

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOHN NELSON NIXON,

Defendant and Appellant.

NO. H010623

(SANTA CLARA CO.
SUPERIOR COURT
NO. 136988)

STATEMENT OF APPEALABILITY

The instant appeal is taken from a final judgment entered after a hearing on remand from this court. As such, the judgment is appealable pursuant to Penal Code section 1237.

STATEMENT OF THE CASE AND FACTS

On September 30, 1992, this court issued its opinion in appellant's earlier appeal, H008879. In its disposition of the appeal, this court remanded the case to the Superior Court "for the limited purpose of conducting a hearing on appellant's *Marsden* motion." (Opinion, p. 36.)¹

¹ Under separate cover, appellant has requested this court to take judicial notice of its own records in H008879. In so doing, this court will have proof of the salient procedural facts discussed herein.

On or about November 4, 1992, appellant filed a timely petition for review. On December 30, 1992, the petition was denied. On January 5, 1993, this court issued its remittitur.

In the meantime, the Superior Court conducted a *Marsden* hearing over two days on December 8 and 9, 1992. (CT 41, 43.) On December 9, 1992, the *Marsden* motion was denied and the judgment was reinstated. (CT 43.) On December 16, 1992, a timely notice of appeal was filed.

I. THE JUDGMENT MUST BE REVERSED SINCE THE SUPERIOR COURT LACKED JURISDICTION TO CONDUCT THE MARSDEN HEARING.

In its opinion in appellant's earlier appeal, this court directed the Superior Court to conduct a *Marsden* hearing. In pursuit of this order, the Superior Court conducted a hearing on December 8 and 9, 1992. (CT 41, 43.) However, as will now be explained, the Superior Court lacked jurisdiction to conduct the hearing. As a result, the court's order denying relief is void and a new hearing must be held.²

As this court's records reveal, the remittitur was issued to the Superior Court on January 5, 1993. Prior to that date, jurisdiction over appellant was vested solely in the appellate courts. (*People v. Perez* (1979) 23 Cal.3d 545, 554.) Thus, when the Superior Court heard appellant's *Marsden* motion, it had no jurisdiction. Such being the case, its judgment is void.

In this regard, *People v. Sonoqui* (1934) 1 Cal.2d 364 is dispositive. In *Sonoqui*, the People filed a notice of appeal from an order granting a motion for new trial. Soon thereafter,

² Appellant did not register a jurisdictional objection at the renewed *Marsden* hearing. However, no objection was required. (*People v. Chadd* (1981) 28 Cal.3d 739, 757; *People v. Cavanna* (1989) 214 Cal.App.3d 1054, 1059; subject matter jurisdiction cannot be conferred by consent, waiver or estoppel.)

the appeal was dismissed by stipulation of the parties. Then, prior to the issuance of the remittitur, the defendants were convicted at a new trial. Subsequently, the Supreme Court reversed the judgment on the grounds that the trial court had no jurisdiction to proceed prior to the issuance of the remittitur. (*Id.*, at pp. 366-367.)

Without spilling needless ink, it is manifest that the identical result is compelled here. As has been noted above, the Superior Court proceeded in this case long before the remittitur was issued. As a result, its judgment is void and a new *Marsden* hearing must be held. (*People v. Sonoqui, supra*, 1 Cal.2d 364, 366-367.)

CONCLUSION

For the reasons expressed above, the judgment must be reversed with directions to conduct a new *Marsden* hearing.

Dated: April 1, 1993

Respectfully submitted,

Dallas Sacher

DALLAS SACHER
Attorney for Appellant,
JOHN NIXON

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morning of December 11, 2006, the jury began its deliberations. (CT 1153.) On the late afternoon of December 14, 2006, the jury returned its verdicts. (CT 1173.) Appellant was convicted of second degree murder. (CT 1166.) The gun use enhancement was found true and the jury hung on the gang enhancement. (CT 1166.)

On January 30, 2007, appellant was sentenced to state prison for the term of 40 years to life. (CT 1199-1200.) Appellant received 15 years to life for his conviction for second degree murder and 25 years to life for the Penal Code section 12022.53, subdivision (d) enhancement. (CT 1199-1200.)

