SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. OSWALDO AMEZCUA and JOSEPH CONRAD FLORES, Defendants and Appellants.	Superior Court No. No. KA050813 / BA240363 California Supreme Court No. S133660

APPELLANT JOSEPH CONRAD FLORES 'S REPLY BRIEF

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

THE HONORABLE ROBERT J. PERRY PRESIDING

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DEATH PENALTY

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APPELLANT FLORES'S REPLY BRIEF

In this brief, appellant does not reply to those of respondent's arguments which are adequately addressed in his opening brief. The failure to address any particular argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment, or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995 fn. 3, cert. den. (1993) 510 U.S. 963), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined. References to Appellant's Reply Brief are identified by the initials AOB. References to respondent's brief are identified by the initials RB.

As used herein "appellant" refers to appellant Joseph Flores, and "Amezcua" refers to co-appellant Oswaldo Amezcua. The use of the plurals "defendants" and "appellants" refers jointly to appellant and Amezcua.

ARGUMENTS

JURY SELECTION ISSUES

I
THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY EXCUSING PROSPECTIVE JUROR NO. 74 WHO, DESPITE CONSCIENTIOUS RESERVATIONS ABOUT IMPOSING THE DEATH PENALTY, STATED REPEATEDLY THAT SHE WAS WILLING TO CARRY OUT HER DUTIES AS A JUROR IN ACCORDANCE WITH THE COURT'S INSTRUCTIONS AND HER OATH

A. Summary of Contentions

The trial court committed reversible error and violated appellant's rights to a fair trial and impartial jury as guaranteed by the Fifth, Sixth, and Fourteenth Amendments when it excused Prospective Juror No. 74 for cause despite her willingness to fairly consider imposing the death penalty. (*Witherspoon v. Illinois* (1968) 391 U.S. 510; *Wainwright v. Witt* (1985) 469 U.S. 412.) Prospective Juror No. 74 expressed both confusion and reservations toward the death penalty, but consistently said her feelings about the death penalty would not impair her ability to be a fair and impartial juror in the case. The prospective juror said she could weigh aggravating and mitigating evidence and that she would vote for death if she found "the aggravating was enough, then you know, it would be hard, but I could make the decision." (5RT 1384-1385.)

Appellant contended in the opening brief that the trial court erred in excusing this prospective juror because the United States Supreme Court and this Court have made it clear that a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding a person who was willing to follow the court's instructions to weigh the aggravating and mitigating circumstances and determine whether death was the appropriate penalty under the law. (AOB 57-70.)

Respondent points out that Prospective Juror No. 74 gave inconsistent and conflicting responses regarding her ability to impose the death penalty and asserts that substantial evidence therefore supports the trial court's findings. Respondent further argues that any error was harmless. (RB 37-45.)

B. The Trial Court's Excusal of Prospective Juror No. 74 Is Not Supported by Substantial Evidence

A prospective juror in a capital case may be excluded for cause if the juror's views on capital punishment would prevent or substantially impair the juror's performance of his or her duties. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; *People v. Jenkins* (2000) 22 Cal.4th 900, 987; *People v. Blair* (2005) 36 Cal.4th 686, 741.) When the prospective juror's answers are conflicting or equivocal, the trial court's findings regarding the prospective juror's state of mind are binding on the appellate courts if the findings are supported by substantial evidence. (*People v. Duenas* (2012) 55 Cal.4th 1, 10; *People v. Wilson* (2008) 44 Cal.4th 758, 779.)

Respondent points to voir dire responses given by Prospective Juror No. 74 and characterizes them as conflicting. Respondent asserts that substantial evidence therefore supports the trial court's conclusion that this juror's personal feelings about the death penalty would prevent her from carrying out her duties in accordance with the court's instructions and the juror's oath, the standard articulated in *Wainwright v. Witt*, *supra*. (RB 37-38, 41-43.)

An examination of the record, however, reveals otherwise, i.e., that the trial court's determination that Prospective Juror No. 74 was not a proper death-qualified juror is *not* supported by substantial evidence.

Respondent and appellant rely upon the same factual representations regarding the prospective juror's questionnaire and oral voir dire responses. (See, e.g., AOB 60-63 and RB 37-39, 41-43.)

The record in fact shows that Prospective Juror No. 74 may have had ideas about the death penalty that were indefinite or complicated or made the death penalty difficult to impose, but this Court and the United States Supreme Court have recognized that such a juror's performance still would not be substantially impaired under *Witt*. (See, e.g., *Uttecht v. Brown* (2007) 551 U.S. 1, 9; *People v. Stewart* (2004) 33 Cal.4th 425, 447; *People v. Pearson* (2012) 53 Cal.4th 306, 327; AOB 81-88.)

The record shows that the most direct exchange between the trial court and Prospective Juror No. 74 occurred when the trial court asked the juror if she was someone who kind of believed in the death penalty but could never impose death herself or whether she was someone who would be able to weigh all of the evidence and make an appropriate decision. During the jury selection process, the court asked each prospective juror to identify him- or herself with a series of four categories described by the court (see AOB 57-60). The court labeled the questions above that it asked of this prospective juror as describing categories 3 and 4, respectively.

During the colloquy between the court and Prospective Juror No. 74, the prospective juror initially described herself as a category 3 person, i.e., someone who kind of believed in the death penalty but could never impose death. But, then the prospective juror also said she could impose death albeit under "harsh circumstances." (5RT 1356:17-18.) After a further exchange, the court and the prospective juror agreed that the prospective juror was a category 4 person, i.e., someone who would be able to weigh all of the evidence and make an appropriate decision. (5RT 1357:3-6.) In short, Prospective Juror No. 74 and the trial court were in agreement that the prospective juror was a properly qualified juror under the *Witt* standard.

However, a little later in the proceeding when the court was formulating the list of prospective jurors to be excused for cause, the trial court added Prospective Juror No. 74 to the list, finding that the prosecutor had "pushed her

over or got her to commit to being a [category] three." (5RT 1396: 17-20; AOB 63-64.)

The trial court was referring to an exchange between the prosecutor and Prospective Juror No. 74 when the prosecutor asked if the prospective juror had thought about having to tell the defendant's mother that her son was going to be executed. The prosecutor said: "Is there anybody that has listened to what I've said and starting to think, whoa, wait a minute, in front of the defendants, I am going to have to come back and return a verdict of death in front of them. [¶] Maybe with their family sitting out in the audience, I have to tell a mother that her son is going to be put to death?" (5RT 1387:1-17.) Prospective Juror No. 74's response to this was, "I don't think I could do it." (5RT 1388:11-12.)

The United States Supreme Court has made it very clear that a juror whose views on the death penalty would substantially impair the performance of his duties as a juror in accordance with his *instructions* and his *oath* may be excused for cause. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; emphasis added.) If the juror is not substantially impaired, removal for cause is impermissible. (*Uttecht v. Brown*, *supra*, 551 U.S. at p. 9.)

Here, the trial court found the prospective juror disqualified for service based on a hypothetical verdict reached not on the law and the evidence, but on an impermissible basis – the verdict's effect upon others – based on a constructed hypothetical scenario ("I have to tell a mother that her son is going to be put to death") specifically intended to elicit the very response given by the prospective juror.

Neither the juror's oath[1] nor any legal instruction requires a juror to render a verdict on anything but the evidence presented and the instructions of the court.

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[1] The oath administered to trial jurors pursuant to Code of Civil Procedure 232, subdivision (b), is as follows: "Do you and each of you understand and agree that you will well and truly try the cause now pending before this court, and a true

In all other pertinent responses during the jury selection process, Prospective Juror No. 74 expressed some reservations about imposing the death penalty, but she also explained that she would vote for death if she found "the aggravating was enough, then you know, it would be hard, but I could make the decision." (5RT 1384:28-1385:1.)

Here, the trial court relied on Prospective Juror No. 74's emotional reaction to a flawed hypothetical and found the prospective juror's response to be dispositive in determining whether the juror was a properly death-qualified juror.

Hence, evidence that the jury was not a death-qualified juror was not supported by substantial evidence.

C. Respondent Agrees that *Witherspoon-Witt* Error Is Reversible Per Se

The law is settled that reversal of the penalty judgment is the appropriate remedy for *Witherspoon-Witt* error. (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 521-523; *Gray v. Mississippi* (1987) 481 U.S. 648, 668; *People v. Riccardi* (2012) 54 Cal.4th 758, 783; AOB 89-90.) Stare decisis thus compels its application here.

Respondent recognizes that *Witherspoon-Witt* error is reversible per se, but nonetheless urges this Court to adopt a new, more permissive standard and find "technical" errors to be harmless. (RB 43-45.) As explained below, both this court and the United States Supreme Court have already considered and rejected this argument, and because respondent provides no new rationale for reconsidering this contention, this court should once again reject it.

In support of this request, respondent characterizes the erroneous for-cause exclusion of Prospective Juror No. 74 as a mere "technical error" that should be considered harmless. Respondent attributes this characterization to *Gray v. Mississippi*, *supra*, 481 U.S. at p. 666. (RB 45.) An examination of *Gray*,

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verdict render accordingly only to the evidence presented to you and to the instructions of the court."

however, reveals that the "technical error" language and harmless error standard of review argument were merely the linchpins of an argument made by the State of Mississippi and rejected by the *Gray* Court. Mississippi argued that the erroneous exclusion of a prospective juror should be viewed as a "technical error that should be considered harmless" because it had no prejudicial effect. (*Ibid.*)

In rejecting this contention, the court in *Gray* explained why the harmless error analysis formulated in *Chapman v. California* (1967) 386 U.S. 18[2] could not apply to the fundamental constitutional issues at stake here. "Because the *Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury [citation] and because the impartiality of the adjudicator goes to the very integrity of the legal system, the *Chapman* harmless-error analysis cannot apply. We have recognized that 'some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error.' [Citation.] The right to an impartial adjudicator, be it judge or jury, is such a right. [Citation.] As was stated in *Witherspoon*, a capital defendant's constitutional right not to be sentenced by a 'tribunal organized to return a verdict of death' surely equates with a criminal defendant's right not to have his culpability determined by a 'tribunal "organized to convict."' [Citation.] (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 668.)

Respondent thus asks this Court to visit an argument the high court has previously considered and rejected. Respondent's argument, which is heavily dependent on the concurring opinion in *People v. Riccardi*, *supra*, is essentially as follows: *Witherspoon* and *Witt* limit the State's power to exclude capital case jurors, but this power is neither unilateral nor unlimited and therefore its misapplication is a technical error subject to harmless error analysis. (RB 45.)

