In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

NORMA LILIAN CORTEZ et al.,

Defendants and Appellants.

Case No. S211915

Second Appellate District, Division Eight, Case No. B233833
Los Angeles County Superior Court, Case No. BA345971
The Honorable Dennis J. Landin, Judge

RESPONDENT'S REPLY BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
MICHAEL C. KELLER
Deputy Attorney General
STEVEN D. MATTHEWS
Supervising Deputy Attorney General
ZEE RODRIGUEZ
Deputy Attorney General
State Bar No. 204357
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 576-1342
Fax: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov
Zee.Rodriguez@doj.ca.gov
Attorneys for Respondent

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CALCRIM No. 361 allows a jury to consider the meaning and importance of a defendant's failure to explain or deny adverse evidence, if she could reasonably be expected to have done so, in assessing her credibility. The instruction traditionally has been, and logically should be, applied anytime a defendant fails to explain or deny facts, regardless of whether she does so by completely failing to address evidence or by giving implausible or non-responsive answers that do not truly explain or deny the adverse evidence.

A. CALCRIM No. 361 Applies to Testimony That is Implausible or Bizarre or That Creates Logical Gaps

As discussed in respondent's Opening Brief on the Merits ("OBOM"), this Court and the majority of Court of Appeal cases have found that a failure to explain or deny evidence instruction applies when a defendant's testimony contains logical gaps or is bizarre or implausible.[1] (OBOM 14-20; *People v. Belmontes* (1988) 45 Cal.3d 744, 784 ("*Belmontes*"), disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421 ("*Doolin*"); *People v. Redmond* (1981) 29 Cal.3d 904, 911 ("*Redmond*"); *People v. Sanchez* (1994) 24 Cal.App.4th 1012, 1030 ("*Sanchez*"); *People v. Mask* (1986) 188 Cal.App.3d 450, 455; *People v.*

[1] Most of the published cases on point addressed CALJIC No. 2.62, the predecessor to CALCRIM No. 361. The instructions are essentially the same in substance and have been treated as one in the same by the Court of Appeal. (See *People v. Rodriguez* (2009) 170 Cal.App.4th 1062, 1067 ("*Rodriguez*").)

Roehler (1985) 167 Cal.App.3d 353, 393-394 ("*Roehler*"); *People v. Haynes* (1983) 148 Cal.App.3d 1117, 1120-1122 ("*Haynes*"); but see *People v. Kondor* (1988) 200 Cal.App.3d 52, 57 ("*Kondor*") [the instruction is "unwarranted when a defendant explains or denies matters within his or her knowledge, no matter how improbable that explanation may appear"]; accord, *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1469 ("*Lamer*").) This is so because an answer that is bizarre or implausible, or that creates a logical gap in the evidence, fails to truly explain facts and is thus the functional equivalent of no answer at all. (See OBOM 17-19.)

Nevertheless, the majority opinion of the Court of Appeal, below, ruled that CALCRIM No. 361 is warranted only where there is a complete failure to respond to evidence. The majority then held that a general response precludes the instruction because "plausibility" is "not the test." (Opn. at 14-15 [relying on *Lamer* and *Kondor* without addressing conflicting authority]; but see Dis. Opn. at 2-3.)

While contending there is no conflict in the Court of Appeal on the applicability of CALCRIM No. 361, appellant acknowledges "some Courts of Appeal" have found the instruction applies to implausible answers. (ABOM 15, 18-19.) She proposes a rule, however, that departs from all of the relevant case authority, including the opinion below – that CALCRIM No. 361 should apply only to complete failures to address evidence *or to answers that are implausible, but "implausible" only in the sense that the explanations are physically impossible or create long, unaccounted-for gaps in time*. (ABOM 20-22.) To reconcile her proposed rule with the authority cited by respondent, appellant (1) argues that "implausible" in this context has a meaning different from its ordinary usage; and (2) creates exceptions based on the facts of each case approving of the instruction where the defendant's answers were implausible or created a logical gap.

(ABOM 20-22.) Her position is supported neither by case law nor common sense.

This Court and the Court of Appeal have used the ordinary meaning of "implausible" when assessing the applicability of CALCRIM No. 361. "Implausible" is defined as "not having the appearance of truth or credibility." (*Dictionary.com Unabridged.* Random House, Inc. 23 Feb. 2014. Dictionary.com http://dictionary.reference.com/browse/implausible.)

This Court, in *Belmontes*, cited the following implausible answers as examples of the defendant's failure to explain or deny adverse evidence: (1) he testified that he heard his accomplices, Vasquez and Bolanos, arrive and that Vasquez did not have time to open the car trunk before going to the front door; however, Bolanos and a disinterested neighbor both testified that Vasquez attempted to open the trunk first; (2) defendant said he hit the victim in the head only once and she fell to the ground, but did not explain her defensive wounds or the autopsy surgeon's conclusion that such a blow probably would not have rendered her unconscious; (3) defendant said he only ran through the house quickly, claiming Vasquez must have ransacked the bedroom and hit the victim, but he "failed to explain how Vasquez could have beaten the victim so extensively *and* ransacked the master bedroom; all in a matter of 'seconds'"; (4) defendant claimed he did not hear Vasquez beating the victim, but there were 15 to 20 skull-cracking blows that Bolanos heard from outside and that would have sounded like a "'cracked pot[.]'" (*Belmontes*, *supra*, 45 Cal.3d at pp. 783-784.)

The Court noted, "There were other crucial points of conflict between defendant's extrajudicial statements and trial testimony on the one hand, and the physical evidence and testimony of witnesses on the other." The Court then concluded as follows:

> Without belaboring the point, our review of the record indicates that these and other such conflicts were hardly "tangential,

> collateral and of little importance." "[I]f the defendant tenders an explanation which, *while superficially accounting for his activities, nevertheless seems bizarre or implausible*, the inquiry whether he reasonably should have known about circumstances claimed to be outside his knowledge is a credibility question for resolution by the jury [citations]." (*People v. Mask* (1986) 188 Cal.App.3d 450, 455 [233 Cal.Rptr. 181].)

(*Belmontes*, *supra*, 45 Cal.3d at p. 784, italics added.)

