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SUPREME COURT, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Ave. Denver, CO 80203	
Certiorari to the Colorado Court of Appeals Case Number 09CA572	
JOE ANTHONY MARTINEZ Petitioner v. THE PEOPLE OF THE STATE OF COLORADO Respondent	♦ COURT USE ONLY ♦
Douglas K. Wilson, Colorado State Public Defender SHANN JEFFERY, #28689 1300 Broadway, Suite 300 Denver, CO 80203 PDApp.Service@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 12SC803

OPENING BRIEF OF THE PETITIONER

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CERTIFICATE OF COMPLIANCE	

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The brief complies with C.A.R. 28(g).

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It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R._, p.___), not to an entire document, where the issue was raised and ruled on, if the issue involves (i) admission or exclusion of evidence, (ii) giving or refusing to give a jury instruction, or (iii) any other act or ruling for which the party seeking relief must record an objection or perform some other act to preserve appellate review.

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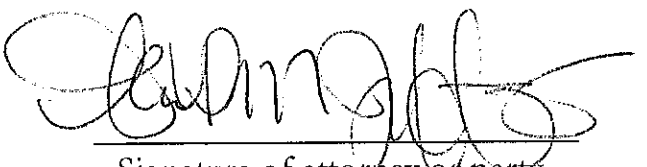

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INTRODUCTION

Petitioner, Joe Anthony Martinez, was the defendant in the trial court and will be referred to by name or as the Defendant. Respondent, the State of Colorado, will be referred to as the prosecution or the State. Numbers in parentheses refer to the volume and page number of the record on appeal. All trial dates are located in a single, continuously paginated transcript on the CD entitled, "Martinez, Joe Text Document" hereafter referred to as "Trial Transcript."

ISSUES ANNOUNCED BY THE COURT

1. Whether the trial court committed reversible, constitutional error by giving the jury a legally erroneous instruction on the time interval for deliberation, thereby lessening the prosecution's burden of proving deliberation necessary for first-degree murder.
2. Whether the evidence was insufficient to support the first-degree murder conviction.

STATEMENT OF THE CASE

On July 8, 2005, the Pueblo County District Attorney charged Joe Anthony Martinez (hereafter "Martinez") with the following: one count of first-degree murder with intent--after deliberation[1] (Count 1); one count of first-degree murder with

[1] *See* §18-3-102(1)(a),C.R.S. 2005, a class one felony.

extreme indifference[2] (Count 2); and one count of conspiracy to commit first-degree murder[3] (Count 3). (v1,p5-6) The conspiracy count was dismissed at the preliminary hearing. (*see* Trial Transcript, p1044) At trial, the prosecutor decided not to proceed on the extreme indifference murder count. (Trial Transcript, p1289)

Martinez's jury trial occurred on April 8 – 18, 2008. (Trial Transcript, p1-1434) The jury found Martinez guilty as charged of Count 1. (Trial Transcript, p1428-34; v2, p379) The court sentenced Martinez to the mandatory life sentence without the possibility of parole. (v:1/30/09, p5) The Court of Appeals affirmed Martinez's conviction and sentence in an unpublished opinion issued on September 6, 2012. Martinez now appeals to this Court to reverse the decision of the Court of Appeals.

STATEMENT OF THE FACTS

This case involves the fatal shooting of Daniel Medina ("the deceased") while he was trespassing at the least, and attempting murder at the worst. (Trial Transcript, p442) On June 29, 2005, a few minutes after 3:30 a.m., Medina was shot several times as he attempted to enter the house where, only a few minutes earlier, he had

[2] *See* §18-3-102(1)(d),C.R.S. 2005, a class one felony.

