of adjudicated non-violent as well as violent felonies, while factor (b) permits all *violent* incidents, adjudicated or not, to be introduced to show a defendant's propensity for violence. (*Melton, supra*, 44 Cal.3d at p. 764; *Babbitt, supra*, 45 Cal.3d at p. 719; see also, *People v. Hamilton* (1988) 46 Cal.3d 123, 146; *People v. Balderas* (1985) 41 Cal.3d 144, 202.)

However, all factor (b) evidence must be proved beyond a reasonable doubt, and this requirement must also be applied when factor (c) evidence is offered under factor (b). This is particularly important when

the prior convictions resulted from guilt pleas and there has never been a finding of guilt by a trier of fact. Defendants plead guilty for many reasons, and while a guilty plea admits the elements of the crime, it does not admit all of the underlying facts the prosecution seeks to use as proof of violent conduct under factor (b). To remove from the jurors the requirement of finding factor (b) allegations to be true beyond a reasonable doubt turns the Eighth Amendment requirement of heightened reliability on its head.

People v. Ashmus (1991) 54 Cal.3d 932, 954, 1000-1001, which respondent cites at RB 207, is not to the contrary. That case does not specify whether the conviction which qualified under both factors was obtained by jury trial or plea. *People v. Morales* (1989) 48 Cal.3d 527, 566, a case relied upon in *Ashmus*, also did not specify whether the conviction in question was by jury trial or plea, and also involved a *Robertson* instruction (*People v. Robertson* (1982) 33 Cal.3d 21, 54) because more unadjudicated offenses allegedly occurred during the commission of the crime for which the defendant had been convicted.

Respondent relies on *People v. Bacon* (2010) 50 Cal.4th 1082. (RB 207.) *Bacon* acknowledges that *Ashmus*, *supra*, left open the question of whether the reasonable doubt instruction must be given when the People

seek to prove the conduct underlying the prior conviction. The distinction the Court discussed was whether or not the "conduct described went beyond the elements of the crime" as discussed in two earlier cases, *People v. Kaurish* (1990) 52 Cal.3d 648, 707, and *People v. Morales* (1989) 48 Cal.3d 527, 566. (*Id.,* at pp. 1123-1124.) *Bacon* held that because the conduct in that case was "part of the conduct that formed the basis of the crime of which defendant was convicted, not some other crime with which he could have been charged but was not[,]" the reasonable doubt instruction was not required. (*Id.,* at p. 1124.)

However, the *Bacon* did not address the situation here, where the earlier conviction was obtained by guilty plea. With respect to the 1983 voluntary manslaughter conviction, for incident that occurred at Recreation Park in Buena Vista, the prosecution evidence was that the then-16-year-old appellant admitted he was present in a group of gang members who participated in a retaliatory attack against members of another gang. However, according to the investigating detective in that case, there was no evidence that appellant was the shooter. Moreover, appellant told the detective that he initially thought the gang intended only a fist-fight, and that when he heard otherwise, he sought to withdraw but was bullied into participating by another gang member. (34 RT 6083-6087.)

Under respondent's interpretation of *Bacon*, no reasonable doubt instruction would be required before the jury could consider the conviction as violent conduct under factor (b) because the underlying conduct was "part of the conduct that formed the basis of the crime" of voluntary manslaughter. However, the process of weighing aggravating and mitigating evidence "is inherently moral and normative [citation omitted] and therefore the weight or importance to be assigned to any particular factor or item of evidence involves a moral judgment to be made by each juror individually." (*People v. Crandall* (1988) 46 Cal.3d 833, 882-883.) While the *elements* of the crime were admitted as part of the plea, the trial court's instruction that the jury could not consider whether the underlying allegedly violent conduct had been proved beyond a reasonable doubt removed from them the responsibility of making a moral judgement regarding appellant's degree of culpability.[23]

Accordingly, appellant submits that where the prior conviction for prior conduct admitted under factor (c) is also submitted by the prosecution for consideration under factor (b), the *Bacon* test should be narrowed. In

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[23]For this reason, when prior convictions for felony murder are admitted for factor (b) purposes, reasonable doubt instructions should be given at least in situations in which the defendant was not the actual perpetrator of the killing.

cases in which the prior conviction results from a guilty plea, as in this case, the jury should be instructed that they should consider the allegedly violent conduct underlying the prior conviction only if they find that conduct proved beyond a reasonable doubt.

IX. REGARDING THE UNCONSTITUTIONALITY OF CALIFORNIA'S DEATH PENALTY SCHEME, APPELLANT WILL REST ON HIS PRIOR BRIEFING

As the Court has made clear, there appears no need for additional briefing on these systemic claims unless the court so requests. As to these issues, appellant rests on the briefing presented in his opening brief.

CONCLUSION

Respondent's argument rests on a stubbornly partisan and blinkered view of the facts, which entirely ignores the testimony of law enforcement officers in appellant's defense. That testimony so thoroughly undermined the prosecution case with reasonable doubt as to compel acquittal. The trial court's evidentiary errors unfairly tilted the playing field in favor of the prosecution and deprived appellant of due process and his right to a reliable guilt and penalty determination. Under the circumstances, appellant's conviction and sentence should be reversed.

DATED:

Respectfully submitted

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RICHARD I . TARGOW

Attorney for Appellant

CERTIFICATE OF LENGTH OF BRIEF

I, Richard I. Targow, attorney for appellant herein, hereby certify under California Rules of Court, rule 8.630(b)(2), that the length of this brief is 25,317 words, within the limits for the reply brief set forth in rule 8.630(b)(1)(C).

_____

RICHARD I. TARGOW

DECLARATION OF SERVICE BY MAIL

Re: People v. Anthony Navarro No. S165195

I, RICHARD I. TARGOW, certify:

I am, and at all time mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is Post Office Box 1143, Sebastopol, California 95473.

I served a true copy of the attached APPELLANT'S REPLY BRIEF on each of the following, by placing same in an envelope or envelopes addressed, respectively, as follows:

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Each said envelope was then, on October 6, 2015, sealed and deposited in the United States Mail at Sebastopol, California, with postage fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 6th day of October, 2015, at Sebastopol, California.

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