Belmontes approved of CAJIC No. 2.62 where the defendant's answers ostensibly addressed the adverse evidence, but were incredible. The Court did not suggest a meaning for "implausible" apart from or more restrictive than its ordinary definition. (Compare *Belmontes*, *supra*, 45 Cal.3d at pp. 783-784, with ABOM 15-22.)

Additionally, the responses the Court deemed to be implausible were not limited only to those relating to physical evidence. (*Belmontes*, *supra*, 45 Cal.3d at pp. 783-784.) In fact, the first example the Court noted was that the defendant's testimony contradicted the testimony of two other witnesses regarding their observations. (*Id.* at p. 783; see also *Mask*, *supra*, 188 Cal.App.3d at p. 455 [CALJIC No. 2.62 warranted because defendant's explanation – that he was dropped off at a friend's house and then rode his bicycle or walked to two other locations within a mile did not address why it took him four hours – was implausible].)

This Court similarly found in *Redmond* that the defendant's testimony contained logical gaps because he failed to explain other circumstances as well as physical evidence. (*Redmond*, *supra*, 29 Cal.3d at p. 908; see ABOM 20.) The defendant said he accidentally stabbed the victim. Afterward, he went to his bedroom to retrieve his car keys in order to take the victim to the hospital and put the knife away while there. During that time, the victim left. (*Ibid.*) The Court held that CALJIC No. 2.62 was warranted due to "the variance between the description of [the victim's] wound as 'downward and inward' and defendant's version of an 'upward'

thrust caused by [the victim's] fall on the knife," and also because the defendant failed to explain why he did not reveal the location of the knife for two months and why he did not seek medical assistance for the victim. (*Ibid.*)

The Court of Appeal in *Roehler* likewise did not suggest that CALJIC No. 2.62 was applicable only where a defendant's testimony was rendered implausible by physical evidence. There, the Court of Appeal ruled that, due to the defendant's presence on the scene, his claim not to know what caused his wife and stepson to lose consciousness and drown when their small boat capsized created a logical gap in the evidence. (*Roehler*, *supra*, 167 Cal.App.3d at p. 394.) While the defendant's failure to explain physical evidence showing the victims suffered pre-mortem head injuries was significant, it was not the only factor cited by the court. More importantly, there was no suggestion the court believed the instruction applied only to failures to explain physical evidence. (Compare *id.* at pp. 393-394 [noting the boat capsized in calm seas, nothing suggested the victims suffered injuries earlier, they were good swimmers, and defendant had recently obtained life insurance policies for both victims], with ABOM 21-22; see also *Sanchez*, *supra*, 24 Cal.App.3th at p. 1030 [CALJIC No. 2.62 warranted where defendant gave detailed testimony about his alcohol and cocaine consumption the day of murder, but claimed lack of recall regarding inculpatory details, including physical evidence and descriptions of events].)

Further, appellant does not provide a reason for distinguishing testimony that contradicts physical evidence or fails to account for long periods of time from any other implausible testimony. She does not explain, for example, why the testimony in *Belmontes* which addressed contradictions with physical evidence or that in *Mask* which failed to explain why the defendant's actions took four hours amount to a failure to

explain or deny evidence, but other implausible testimony such as the answers in *Belmontes* that contradicted observations made by two prosecution witnesses does not. (ABOM 20-22, citing *Mask*, *supra*, 188 Cal.App.3d at p. 455; see *Belmontes*, *supra*, 45 Cal.3d at pp. 783-784.)

As explained in respondent's Opening Brief (15-20), the rule adopted by the majority opinion, prohibiting CALCRIM No. 361 anytime a defendant generally addresses adverse evidence regardless of how implausible her answers might be, conflicts with this Court's authority as well as the weight of Court of Appeal authority and common sense. (Compare Opn. at 14-15 and *Kondor*, *supra*, 200 Cal.App.3d at p. 57 [the instruction is "unwarranted when a defendant explains or denies matters within his or her knowledge, no matter how improbable that explanation may appear"], with *Belmontes*, *supra*, 45 Cal.3d at p. 784 [deciding, two months after *Kondor*, "'[I]f the defendant tenders an explanation which, while superficially accounting for his activities, nevertheless seems bizarre or implausible,'" the instruction is warranted], quoting *Mask*, *supra*, 188 Cal.App.3d at p. 455, and Dis. Opn. at 2-3.) Tellingly, appellant also argues for a rule with exceptions to the blanket rule adopted by the majority opinion. (ABOM at 15-20.)

Respondent agrees that a simple contradiction, alone, or one on a collateral point may not warrant CALCRIM No. 361. (See ABOM 18; Opn. at 14; *People v. Saddler* (1979) 24 Cal.3d 671, 682-683 ("*Saddler*").) However, a jury should be permitted to determine whether a defendant failed to explain or deny evidence and whether any such failure affects her credibility when her testimony is implausible or otherwise creates "crucial points of conflict." (OBOM 18-19; *Belmontes*, *supra*, 45 Cal.3d at p. 784; citing *Mask*, *supra*, 188 Cal.App.3d at p. 455 [finding contradiction, alone, does not warrant CALJIC No. 2.62; "[h]owever, if the defendant tenders an

explanation which . . . nevertheless seems bizarre or implausible" the instruction is warranted].)

As explained, a highly implausible explanation might very well be more damaging to a defendant's credibility and ultimately less explanatory than no answer at all, yet the *Kondor/Lamer* rule applied by the majority opinion, here, would permit CALCRIM No. 361 to be given only in the latter situation. Such a rule defies logic. (OBOM 18; see, e.g., *Haynes*, *supra*, 148 Cal.App.3d at pp. 1121-1122 [implausible answers do not truly explain or deny prosecution facts].)

The criticism of CALJIC No. 2.62 noted by appellant (ABOM 17-18) has mainly been in the form of reviewing courts counseling trial courts against "routinely" including the instruction in the standard cache of jury instructions without considering the evidentiary basis for it. (See, e.g., *Lamer*, *supra*, 110 Cal.App.4th at pp. 1469-1470; *Haynes*, *supra*, 148 Cal.App.3d at pp. 1119-1120; *People v. Campbell* (1978) 87 Cal.App.3d 678, 685; Opn. at 14-15.) In any case, trial courts have a duty to refrain from instructing on principles of law that are irrelevant to the evidence and confusing to the jury. (*Saddler*, *supra*, 24 Cal.3d at p. 681.) Also, "[i]t is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference[.]" (*Ibid.*, internal quotations omitted.) Thus, the criticisms simply remind trial courts to first determine if there is an evidentiary basis for the instruction.