[3] *See* §18-3-102(1)(a) & §18-2-201,C.R.S. 2005, a class two felony.

threatened to "slice up everybody in the house."[4] (v:4/10/06, p4) The occupants of the house, and thus Medina's intended murder victims if he had made good on his threats, included: Christine Sayesva (the deceased's ex-girlfriend/mother of his children); Joe Martinez (the defendant and Sayesva's boyfriend); Gabriel Tapia (the co-defendant and friend of Martinez); and some of Sayesva's children. (v:3/28/06, p115; v:4/10/06, p4; Trial Transcript, p590, 987, 1043-44)

What precipitated the shooting had been festering for several years prior to the ill-fated morning of June 29th. Although this fact was kept from the jury, Medina had been stalking and perpetrating acts of domestic violence against Christine Sayesva for several years. Sayesva testified at a pre-trial hearing that Medina had repeatedly threatened, in graphic detail, to harm and kill her family members as a means of controlling her. (v:3/28/06, p106-108, 111-113, 116-119, 120-125)

For example, Sayesva testified (pre-trial) that Medina would stalk her, kill her animals, vandalize her daughter's car, and threaten to harm or kill her co-workers and family members. Medina would hit, shove, or push her whenever he lost control of himself. Medina would threaten with convincing detail how he planned to harm her parents, sister, grandparents and children. Medina threatened her with a knife.

[4] Unbeknownst to the jury, Medina's ex-girlfriend, Christine Sayesva, hysterically cried out to police just after the shooting that the deceased had earlier that morning threatened to come over and slice up everybody in the house. (v:4/10/06, p4)

Medina had assault convictions and could not pass a background check to legally purchase firearms, but he possessed firearms and threatened her with them. Sayesva filed police reports detailing the assaultive behavior but the police failed to take action and Medina always avoided service of restraining orders. Medina cut the heads off of their children's pet ducks, ran over a dog and killed a cat. Medina threatened to have people tie up Sayesva's mother and rape and kill her in front of Sayesva's father, and threatened a similar fate regarding her sister and father. (v:3/28/06, p106-108, 111-113, 116-119; 120-125)

At the same pre-trial hearing, Miranda Trujillo (daughter of Sayesva) testified that when Medina lived with her and her mother, he would pick fights with Sayesva that would get physical "a couple times a month" and also threatened to hurt Trujillo. Sayesva and all the children snuck away and moved into a different house (where the shooting occurred) and Medina was never allowed back into Sayesva's home after that. When living with Medina, he would brandish a knife and threaten to kill her grandparents, sister, etc. and claim that he had already stabbed someone. Medina had guns and knives. Trujillo witnessed Medina pin down her mother and say, "You know, there are guys who kill their whole family and then kill themselves." Trujillo believed that if Medina had done enough drugs, he would be bold enough to do that.

Medina killed some of Trujillo's pets and slashed her and her mothers' tires. (v:3/28/06, p135-42, 149-61)

At the same pre-trial hearing, Emyliano Trujillo-Medina, son of the deceased and Sayesva, testified that he knew his mother was afraid of his father. He testified that his father was a black-belt in the martial art of Shaolin Kepmo, was trained in boxing and Filipino knife fighting, and "quite possibly" would have used his skills to harm another person. (v:3/28/06, p61, 78-80, 87)

Finally, at the pre-trial hearing, Sayesva's landlord and neighbor Georgia Vallejo testified that Sayesva feared Medina and kept some of her belongings at the landlord's house in case she needed to flee her house without warning, and kept a handgun in her purse. Vallejo testified that she witnessed Medina attempting to break into and "force his way into the house" after Sayesva broke off the relationship and locked him out of the house. After Sayesva moved out of the house, Medina and another person "trashed" it. (v:3/28/06, p25-28, 31-37) Edmund Vallejo (Georgia's husband) testified that he believed Medina owned weapons and was worried that Medina might come after him after Medina was no longer allowed in the house that Medina had formerly rented from the Vallejo couple. Edmund Vallejo kept a pistol and ammunition accessible for immediate use against Medina if needed. (v:3/28/06, p43-44) Although Medina's history of stalking and perpetrating domestic violence against

Sayesva and her children was part of the *res gestae* of the conflict that led to his own death, the jury was not allowed to know about it.