On February 2, 2007, a notice of appeal was filed. (CT 1201.)

STATEMENT OF FACTS

OVERVIEW

Cesar Sanchez was a Sureno gang member. At approximately 8:25 one evening, Mr. Sanchez was shot and killed on the front porch of his home. The People's theory was that appellant murdered Mr. Sanchez since he was an opposing gang member.

On the evening in question, appellant was wearing a 49er's jersey with the number 80. Members of Mr. Sanchez' family gave varying accounts as to whether his killer wore a 49er's jersey. Mario Torres told the police on the night of the shooting that the killer wore a red Sharks jersey. However, Juan

Torres testified that the shooter wore a 49er's jersey.

Marcelino "Boo" Carranza was the primary witness for the People. Mr. Carranza testified that he saw appellant shoot Mr. Sanchez. By his own admission, Mr. Carranza had recently been incarcerated for stabbing someone multiple times.

The defense theory of the case was that Francisco "Pico" Carrillo was the killer. Mr. Carrillo wore a red Sharks jersey on the night of the murder. At the time of the shooting, several neutral witnesses heard a woman scream "Francisco, Francisco." Mr. Carrillo was a convicted child molester. Two months after the shooting in this case, Mr. Carrillo was arrested for his involvement in a stabbing.

The Government's Case

The Alleged Gang Milieu

On March 7, 2005, appellant was 16 years old. (ACT 2.) During the late afternoon and early evening, appellant was in the company of a group of young men who were associated with two separate Norteno gangs. The men included Alejandro Mariscal, Marcelino Carranza, Fernando Morales, Joel Gutierrez, Francisco Carrillo and Javier Medina. (RT 2348.)^{1/} According to

¹Several of the men were also known by nicknames. The glossary of characters is as follows.

Marcelino Carranza - Boo (RT 673)

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arrested and \$252 was taken from his wallet. (RT 329.)

The parties stipulated that appellant had sustained a conviction for the foregoing conduct. The jury was advised that appellant "pled no contest to possession for sale of methamphetamine and being under the influence of methamphetamine in [the] case that Officer Torres" testified about. (RT 337.)

Defense Case

The defense did not present any witnesses. The defense introduced appellant's 2007 wage records from the Family Community Church. (RT 342-343.)

In his closing argument, defense counsel contended that the People had failed to prove that appellant was in possession of the methamphetamine. (RT 393-396.) In this regard, counsel noted that Mr. Orville and Anthony Badilla had ample opportunity to put the drugs in appellant's room during the 45 to 60 second period while the police were announcing their presence. (RT 393-396.)

As an alternative theory, defense counsel suggested that appellant possessed the drugs for personal use. (RT 398-403.) Counsel noted that there was no evidence that cutting agents or pay-owe sheets were found with the drugs. (RT 401.)

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INTRODUCTION

1
2 It is said that the truth will set you free. The truth in this case is twofold: (1) Ms. Perez
3 died a brutal and horrible death; and (2) petitioner was unconstitutionally convicted. While
4 our human instincts demand that someone must pay for Ms. Perez' death, the reality remains
5 that petitioner has been made to pay in a manner which does not conform to due process. It
6 therefore falls to this court to ensure that the rule of law prevails over our more emotive sense
7 of justice.

8 By the time of trial, petitioner was the only person who could be punished for the
9 killing. Due to the untimely death of the co-defendant, Mr. Martinez, the jury never heard Mr.
10 Martinez' testimony regarding the manner in which Ms. Perez met her end.

11 Notwithstanding the horrible facts of the case, the California Court of Appeal
12 recognized that petitioner did not receive a fair trial. Through his testimony, petitioner
13 presented the substantial defense that Mr. Martinez killed Ms. Perez after petitioner left the
14 scene. We know to a certainty that the jury actively considered this version of the facts since
15 they posed a question regarding petitioner's liability if he was not the actual killer. Although
16 CALJIC No. 8.27 set forth the correct principles, the trial court did not read it to the jury.
17 Given the trial court's failure to properly answer the jury's question, the Court of Appeal
18 reversed the judgment under the federal Constitution.