Saddler did not, as appellant contends, criticize CALJIC No. 2.62 or find that it, "in the wrong [evidentiary] circumstances risks raising irrelevant issues, confusing the jury, and violating the defendant's Fifth Amendment rights." (ABOM 24; see *Saddler*, *supra*, 24 Cal.3d at pp. 679-681.) Rather, *Saddler* ruled there is no Fifth Amendment concern when the instruction is applied in appropriate cases, i.e., where a defendant testifies

and there is a general denial or alibi defense rendering the scope of cross-examination "very wide." (*Id.* at pp. 679, 681.) The Court's only mention of the risk of raising irrelevant issues or confusing the jury was in its discussion of the general principles of law applicable to all jury instructions which occurred immediately before it assessed whether CALCJIC No. 2.62 was appropriate there. (*Id.* at p. 681.)

As in the typical case in which CALCRIM No. 361 applies, appellant testified and entered a general denial which waived any Fifth Amendment concerns. She failed to explain or deny adverse facts, and the trial court considered that evidence before permitting the instruction. (8RT 4026-4027.)

Moreover, the cases criticizing the instruction addressed CALJIC No. 2.62. CALCRIM No. 361 does not include language from CALJIC No. 2.62 which told the jury that any "unfavorable" inferences it could draw were "more probable." (CALJIC No. 2.62; see also *Saddler*, *supra*, 24 Cal.3d at p. 685, fn. 2 (Conc. Opn. of Bird, C.J.) [advising that future versions of CALJIC No. 2.62 should more closely track Evidence Code section 413, which "leaves entirely with the jury the determination of what inferences to draw"].)

Finally, rather than advocating for "frequent" use of CALCRIM No. 361 (see ABOM 22-23), respondent suggested the instruction should be applied in a manner that avoids rendering it and the statute upon which it is based (Evid. Code, § 413) meaningless. (OBOM 19-20; see generally *People v. Hudson* (2006) 38 Cal.4th 1002, 1010 [statutory interpretations that render portions meaningless should be avoided].) The majority opinion's blanket rule renders it inapplicable in almost all cases.

CALCRIM No. 361 is appropriately supported by the evidence where a defendant's testimony is implausible, contains logical gaps, or is otherwise non-responsive. Such testimony only superficially addresses

adverse facts and does not amount to an explanation or denial of the evidence. Accordingly, this Court should reaffirm the *Belmontes/Redmond* rule – that CALCRIM No. 361 is warranted where a defendant does not explain or deny facts either by failing to respond at all or by giving answers that are implausible or bizarre or contain logical gaps. (See OBOM 15-20.)

B. Appellant Failed to Explain or Deny Adverse Evidence on Several Crucial Points

As argued in detail in respondent's Opening Brief, appellant failed to explain or deny several critical portions of the prosecution's evidence. Her testimony was riddled with implausible statements and logical gaps, and she did not directly answer many of the prosecutor's questions. (OBOM 21-27.) Respondent will reiterate only a few of those points here.

Appellant contends that, unlike the defendants in the *Belmontes/Redmond* line of cases, she addressed the prosecution evidence and her responses were not tantamount to a failure to explain or deny testimony. (See ABOM 20-22.) However, she fails to convincingly demonstrate that her superficial responses were any different.

For example, appellant testified that neither she nor anyone else yelled anything from her car to Guzman and Zuniga (7RT 3379, 3454), but she failed to explain the contradictory testimony of two prosecution eyewitnesses. She did not account for Zuniga's testimony that a woman said, "Where you from?" and "Let them have it," from the car (3RT 1263-1268, 1293); Ramos's testimony that the female driver and male passenger both yelled at the victims (2RT 952-957); or the undisputed evidence that she was the driver and the only female in the car (see 7RT 3454-3455). (See *Belmontes*, *supra*, 45 Cal.3d at p. 784 [defendant implausibly testified Vasquez did not have time to open the car trunk, but two prosecution witnesses testified he had attempted to do so]; *Redmond*, *supra*, 29 Cal.3d at p. 911 [CALJIC No. 2.62 warranted due, inter alia, to "the variance

between the description of [the victim's] wound as 'downward and inward' and defendant's version of an 'upward' thrust caused by [the victim's] fall on the knife"]; *Mask*, *supra*, 188 Cal.App.3d at p. 455 [defendant, in an attempt to explain why he was near the crime scene at midnight, testified to going to different cousins' homes within a one-mile area before reaching the crime scene area, but did not explain why it took him four hours].)

Appellant challenges the credibility of the witnesses and argues, for example, that her testimony was not contradictory because the prosecution witnesses were not certain they heard a woman. (See ABOM 25-26.) First, whether the prosecution witnesses were more credible and whether appellant's responses actually amounted to a failure to explain or deny evidence were questions for the jury. The issue here was whether the evidence sufficiently suggested she failed to explain or deny adverse evidence such that the trial court could properly instruct with CALCRIM No. 361. (See *Saddler*, *supra*, 24 Cal.3d at p. 682; *Lamer*, *supra*, 110 Cal.App.4th at p. 1469.)

Second, Zuniga and Ramos were both certain a woman yelled from the car. Zuniga testified that a woman said, "Where you guys from?" (3RT 1264-1265.) The prosecutor asked, "Why do you say it was a female?" He responded, "Because it sounded like a female voice." (3RT 1265.) On cross-examination, Zuniga reaffirmed that it was a "low-pitched voice" but did not "sound like a guy." Defense counsel asked if he assumed it was a woman's voice because he saw a female driver. Zuniga said, "No, it just sounded like a woman." Defense counsel then asked, "And the second statement about, 'Let them have it,' you think that was the same voice?" Zuniga answered, "I don't think. I know." (3RT 1293.)

Ramos was likewise certain the female driver yelled, as he saw and heard both her and Bernal yelling. Ramos could not tell exactly what they were saying because they yelled over each other. (2RT 952-953, 957, 975.)