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[2]*Chapman* articulated this standard: "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

As noted, respondent relies on the concurring opinion in *Riccardi* for his harmless error argument. The concurrence discussed and contrasted the reasoning and rulings in *Gray v. Mississippi*, *supra*, with *Ross v. Oklahoma* (1988) 487 U.S. 81, and noted that "the *Ross* majority declined to apply the reasoning articulated in the *Gray* court's majority opinion – that an error in ruling on a challenge for cause, which might have affected the ultimate composition of the jury as a whole, always requires reversal." (*People v. Riccardi*, *supra*, 54 Cal.4th at p. 843, conc. opn. of Cantil-Sakauye, C.J.) *Ross* instead applied harmless error analysis in a situation involving the erroneous inclusion of a prospective juror who stated he would automatically vote for death if the defendant was found guilty. (*Ross v. Oklahoma*, *supra*, 487 U.S. at pp. 83-87.)

The concurring opinion noted that the *Gray* majority based its automatic reversal rule on the reasoning that *Witherspoon-Witt* error in excluding a qualified juror affects the composition of the jury panel as a whole. By contrast, while the *Ross* majority criticized this reasoning and found the rationale "too sweeping to be applied literally." (*People v. Riccardi, supra*, 54 Cal.4th at p. 843, conc. opn. of Cantil-Sakauye, C.J.) The *Ross* court then disagreed on the appropriate remedy, holding instead that such an error could be found harmless. The concurrence concluded that "[u]ltimately, the difference between *Gray* and *Ross* perhaps boils down to a question of policy." (*People v. Riccardi*, *supra*, 54 Cal.4th at pp. 842-845, conc. opn. of Cantil-Sakauye, C.J.) The concurring opinion invited clarification by the high court, noting that "[a]ppellate courts around the country would certainly be assisted if the United States Supreme Court were to provide further elucidation on this important subject. . . ." (*Id.*, at p. 846.)

However, as Justice Liu pointed out in his separate concurring opinion, *Ross* factually distinguished *Gray* by noting that in *Gray* it was impossible to know with certainty whether the prosecution would have used a peremptory challenge to remove the wrongly excused juror. In *Ross*, on the other hand, the prospective juror was in fact removed, thus eliminating the need to speculate

whether the juror would have been excused by peremptory challenge in the absence of the erroneous ruling. *Ross* thus declined to extend the rationale of *Gray* beyond circumstances involving an erroneous excusal for cause because it is impossible to analyze prejudice when a qualified juror has been wrongfully excused. (*People v. Riccardi, supra*, 54 Cal.4th at p. 847, conc. opn. of Liu, J.)

Gray was decided in 1987 and *Ross* in 1988. Justice Liu pointed out in his concurring opinion that both cases have been repeatedly applied by state and federal courts and therefore the doctrine of stare decisis offers no basis for reconsidering this issue.

> The Chief Justice contends that *Gray* and *Ross* considered together lack a certain theoretical purity. (See conc. opn. of Cantil-Sakauye, C. J., ante, at pp. 834–844.) But *Ross* itself makes explicit the ground of distinction between the two cases, and in the two and a half decades since *Gray* and *Ross* were decided, state and federal courts have dutifully applied their respective holdings without complaint and without any split of authority. There appear to be few cases where a trial court has erroneously excluded a prospective juror for cause resulting in an unknowable effect on the composition of the jury as a whole. But in the few cases where this has occurred, courts have consistently applied *Gray*. (See *People v. Stewart* (2004) 33 Cal.4th 425, 432; *People v. Heard* (2003) 31 Cal.4th 946, 951; *Szuchon v. Lehman* (3d Cir. 2001) 273 F.3d 299, 329-331; *U.S. v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1272–1273.) There are significantly more cases where a trial court has erroneously failed to exclude a prospective juror but the juror did not end up sitting on the jury. In such cases, courts have consistently applied *Ross* to find harmless error. (E.g., *People v. Farley* (2009) 46 Cal.4th 1053, 1096; *People v. Wallace* (2008) 44 Cal.4th 1032, 1056; *People v. Gordon* (1990) 50 Cal.3d 1223, 1246-1247; *Beuke v. Houk* (6th Cir. 2008) 537 F.3d 618, 638; *Soria v. Johnson* (5th Cir. 2000) 207 F.3d 232, 242-243 & fn. 12; *U.S. v. Nururdin* (7th Cir. 1993) 8 F.3d 1187, 1191; *Pickens v. Lockhart* (8th Cir. 1993) 4 F.3d 1446, 1450-1451; *U.S. v. Farmer* (11th Cir. 1991) 923 F.2d 1557, 1566; *Pursell v. Horn* (W.D.Pa. 2002) 187 F. Supp. 2d 260, 322; *Ward v. State* (Ind. 2009) 903 N.E.2d 946, 954–955.)
>
> Neither *Gray* nor *Ross*, singly or together, has proven unworkable. No factual premise of either decision has changed in

> the past 25 years. And far from having been eroded by subsequent legal developments, both cases have been repeatedly and faithfully applied by state and federal courts. There is no basis in the doctrine of stare decisis for revisiting this settled law.

(*People v. Riccardi*, *supra*, 54 Cal. 4th at pp. 847-848, conc. opn., Liu, J.

Because, as Justice Liu explained, there is no basis in the doctrine of stare decisis for revisiting this settled law, respondent's request lacks merit and should be rejected.

GUILT PHASE ISSUES

II

APPELLANT'S RIGHTS TO A FAIR TRIAL, TO PRESENT A DEFENSE, AND TO THE PRESUMPTION OF INNOCENCE WERE PREJUDICED BY HEIGHTENED COURTROOM SECURITY; THE TRIAL COURT DID NOT BASE ITS SECURITY ORDER EXCLUSIVELY ON CASE-SPECIFIC REASONS AND DID NOT STATE ON THE RECORD WHY THE NEED FOR THE HEIGHTENED SECURITY MEASURES OUTWEIGHED POTENTIAL PREJUDICE TO THE DEFENDANTS

As explained in Appellant's Opening Brief (AOB 83-97), the defense objected to the presence of exceptionally heavy courtroom security and to the prejudicial impression such a level of security would have upon the jurors and the trial. (5RT 1201-1202.) As appellants explained, the court failed to exercise its own discretion and instead deferred to the Sheriff's Department's judgment without independently analyzing the need for that level of security and its potential impact upon the trial.

A. The Flaws in Respondent's Contentions

Respondent argues that heightened courtroom security was justified by various incidents involving appellants in jail. (See, e.g., RB 46-48.) However, while some of the incidents respondent discusses might have justified heightened security in *jail*, most of these incidents had nothing to do with appellants' behavior in the *courtroom*. For example, respondent notes that appellant had a pencil in his cell when he had been previously limited to crayons as writing equipment. (RB 48.) The possession of a pencil in his cell may have been a violation of jail rules, but it cannot be said to be a major threat to the security of the trial, particularly when defendants can be searched prior to entering the courtroom.

Other evidence respondent cites of appellants' behavior in the jail, while certainly more violent, also reflects conditions in the jail, had little to do with appellant's likely behavior in the courtroom, and was moreover outdated. Most of the incidents to which respondent points occurred in the jail in 2001, and even the pencil incident occurred in 2002, whereas the motion on excessive security was not heard until 2005, four years after the violent incidents in the jail. (2RT 613, 5RT 1197.) Four-year-old incidents occurring in the violent, threatening surroundings of a jail have little relevance to determining whether a defendant might most potential security threats in a courtroom. Furthermore, if four-year-old incidents in the jail were to be introduced against them, the court at a minimum should have inquired into whether any similar misconduct had occurred in the meantime or whether the defendants appeared to have adjusted to institutional restrictions. In failing to even conduct such an inquiry, the court failed to exercise its discretion.

Even when respondent points to incidents that occurred in the courtroom, the incidents were plainly mere macho posturing rather than real threats. For example, respondent notes that appellant pointed his finger at the deputy district attorney and said he wished he had a gun. (RB 48.) This gesture and comment may be unnerving, but it does not justify security measures in the courtroom that denied appellant a fair trial. Moreover, the court clearly did not consider this incident to be particularly threatening. In fact, in the hearings of February of 2005, when courtroom security was discussed, the noted that appellants had "*conducted themselves in a very appropriate manner at all times with this court*, and I think that once we get going, that the sheriff will see that there is probably not the need to have such a number of bailiffs." (5RT 1202:16-1203:10; italics added.)

Respondent agrees that extraordinary security measures "must be justified by a particular showing of manifest need." (RB 52, citing *People v. Stevens* (2009) 47 Cal.4th 625, 633-634.) However, apart from conduct that occurred two

years before in jail, in light of their good behavior at all times in court, respondent is unable to point to facts that would justify extraordinary security.

In short, respondent's argument regarding appellants' prior misconduct in jail is a red herring. Unlike the courtroom, jail is a violent environment in which inmates must defend themselves to survive. However, prior to being transported to court, each inmate is searched, subject to some restraint, and under the constant supervision of watchful eyes. Not only is the courtroom substantially different from the environment of the jail, but also the evidence of appellants' violent behavior was four years old and had little relevance to appellants' likely behavior in court, which the court itself had found to be exemplary.

The second problem with respondent's contentions is that respondent ignores the fact that the court failed to exercise its discretion in making this ruling. Instead, the judge clearly stated that he was relying on the judgment of the sheriffs because he normally left security issues up to the bailiffs, whom the judge viewed as "the experts." (5RT 1202.) Thereafter the judge gave no indication that he was using its own discretion to evaluate this issue independently, putting specific reasons on the record.

A trial judge cannot simply leave the matter of courtroom security up to "the experts" but must instead make a ruling which primarily protects the due process rights of criminal defendants to a fair trial while also taking into account the state's need for security adequate to maintain custody of the defendant and protect the safety of court personnel and the public. Permitting the sheriff to make all decisions regarding security without performing this analysis is an abdication of the trial court's fundamental responsibility to ensure a fair trial.

The court's abdication in this case is in contrast to law set forth in the numerous cases cited in the Opening Brief (AOB at pp. 86-89, 93-95), including *Holbrook v. Flynn* (1986) 475 U.S. 560, *People v. Stevens* (2009) 47 Cal.4th 625, 644, *People v. Hernandez* (2011) 51 Cal.4th 733, 742, 744, and *People v. Mar*

(2002) 28 Cal.4th 1201. All of these cases clearly hold that the court must use its own discretion rather than rely excessively on the policies of security personnel.

In fact, the trial court's rationale for its ruling in this case was specifically rejected in *Hernandez* where this Court found the trial court did not base its decision on a "thoughtful, case-specific consideration of the need for heightened security" but on a standard policy. (*People v. Hernandez*, *supra*, 51 Cal.4th at p. 743.)