19 When the case reached the California Supreme Court, the facts of the case were no less
20 horrible. Given the facts, the Supreme Court did the human thing: It issued a ruling which
21 condemned petitioner to spend the rest of his life in prison. However, in rendering its
22 decision, the court employed reasoning which cannot survive scrutiny under the governing
23 standard of *Neder v. United States*, 527 U.S. 1 (1999) or the court's own prior authorities.

24 As will be shown below, the jury should have been given CALJIC No. 8.27 which
25 would have advised the jury that petitioner could be found liable for Mr. Martinez' act of
26 killing Ms. Perez only if Mr. Martinez participated in the underlying rape. Under *Neder*, the
27 omission to instruct on an element of the offense can only be deemed harmless if the evidence
28 regarding the omitted element was "overwhelming" or "uncontroverted." *Neder*, 527 U.S. 1,

1 17-18. Since the evidence concerning Mr. Martinez' participation in the rape was far from
2 "uncontroverted," reversal is compelled. Nonetheless, the California Supreme Court failed
3 to cite *Neder* or its test. By acting in this fashion, the court acted "contrary" to federal law and
4 the murder conviction must be reversed.

5 Aside from its failure to honor the *Neder* rule, the California Supreme Court violated
6 due process by retroactively enlarging the scope of the felony murder rule. Prior to the
7 California Supreme Court's decision in this case, the controlling rule was that a nonkiller
8 could not be held liable unless the killer maintained the specific intent to aid and abet the
9 underlying felony committed by the nonkiller. This rule was so well settled that it was
10 included in No. 8.27. Nonetheless, the California Supreme Court ignored the rule in this case
11 and held that Mr. Martinez did not have to hold the requisite intent. By retroactively applying
12 its new rule, the California Supreme Court violated due process. *Bouie v. City of Columbia*,
13 378 U.S. 347, 353-354 (1964).

14 Petitioner has contended that there is insufficient evidence to support his aggravated
15 kidnapping conviction since the law at the time of the alleged offense in 1997 required
16 asportation of at least 90 feet and Ms. Perez was asported only 25 feet. In rejecting this claim,
17 the California Supreme Court held that the 1997 law did not necessarily require asportation
18 for any specific distance. However, this is untrue as is reflected by the court's 1999 decision
19 in *People v. Martinez*, 20 Cal.4th 225 (1999) and the court's 2007 decision in *People v.*
20 *Morgan*, 42 Cal.4th 593 (2007). As a result, the court's refusal to apply the 1997 rule resulted
21 in another federal due process violation. *Bouie v. City of Columbia*, 378 U.S. 347, 353-354.

22 Petitioner also challenged his aggravated kidnapping conviction on the grounds that
23 there was insufficient evidence to establish that the asportation of Ms. Perez was not incidental
24 to the rape. Insofar as Ms. Perez was moved only 25 feet from the road to a safer, more
25 comfortable location for the commission of a sex act, the asportation was manifestly incidental
26 to the rape. By holding to the contrary, the California Supreme Court engaged in an
27 unreasonable application of federal law.

28 Finally, petitioner argued on his state appeal that the trial court had erred by failing to

1 instruct on the defense of reasonable good faith belief in consent with respect to the rape
2 charge. In its analysis on this point, the California Supreme Court omitted to discuss the
3 critical facts which supported the theory. Thus, the court once again engaged in an
4 unreasonable application of federal law.

5 In urging reversal on the foregoing grounds, petitioner does not ignore the obvious.
6 Ms. Perez suffered an unjustified and miserable death. However, if the government wishes
7 to hold petitioner accountable for the death, it must first comply with the federal Constitution.
8 Insofar as the record reveals numerous prejudicial errors, petitioner must be afforded a new
9 trial along with a judgment of acquittal on the unsupported kidnapping count.

10 I.

11 THE MURDER CONVICTION MUST BE REVERSED PURSUANT TO
12 *NEDER v. UNITED STATES*, 527 U.S. 1 SINCE THE TRIAL COURT
13 FAILED TO INSTRUCT THE JURY WITH CALJIC No. 8.27.