Also, he did not say "both groups yelled at one another." (See ABOM 25.) Ramos said the female driver and male passenger both yelled at Guzman, and Guzman said only "a couple words back" then continued walking. (2RT 956-957, 975-977.) Accordingly, the evidence sufficiently showed appellant failed to explain strong prosecution evidence that she issued a gang challenge to the victims and then told Bernal to "Let them have it."

Appellant's testimony was particularly implausible and contained a logical gap when she testified she did not believe Bernal was the shooter. (7RT 3431-3441; see OBOM 23-24.) She failed to explain this alleged lack of knowledge given the evidence that: (1) she was in the driver's seat as he fired; (2) he pulled the gun from his waist area as he got out of the car; (3) he fired several shots at the victims *from the passenger side of the car and across the roof of the car, with one hand still on the roof*; (3) he was trying to put the gun back inside his waistband as he got back into the car; and (4) she admitted the gunshots occurred only after Bernal got out of the car and then stopped when he got back in. (2RT 957-961, 973-974, 982, 986, 1007-1009, 1014; 3RT 1266-1271, 1306, 1319.)

Appellant's claimed lack of knowledge that Bernal was the shooter, "while a denial of sorts," created a logical gap warranting a credibility determination by the jury pursuant to CALCRIM No. 361. (See *Roehler*, *supra*, 167 Cal.App.3d at p. 394 [defendant's claimed lack of knowledge of what occurred, "while a denial of sorts, cannot be logically equated with an alibi placing him across town" given his presence at the scene]; see also *Belmontes*, *supra*, 45 Cal.3d at p. 784 [defendant's claim he did not hear 15 to 20 blows was implausible given testimony that it would have sounded like a "cracked pot" and that another witness heard the blows from outside]; *Sanchez*, *supra*, 24 Cal.App.4th at p. 1030 [defendant's specific testimony about his alcohol and cocaine consumption the day of murder, but claimed lack of recall regarding inculpatory details created logical gap].)

As detailed in the Opening Brief, appellant failed to explain or deny many other adverse facts, including (1) the circumstances of her driving Bernal around that day – without knowing where they were going, stopping at the same location before and after the shooting, and permitting a minor she did not know and who was dressed like a gang member to get into the car; (2) how Bernal got out of the car, committed the shooting, and got back in without her ever stopping the car; (3) how a bullet ended up on her floorboard; (4) why she waited for Bernal immediately after the shooting if she was surprised by the shooting and had an opportunity to leave; (5) why she was afraid of Bernal if she did not believe he was the shooter, he was her friend, and she described him as a nice person; (6) her claims at times to know little to nothing about gang behavior or territories or that Bernal was in a gang, then testifying that she knew he was a gang member, the victims made gang signs, and she knew the 18th Street and Rockwood gang territorites. (See OBOM 20-27.) Accordingly, the trial court properly instructed the jury with CALCRIM No. 361.

C. Any Error Was Patently Harmless

Even if CALCRIM No. 361 was not warranted in the present case, any error was harmless. Error in instructing the jury with CALCRIM No. 361 is subject to the *People v. Watson* (1956) 46 Cal.2d 818, 836 ("*Watson*") state law harmless error analysis. (*Saddler*, *supra*, 24 Cal.3d at p. 681; *Lamer*, *supra*, 110 Cal.App.4th at p. 1472; see *Rodriguez*, *supra*, 170 Cal.App.4th at p. 1067 [*Saddler* applies with equal force to CALCRIM No. 361 and CALJIC No. 2.62].)

Appellant contends the error violated her Fifth Amendment rights and is subject to a prejudice analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824] ("*Chapman*"). (ABOM 29, citing *Saddler*, *supra*, 24 Cal.3d at pp. 678-679.) However, *Saddler* applied *Watson* to the erroneous instruction on CALJIC No. 2.62 and the Court of

Appeal has followed suit. (*Saddler*, *supra*, 24 Cal.3d at p. 681; accord, *Lamer*, *supra*, 110 Cal.App.4th at p. 1472; *Kondor*, *supra*, 200 Cal.App.3d at p. 57.) As noted, *Saddler* also ruled that CALJIC No. 2.62 does not implicate a defendant's Fifth Amendment rights when she testifies and enters a general denial. (*Id.* at pp. 679, 681.) Accordingly, appellant must show that an outcome more favorable to her was reasonably probable absent CALCRIM No. 361. (*Id.* at p. 681.)

Any instructional error was patently harmless here due to the language of CALCRIM No. 361, the other instructions given to the jury, and the strong evidence against appellant. As set forth in detail in the Opening Brief, CALCRIM No. 361 is a permissive instruction which, by its own terms, does not apply unless the jury determines the defendant failed to explain or deny evidence. (OBOM 28-29; see *Saddler*, *supra*, 24 Cal.3d at p. 680 [inferences are permissible only *if the jury* finds defendant failed to explain or deny facts"], italics in original; *Lamer*, *supra*, 110 Cal.App.4th at p. 1472 [error "routinely" found harmless due to permissive language].) The instruction also does not direct the jury to draw any particular inference, it simply states the jury decides the meaning of any failure to explain or deny evidence. (OBOM 28-29.)

The trial court also instructed the jury with CALCRIM No. 200, directing the jury to follow only the instructions that apply to the facts of the case, as well as CALCRIM No. 362, on false or misleading testimony, which permitted the same, if not a more damaging, assessment of appellant's testimony. (OBOM 30-31.) In fact, due primarily to the permissive nature of CALCRIM No. 361 in combination with CALCRIM No. 200, *Lamer* noted it was unable to find "a single case" in which the erroneous inclusion of a failure-to-explain instruction constituted reversible error. (*Lamer*, *supra*, 110 Cal.App.4th at p. 1472.)

Finally, the evidence strongly demonstrated that appellant knowingly went into 18th Street territory with Bernal on a mission to shoot rival gang members. (OBOM 27-34.) She lived in Rockwood territory and associated with its members, including Bernal. She drove Bernal, who was armed with a nine-millimeter firearm, into the rival 18th Street gang's territory knowing he was always armed. (OBOM 2-9, 31-33; 2CCT 421; see 5RT 2479-2481 [it was never safe to enter rival gang's territory and gang members did so only to assault or retaliate against rivals].) On the way, they picked up Edwin Cuatlacuatl, a Rockwood member whom officers believed had been in altercation with 18th Street gang members two weeks earlier. (5RT 2434-2435; 7RT 3459-3460; see *People v. McKinnon* (2011) 52 Cal.4th 610, 656 ("*McKinnon*") [rumors that fellow gang member had been killed by a rival gang relevant to show motive].)