The jury was allowed to know the following facts. With alcohol and cocaine in his system, Medina placed eighteen calls to Sayesva's cell phone—six of which were connected-- in the early morning hours of June 29, 2005. (Trial Transcript, p616-17 (cocaine and alcohol); p911 (calls)) After the final call, Medina woke his teenaged son by violently knocking on his door and ordered him to get dressed because they had to "take care of something." Medina was in a rage and ordered his son to bring the gun and a tactical fighting knife. The son appealed to his father's sense of manhood and talked him out of taking those particular weapons, suggesting that he instead go and fight "like a man." Nevertheless, there was one knife located in Medina's car and the son brought a pair of brass knuckles with him. (Trial Transcript, p435-439) This apparent de-escalation of Medina's intended level of violence and choice of weaponry, however, was apparently never communicated to Sayesva or her protectors.

Medina drove his son to Sayesva's house and then told his son to go in the house and get his mother. (Trial Transcript, p441) Although Medina knew he was not allowed on Sayesva's property, he then entered the yard and made it onto the enclosed front porch of the dwelling before he encountered either Martinez

(defendant) or Tapia (co-defendant) or both of them. (Trial Transcript, p442, 1114; v:3/28/06: prosecution concedes that struggle began on front porch just to the left of the front door) Witnesses heard male voices yelling or arguing and then a round of gunshots. (Trial Transcript, p515, 517, 523) Some witnesses heard a voice yell something like, "Get out of here," or "Get out of my house!" before the shots were fired. (Trial Transcript, p1105, 1392)

Medina was shot several times in various parts of his body in quick succession, but none of those shots were fatal. (Trial Transcript, p590 (head wound alone was fatal), p987, 1043-44) Neighbors reported yelling, but there were no eye-witnesses to this first round of shots or whether they were fired in reaction to initial aggression on the part of Medina.[5] (Trial Transcript, p1363) Medina, while injured but still alive, was then dragged to the street in front of Sayesva's property. A defense expert testified that all evidence showed it was only one person dragging the deceased's body. (Trial Transcript, p1204-1212) Neighbors testified that they saw a man with a

[5] Defense counsel argued in closing that it was reasonable to infer that Medina was carrying his knife which he took from the glove compartment of his car as he approached the house. The evidence at trial revealed that the glove compartment was left open, the bag that carried that knife was left lying on the passenger seat, the knife had dust on it that could have come from having been dropped in the yard, and the knife was later found on Sayesva's bedroom dresser. (Trial Transcript, p1388-1389) In rebuttal closing argument, the prosecutor conceded that Medina "probably did reach in the car and put that silver knife in his pocket, . . ." (Trial Transcript, p1411)

shirt (defendant Martinez) standing behind the head of the deceased as he lay in the street, and a shirtless man (co-defendant Tapia) standing at the feet at the moment when Tapia took out his pistol and shot the deceased in the head (the fatal wound). (Trial Transcript, p338-339) After Tapia shot Medina in the head, Martinez eventually pulled Tapia away and they drove away from the scene where they were apprehended a short time later. (Trial Transcript, p344, 1390-91) Tapia was still in possession of the gun at the time of arrest and tried to discard it as he was ordered out of the car. (Trial Transcript, p709) Martinez was not found with any weapon, but had three live rounds (unused bullets) in his pocket. (Trial Transcript, p682)

In separate prosecutions, Tapia and Martinez were both charged with first-degree murder with intent and after deliberation. Martinez's jury trial occurred on April 8 – 18, 2008. (Trial Transcript, p1 - 1434) It was undisputed at trial that Tapia fired the fatal shot to the deceased with Martinez simply standing in the vicinity. (Trial Transcript, p1049, 1053) Out-of-earshot of the jury, the prosecution conceded to the trial court and defense counsel that "everybody in the room knows that we believe that between Joe Martinez and Gabriel Tapia, Tapia's a much bigger bad guy." (v:4/11/06, p88) Even the district court professed its belief that Tapia was "more culpable." (v:4/11/06, p94) Nevertheless, the State prosecuted Martinez for

complicity in first-degree murder, which punishes Martinez just as harshly as if he fired the shot that killed the deceased. (v1, p392, 396)