14 A brief resume of the relevant facts and procedural history is in order. In his testimony,
15 petitioner admitted that he had sex with Ms. Perez. He also implied that Mr. Martinez had
16 killed Ms. Perez since she had been left alone with the enraged Mr. Martinez. Based on this
17 evidence, defense counsel argued to the jury that petitioner should be acquitted since Mr.
18 Martinez was the sole perpetrator of the killing. (RT 684.)

19 The only theory offered by the government was that petitioner was liable as a
20 participant in a rape felony murder. In light of this theory, the court instructed the jury with
21 CALJIC Nos. 8.10 and 8.21 which generally describe felony murder liability when the
22 defendant is the perpetrator of the killing. (RT 706.)

23 At the time of trial, CALJIC No. 8.27¹ was the standard jury instruction which defined

24 ¹CALJIC No. 8.27 provided:

25 "If a human being is killed by one of several persons engaged in the commission or
26 attempted commission of the crime of (felony), all persons, who either directly and actively
27 commit the act constituting that crime, or who with knowledge of the unlawful purpose of the
28 perpetrator of the crime and with the intent or purpose of committing, encouraging, or
facilitating the commission of the offense, aid, promote, encourage, or instigate by act or
advice its commission, are guilty of murder of the first degree, whether the killing is

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introduce relevant evidence. (*Rock v. Arkansas* (1987) 483 U.S. 44, 51-56; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) As will be demonstrated below, appellant suffered a fundamental deprivation of due process in this case.

A. The Trial Court Erred By Excluding The Testimony Of Dr. Reidy.

The autopsy conducted on Mr. Carrillo revealed that he had .62 milligrams per liter of methamphetamine in his system. (6 RT 1540.) The coroner classified this amount as potentially toxic. (6 RT 1540.)

Prior to trial, appellant made known to the People that he intended to call Dr. Reidy "to testify about the effects of methamphetamine on the body and the correlation with violent behavior." (2 CT 41.) The People registered relevancy and Evidence Code section 352 objections. (2 CT 41.) The People argued that Dr. Reidy's testimony could not shed any light on Mr. Carrillo's behavior. (2 RT 315.)

Defense counsel contended that Dr. Reidy was qualified to offer an opinion that the use of methamphetamine can cause "aggressive" behavior. (2 RT 316.) In counsel's view, the testimony would support the defense theory that appellant acted reasonably in self defense since Mr. Carrillo's aggressive behavior and demeanor caused appellant to fear him. (2 RT 316.)

The trial court first indicated that it would allow admission of the

evidence that Mr. Carrillo was under the influence of methamphetamine. (2 RT 317.) However, the court excluded Dr. Reidy's testimony.

“As to the testimony of Doctor Reidy, I don't believe that's relevant or admissible, and so the Court will grant the motion to exclude Doctor Reidy's testimony about the effects of methamphetamine ingestion.” (2 RT 318.)

At the outset, it must be noted that the trial court's ruling was internally illogical. The rule is well settled that evidence of drug use is inadmissible unless it is supported by expert testimony concerning the effect of such use. (*People v. Wilson* (2008) 44 Cal.4th 758, 794.) Thus, once the court admitted the evidence concerning Mr. Carrillo's methamphetamine use, it should have taken the next step of allowing Dr. Reidy to testify.

The court ruled that Dr. Reidy's testimony was irrelevant. (2 RT 318.) The ruling was erroneous.

Pursuant to Evidence Code section 210, relevant evidence is that evidence which has a “tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” Evidence is relevant “if it ‘tends “logically, naturally, and by reasonable inference” to establish material facts’” which are at issue. (*People v. Morrison* (2004) 34 Cal.4th 698, 711.)

Here, Dr. Reidy's testimony was offered to show that the use of methamphetamine can cause people to act in an aggressive fashion. This

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VII.

PETITIONER WAS DEPRIVED OF A FAIR TRIAL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS DUE TO THE CUMULATIVE PREJUDICE FLOWING FROM THE SEVERAL ERRORS WHICH OCCURRED AT HIS TRIAL.

Assuming that this court should conclude that none of the errors identified above individually warrant reversal, the cumulation of the errors compels a finding of prejudice. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303; *People v. Hill* (1998) 17 Cal.4th 800, 844.) In establishing this conclusion, it is helpful to compare the trial which actually took place with the one which should have occurred. (*Bonin v. Calderon* (9th Cir. 1995) 59 F.3d 815, 834 [in assessing prejudice, the court should "compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently."].)