B. Prejudice

Respondent contends that "[t]he mere presence of security guards in the courtroom 'is seen by jurors as ordinary and expected.' " (RB 60, citing *People v. Stevens* (2009) 47 Cal.4th 625, p. 634.) It is probably true that the mere presence of security guards is normal and would be perceived to be so by the jury. However, this case involved not the mere presence of security, a feature common in courtrooms, airports, and courtrooms, but the presence of *exceptional* security. It is precisely this exceptional level of security that prejudices criminal defendants, depicting them dangerous persons and distracting jurors from their task of determining the defendants' guilt or innocence solely on the basis of the evidence presented.

Similarly, respondent notes that "there are a wide range of inferences that a juror might reasonably draw from the presence of additional courtroom security officers . . . " (RB 60.) While this may be true, respondent ignores the fact that one of those inferences is that the defendants are unusually dangerous men.

Respondent's contentions regarding prejudice focus heavily on the fact that there was evidence supporting the verdict. (RB 60-62.) However, appellant is not here arguing that there was insufficient evidence to support the verdict, but rather that the verdict was improperly influenced by security measures which violated appellants' due process rights. Respondent's arguments also ignore the likely impact of these security measures both on the jurors and the defendants.

The deprivation of a federal constitutional right requires application of the *Chapman* prejudice standard and shifts the burden to respondent to show beyond a reasonable doubt that the error did not affect the outcome. (*Chapman v. California , supra*, 386 U.S. at p. 24.) Respondent cannot show that the presence of eight uniformed and armed deputies in the courtroom was never noticed by any juror, and cannot show that no jurors came to the conclusion that these were particularly dangerous defendant requiring the utmost security. Likewise, respondent cannot show that the unusual physical limitations on appellants' ability to move imposed by the physical restraints would not go unnoticed by the panel naturally looking at the defendants to judge how they were reacting.

Likewise, the courts have noted that there is an unavoidable impact on the defendant when restraints are used. *People v. Mar* (2002) 28 Cal.4th 1201, discussed the problems inherent in restraints, which this court had previously recognized by *People v. Duran* (1976) 16 Cal.3d 282, noting that the impact of such restraints in court not only prejudices the jurors but also constitutes an "affront to human dignity" and impacts a defendant's decision to take the stand. (*Mar*, at p. 1216, quoting *Duran*, at p. 290.) It was this factor which caused *Duran* to state that its principles applied to both "visible" and "concealed" restraints. (*Id.*, at pp. 291-292.) As a result, *Mar* held that in determining what security measures to employ, trial courts should adopt "the least restrictive measure that will satisfy the court's legitimate security concerns." (*Ibid.*)

The United States Supreme Court has also recognized that the use of shackles has a negative effect *beyond* the prejudicial impact on a jury which might become aware of the shackles. The high court found that the use of shackles was itself "an affront to the very dignity and decorum of the judicial proceedings that the judge is seeking to uphold." (*Illinois v. Allen* (1970) 397 U.S. 337 at pp. 343-344.) Furthermore, the principal value protected by a defendant's right to be physically present at his trial-- his ability to communicate with his counsel-- is greatly reduced in a condition of total restraint. (*Ibid.*) In

short, the prejudicial impact of excessive restraints and heightened security measures goes beyond the impact such measure may have upon the jury and includes other factors that are less tangible but are nonetheless real.

Finally, in capital cases, heightened security measures not only impact the fundamental fairness of the trial but also violate a capital defendant's Eighth Amendment right to reliable guilt and penalty verdicts. The decision whether or not to impose death is a "moral" and "normative" decision. (*People v. Hawthorne* (1992) 4 Cal.4th 43; *People v. Hayes* (1990) 52 Cal.3d 577, 643.) Otherwise stated, the verdict is a highly "moral and . . . not factual" determination. (*People v. Brown* (2004) 33 Cal.4th 382, 400; *People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) Ion determining whether death is the appropriate punishment, the penalty phase jury must look beyond the facts of the crime and consider the individual character and background of the defendant. The profoundly prejudicial message conveyed by excessive restraints necessarily affects the jury's determination regarding the likely future dangerousness of the defendants and the appropriateness of the death penalty. Accordingly, the excessive security measures employed in this case compel reversal of the guilt and penalty judgment.

III

THE TRIAL COURT ERRED IN ADMITTING THE JAILHOUSE INTERVIEW OF APPELLANTS BECAUSE THOSE STATEMENTS WERE PART OF SETTLEMENT NEGOIATIONS AND WERE PRIVILEGED UNDER EVIDENCE CODE SECTION 1152

A. Introduction

As detailed more fully in Appellant's Opening Brief (AOB 98-99), prior to trial the Deputy District Attorney and trial prosecutor Darren Levine interviewed appellants in the Los Angeles County Jail at a time when appellants represented themselves. Those interviews were tape-recorded.

At trial, over multiple defense objections, the trial court allowed the jury to hear redacted versions of the taped interviews as part of the prosecution's case-in-chief. Appellant contends that these statements were made during plea negotiations and therefore their admission was prohibited by statute and public policy, as appellant explains below. (Evid. Code, § 1153; Pen. Code, § 1192.4; *Bryan v. Superior Court* (1972) 7 Cal.3d 575, 588 (policy favoring settlement of criminal cases underlies the exclusionary rule).

B. The Issue Is Not Waived

Respondent contends that appellant has waived this issue because at trial appellants' attorneys only objected under *Miranda v. Arizona* (1966) 384 U.S. 436 and further argues that appellants spoke to the Deputy District Attorney because of promises of leniency regarding restitution. (RB 75-76.) Respondent is wrong.

In *People v. Wilson* (2008) 43 Cal.4th 1, this court articulated the standard to be applied in determining whether a defendant has properly preserved an issue for purposes of appeal by quoting from *People v. Boyer* (2006) 38 Cal.4th 412, 441 fn. 17:

> As to this and nearly every claim on appeal, defendant asserts the alleged error violated his constitutional rights. At trial, he failed to raise some or all of the constitutional arguments he now advances. "In each instance, unless otherwise indicated, it appears that either (1) the appellate claim is of a kind (e.g., failure to instruct sua sponte; erroneous instruction affecting defendant's substantial rights) that required no trial court action by the defendant to preserve it, or (2) the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional legal consequence of violating the Constitution. To that extent, defendant's new constitutional arguments are not forfeited on appeal. [Citations.] [¶] In the latter instance, of course, rejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional 'gloss' as well. No separate constitutional discussion is required in such cases, and we therefore provide none."

(*Wilson*, at p. 13 fn. 3.)

Additionally, while a party's failure to object may preclude a party from asserting an issue, it is not a bar to the issue being resolved by an appellate court if that court sees a need to resolve the issue. As this court stated in *People v. Williams* (1998) 17 Cal.4th 148, n. 6,

> In *Scott* [*People v. Scott* (1994) 9 Cal.4th 331], we held only that *a party* cannot raise a "complaint[] about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons ... for the first time on appeal." (*Id.* at p. 356.) We did not even purport to consider whether *an appellate court* may address such an issue if it so chooses. Surely, the fact that a party may forfeit a right to present a claim of error to the appellate court if he did not do enough to "prevent[]" or "correct[]" the claimed error in the trial court (*id.* at p. 353) does not compel the conclusion that, by operation of his default, the appellate court is deprived of authority in the premises. An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party. (*Id.* at p, 161.)

Furthermore, as the facts relating to the contention are undisputed and there would probably be no contrary showing at a new hearing, the appellate court may properly treat the contention solely as a question of law and pass on it accordingly. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742; *Williams v. Mariposa County Unified Sch. Dist.* (1978) 82 Cal.App.3d 843, 850.) This is particularly true when the new issue is of "considerable public interest" or concerns "important issues of public policy" and has been briefed and argued before the reviewing court. (See, *Wong v. Di Grazia* (1963) 60 Cal.2d 525, 532, fn. 9; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *Pena v. Municipal Court* (1979) 96 Cal.App.3d 77, 80-81.)

In this case, the facts relating to this issue are not in dispute, and therefore it is a pure issue of law. There is no reason why this court should not address the issue. (*People v. Brown* (1996) 42 Cal.App.4th 461, 475; *People v. Blanco* (1992)10 Cal.4th 1167, 1172.)

Furthermore, waiver is not a favored concept and should be sparingly applied, especially in a criminal case. "Because the question whether defendant has preserved his right to raise this issue on appeal is close and difficult, we assume he has preserved his right, and proceed to the merits." (*People v. Bruner* (1995) 9 Cal..4th 1178, 1183, n. 5; see also *People v. Wattier* (1996) 51 Cal.App.4th 948, 953.) "Whether the [general] rule shall be applied is largely a question of the appellate court's discretion." (*People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172-1173.)

A finding of waiver is not lightly to be made. (*Moore v. Michigan* (1957) 355 U.S. 155, 161.) As has been pointed out in another context, "[i]t has been pointed out that `courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we `do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." (*Edwards v. Arizona* (1981) 451 U.S. 477, 482; *Johnson v. Zerbst* (1938) 304 U.S. 458, 464.)

Additionally, the fact that the Deputy District Attorney advised appellants that any statements made could be used against them does not act as a waiver of any rights they may have had in regards to settlement negotiations because any purported waiver was not knowing. "A waiver is knowing and intelligent if made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." (*United States v. Harper* (8th Cir. 2006) 466 F.3d 634, 643.) "A waiver is voluntary if it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." (*United States v. Gaddy* (8th Cir. 2008) 532 F.3d 783, 788; see, *Glasser v. United States* 315 U.S. 60, 71; *Adams v. United States ex rel. McCann* (1942) 317 U.S. 269, 277-281.)

The inquiry into the validity of waiver has two distinct elements. (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) The court must determine, first, whether it was voluntary and second, whether it was knowing and intelligent. (*Ibid.*) This determination is to be made based on the "'totality of the circumstances'" (*Fare v. Michael C.* (1979) 442 U.S. 707, 725.)

In this case, while appellants had definite goals in these discussions, i.e., to secure either a sentence of no more than fifty years with no life-in-prison provision and/or a limit on restitution, they were laymen with no legal training, and it is unlikely that they would know that they could negotiate for these things in confidence. If they wanted to negotiate in pursuit of these goals, their only option was to talk to the prosecution.

Furthermore, unlike a police officer taking a suspect into custody, a deputy district attorney should be held to a higher standard in his dealings with defendants due to knowledge of the law, including the fact that settlement negotiations are confidential. For a prosecutor to advise and obtain a waiver only of Miranda rights, and fail to advise appellants of other potential privileges and consequences that could result from negotiations, was to use his training and position to take advantage of pro per defendants unversed in the law.