The defense to the first-degree murder charge was that Tapia was the shooter (undisputed) and Martinez did not share Tapia's intent to kill the deceased with the final, fatal shot to the head. With respect to the events leading up to the final shot, however, Martinez was precluded from properly litigating the affirmative defenses of self-defense and defense against an intruder because the trial court excluded evidence of the Medina's violent history with Sayesva, the primary occupant of the dwelling. The trial court also effectively precluded the defense from informing the jury that Medina had threatened to come over and slice up everybody in the house. The court also erroneously instructed the jury on the time interval required to form intent after deliberation, thereby lessening the district attorney's burden of proof on that element of first-degree murder and whether or not Martinez was complicit in any murderous intent. At the end of the trial, the jury found Mr. Martinez guilty as charged of first-degree murder with intent—after deliberation. (Trial Transcript, p1428-34; v2, p379) The court sentenced Mr. Martinez to the mandatory life sentence without the possibility of parole. (v:1/30/09, p5)

It is noteworthy that the district attorney also charged Sayesva with first degree murder, and then refused to dispose of that charge against Sayesva until after the

conclusion of this case, thereby rendering Sayesva unavailable to testify to her knowledge of the events preceding the shooting (based on her Fifth Amendment right to avoid self-incrimination in her own case). After the jury found Martinez guilty in this case, the district attorney offered Sayesva a very favorable plea bargain, which she accepted. (v:1/23/09, p19-20, 62; Trial Transcript, p507) Therefore, if this court concludes that retrial is the appropriate remedy pursuant to Issue I, Sayesva would no longer have any Fifth Amendment right to refuse to testify. If, pursuant to Issue II, this Court determines that insufficient evidence existed that Martinez was complicit in Tapia's final, fatal shot to the head, then re-trial on the first-degree murder charge will be prohibited based on the prohibition against double jeopardy.

SUMMARY OF THE ARGUMENT

Under the plain error standard of review, the Court of Appeals correctly concluded that the instructional error concerning the time interval for deliberation was obvious, but incorrectly concluded that there was no "reasonable possibility that the instruction contributed to the defendant's conviction." (Opinion, p17) The Court's analysis was faulty, however, because it unreasonably conflated evidence of Tapia's intent with that of Martinez. That Court also assumed, without supporting evidence, that any intent or deliberation connected to the first round of non-fatal shots necessarily extended to Tapia's firing of the fatal shot to the head.

The evidence overwhelmingly proved that Tapia fired the fatal shot, so the prosecution's murder case against Martinez depended on complicity liability. As discussed below, however, the evidence was neither substantial nor sufficient to support a conclusion by a reasonable person that Martinez was liable either as a principal or complicitor for first-degree murder after deliberation beyond a reasonable doubt.

ARGUMENT

I. The trial court committed reversible, constitutional error by giving the jury a legally erroneous instruction on the time interval for deliberation, thereby lessening the prosecution's burden of proving deliberation necessary for first-degree murder. The Court of Appeals erred in "perceive[ing] no reversible error."

This issue concerns Instruction No. 12, which read as follows:

"The only time requirement for deliberation and premeditation is an interval sufficient for one thought to follow another. The length of time required for deliberation need not be long." (v2, p394, attached as "Appendix A") (hereafter referred to as the "time interval" instruction)

A. Standards of review

1. Issue preservation

At trial, defense counsel specifically objected to the time interval instruction, pointing out that the stock instruction defining "after deliberation" was already

tendered. Defense counsel stated, "**Well, Judge, concerning the act, the length of time required for deliberation need not be long, we are objecting to that.**" . . . "**They can certainly make that argument, but I do not think it's appropriate to give another instruction that further defines deliberation.**" (emphasis added) (Trial Transcript, p1084) The court then asked about "[t]he premeditation interval" and defense counsel replied that she would "make the same argument." (Trial Transcript, p1085) Defense counsel later argued that "the pattern instruction of after deliberation would be appropriate" instead of the time interval instruction. (Trial Transcript, p1090-91, 1304) In its motion for new trial, the defense restated its previous objection, specifically using the term "erred":

> 35. The Court erred in instructing the jury with the further definition of "after deliberation" when it was already defined in the jury instructions. This definition was unnecessary and prejudicial as it further limited the element of "after deliberation."

(*See* Appendix B)

Thus, the objection was preserved both at trial and in the post-trial motion for new trial.