Appellant slammed on the brakes of the car when she saw Guzman and Zuniga. She then confronted them by saying, "Where you guys from?," which was not a real question in gang culture. There was no friendly interpretation, and the person asking planned to assault the person asked. (5RT 2717-2718; 6RT 3156-3157.)

After appellant and Bernal both yelled at the victims, appellant said, "Let them have it." Bernal then shot and killed Guzman. As appellant knew Bernal always carried a gun, the only reasonable inference was that she was encouraging him to shoot Guzman and Zuniga. (See, e.g., *People v. Sanchez* (2001) 26 Cal.4th 834, 849-850 [premeditation shown, even though the particular shooting might have been spontaneous, where there was a preexisting gang rivalry and defendant, armed with a firearm, and his accomplice drove slowly by rivals and both sides threw gang signs before defendant fired].) This evidence strongly showed that appellant and Bernal went into 18th Street territory intending to find 18th Street members to assault or kill. (See Dis. Opn. at 11 ["As the prosecutor argued in closing,

although Cortez was not a typical gang member, there was no rational explanation for her conduct, other than that she knew what was going to happen when she drove Bernal into rival gang territory"].)

Further, appellant waited for Bernal to return to the car immediately after the shooting and waited again while he hid the gun shortly afterward. Bernal also told his nephew that he and appellant went to shoot two 18th Street gang members, and his letter that was confiscated by jail authorities implicated both him and appellant. Finally, appellant's testimony was incredible and impeached several times. (See OBOM 2-10; 32-33.)

Due to the strong evidence showing appellant's intent to aid and abet the gang murder, the permissive nature of CALCRIM No. 361 as well as other safeguards contained within the instruction, and that other instructions were given which would have mitigated any prejudice, appellant cannot show that an outcome more favorable to her was reasonably probable absent CALCRIM No. 361.

II. THE TRIAL COURT PROPERLY ADMITTED BERNAL'S STATEMENT TO HIS NEPHEW UNDER THE HEARSAY EXCEPTION FOR DECLARATIONS AGAINST INTEREST

The majority opinion of the Court of Appeal clearly erred in holding that the trial court abused its discretion by admitting Bernal's declaration against interest (Evid. Code, § 1230). The majority found Bernal's statement to his nephew – "we went" to shoot at two 18th Street gang members, Bernal shot, and appellant drove – to be untrustworthy solely because it implicated appellant and amounted to "speculation" on her state of mind. The majority's decision failed to acknowledge this Court's ruling in *People v. Samuels* (2005) 36 Cal.4th 96, addressing declarations that implicate a non-testifying defendant, and conflated the issues of admissibility and the evidentiary weight to be given the statement.

Following *Samuels*, the majority would have had little choice but to affirm the trial court's admission of Bernal's statement in its entirety because it was against his interest, the portions implicating appellant were inextricably tied to and part of his statement against interest, and it was made under circumstances that this Court and the Court of Appeal have repeatedly deemed to demonstrate trustworthiness. (OBOM 34-47; *Samuels*, *supra*, 36 Cal.4th at pp. 120-121.)

A. Bernal's Entire Statement Constituted a Declaration Against Interest

Bernal's entire statement was properly admitted as a declaration against interest because the portions incriminating appellant were not exculpatory or self-serving were "inextricably tied to and part of a specific statement against penal interest." (*Samuels*, *supra*, 36 Cal.4th at pp. 120-121; OBOM 39-40.) Appellant misconstrues respondent's argument in contending respondent believes "collateral, neutral statements are admissible if made in conjunction with a statement against interest." (ABOM 37.) In accordance with *Samuels*, respondent argued that a portion of a statement implicating a non-testifying defendant may be admitted if it is "*not* 'exculpatory, self-serving, or collateral,'" is "not an attempt to shift blame," and is "'*inextricably tied to and part of a specific statement against penal interest.*'" (OBOM 34, 39-40, quoting *Samuels*, *supra*, 36 Cal.4th at pp. 120-121, italics added.)

Bernal's statement fits squarely within the *Samuels* rule. Every portion of the statement inculpated him, he consistently assigned the most blame to himself by admitting he was the shooter, and he never attempted to shift blame to appellant. (See *People v. Duarte* (2000) 24 Cal.4th 603, 611 [statement attempting to shift blame from declarant is self-serving and not truly against the declarant's interests]; see also *People v. Greenberger*

(1997) 58 Cal.App.4th 298, 335 [the least reliable circumstance is where declarant attempts to improve his situation by shifting blame to others].)

The portions of Bernal's statement that incriminated appellant – "we" went to shoot two 18th Street gang members and she drove – were not collateral and were, instead, "inextricably tied to and part of a specific statement against penal interest." (*Samuels*, *supra*, 36 Cal.4th 120-121.) Those portions were necessary to describe the scope and type of crime. Bernal increased his culpability by suggesting he planned to and did shoot at the victims from a car driven by appellant. He suggested he planned a drive-by shooting and participated in a conspiracy to commit murder, both of which show premeditation. (See Dis. Opn. at 4 [remarks incriminating appellant were not collateral and were "quite damaging" to Bernal because he implied they intended a drive-by shooting, which is probative of premeditation and conspiracy to commit murder]; see also Pen. Code §§ 187, subd. (a), 189; *Samuels*, *supra*, 36 Cal.4th at pp. 120-121 [portions incriminating defendant were "specifically disserving to [the declarant's] interests in that it intimated he had participated in a contract killing . . . and in a conspiracy to commit murder"]; *People v. Tran* (2013) 215 Cal.App.4th 1207, 1219-1220 [statement that defendant shot someone and declarant helped defendant burn the car involved was properly admitted because portions incriminatory of defendant were inextricably tied to his statement against interest, showing he committed arson and was potentially an accessory to murder].)