It is particularly egregious for the professional prosecutor to take advantage of the ignorant pro per. As Justice Black wrote for the Court:

> The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done." It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer-to the untrained layman may appear intricate, complex and mysterious.

(*Johnson v. Zerbst* (1938) 304 U.S. 458, 462-463.)

C. The Flaws In Respondent's Contentions

Respondent contends that the interviews with appellants were not part of negotiations designed to reach a plea bargain, and therefore are not prohibited by Evidence Code section 1153 or Penal Code section 1192.4. However, respondent's argument relies entirely on a highly selective review of the discussions. Respondent refers to portionss of the negotiations between appellants and the prosecution, respondent ignores crucial sections of the negotiations.

In addition, it must be remembered that although the prosecution was represented by experienced litigators, the defendants were uprepresented when they were engaged in these discussions. As amateurs they should not be held to hypertechnical, legalistic standards in articulating their intent. Examining the discussions from a lay-person's perspective, it is clear that appellants *were* engaged in discussions with an intent to resolve at least some aspects of the case, if not the entire case.

Appellants' intent becomes particularly apparent in view of the fact that they repeatedly asked deputy district attorney Levine about the possibility of an outcome less than the death penalty. Achieving that result would both obviously

and necessarily involve a plea bargain without regard to whether the words "plea bargain" were ever mentioned. Whether appellant's used precise legal terminology correctly is irrelevant when one considers the only possible way their clear purpose could be achieved.

As noted in Respondent's Brief, in the February 21, 2002 meeting, deputy district attorney Levine reminded appellants that they had come to him asking for "50 years.... [¶] . . . without the 'L.' [life sentence]." Appellant wanted that deal because if he got the 50 years and no life sentence, "I can get married and get a bone yard visit. . . . [¶] But if you give me the 'L,' I have no sex." (RB p. 66, citing DPSupp III CT 51:21-22, 24.)

Explaining that this 50-year sentence would be the functional equivalent of life-without-parole, appellant added, "If you give me 50 years, I guarantee you I won't live 50 years. If you give me 85%, which I have to get it – " (DPSuppIIICT 52:8-9.)[3]

Obviously, achieving appellant's goal of a 50-year sentence would necessarily involve a plea bargain. It would be impossible for the prosecution to agree to a deal involving a maximum of 50 years without a guilty plea.

Later during this February 21 meeting, as respondent notes, appellants asked for a cap on restitution. (RB p. 69, citing DPSupp III CT 74-75.) They also asked for assurances of a limit on restitution during the March 28, 2002 meeting. (Supp. III 1CT 99.)

The foregoing portions of the record make clear that appellants were negotiating with the prosecution in an effort to achieve a result that would necessarily involve a plea bargain – a sentence of 50 years with no life in prison – and also for a limit to restitution. It is only by ignoring the fact that appellants

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[3] The 85% appears to be a reference to section 2933.(c) which limits the maximum conduct credits that can be awarded to a defendant convicted of a felony listed in section 667.5. Under this formula, appellant would still be serving a de facto life term.

were seeking something very specific that respondent can argue that the statements were not made in the course of plea negotiations.

It is also important to recall that appellants were charged with five counts of first degree murder, seven counts of attempted murder, and a variety of other offenses. By the end of trial, appellants indicated a preference for the death penalty rather than life in prison. For respondent to suggest that any negotiations would depend on appellant seeking to enter into a "plea bargain" ignores the reality that it is inconceivable that the District Attorney would have agreed to any "plea bargain" that would have resulted in anything less than a very long prison term.

Consequently, appellants could ask for little in return beyond what they were asking for – a term with no life sentence and leniency when the case reached a stage where restitution and fines would be in issue.

The fact that the prosecution lived up to its part of the deal when the case reached that stage of restitution does not mean that they were not involved in negotiations as respondent contends (See RB 77-78.). In short, appellant was bargaining for the most for which he could ask – a request by the District Attorney's Office for leniency in restitution fines and a term with no life sentence. Thus, appellants were clearly negotiating in with the prosecution for a result that would have a favorable impact on appellants' sentences.

Respondent's position that these statements were not made in the course of negotiations should also be rejected as urging a too-narrow, literal reading of section 1192.4 and Evidence Code section 1153. To the contrary, and as noted in Appellant's Opening Brief (AOB 106-107), a liberal reading of the statute must be applied to promote the policies underlying the rule. Although the statutes refer to offers to plead guilty, in *People v. Tanner* (1975) 45 Cal.App.3d 345, this Court held that in order to promote candor in negotiations the statutes must be read as applying to "any incidental statements made in the course of plea

negotiations . . . ." (*Id.* at pp. 351-352, see also *People v. Crow* (1994) 28 Cal.App.4th 440.)

D. The Cases Cited By Respondent.

In support of his argument, respondent relies on a number of inapposite cases.

For example, respondent cites *People v. Posten* (1980) 108 Cal.App.3d 633. (RB 80.) In that case, the police went to Virginia to pick up the defendant and bring him back to California for trial. On the way back to California he had to spend several days in close quarters with the police officers. During that time, he requested a copy of the complaint, discussed the charges against him, and "apparently" tried to work out a deal regarding a plea. The Court of Appeal held that the defendant's offers "were not made in the course of bona fide plea negotiations but were merely unsolicited admissions by appellant without any understanding that they would be inadmissible." (*Id.* at p. 648.)

Posten has no relevance to this case. First, it is unclear whether the defendant in that case actually thought he was engaged in negotiations, or whether anything resembling negotiations actually took place. The court stated only that the defendant was "apparently" trying to work out a deal. The court stated that appellant asked for a copy of the complaint. However, he did not seek a particular desired outcome or other resolution of the case, such as being charged with a lesser offense.

More importantly, however, and unlike the situation in this case, the defendant in *Posten* was not negotiating with the deputy district attorney prosecuting his case. It goes without saying that police officers escorting a defendant back to California do not have the authority to engage in plea negotiations. The defendant in *Posten* was simply in close quarters with the police for an extended period of time and chose to make conversation about his case.

Respondent also cites *People v. Leonard* (2007) 40 Cal.4th 1370. (RB 81.) That case is also not relevant here. In *Leonard* the defendant in open court, on the record, suddenly raised his finger and blurted out that he was guilty. (*Id.* 1410.) Neither the prosecution nor the court did anything to elicit this statement, and the defendant was not pro per but was represented by two attorneys. Far from constituting an offer to negotiate, the defendant's statement in *Leonard* was simply an outburst and a disruption of the proceedings.

By contrast, appellants in this case were seeking very specific benefits as part of discussions in which they were acting in pro per-- a limit of 50 years on the sentence or a limit on restitution.

E. Summary

As appellant has shown above and in the opening brief, a review of the exchanges between Levine, his investigator, and appellants establishes that the parties were in negotiations for either a sentence of fifty years in prison or, in the alternative, a reduced restitution amount. As such, appellants' statements, made in the course of bona fide plea bargaining negotiations, should have been excluded under the rule of *Tanner*. Because appellants were prejudiced by the improper admission of this evidence, the conviction must be reversed.

IV

APPELLANT WAS DENIED HIS RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT WHEN THE RESULTS OF ARTURO MADRIGAL'S AUTOPSY WERE ENTERED INTO EVIDENCE THROUGH THE IN-COURT TESTIMONY OF A FORENSIC PATHOLOGIST WHO DID NOT PERFORM THE AUTOPSY

A. Summary of Contentions

Appellant argued in the opening brief that his Sixth Amendment right to confront witnesses against him was violated when Dr. Lisa Scheinin, who neither performed nor observed the autopsy of Arturo Madrigal, was allowed to testify to the findings and conclusions made by Dr. Juan Carrillo, the forensic pathologist who actually performed the autopsy. (AOB 113-137.)

Respondent contends that appellant has failed to show that his Sixth Amendment right of confrontation was violated by the admission of Dr. Scheinin's testimony. (RB 86-88.) Respondent initially contends that appellant has waived his claim because he failed to object to Dr. Scheinin's testimony on this constitutional basis. (RB 88-91.) Respondent next argues there was no Confrontation Clause violation because Dr. Carrillo's opinion and conclusions were prepared before appellant was a suspect in Madrigal's murder and they were therefore not testimonial. (RB 91-99.) Respondent's final contention is that any error was harmless. (RB 99-101.)

B. Appellant's Claim Has Not Been Forfeited

Respondent argues that because appellant did not raise a Confrontation Clause objection to Dr. Scheinin's testimony at trial, this issue has not been preserved for appeal. (RB 88-91.)

Appellant anticipated and addressed respondent's claim of procedural default of this issue in the opening brief. (AOB 134-137.) There, appellant

asserted that any claimed procedural fault resulted from trial counsels ineffective performance in failing to object to the testimony on Sixth Amendment grounds. *Crawford* was decided in 2004; appellant's trial was held in 2005. By then, *Crawford* had been recognized as a significant development in criminal defense jurisprudence. Appellant argued there was no satisfactory explanation for counsel's failure to object on confrontation grounds. (AOB 140-142.)

Respondent argues that appellant should not be allowed to rely on a claim of ineffective assistance of counsel to salvage his claim of error because "trial counsel may have decided not to object to Dr. Scheinin's testimony because of the relative unimportance of the testimony and in order to prevent delays in the trial." (RB 91.) The argument is both legally and factually incorrect.

First, while a defense attorney's tactical judgment calls generally will not be second-guessed on appeal, the imaginary justifications respondent has advanced are not "tactical" in nature. Even if counsel had somehow concluded that the evidence was "relatively unimportant" or wanted to prevent delays—suppositions for which there is no evidence apart from respondent's own imagination, and which the following discussion will show to be factually inaccurate-- these rationales have nothing to do with trial strategy or tactics and therefore would not constitute legal justification for a failure to object.

Moreover, the evidence in question included evidence pertaining to the gunshot wounds, including the trajectory of the bullets, the age of wounds, the cause of death, and the assignment of death as a homicide-- all facts that were indisputably a critical part of the prosecution's case. Furthermore, the prosecution presented evidence of the autopsy results as "science," as objective "corroboration" in arguing appellant was guilty of premeditated murder. The failure to object on confrontation grounds to the hearsay presentation of that evidence clearly fell below a standard of reasonable competence.

The standard of reasonable competence requires defense counsel to diligently investigate the case and research the law. (*People v. Thimmes* (2006)

138 Cal.App.4th 1207, 1212-1213.) Defense counsel in capital cases have a particular duty to assert and preserve legal claims "against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited." (American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Guideline 10.8(A)(3)(c).) Plainly, defense counsel in this case fell below the standard of reasonable competence in failing to make a *Crawford* based objection.