The State has conceded that the time interval instruction was given "over defense objections" but argued to the Court of Appeals that those objections were insufficient to alert the trial court to the legal error. (*See* State's Answer Brief in Court of Appeals, p32, attached as "Appendix C") The Court of Appeals agreed that

the defense "objected" to the time interval instruction, but concluded that the objection was based on grounds other than those raised on appeal, because trial counsel did not proffer the cases holding that use of the time interval instruction was constitutional error. (*See* Court of Appeals ("COA") Opinion, p15-16)

Martinez disagrees that the defense objections were insufficient to alert the trial court that the time interval instruction was legally objectionable. In *Key v. People*, 715 P.2d 319, 321 (Colo. 1986), the defense made a similar objection to the one made in this case, arguing that the time interval instruction "contradicted the statutory definition of 'after deliberation' and effectively lowered the prosecution's burden of proving deliberation as an element of first-degree murder." Although the defendant in *Key* did not use the terminology, "legally erroneous" or "an incorrect statement of the law," this Court did not fault Key for failing to alert the trial court to the fact that giving the instruction would amount to constitutional error, despite the fact that the time interval language had been disapproved in earlier decisions by this Court. *Key*, 715 P.2d at 322 (discussing the Court's earlier disapproval of the time interval language in *People v. Sneed*, 514 P.2d 776 (1973)).

Here, the defense clearly objected to the time interval instruction and pointed out that it deviated from the committee-approved pattern jury instruction defining

deliberation as the exercise of reflection and judgment and explaining that a pre-meditated act is never one which has been committed in a hasty or impulsive manner. As in *Key*, the defense objection was sufficient to put the trial court on notice that it should further research whether there was case authority concluding that it is error to limit the time interval for deliberation beyond the language used in the pattern (and correct) definition of deliberation.

2. Standard of review and reversal

Instructing the jury in a first-degree murder case using the disapproved time interval language is error of constitutional dimension. *See Key v. People*, 715 P.2d 319, 322-23 (Colo. 1986) (concluding that instruction stating "time requirement for deliberation within the meaning of first degree murder statute is an interval sufficient for one thought to follow another" was constitutional error). Error of constitutional dimension requires reversal unless the error was harmless beyond a reasonable doubt. *Id.* In the context of an erroneous instruction on a culpable mental state, a reviewing court considers two factors to determine whether the error was harmless beyond a reasonable doubt: first, the court reviews the jury instructions as a whole to ascertain whether—despite the erroneous instruction—the jury must have found that the defendant acted with the required mental state; and second, the court reviews whether evidence on the issue of *mens rea* was overwhelming. *Id.*

Regardless of whether the defense properly preserved the error for constitutional harmless error analysis, however, the constitutional error here was reversible error under any standard of review. Under the plain error standard of review, the error was both obvious and substantial. A reasonable possibility exists that the error contributed to Mr. Martinez's conviction, as argued below. *See People v. Sweeney*, 78 P.3d 1133 (Colo. App. 2003).

B. <u>Proceedings below</u>

During the colloquy on the jury instructions, the court referred to each instruction individually and asked whether there were any objections. Defense counsel objected to the time interval instruction (Instruction No. 12) as follows:

> "THE COURT: Deliberation.
>
> [DEFENSE COUNSEL]: Judge, could you read that instruction because I have two different ones.
>
> THE COURT: Okay. I have the element of deliberation requires that the decision of the act is made after the exercise of reflection.
>
> [DEFENSE COUNSEL]: Well, Judge, concerning the act, the length of time required for deliberation need not be long, we are objecting to that. I asked the prosecution if they had a case on point, but we just gave an instruction that defines after deliberation, which is from the stock of jury

instructions. They can certainly make that argument, but I do not think it's appropriate to give another instruction that further defines deliberation.

THE COURT: The premeditation interval.

[DEFENSE COUNSEL]: I would object and make the same argument.

THE COURT: Read the second instruction on that. What is the prosecution relying on for those two instructions?

[PROSECUTION]: There is, Judge, there is case law that supports these areas both given in the Tapia case. The first one was Instruction No. 13, second one was Instruction No. 14. Mr. Turner is the one who has the case law and I expect him to provide that for us fairly shortly. What I would ask is that the Court reserve judgment on admitting or denying these motions until we have the opportunity to present the cases to the Court and counsel.