Appellant inaccurately contends that Bernal's statement is more analogous to the statement excluded in *People v. Lawley* (2002) 27 Cal.4th 102 ("*Lawley*"), than the statement admitted in *Samuels*. (ABOM 37-38.) First, the issue was presented differently in *Lawley* as this Court was asked to determine whether the trial court abused its discretion in *excluding* a portion of a declarant's statement, not whether it did so in *admitting* a

statement as here and in *Samuels*. (See Dis. Opn. at 4-5; RB 40-41 & fn. 12; *Samuels*, *supra*, 36 Cal.4th at pp. 120-121; *Lawley*, *supra*, 27 Cal.4th at p. 154.) Reviewing courts give deference to the trial court's exercise of discretion in excluding or admitting evidence, and may not overturn the ruling on appeal absent a showing it "was arbitrary, capricious or patently absurd" and "resulted in a manifest miscarriage of justice." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124 ("*Rodrigues*"), quotations and citations omitted; Evid. Code, § 352.)

Second, the excluded portions of the statement in *Lawley* incriminated a third party and were not necessary.[2] The defendant sought admission of statements made by the declarant to his prison cellmate in which he admitted killing a man, that he was paid by the Aryan Brotherhood to do it, and that an innocent person was in custody for the crime. (*Lawley*, *supra*, 27 Cal.4th at pp. 151-152.) The trial court excluded the portions about who hired the declarant and an innocent person being incarcerated, finding those portions did not render the declarant more culpable. (*Id.* at p. 154.) This Court found no abuse of discretion. (*Ibid.*)

In *Samuels*, this Court found no abuse of discretion in the trial court's admission of an entire declaration against interest that also implicated a non-testifying defendant. There, the defendant had paid James Bernstein to murder her ex-husband. (*Samuels*, *supra*, 36 Cal.4th at pp. 101-105.) After Bernstein had done so, the defendant hired someone to murder him. (*Ibid.*) At the defendant's trial, Bernstein's acquaintance testified that Bernstein told him, "'He had done it and Mike [Silva] had helped him. And that [defendant] had paid him.'" (*Id.* at p. 120.)

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[2] Since the excluded portions inculpated a third party and exonerated the defendant, third-party culpability issues may also have driven the trial court's exercise of discretion under Evidence Code section 352.

The Court found the statement to be "specifically disserving to Bernstein's interests in that it intimated he had participated in a contract killing – a particularly heinous type of murder – and in a conspiracy to commit murder." (*Samuels*, *supra*, 36 Cal.4th at pp. 120-121.) Under the totality of the circumstances, the Court held that the portion incriminatory to the defendant was not simply collateral, was not an attempt to shift blame, and was, instead, "inextricably tied to and part of a specific statement against penal interest." (*Ibid.* [also noting the difference in trustworthiness between the statements in *Lawley* and those before it was "palpable"].)

Here, as in *Samuels*, Bernal's entire statement – "we went" to shoot two 18s, he shot, and appellant drove – was disserving to him and necessary. The "redacted" version suggested by the majority opinion, "he went ... to go shoot somebody," changes the statement and does not convey that Bernal engaged in a conspiracy to commit murder, suggest a drive-by shooting, or even mention that a car or another person were involved. (Opn. at 18; see *Samuels*, *supra*, 36 Cal.4th at pp. 120-121.)

B. Bernal's Statement Was Trustworthy and Did Not Include Speculation on Appellant's State of Mind

As even the majority opinion agrees, Bernal's statement was made in what has been deemed the most trustworthy of circumstances. (OBOM 41-44; Opn. at 18; Dis. Opn. at 5-6.) He made the statement to his nephew, whom he treated like a younger brother, the day after the shooting while in his family's home. (See, e.g., *Samuels*, *supra*, 36 Cal.4th at p. 121 [non-custodial statements made to acquaintance were trustworthy]; *People v. Arceo* (2011) 195 Cal.App.4th 556, 576 [statement to friend in casual, non-custodial setting was trustworthy and made in one of the most reliable of circumstances]; *People v. Cervantes* (2004) 118 Cal.App.4th 162, 175

[statement made within 24 hours of shooting to lifelong friend in a casual setting was one of the most trustworthy of situations].)

Nevertheless, the majority opinion found Bernal's statement to be unreliable, not because the circumstances suggested he had a motive to lie, but because it amounted to "speculation" on appellant's state of mind. As explained, however, Bernal recited *only what they did* – "we went" to shoot at two 18th Street gang members, she drove, and he fired the gun. (OBOM 42-43; see Dis. Opn. at 6 ["nothing in this statement purports to explain what she was *actually thinking*. Rather, he explained what they *did*"].) There was nothing speculative about what they did together.

The fact that Bernal's statement, "we went" to shoot two 18s, might also have supported an inference that he and appellant planned together to commit the crimes was relevant only to the evidentiary *weight* of the statement, not its *admissibility*. (Dis. Opn. at 6; OBOM 42-43, citing *People v. Guerra* (2006) 37 Cal.4th 1067, 1122 ("*Guerra*") [ruling that the meaning of defendant's statement, "'In my country, I do this, no problem, I go home tonight,'" concerned "'only the weight of this evidence, not its admissibility'"], overruled on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151, quoting *People v. Ochoa* (2001) 26 Cal.4th 398, 438; *People v. Riel* (2000) 22 Cal.4th 1153, 1189 [ruling, where declarant said "they" did certain acts and it was unclear whether he included the defendant, that "[t]o warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide"]; see also *People v. Blacksher* (2011) 52 Cal.4th 769, 834 [whether a statement qualifies as a spontaneous statement rests with the court, but whether the declarant actually perceived the events

or had personal knowledge of facts contained within the statement was an issue for the jury].)

Appellant contends the foregoing cases are distinguishable because the wording of the statements at issue was "clear," whereas Bernal's nephew, Oscar Tejeda, was unable to tell detectives exactly what Bernal said. (ABOM 33-35.) Although Tejeda could not recall Bernal's exact words, he noted that Bernal did not give a lot of details and the substance of what he said never changed. Tejeda consistently told detectives that Bernal said: Bernal and appellant went together to shoot gang members, Bernal shot, and appellant drove. (See CCT 268-315; see also Dis. Opn. at 5; RB 43-44.) The effect was the same whether he said "we went" or "he went with some lady to go shoot somebody." (See ABOM 33.) In any event, appellant fails to show how a more ambiguous statement would affect application of the rule that the jury decides the meaning of evidence.