Had the case been properly litigated, the defense would have strongly impeached the People's evidence. In the absence of the testimony of Dr. Abbott, the jury was misled into believing that Justin's extrajudicial statements were credible. Similarly, in the absence of the testimony of Dr. Crawford, the jury had no clue that Ms. Ritter's findings scarcely supported a finding that Justin had been molested. Moreover, Ms. Ritter testified with a false aura of credibility since the jury did not know that she chronically concealed videotapes and gave misleading testimony in other cases. The jury also did not know that Ms. Ritter ritualistically failed to comply with Penal Code section 13823.5.

In addition, the People's case was unfairly strengthened when the jury improperly learned that petitioner had a criminal record. This highly prejudicial evidence undoubtedly caused the jury to overlook the fundamental weaknesses in the government's case.

The bottom line is that a conviction was obtained on the basis of two pieces of evidence: (1) Justin's extrajudicial statements; and (2) Ms. Ritter's testimony that the superficial fissure found in Justin's anus was "consistent" with sexual penetration. As we now know, both of these pieces of evidence were subject to powerful rebuttal. Given this reality, it simply cannot be said that petitioner received a fair trial.

1 *Sanders v. Ryder*, supra, 2006 U.S. App. Lexis 16991 so holds. In *Sanders*, as here,
2 defense counsel failed to introduce expert testimony which would have impeached
3 extrajudicial statements made by the complainant and the forensic findings introduced by the
4 prosecution. The Court of Appeals found that these errors required reversal.

5 “*There was no rational reason for defense counsel’s failure to challenge
6 the only pieces of evidence offered by the state - - the child hearsay statements
7 and the limited forensic evidence - - both of which could have been severely
8 undermined by the presentation of expert testimony. Counsel not only failed to
9 present such experts at trial, but also failed to consult them pre-trial, thereby
10 depriving himself of critical knowledge necessary to the formulation of a
11 defense. As noted, without the child’s hearsay statements, there would have
12 been insufficient evidence to support a conviction, and yet counsel made no
13 argument against admissibility at the pre-trial hearing. Further, as emphasized
14 by the prosecution’s closing argument at trial, counsel failed to offer witnesses
15 to impeach the credibility of the state’s key witness - - the child’s mother - - or
16 to corroborate Sanders’s version of events. Given such deficiencies, no
17 reasonable court could maintain confidence in the jury’s verdict. Accordingly,
18 we reverse the district court’s denial of Sanders’s habeas petition and remand
19 for issuance of the writ.” (*Sanders*, supra, 2006 U.S. App. Lexis 16991, at * 12-
20 13.*

21 The bedrock of our judicial system is the concept that a criminal defendant must be
22 given a fair trial. Petitioner was convicted in a proceeding which was marred by fundamental
23 error. A remedy must be provided.

24 VIII.

25 RELIEF MUST BE GRANTED PURSUANT TO THE DUE PROCESS
26 CLAUSE OF THE FOURTEENTH AMENDMENT SINCE PETITIONER IS
27 FACTUALLY INNOCENT.

28 The full record before this court demonstrates that petitioner is actually innocent of the
charges against him. As petitioner has demonstrated, the People’s evidence is so flimsy that
no reasonable trier of fact would return a conviction. Under these circumstances, petitioner’s
convictions must be set aside. (*See Herrera v. Collins* (1993) 506 U.S. 390, 417 [court
assumed that the execution of an innocent man would be an unconstitutional act].)

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III.

APPELLANT WAS DEPRIVED OF DUE PROCESS AND THE RIGHT TO CALL WITNESSES UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS WHEN THE TRIAL COURT EXCLUDED VITAL DEFENSE EVIDENCE.

In his opening brief, appellant established that the trial court erred by excluding defense evidence. (AOB 35-49.) The evidence involved Mr. Carrillo's prior conviction for possession of a loaded firearm for a gang purpose and expert testimony that methamphetamine use can cause a person to act aggressively. The People contend that the court's rulings were proper. In the sections which follow, appellant will demonstrate that the People's claims are meritless.