The admission of the autopsy evidence also cannot be said to have been harmless beyond a reasonable doubt with regard to proving that Madrigal's death was a premeditated murder, as respondent urges this Court to find. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Appellant has already discussed the prejudice from this error in his opening brief. (See AOB 133-134.) Briefly, however, the autopsy evidence was the only corpus delicti evidence presented to confirm appellant's statement regarding the Madrigal murder, and was therefore critical to the prosecution's case. Without it, the conviction could not have occurred. The error therefore cannot be held harmless under any standard of review.

C. The Admission of Testimonial Evidence Violated the Confrontation Clause

Respondent contends that because appellant was not a suspect in the death of Madrigal at the time the autopsy was conducted, no Confrontation Clause violation occurred because the autopsy report was not testimonial within the meaning of Confrontation Clause jurisprudence. Respondent further argues the autopsy report was not testimonial because the autopsy was conducted and the report written before appellant was either suspected of committing the crime or arrested for it. (RB 91-99.)

Appellant summarized Dr. Scheinin's testimony at pages 113-114 of the opening brief. As respondent acknowledges, Dr. Scheinin testified not only to the

condition of Madrigal's body, but also to Dr. Carrillo's opinion and conclusions on the cause of Madrigal's death as Dr. Carrillo memorialized them in the autopsy report he authored. (RB 98; AOB 115-116; 7RT 1739-1745.)

Crawford v. Washington (2004) 541 U.S. 36, 68, established that the prosecution violates the Confrontation Clause when it introduces one witness's testimonial statements through the in-court testimony of a second witness. The use of testimonial out-of-court statements ordinarily violates the defendant's right to confront the maker of the statements unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 59.)

Respondent relies on *People v. Dungo* (2012) 55 Cal.4th 608. (RB 94-98.) In *Dungo*, this Court held that statements in an autopsy report describing a nontestifying pathologist's observations of the condition of the victim's body were not testimonial. *Dungo* explained that autopsy reports typically contain two kinds of statements – "(1) statements describing the pathologist's anatomical and physiological observations about the condition of the body; and (2) statements setting forth the pathologist's conclusions as to the cause of the victim's death." (*Id.*, at p. 619.) The autopsy report in issue in *Dungo* contained the nontestifying pathologist's observations about the condition of the victim's body. *Dungo* found such statements to be nontestimonial in nature because "[t]hese statements, which merely record objective facts, are less formal than statements setting forth a pathologist's expert conclusions." (*Ibid.*)

In *People v. Lopez* (2012) 55 Cal.4th 569, this Court considered whether a nontestifying analyst's laboratory report and a colleague's testimony relating some of the report's contents violated the defendant's right to confront and cross-examine the report's author and concluded it did not. In reaching this decision, *Lopez* took up the question of whether the critical portions of the laboratory report were made with the requisite degree of formality or solemnity to be considered testimonial in the context of *Crawford v. Washington* (2004) 541 U.S.

36; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305; *Bullcoming v. New Mexico* (2011) 564 U.S. ___ (131 S.Ct. 2705; 180 L.Ed.2d 610); and *Williams v. Illinois* (2012) 567 U.S. ___ (132 S.Ct. 2221; 183 L.Ed.2d 89).

Lopez concluded that to be testimonial the out-of-court statement must have been made with some degree of formality or solemnity, but also noted that the degree of formality remains a matter of dispute among the members of the high court itself. (*People v. Lopez*, *supra*, 55 Cal.4th at pp. 581-582.) *Lopez* also noted that "all nine high court justices agree that an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution, but they do not agree on what the statement's primary purpose must be." (*Ibid.*)

Dungo noted that an autopsy serves several purposes, only one of which is criminal investigation, and concluded that "[t]he autopsy report itself was an official explanation of an unusual death, and such official records are ordinarily not testimonial." (*People v. Dungo*, *supra*, 55 Cal.4th at pp. 619-620; *Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. at p. 324 (business and public records generally admissible absent confrontation because they were created for the administration of an entity's affairs and not for proving some fact at trial.) In his concurring opinion, Justice Chin explained further that the autopsy report did not have the primary purpose of accusing the defendant or any other targeted individual of having committed a crime. Instead, its primary purpose was to describe the condition of the victim's body. (*People v. Dungo*, *supra*, 55 Cal.4th at p. 630 (conc. opn. of Chin, J.).)

In his concurring opinion, Justice Chin noted the presence of some circumstances indicating that the autopsy report in *Dungo* was prepared for the primary purpose of accusing the defendant of a crime. The defendant was a suspect at the time the autopsy report was prepared; an investigator was present at the autopsy; and the pathologist was aware that the defendant had confessed before the autopsy report was written. Justice Chin noted that the plurality in

Williams had noted that the defendant in that case was not a suspect at the time the autopsy report was written and that nothing in *Williams* suggested that the defendant's status as a suspect was anything more than a circumstance of which the Court must take account. (*People v. Dungo*, *supra*, 55 Cal.4th at p. 632; *Williams*, *supra*, 567 U.S. at p. ___ (132 S. Ct. at p. 2243.) The key distinction for Justice Chin was that the opinion concerning the manner of death came from the testifying expert who was subject to full cross-examination, and not from the report. (*People v. Dungo*, *supra*, 55 Cal.4th at p. 632, conc. opn. of Chin, J.; *People v. Barba* (2013) 215 Cal.App.4th 712, 738.)

In contrast, in the present case, as respondent acknowledges, Dr. Scheinin testified to Dr. Carrillo's opinion and conclusions in the cause of Madrigal's death that were contained in the autopsy report. (RB 98; see, e.g., 7RT 1739, 1744 (Dr. Scheinin testified that Dr. Carrillo stated his opinion in the autopsy report that Madrigal's death was a homicide resulting from a gunshot wound to the head.) Respondent relies on *Williams v. Illinois*, *supra*, and argues there was no Confrontation Clause violation here because appellant was not a suspect when the autopsy report was prepared and argues that for this reason the Madrigal autopsy report was not prepared for the primary purpose of accusing a targeted individual. (RB 98-99; *Williams v. Illinois*, *supra*, 132 S.Ct. at p. 2243.)

As appellant noted above, Justice Chin explained in his concurring opinion in *Dungo* (in which Cantil-Sakauye, C.J., Baxter, J., and Werdegar, J., concurred), that although the plurality in *Williams* stated the defendant in that case was not a suspect at the time, nothing in the opinion suggested that a targeted suspect was a "*requirement*" in determining whether the autopsy report was testimonial. Rather, it was a "surrounding circumstance" of which the court must take account. (*People v. Dungo*, *supra*, 55 Cal.4th at p. 632; *Williams v. Illinois*, *supra*, 132 S.Ct. at p. 2243; see also *People v. Barba*, *supra*, 215 Cal.App.4th at pp. 733-734 (how to interpret *William*.) Indeed, whether a particular individual has been targeted for investigation bears little logical relevance to the question of

whether the contents of the report on a homicide victim's autopsy or the autopsy surgeon's conclusions are testimonial in nature. Even if appellant himself was not a suspect at the time the Madrigal autopsy was performed, it defies both reason and experience to argue that forensic pathologists are not aware that their conclusions regarding an autopsy performed on a homicide victim are likely to be presented as evidence in a murder trial.

Here, the trial court erred in not allowing appellant to confront Dr. Carrillo, who was not shown to be unavailable and who had not been previously subject to cross-examination by appellant. (See AOB 119-120 for discussion on the record's failure to establish that Dr. Carrillo was either unavailable or that appellant had a prior opportunity to cross-examine him.) The Confrontation Clause required that appellant be afforded the opportunity to confront Dr. Carrillo regarding his opinion and conclusions on the cause of Madrigal's death. The prosecution's presentation of this evidence through the testimony of Dr. Scheinin violated appellant's Sixth Amendment right to confront witnesses against him.

D. The Erroneous Admission of Dr. Carrillo's Testimonial Statements through the In-Court Testimony of Dr. Scheinin Was Not Harmless Beyond a Reasonable Doubt

Respondent argues that any Confrontation Clause violation arising from the testimonial statements of Dr. Carrillo through the testimony of Dr. Scheinin was harmless beyond a reasonable doubt. (RB 99-101.) Respondent asserts evidence that Madrigal died from gunshot wounds to the head was overwhelming. Respondent points to Flores' statement that he "domed" Madrigal and shot him in the face and to other evidence establishing that Madrigal had been shot. (RB 100-101.)

However, as appellant observed above and also in his discussion of prejudice in the opening brief (AOB 133-134), the jury was required to find proof of the corpus delicti of the crime independent of Flores' statement he had

"domed" Madrigal, as the court properly instructed the jury. (*People v. Beagle* (1972) 6 Cal.3d 441, 455; CALJIC No. 2.72; 17CT 4513.) The forensic autopsy evidence that Madrigal was killed by a fatal gunshot wound to the head corroborated Flores's statement and the prosecution relied upon it.

The admission of the autopsy evidence thus cannot be said to have been harmless beyond a reasonable doubt with regard to proving that Madrigal's death was a premeditated murder. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

V

THE TRIAL COURT COMMITTED FEDERAL CONSTITUTIONAL ERROR WHEN IT ERRONEOUSLY INSTRUCTED THE JURY THAT A PERSON WHO AIDS AND ABETS IS "EQUALLY GUILTY" OF THE CRIME COMMITTED BY A DIRECT PERPETRATOR. IN A PROSECUTION FOR MURDER, AN AIDER AND ABETTOR'S CULPABILITY IS BASED ON THE COMBINED ACTS OF THE PRINCIPALS, BUT THE AIDER AND ABETTOR'S OWN MENS REA, AND THEREFORE HIS LEVEL OF GUILT, "FLOATS FREE."

A. Summary of Contentions[4]

Among other offenses, appellant was convicted by the jury of the first degree murders of George Orlando Flores[5] (count 4) and Luis Reyes (count 11) and of the attempted willful, deliberate, and premeditated murder of Fernando Gutierrez (Count 46), counts for which Amezcua was the shooter.

As discussed in greater detail in the Statement of the Facts (AOB 19-21), the prosecution's evidence showed that around midnight on June 18, 2000, appellant was riding in a Toyota Cressida driven by a woman named Katrina Barber as they passed a residence on Ledford Street in La Puente. George Flores, Robert Perez, and two other men were standing or sitting near a cinder block wall in front of the residence. Barber drove past, turned around, and returned, stopping in front of the residence. As she did so, a grey Monte Carlo driven by Luis Reyes pulled up in front of the residence. Amezcua got out of the Monte Carlo, pulled out a gun, and walked up to Flores. Perez heard a shot and jumped behind a parked car for cover. He heard other shots, possibly from another gun. Barber testified that appellant fired an AK-47, and that she herself had fired four

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[4] Respondent addresses this issue stating, "appellant Amezcua claims that the trial court erroneously instructed the jury with CALJIC No. 3.00...." (RB, at p. 107.) However, appellant also raised this issue in his opening brief, specifically explaining that the issue also applied to appellant. Although respondent only addresses the argument as to Amezcua, to the extent that reasoning applies to appellant, appellant replies to respondent's contentions here.