Once the trial court determined that Bernal's statement qualified as a declaration against interest– because it was disserving to him, the portions incriminating appellant were not exculpatory or collateral, and it was trustworthy – it was for the jury to decide whether, in conjunction with the other evidence, "we went" meant that appellant knew of the plan to shoot the victims. (Compare *People v. Bacon* (2010) 50 Cal.4th 1082, 1102-1103 [trial court does not resolve conflicts in the evidence submitted on preliminary fact questions] and *Guerra*, *supra*, 37 Cal.4th at p. 1122 [meaning of statement relevant to weight, not admissibility], with Opn. at 18 [finding statement inadmissible because "we went" permitted inference that appellants planned together to commit crimes].)

The majority opinion's contrary ruling ignored *Samuels* as well as the weight of authority demonstrating that Bernal's statement was trustworthy in content and context. (See *Samuels*, *supra*, 36 Cal.4th at pp. 121 [noting difference in trustworthiness between statements in *Lawley* and those

before it, made to an acquaintance in a casual setting, was "palpable"]; *Lawley*, *supra*, 27 Cal.4th at pp. 151-152 [made to cellmate, proffered by defendant, and suggesting third party culpability while exonerating defendant].) Applying *Samuels*, the majority opinion could not have found the trial court's ruling to be "arbitrary, capricious or patently absurd."

C. The Trial Court Did Not Abuse Its Discretion Under Evidence Code Section 352

As noted, the trial court has broad discretion to determine whether evidence should be excluded under Evidence Code section 352. (*Rodrigues*, *supra*, 8 Cal.4th at p. 1124; accord, *People v. Gurule* (2002) 28 Cal.4th 557, 654.) Respondent explained in the Opening Brief that Bernal's statement to Tejeda amounted only to a general affirmation of the other strong evidence showing appellant and Bernal committed the crimes together. Appellant was unable to show the statement was likely to confuse the jury or to evoke emotional bias or a verdict based on factors other than the evidence. Thus, the trial court did not abuse its discretion. (OBOM 45-46.)

D. Any Error Was Harmless

As set forth in the Opening Brief, appellant cannot show that an outcome more favorable to her was reasonable probable if Bernal's statement to Tejeda had been excluded or redacted. (See *Samuels*, *supra*, 36 Cal.4th at p. 121 [applying *Watson* harmless error analysis to erroneous admission of statement as declaration against interest].) The evidence showing appellant's intent was strong apart from Bernal's statement. (See Arg. I(C).) Also, appellant's letter to Jose Birrueta conveyed similar information – it was an admission directly from Bernal supporting the prosecution's theory that he and appellant committed the crimes together. Finally, appellant's testimony was implausible and impeached in several respects. (OBOM 46-47.)

E. Appellant's Sixth Amendment Challenge to Bernal's Statement Is Not An Issue Before This Court on Review

Appellant's claim that admission of Bernal's declaration against interest violated her Sixth Amendment rights under *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620. 20 L.Ed.2d 476] ("*Bruton*") (ABOM 39-44), is not one of the issues, or fairly included within the issues, upon which the People's Petition for Review was granted. (See Cal. Rules of Court, rule 8.516(a)(1) [on review, parties must limit briefs and arguments to the issues specified by the Court and any issues fairly included within them]; Order Granting the People's Petition for Review [Sept. 18, 2013].)

The only issue presented relating to Bernal's statement was: "Is a statement that implicates a non-testifying codefendant admissible where it is against the declarant's interest, inextricably tied to and part of the statement against interest, and made under circumstances that this Court and the Court of Appeal have repeatedly deemed to demonstrate trustworthiness?" The argument addressed the statement only under California Evidence Code sections 1230 and 352 (Pet. for Rev. 1, 12-15), and did not include the separate Sixth Amendment issue of whether the statement is testimonial and violates *Bruton*. Indeed, the Sixth Amendment issue was decided unanimously in the People's favor by the Court of Appeal. (Opn. at 16; Dis. Opn. at 3.)

In the event the Court addresses appellant's contention, it should be rejected for the reasons set forth by the Court of Appeal and in the Respondent's Brief. (Opn. at 16; Dis. Opn. at 3; RB 28-36.)

III. THE PROSECUTOR'S CLOSING ARGUMENT DID NOT LOWER THE BURDEN OF PROOF

The majority opinion's holding that the prosecutor committed prejudicial misconduct when he briefly commented on the reasonable doubt

standard in rebuttal (Opn. at 10-13) is clearly erroneous when viewed in context and when the law established by this Court is applied. (See OBOM 47-58.)

Defense counsel suggested during closing argument that proof beyond a reasonable doubt was evidence sufficient for a mother to convict her own child. (9RT 4514.) On rebuttal, the prosecutor stated, " Counsel talked to you about reasonable doubt. You have the instruction on that. I think he tried to characterize it as proof so strong that a mother would convict her own child. Obviously that's ridiculous." (9RT 4594.) He then stated as follows:

> The court told you that proof beyond a reasonable doubt is not proof beyond all possible doubt or imaginary doubt. Basically, I submit to you what it means is you look at the evidence and you say, "I believe I know what happened, and my belief is not imaginary. It's based in the evidence in front of me."

(9RT 4594.) The trial court overruled defense counsel's objection. (9RT 4594.)

In context, the prosecutor was responding to defense counsel's erroneous argument by repeating part of the standard reasonable doubt instruction and then explaining it only to the extent that he said the jury's belief had to be, not imaginary, but based on the evidence. Encouraging the jury to decide the case based on the evidence is appropriate. (See *People v. Seaton* (2001) 26 Cal.4th 598, 663 ("*Seaton*") [properly telling jury to base its verdict on the evidence].)

Appellant responds that the prosecutor's comment suggested the jury could convict based on a "non-imaginary belief" standard which was more akin to "a strong suspicion" or a preponderance of the evidence. (ABOM 10-11; Opn. at 11-12.) This interpretation distorts the prosecutor's comment and, contrary to this Court's well-settled precedent, views it in

isolation as well as infers the jury drew the most damaging meaning from it. (*People v. Brown* (2003) 31 Cal.4th 518, 553-554 ("*Brown*") ["the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner[] [Citations.]"]; accord, *People v. Thomas* (2012) 53 Cal.4th 771, 797; *People v. Schmeck* (2005) 37 Cal.4th 240, 286 [reviewing court must consider the challenged remarks in the context of the whole argument along with the jury instructions], abrogated on other grounds as stated in *People v. McKinnon*, *supra*, 52 Cal.4th at p. 637; *People v. Cole* (2004) 33 Cal.4th 1158, 1203.)