A. The Trial Court Erred By Excluding The Testimony of Dr. Reidy.

Appellant made an offer of proof that Dr. Reidy would testify that the use of methamphetamine can cause "aggressive" behavior. (2 RT 316.) The evidence was admissible to support appellant's testimony that he feared that Mr. Carrillo would use a weapon since he appeared to be "psyched or loaded." (8 RT 2187.)

The People contend that: (1) the trial court properly ruled that the evidence was irrelevant; and (2) exclusion of the evidence constitutes harmless error. (RB 37-38.) The People are mistaken.

APPENDIX H

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
RAYMUNDO RIVERA,
Defendant and Appellant.

No. H033633

(Santa Clara County
Superior Court No.
CC632875)

I.

THIS COURT SHOULD MODIFY ITS DISPOSITION TO PROVIDE THAT THE TRIAL COURT IS TO PREPARE AN AMENDED ABSTRACT OF JUDGMENT.

This court has held that the trial court erred by failing to impose a Penal Code section 654 stay as to appellant's robbery conviction. (Opinion, pp. 9-15.) In its disposition, this court "remanded for resentencing" (Opinion, p. 17.) This is not the appropriate disposition.

Appellant was convicted on only two charges: first degree murder and robbery. The only permissible sentence for first degree murder is 25 years to life. Insofar as the punishment for the robbery conviction is to be stayed pursuant to section 654, the only possible sentence is 25 years to life.

Given these circumstances, the proper disposition is to direct the trial court to prepare an amended abstract of judgment that reflects a section 654

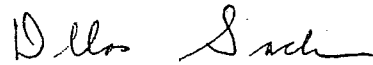
stay on the robbery conviction with a consequent reduction in the sentence to 25 years to life. In this way, an unnecessary "resentencing" hearing will be avoided.

CONCLUSION

For the reasons expressed above, this court should modify its disposition to provide that the judgment is reversed with directions to issue an amended abstract of judgment that reflects a Penal Code section 654 stay for the robbery conviction and a total sentence of 25 years to life for the murder conviction.

Dated: February 25, 2010

Respectfully submitted,



DALLAS SACHER
Attorney for Appellant,
Raymundo Rivera

APPENDIX I

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,]	
]	NO. H026552
Plaintiff and Respondent,]	
]	(SANTA CLARA CO.
vs.]	SUPERIOR COURT
]	NO. EE015964)
DAVID RUEZGA,]	
]	
Defendant and Appellant.]	

INTRODUCTION

This is a serious case which raises a number of difficult and complicated constitutional issues. In his opening brief, appellant made a diligent and good faith effort to present his contentions in an objective manner which paid allegiance to both the record and legal precedent.

As an apparent strategic choice, the People have responded to appellant's contentions by repeatedly alleging that appellant has not faithfully represented the record and the law. (RB 35-38, 41, 45, 47, 51, 55, 59, 61, 65.) Needless to say, appellant does not agree. In the interest of professional

decorum, appellant will reply to the People's baseless allegations only to the extent that it is reasonably necessary to demonstrate the bona fides of his claims of error.

Appellant intends no disrespect to the People. However, it is regrettable that the People have resorted to inflammatory rhetoric rather than confining their analysis to the issues at hand. Once the rhetoric in the People's brief is put aside, appellant is confident that a fair analysis of the legal issues will result in the remedy to which he is entitled.

I. APPELLANT WAS DEPRIVED OF DUE PROCESS UNDER THE FEDERAL CONSTITUTION WHEN THE TRIAL COURT GAVE CALJIC NO. 5.55.

In his opening brief, appellant established that the trial court erred by giving CALJIC No. 5.55 since it had no application to the facts of the case. (AOB 17-26.) In response, the People offer a series of contentions: (1) the instruction was appropriately given since appellant orchestrated the incident; (2) even if appellant did not orchestrate the episode, the instruction properly applied to the second set of shots which he fired; (3) regardless of the facts of the case, appellant has distorted the legal principle found in No. 5.55; and (4) any error was harmless. (RB 33-43.) Each of these meritless contentions will be separately rebutted below.

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