[5] George Flores was not related to appellant.

or five shots from a .22 caliber pistol appellant had handed her. Perez might have heard a gun being loaded in the area where he had seen appellant. Bullets from two guns were found in the area. Flores and another man were fatally shot.

The relevant facts pertaining to Reyes, discussed in greater detail in the Statement of the Facts (AOB 22), are as follows. After the Flores shooting, the Toyota Cressida in which appellant and Barber were riding began to have engine trouble and Barber pulled off the freeway. Reyes and Amezcua, who were driving behind them in the Monte Carlo, followed them, and the two cars stopped near each other on a side road. Barber heard gunshots coming from the Monte Carlo and saw Amezcua shoot Reyes, killing him. Appellant asked Amezcua why he had shot Reyes.

With regard to the murder of George Flores (Count 4), the jury found true the allegations that appellant personally used a firearm causing death, that the murder was committed for the benefit of a street gang allegation, and that the murder was committed by means of firing a firearm from a motor vehicle. The jury also found true the special circumstance allegation of multiple murder.

With regard to the murder of Reyes (Count 11), the jury found the murder to be in the first degree and found true the allegation that the murder was committed for the benefit of a street gang allegation. The jury also found true the special circumstance allegation of multiple murder.

The trial court instructed the jury stating that those who aid and abet a crime and those who directly perpetrate the crime are principals and *equally guilty* of that crime. (CALJIC No. 3.00; 17CT 4515; 13RT 2958.)

Appellant contended in the opening brief that the trial court erred when it instructed that the actual killer and the aider and abettor are *equally guilty* of the crime. An aider and abettor of a homicide is not always as guilty as the actual killer. To the contrary, in a homicide prosecution not based on a felony murder theory, the liability of an aider and abettor's guilt is based on the combined acts of all the principals but the aider and abettor's own mens rea. An aider and

abettor may therefore be culpable for a lesser crime than the direct perpetrator and it is error to instruct the jury to the contrary. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1120; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164-1165; *People v. Concha* (2009) 47 Cal.4th 653, 663; *People v. Nero* (2010) 181 Cal.App.4th 504, 515-518.)

Respondent initially argues that appellant forfeited this claim by inaction below. (RB 107-111.) Respondent also argues that under the factual circumstances present in this case the trial court did not commit error when it instructed in the language of CALJIC No. 3.00. (RB 111-113.) Respondent further contends that any alleged error was harmless. (RB 113-115.)

Appellant addresses each of respondent's contentions in the sections that follow.

B. Appellant's Claim Has Not Been Forfeited

In the opening brief, appellant noted that defense counsel did not object to this instruction but argued that counsel's failure to object is unnecessary to preserve the issue because a trial court has an independent duty to correctly instruct the jury regarding applicable legal principles. (Pen. Code, § 1259; *People v. Graham* (1969) 71 Cal.2d 303, 317-318; AOB 94-95.)

It is the trial judge's duty to see to it that the jury is properly instructed with correct legal principles and to tailor form instructions accordingly. (See, e.g., *People v. Woods* (1991) 226 Cal.App.3d 1037, 1054-55 [court has duty to "tailor instructions to fit the facts"].) "[A] court may give only such instruction as are correct statements of the law. [Citation]." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1275.) This duty requires the trial court to correct or tailor an instruction to the particular facts of the case even though the instruction submitted by the defense was incorrect. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1110 [judge must tailor instruction to conform with law rather than deny outright]; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 924 ["trial court erred in failing to

tailor defendant's proposed instruction to give the jury some guidance regarding the use of the other crimes evidence, rather than denying the instruction outright"]; *People v. Malone* (1988) 47 Cal.3d 1, 49; *People v. Hall* (1980) 28 Cal.3d 143, 159; *People v. Whitehorn* (1963) 60 Cal.2d 256, 265; *People v. Coates* (1984) 152 Cal.App.3d 665, 670-71; *People v. Bolden* (1990) 217 Cal.App.3d 1591, 1597; *People v. Cole* (1988) 202 Cal.App.3d 1439, 1446 and cases cited therein; Witkin & Epstein, *Cal. Crim. Law* (2d Ed. 1988) § 2954, p. 3628.) For example, even though the trial court has no sua sponte duty to instruct upon the elements of other crimes introduced at the penalty phase as aggravating factors, if instructions are given, the court has a duty to instruct correctly. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1337; see also *People v. Castillo* (1997) 16 Cal.4th 1009 [even when a trial court instructs on a matter on which it has no sua sponte duty to instruct, it must do so correctly]; *People v. Malone* (1988) 47 Cal.3d 1, 49; *People v. Montiel* (93) 5 Cal.4th 877, 942.)

Appellant contended that the facts of the Flores, Reyes, and Gutierrez crimes were all situations in which appellant's liability was arguably less than that of Amezcua because evidence of appellant's involvement in these shootings—particularly evidence of mens rea—was sparse at best. For that reason, appellant was entitled to have the jury directed to evaluate the evidence to see whether he possessed the required mental state for the charged crimes at the time the crimes were committed. (See AOB 94-95.)

The gist of respondent's argument is that appellant forfeited his claim because he neither objected to the instruction nor requested clarifying or amplifying language below. (RB 108-111.) Respondent argues that because the questioned "equally guilty" language of CALJIC No. 3.00 is a generally correct statement of the law, appellant was obliged to request that the instruction be modified in order to preserve the issue for appellate review. (RB 110-111.) Respondent supports this contention with citations to *People v. Mejia* (2012) 211 Cal.App.4th 586, 624; *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118-1119;

People v. Canizalez (2011) 197 Cal.App.4th 832, 849; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163. (RB 110-111.)

However, as appellant explained in the opening brief, *Samaniego* and *Nero* held that to the extent the pattern aiding and abetting instructions described aiders and abettors and direct perpetrators as being "equally guilty," the instructions were misleading. (AOB 172-175.) Both *Samaniego* and *Nero* based their holdings on this Court's holdings in *People v. Concha* (2009) 47 Cal.4th 653, 663, and *People v. McCoy* (2001) 25 Cal.4th 1111, 1120, that an aider and abettor's guilt in a homicide prosecution for both the substantive offense and the degree of the crime is based on the combined acts of all of the principals, but on the aider and abettor's own particular mens rea. (AOB 93-94, 97-104.)

Mejia, upon which respondent relies, characterized this description of the law on the liability of principals as an "unremarkable proposition," but ruled that the defendants in that case had forfeited their claim of error by failing to request modification or amplification below. (*People v. Mejia*, *supra*, 211 Cal.App.4th at p. 624.) The Court in *Lopez*, *supra*, noted that the Judicial Council of California had amended CALCRIM No. 400 to remove the "equally guilty" language, but *Lopez* nevertheless characterized the instruction with the "equally guilty" language as being "generally accurate, but potentially incomplete in certain cases," and held that a request for modification was necessary in order to preserve the issue for appeal. (*People v. Lopez*, *supra*, 198 Cal.App.4th at pp. 1118-1119.) In *Canizalez*, *supra*, the Court of Appeal, quoting from *Samaniego*, found that the former version of CALCRIM No. 400, which included the "equally guilty" language, "is generally an accurate statement of the law." (*People v. Canizalez*, *supra*, 197 Cal.App.4th at p. 849.)

In *People v. Nero*, *supra*, the Court of Appeal, in contrast, concluded: "We believe that even in unexceptional circumstances CALJIC No. 3.00 and CALCRIM No. 400 can be misleading." (*People v. Nero*, *supra*, 181 Cal.App.4th at pp. 517-518.) *Nero* noted that the jury in its case had received

multiple instructions from which it should have known that the mental states of the direct perpetrator and the aider and abettor were not linked, but the jury still asked if the aider and abettor could be guilty of a greater or lesser offense than the direct perpetrator. *Nero* understood this to mean that the pattern instruction (CALJIC No. 3.00) with its "equally guilty" language was confusing. (*Ibid.*)

This Court made clear in *McCoy* and again, almost a decade later, in *Concha*, that an aider and abettor is liable for the combined acts of all the principals, but only for his own mens rea. *McCoy* explained that each person's level of guilt "floats free" because each person's mens rea "floats free." (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1121.)

Given this court's clear statement of the law of aider and abettor liability in *McCoy* and *Concha*, the reasoning applied by the courts in *Samaniego*, *Mejia*, *Lopez*, and *Canizalez* is flawed. This Court has repeatedly held that direct perpetrators and aiders and abettors are "equally guilty" *only* in certain evidentiary circumstances. Indeed, even *Mejia* acknowledged "that the extent of an aider and abettor's liability is dependent upon his particular mental state, which may, under the specific facts of any given case, be the same as, or greater or lesser than, that of the direct perpetrator." (*People v. Mejia*, *supra*, 211 Cal.App.4th at p. 624.) Despite its recognition that aider and abettor liability is dependent upon the aider and abettor's particular mental state, *Mejia* and the other cases upon which respondent relies concluded that as a general proposition the "equally guilty" language of CALJIC No. 3.00, as read to appellant's jury, was a correct statement of the law. However, that "general proposition" is simply wrong. *McCoy* and *Contra* teach that the accurate "general" legal proposition on aider and abettor liability is that the extent of an aider and abettor's liability is dependent upon his particular mental state. In contrast, the statement of law that principals are equally guilty does not describe a general proposition of law, but rather a specific statement of law that is correct or not depending on the specific facts of the case.

For that reason, the line of cases upon which respondent relies does not withstand scrutiny. Moreover, the removal of the "equally guilty" language from CALCRIM 400 and CALJIC No. 3.00 by the Judicial Council of California and West's Committee on California Criminal Jury Instructions, respectively, strongly suggests that the Judiciall Council does not view the "equally guilty" language as an accurate statement of the law.

Appellant contended in the opening brief that he has not forfeited his claim of error because a trial court is obligated to correctly instruct the jury on the applicable law. (AOB 181-182.) "The trial court's duty to fully and correctly instruct the jury on the basic principles of law relevant to the issues raised by the evidence in a criminal case is so important that it cannot be nullified by defense counsel's negligent or mistaken failure to object to an erroneous instruction or the failure to request an appropriate instruction." (*People v. Avalos* (1984) 37 Cal.3d 216, 229; *People v. Hernandez* (1988) 47 Cal.3d 315, 353.)