The prosecutor did not say or suggest the standard of proof was a "non-imaginary belief." He had already noted the jury had the reasonable doubt instruction, and immediately before clarifying defense counsel's erroneous characterization of reasonable doubt said: "The court told you that proof beyond a reasonable doubt is not proof beyond all possible doubt or imaginary doubt." The prosecutor then said, "what it means is you look at the evidence and you say, 'I believe I know what happened, and my belief is not imaginary. It's based in the evidence in front of me.'" In context, he distinguished the concept of imaginary doubt from what the jurors might actually believe based on the evidence. The majority opinion viewed the comment in isolation and then drew the most damaging meaning possible from it. (See *Brown, supra,* 31 Cal.4th at pp. 553-554 [reviewing court "do[es] not lightly infer that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements"], internal quotations omitted.)

Further, as discussed in respondent's Opening Brief, even if the prosecutor's comments could have been misconstrued as suggesting a lower standard of proof, the error was harmless under any standard. The comment was brief and innocuous in context; the jury was instructed with

the standard reasonable doubt instruction; the prosecutor referred the jury to that instruction and re-read part of it; he emphasized the verdict had to be based on the evidence; the court instructed the jury to follow the law as stated by the court, and to disregard any conflicting comments by the attorneys; and the evidence of appellant's guilt was strong (see Arg. I(C)). (See OBOM 50-58.)

Further, in analyzing the comment, the majority opinion declined to follow this Court's precedent and presume the jury understood and followed the trial court's instructions. It also failed to meaningfully distinguish three Court of Appeal cases finding more serious misstatements on reasonable doubt to be harmless. (OBOM 51, 53-58, citing *People v. Ellison* (2009) 196 Cal.App.4th 1342, 1353 [arguing reasonable doubt required jury to determine whether innocence was reasonable was harmless], *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1266 [improperly quantifying reasonable doubt by comparing it to fitting pieces of jigsaw puzzle together was harmless], and *People v. Nguyen* (1995) 40 Cal.App.4th 28, 36 [improperly comparing reasonable doubt standard to everyday decisions and suggesting lower burden of proof was harmless].)

Finally, appellant argues the case was close on the issue of her intent and thus the prosecutor's comment likely resulted in prejudice. She assumes the jury had difficultly deciding her intent because it spent "one full day and most of another" deliberating and it reviewed her testimony. (ABOM 12.) However, the jury deliberated for only six hours, excluding the time taken for the readback of testimony and viewing the video of appellant's interview. It reached a guilty verdict relatively quickly after reviewing the testimony and interview. (2CCT 471-476.) Moreover, the jury was deciding all issues related to guilt on all of the counts and enhancements alleged against both defendants. Significantly, it did not

submit questions on or otherwise suggest it misunderstood the standard of proof.

Given the strength of the evidence, the trial court's instructions, and the "brief and fleeting" nature of the prosecutor's comment, appellant cannot show the comment was prejudicial under any standard. (OBOM 51-58.)

IV. THERE WERE NO ERRORS TO CUMULATE

"Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial." (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) The majority opinion reversed appellant's conviction based on its finding of cumulative error, as well as its finding of prosecutorial misconduct alone. (Opn. at 13, 18-20.) However, there were no errors to cumulate and, to the extent there were errors, there was little potential for prejudice to cumulate. (See OBOM 58; *Seaton, supra*, 26 Cal.4th at p. 675 ["The few errors we have identified were minor and, either individually or cumulatively, could not have altered the trial's outcome"]; see Dis. Opn. at 11 [disagreeing with majority that the case against appellant was not strong].)

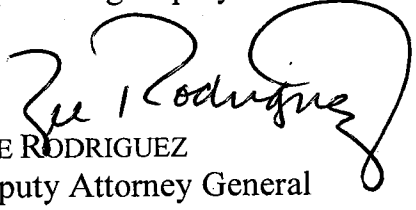
CONCLUSION

For the reasons set forth above, respondent respectfully requests that this Court reverse the judgment of the Court of Appeal and affirm appellant's conviction.

Dated: February 28, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
MICHAEL C. KELLER
Deputy Attorney General
STEVEN D. MATTHEWS
Supervising Deputy Attorney General



ZEE RODRIGUEZ
Deputy Attorney General
Attorneys for Respondent

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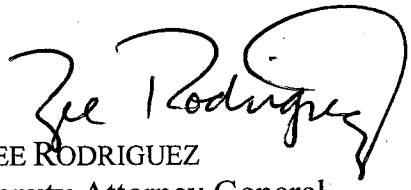
CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Reply Brief On The Merits, uses a 13-point Times New Roman font, and contains 8,187 words.

Dated: February 28, 2014

KAMALA D. HARRIS
Attorney General of California



ZEE RODRIGUEZ
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Norma Lilian Cortez***
No.: **S211915**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

On February 28, 2014, I electronically filed the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS,** with the Clerk of the Court using the Online Form provided by the California Court of Appeal, Second Appellate District.

I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On February 28, 2014, I served the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS,** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Robert E. Boyce
Attorney at Law
Boyce & Schaefer
934 23rd Street
San Diego, CA 92102-1914
Counsel for Appellant Norma Cortez
(Served 2 Copies)

Eric R. Larson
330 J Street, #609
San Diego, CA 92101
Counsel for Appellant Rodrigo Bernal
(Served 2 Copies)

The Honorable Jackie Lacey
District Attorney
L.A. County District Attorney's Office
210 West Temple Street, 18th Floor
Los Angeles, CA 90012
Attn.: John McKinney, Deputy District Attorney

Second Appellate District
Division Eight
Court of Appeal of the State of California
300 South Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

Sherri R. Carter
Executive Officer
Los Angeles County Superior Court,
West Airport District
111 N. Hill Street
Los Angeles, CA 90012
For delivery to Hon. Dennis T. Landin, Judge

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 28, 2014, at Los Angeles, California.

C. Esparza
Declarant

Signature

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