In addition, Penal Code section 1259 gives this Court authority to review any instruction given, even if no objection was made below if, as happened here, appellant's substantial rights were affected by the misinstruction.

> Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.

(Penal Code section 1259.)

For these reasons, appellant's claim of error is not forfeited.

C. The Trial Court Erred in Instructing That Principals Are Equally Guilty Given the Facts in This Case

Respondent advances two theories in an attempt to argue that there was no instructional error under the circumstances of this case. (RB 111-113.) Neither argument is persuasive.

Respondent first contends there was no instructional error because the trial court instructed the jury with CALJIC No. 3.01, which states that aider and abettor liability includes the requirements of knowledge, intent, and conduct, and also instructed the jury in accordance with CALJIC No. 17.00 that it must separately decide each defendant's guilt. (RB 111-112.)

The problem with this analysis is perhaps best illustrated by respondent's own argument. Appellant respectfully directs this Court to the first full paragraph of page 112 of respondent's brief, which begins in this manner: "By instructing the jury with CALJIC Nos. 3.00, 3.01, and 17.00, the trial court effectively told the jury. . . ." Respondent purports in this paragraph to explain why the clear directive of CALJIC No. 3.00 that the principals are equally guilty had no effect in this case because CALJIC Nos. 3.01 and 17.00 nullified the damage done by the "equally guilty" language. However, nothing in respondent's argument explains why the jury would not follow the simpler, clearer, and more direct charge that principals are "equally guilty" rather than parsing two other jury instructions to arrive at the contrary conclusion that it must separately determine each defendant's mental state in order to determine each defendant's guilt.

Respondent next contends that the misinstruction was of no consequence because the evidence does not suggest that appellants had different mental states. (RB 112-113.) Respondent supports his argument largely with references to statements made by Flores to the prosecutor at a time when Flores and appellant were representing themselves. (RB 112-113.)

These statements were made by appellant years after the crimes were committed. While they may serve as circumstantial evidence of appellant's

mental state at the time of the commission of the various crimes, appellant was entitled to have the jury consider other evidence of his mental state at the times the crimes were committed in determining his culpability. Penal Code section 20 requires a joint operation of actus reus and mens rea at the time of the commission of the crime. (*People v. Concha*, *supra*, 47 Cal.4th at p. 660.) The instruction stating that principals in the commission of the crime are *equally guilty* manifestly directs the jury away from an evaluation of appellant's individual mens rea.

Furthermore, the evidence suggests that appellant and Amezcua did not share a common mens rea in the offenses discussed above, particularly in the case of the Reyes killing. The evidence showed that Amezcua shot Reyes in the Monte Carlo while appellant was still in the Toyota Cressida driven by Barber, and that after Reyes was shot appellant asked Amezcua why he had shot Reyes. This statement strongly suggests that far from sharing a common mens rea, appellant was completely surprised by Amezcua's act. A correctly instructed jury thus in all likelihood would not have considered appellant "equally guilty" for the Reyes killing but would instead have examined the evidence of appellant's lack of involvement in that offense and found appellant not guilty of the Reyes murder.

In a similar vein, the mens rea of appellant and Amezcua appears to have been very different in the killing of George Flores, where it appeared that Amezcua got out of his car and approached Flores before fatally shooting him, and that appellant did not start shooting at the other people until after that. (See AOB p. 20.)

Consequently, a properly instructed jury may have found that there was a different mental state regarding these two killings and need not have convicted appellant of the same charge as Amezcua

D. The Failure to Instruct Correctly on the Elements of Aiding and Abetting Was Not Harmless Beyond a Reasonable Doubt

Respondent's final contention is that any alleged error was harmless. (RB 113-115.) Because respondent only addresses this issue as it relates to Amezcua, appellant here incorporates the discussion of prejudice from Appellant's Opening Brief. (AOB 182-186.)

However, it is worth reiterating here that misinstruction on elements of a crime is federal constitutional error. (*Neder v. United States* (1999) 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.) Prejudice from federal constitutional errors is measured against the harmless error test of *Chapman v. California* (1967) 386 U.S. 18, 24, which asks whether respondent can show beyond a reasonable doubt that the jury verdict would have been the same in the absence of the misinstruction. Particularly in view of the facts of the Reyes case discussed above, respondent cannot meet this burden, and reversal is required.

VI

THE PROSECUTOR COMMITTED MISCONDUCT AND VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW WHEN HE INVITED THE JURY TO DEPART FROM THEIR DUTY TO VIEW THE EVIDENCE OBJECTIVELY AND INSTEAD TO VIEW THE CASE THROUGH THE EYES OF THE VICTIMS

As explained more fully in Appellant's Opening Brief (AOB 137-139), the prosecutor committed misconduct during guilt phase argument by inviting the jury to "remember what it must have been like to be one of [appellants'] victims" and making other inflammatory appeals to the emotions and sympathy of the jury to improperly influence their verdict. This constituted misconduct and a violation of appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments, in particular to his rights to a fair trial and due process of law.

Respondent's Brief addresses only some of the objectionable arguments made by prosecution, specifically the arguments found at pages 2861-2862 and 2895-2896 of Volume 13 of the Reporter's Transcript. (RB 101-102.) However, as discussed in the Opening Brief (AOB at 137-139), these arguments were just two of the inflammatory arguments used by the prosecutor. The prosecutor repeatedly talked about shattering people's lives, shattering people's bones, and shooting them "to bits." Among his other inflammatory arguments, the prosecutor described appellants as hard-core predators who enjoyed killing and luridly described Reyes choking on his own blood.

Respondent agrees that it is improper to make emotionally charged arguments to the jury. (RB 105.) Likewise, respondent appears to concede that it is improper to ask jurors, as this prosecutor did, to put themselves in the victim's shoes at the time of death. (RB 106.) Nor does respondent argue that the remarks complained of were proper argument. Rather, respondent argues that the issue

was waived by appellants' failure to object and request an admonition and that any error was harmless. (RB 105-106.)

It is true that objections are usually required to preserve an issue for appeal. However, this rule is not uniformly applied, particularly when the issue concerns prosecutorial misconduct in argument. In this situation, this court has held that the failure to request an admonished does not forfeit the issue for appeal if "an admonition would not have cured the harm caused by the misconduct." (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Bradford* (1997) 15 Cal.4th 1229, 1333.)

Respondent argues that appellant did not show that an admonition would not have been effective. (RB 103.) However, it is long been recognized that when a jury has heard profoundly inflammatory argument, it cannot cleanse its collective memory. As is frequently said under such circumstances "one 'cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound'; and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.'" (*United States* v. *Garza* (5th Cir. 1979) 608 F.2d 659, 666, quoting prior case law.)

Misconduct in argument is particularly prejudicial when it comes from the mouth of the prosecutor. The Supreme Court has long recognized that jurors hold prosecutors in high esteem, and that improper suggestions and insinuations "are apt to carry much weight [when presented by the prosecution] against the accused . . ." (*Berger v. United State*s (1935) 295 U.S. 78, 88.)

Finally, as noted above (ante, at p. 16), prosecutorial misconduct in argument is particularly prejudicial in capital cases, where heightened due process requirements apply. (*See Beck* v. *Alabama* (1980) 447 U.S. 625, 638 and n. 13; *see also McElroy* v. *United States Ex Rel. Guagliardo* (1960) 361 U.S. 249, 255 (Harlan, J., diss.).) The prosecutor's repeated misconduct violated the 8th Amendment prohibition on a sentence brought about in part by arbitrariness,

passion or prejudice and rendered the conviction and death sentence unreliable. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 587.)

The misconduct also prejudiced appellant in the penalty phase. As this court has previously observed, the ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision, and the verdict is thus primarily a "moral and . . . not [a] factual" determination." (*People v. Brown*, *supra*, 33 Cal.4th 382, 400; *People v. Rodriguez*, *supra*, 42 Cal.3d 730, 779.) In the penalty phase, the jury's determination does not depend on the amount of evidence of guilt. Therefore, whether or not there was "overwhelming evidence" supporting the guilt verdict, as respondent asserts (RB 105-106), does not indicate that there was no prejudice in the penalty phase, where the decision must focus on the background and character of the defendant in addition to the evidence supporting a finding of guilt.

VII

THE TRIAL COURT ERRED WHEN IT ACQUIESCED TO THE DEMANDS OF APPELLANTS NOT TO ALLOW DEFENSE COUNSEL PRESENT ANY FORM OF DEFENSE IN THE PENALTY PHASE OR TO REQUEST PENALTY PHASE JURY INSTRUCTIONS.

As set forth in more detail in Appellants' Opening Brief (AOB 187-195), the attorneys for both appellants informed the court prior to the guilt verdicts that the defendants did not wish to present any defense in the penalty phase in the event that guilty verdicts were returned. The attorneys, who had previously been prepared to present a case in mitigation, thereafter took a completely passive role. Throughout the penalty phase they made no further objections, did not cross-examine witnesses, and did not present arguments. The defense attorneys did request jury instructions, but the court refused those requested instructions because the defendants themselves objected.

The trial court's acquiescence in allowing defense counsel sit idle and present no defense deprived the defendants of the right to counsel, the right to a jury trial, the right to due process of law, and the right to a reliable determination of the facts in a capital trial, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendment to the Constitution of the United States. The error also defeated the state's own interest in fair, accurate, and reliable capital judgments.

A. The Flaws In Respondent's Argument

Respondent argues that no error occurred. However, these arguments are flawed for several reasons.

Respondent argues that the defense attorneys "acceded" to the request of appellants. (RB 125.) This is not accurate. To "accede" implies giving approval

or consent,[6] and there is no evidence that the defense attorneys either approved or consented to their clients' wishes. At the most, they informed the court of their clients' demands. Counsel had little choice but to do so, as it would have been extremely awkward for the defense attorneys to simply stop litigating and refrain from argument, cross-examination, or any other normal defense functions without explaining in advance what they were doing. The fact that counsel informed the court of their clients' decisions cannot be considered "acceding" to this course of action. Indeed, the fact that the defense offered jury instructions belies the argument that they "acceded" to this tactic.

Respondent next contends that under *People v. Sanders* (1990) 51 Cal.3d 471, it was not error for the court to allow the defense attorneys to abandon efforts to present a defense. Appellant respectfully submits that to the extent that *Sanders* applies in these circumstances, this Court should reconsider its holding in that case.

The principal problem with *Sanders* is that it assigns all power over the control of litigation to the defendant and gives virtually no authority to the attorney, a radical restriction of the role of attorneys. As explained in the opening brief, attorneys previously controlled all aspects of the litigation not involving fundamental rights that personally belonged to the defendant. (See AOB, at pp. 198-201.) None of the litigation decisions in this case were matters that have traditionally fallen within the scope of matters in the control of the defendant. To the contrary, they were all decisions traditionally considered to be within the purview the attorney, who has always been free to act with or without the approval of the client. For example, the selection of appropriate jury instructions is not a personal fundamental right in which the defendant has final say but has instead always been considered within the attorney's purview.

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[6] http://www.merriam-webster.com/dictionary/accede

Here the trial court's acquiescence to the defendant's wishes effectively reversed the traditional roles of attorney and defendant, making counsel the cabin boy when he used to be the "captain of the ship" empowered to make "all but a few fundamental decisions for the defendant." (*People v. Welch* (1999) 20 Cal.4th 701, 728–729; see also *People v. Salter* (2012) 210 Cal.App.4th 769, 774; see also *People v. Jackson* (2009) 45 Cal.4th 662, 688.) With counsel effectively stripped of the power to make objections, cross-examine witnesses, request instructions, call witnesses, or perform any other function, one has to wonder whether it would have been error for counsel to absent themselves for the rest of the trial. Indeed, considering the fact that the motion to reduce the verdict and the notice of appeal are both automatic in capital cases, counsel might as well have been discharged.

Furthermore, *Sanders* fails to recognize the role of opposing attorneys in the adversary system. In *Sanders* this Court found that the required reliability in a capital case is attained when the prosecution has met its burden of proof "pursuant to the rules of evidence . . . , the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, *which the defendant has chosen to present*." (Quoting *Sanders* at p. 526, italics added by respondent, RB 124.)

Taken literally, the foregoing passage suggests that the prosecution, represented by a trained and experienced attorney, is opposed only by a defendant with no legal training. In fact, of course, the defense is represented by an attorney, and it is that attorney—not the defendant himself—who normally choses the evidence to be presented. The foregoing *Sanders* quotation by its terms assumes that the fact that one attorney follows laws of procedure and evidence is sufficient for the adversary system to function, when in fact the Anglo-American system of justice requires the participation of an opposing counsel with equivalent resources and skills.

This case is the perfect example of the need for an advocate for the defense in the adversary system. Inherent in our death penalty scheme is a balancing of aggravating and mitigating factors. If there are facts in the defendant's background that mitigate the severity of the crime, our capital scheme envisions the jury balancing those facts against the circumstances of the crime and any factors in aggravation. For example, if a defendant had been under an extreme mental disturbance at the time or was impaired as a result of mental disease or defect at the time of the crime (Pen. Code § 190.05, (h)(4) and (8)), but was still competent to stand trial, the state would have no interest in executing a person with such mental disabilities merely because he told his attorney not to present a defense. This would be true even if the prosecutor followed rules of evidence and proper instructions were given.

In this case, there was a breakdown in the adversary system because the defense did not test the prosecution's case through cross-examination, described as "the greatest legal engine ever invented for the discovery of the truth" (5 Wigmore, *Evidence*, Chadborne Rev. 1974, Section 1376). Nor did the defense attorneys present any argument to counter the argument presented by the prosecution.

Furthermore, the defense attorneys had a case in mitigation that they wanted to present. They could have questioned the evidence presented by the prosecution. They also could have argued that some factors in aggravation did not apply. In short, the attorneys could have presented a defense, even if it had been limited to questioning the prosecution's case.

Ironically, in the penalty phase of a capital case, the proceeding in which the state has the greatest interest in obtaining an accurate result, this court's holding in *Sanders* permits the attorney to have the least impact. Indeed, in this case, counsel had no impact at all. The inevitable result will be a result that is less reliable, and as a consequence this court should revisit and disapprove *Sanders*.

Respondent's contentions regarding the penalty phase instructions are also incorrect. Appellant had contended it was error to refuse requested instructions at the penalty phase because selection of appropriate jury instructions is a tactical decision within counsel's control. (RB 126, citing AOB 224- 226.) Respondent disagrees, stating that "certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate." (RB 126, quoting *Florida v. Nixon* (2004) 543 U.S. 175, 187.) Respondent notes that *Florida v. Nixon* held counsel did not have the authority to consent to a guilty plea on behalf of a defendant.

It is noteworthy that in this argument respondent impliedly agrees that some decisions are within the realm of the attorney. However, respondent never addresses the question of whether selecting, examining, and cross-examining witnesses, requesting jury instructions, and presenting arguments are within that realm or not.

Furthermore, respondent's argument effectively equates selection of jury instructions with the decision of whether or not to plead guilty. In fact, jury instructions and guilty pleas represent two extremes at the end of a spectrum. Jury instructions are perhaps the paradigm of tactical decisions that are under the control of the attorney. Even when the instruction involves constitutional issues, such as the right not to testify, the decision as to whether to ask for the instruction is under the control of the attorney. (*People v. Towey* (2001) 92 Cal.App.4th 880, 884.) In contrast, the decision as to whether or not to enter a guilty plea is a right that requires a personal waiver by the defendant. (*In re Horton* (1991) 54 Cal.3d 82, 95; *People v. Ernst* (1994) 8 Cal.4th 441.) Indeed, the legal requirement that the defendant must waive that right is included in the California Constitution. (Cal. Const., art. I, § 16.) Respondent errs in conflating matters requiring legal training and experience with fundamental personal rights within the purview of the defendant.

B. Appellants Should Not Be Estopped From Raising This Issue.

Respondent implies that appellants should be estopped from raising this issue because they had instructed the attorneys to pursue this course of action. (RB p. 124.) Appellant disagrees.

If the attorney *does* control the tactics of litigation and there is a dispute as to those tactics, it is error for the trial court to side with the client and overrule counsels' objections, effectively granting control over the litigation to the client. To hold that the defendant is estopped from asserting the error creates two impermissible results: (1) such a holding would eviscerate the rule that the attorney controls the litigation; and (2) such a holding would permanently immunize the error from ever being corrected.

If the defense is estopped from raising this issue on appeal, then the attorney no longer has control over litigation because the client would have unreviewable power to overrule any judgment the attorney may have exercised. Such a rule would not only remove control of the litigation from the attorney, but also undermine the authority of the trial court. The trial court judge is charged with the authority, power, and duty to control the proceedings "with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (Pen. Code § 1044.) The court's pursuit of the truth is not advanced when the defendant is given a veto power over the litigation. As between the defendant, untrained in law with possible motives that are not consistent with obtaining a "just result," and a trial court judge entrusted with the duty of ascertaining the truth and ensuring a proper result , appellant submits that the trial judge is properly assigned the task of presiding over the course of the trial

Furthermore, any bar against the defense raising the issue on appeal would permanently prevent potentially egregious injustices and errors from ever being corrected. Accordingly, appellants should not be estopped from raising this issue

C. Conclusion

Although a defendant maintains control over some decisions, when represented by counsel he relinquishes control over other most areas of the case not involving personal, fundamental rights. In this case, appellant's attorney should have been allowed to make the decisions regarding the defense to be presented in the penalty phase. The failure to allow the attorneys to control these aspects of the case deprived appellant of the right to counsel, the right to a jury trial, the right to due process of law, and the right to a reliable determination of the facts in a capital trial, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendment to the Constitution of the United States. For all the foregoing reasons, reversal is required.

X

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

Appellant argued in the opening brief that for a number of reasons California's death penalty statute, as interpreted by this Court and applied at appellant's trial, violates the United States Constitution. (AOB 225-262.)

Respondent argues that appellant's constitutional challenges to California's death penalty statute must be denied because, in respondent's view, appellant has failed to provide persuasive reasons for departing from the precedents set forth in respondent's brief. (RB 131-136.)

Appellant replies to respondent's contention as follows: In *People v. Schmeck* (2005) 37 Cal.4th 240 (abrogated on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-643), a capital appellant presented a number of often-raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id.*, at p. 303.) This Court acknowledged that in dealing with these attacks in prior cases, it had given conflicting signals on the detail needed in order for an appellant to preserve these attacks for subsequent review. (*Id.*. at p. 303 fn. 22.) In order to avoid detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (*Id.*, at p. 304.)

Accordingly, pursuant to *Schmeck* and in accordance with this Court's own practice in decisions filed since then, appellant has identified the systemic and previously rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requests the Court to reconsider its

decisions rejecting them. Appellant contends that these arguments are squarely framed and sufficiently addressed in Appellant's Opening Brief and therefore makes no further reply.

APPELLANT JOINS IN ALL CONTENTIONS RAISED BY HIS CO-APPELLANT THAT MAY ACCRUE TO HIS BENEFIT

Appellant JOSEPH CONRAD FLORES joins in all contentions raised by his co-appellant that may accrue to his benefit. (Rule 8.200, subdivision (a)(5), California Rules of Court ["Instead of filing a brief, or as a part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related appeal."]; *People v. Castillo* (1991) 233 Cal.App.3d 36, 51; *People v. Stone* (1981) 117 Cal.App.3d 15, 19 fn. 5; *People v. Smith* (1970) 4 Cal.App.3d 41, 44.)

CONCLUSION

For the reasons set forth herein, it is respectfully submitted on behalf of defendant and appellant JOSEPH CONRAD FLORES that the judgment of conviction and sentence of death must be reversed.

In addition, appellant submits that the cumulative impact of the numerous errors in this case requires reversal of the even if no single error does so independently. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487, and fn. 15; *People v. Holt* (1984) 37 Cal.3d 436, 459; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.) In addition, a number of guilt-phase errors also had a considerable impact on the penalty determination and the impact of these errors must also be assessed in evaluating the prejudice resulting from the penalty phase errors.[1]

DATED: August 12, 2013
Respectfully submitted,

DAVID H. GOODWIN, SBN 91476
Attorney for Defendant and Appellant James Flores

[1] An error may be harmless at the guilt phase but prejudicial at the penalty phase. (*In re Marquez* (1992) 1 Cal.4th 584, 605, 609.)

CERTIFICATE OF WORD COUNT

Rule 8.630, subdivision (b)(1), California Rules of Court, states that an appellant's reply brief in an appeal taken from a judgment of death produced on a computer must not exceed 47,600 words. The tables, the certificate of word count required by the rule, and any attachment permitted under Rule 8.204, subdivision (d), are excluded from the word count limit.

Pursuant to Rule 8.630, subdivision (b), and in reliance upon Microsoft Office Word 2007 software, which was used to prepare this document, I certify that the word count of this brief is 16,638 words.

Respectfully submitted,

_____

DAVID H. GOODWIN

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, David H. Goodwin, declare that I am over the age of eighteen years and not a party to the within entitled action; my business address is P.O. Box 93579, Los Angeles, Ca 90093-0579.

On August 12, 2013, I served a copy of the attached Appellant' Opening Brief on the interested parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles , California addressed as follows:

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

David H. Goodwin