THE COURT: So 12 -- and so 12 and 13 we have an objection." [6]

---

[6] The prosecution originally tendered two separate time interval instructions: tendered Instructions No. 12 (addressing deliberation) and No. 13 (addressing premeditation). Those two instructions were eventually combined into final Instruction No. 12 (addressing both deliberation and premeditation) and the remaining instructions were renumbered accordingly. (*see* Trial Transcript, p1303-1306)

(Trial transcript, p1084-1085) Later during the jury instruction conference, the following colloquy occurred:

> [PROSECUTION]: Judge, I do have two cases to cite in connection with the deliberation instruction that have been submitted. The problem is I'm having difficulty reading somebody's handwriting. The first case is 426 P.2d 765, it's B-r-a.
>
> [PROSECUTION #2]: Bradley versus People, Judge.
>
> [PROSECUTION]: Bradley versus People.[7]
>
> [DEFENSE COUNSEL]: What was the cite again?
>
> [PROSECUTION]: 426 P.2d 765. The second case is Hinton versus People. 458 –[8]
>
> [DEFENSE COUNSEL]: But, Judge, these are all taken out of the annotations in the statute. Clearly the law is now and has been recently that deliberation requires enough time for one thought to follow another. That's what those cases say.
>
> [PROSECUTION]: To finish the cite it appears to be 458 P.2d 611.

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[7] *Bradney v. People*, 162 Colo. 403, 405, 426 P.2d 765, 767 (Colo. 1967) (using time interval language in its discussion of whether trial evidence of deliberation was sufficient to sustain conviction but not approving time interval language as a jury instruction).

[8] *Hinton v. People*, 169 Colo. 545, 551, 458 P.2d 611, 613 (Colo. 1969) (same).

THE COURT: 611?

[PROSECUTION]: Yes.

[DEFENSE COUNSEL]: Thank you.

THE COURT: Okay. We will look at those cases and there is an objection to those, but we have no objection to this in the stack that I'm looking at."

(Trial Transcript, p1090-1091)

The trial court acknowledged defense counsel's continuing objection to prosecution-tendered Instructions No. 12 and 13, stating, "We have objections possibly to 2, 11, 12, 13, 15, 16, 17, 18, 19." (Trial Transcript, p1091; *see* this Brief, *supra*, fn 6) The next day, defense counsel also argued that giving two separate time interval instructions was unnecessary and unduly highlighted the time interval language. (Trial Transcript, p1303) The court concluded that tendered instructions No. 12 (time interval instruction for "deliberation") and No. 13 (time interval instruction for "premeditation") should be combined into a single instruction, which the jury received as Instruction No. 12. (*See* Appendix A)

The trial court concluded that it was proper to give the jury the time interval language, stating, "These instructions are accurate. I agree that they should be combined into one instruction. . . ." (Trial Transcript, p1303) Toward the end of the

discussion, defense counsel reiterated her objection once more, arguing that the pattern jury instruction defining "deliberation" was the only appropriate language to send to the jury:

> "[DEFENSE COUNSEL]: Judge, just for the record I mean I understand the case law, but we believe that the pattern instruction of after deliberation would be appropriate. I understand the Court's ruling." (Trial Transcript, p1304)

The time interval instruction was tendered by the district attorney, who therefore had an obligation to research the continuing validity of its own proffered instructions. Nevertheless, the Court of Appeals opted to fault defense counsel for failing to make a more artful objection. In doing so, the Court focused on defense counsel's statement that "[c]learly the law is now and has been recently that deliberation requires enough time for one thought to follow another. That's what those cases say." (COA Opinion, p15 – 16)

The Court interpreted this statement as an incorrect concession of the legal validity of the time interval instruction, concluding, "Because defense counsel conceded, albeit incorrectly, that the second instruction was a correct statement of the law, we conclude that defendant did not object in the trial court on the same basis he now asserts on appeal." (COA Opinion, p15 -16) But defense counsel never

conceded that the proffered time interval instruction was a correct statement of the law as an instruction to the jury.

Instead, defense counsel simply conceded that deliberation clearly requires "enough" time for one thought to follow another. In fact, the stock instruction defines deliberation as requiring enough time for reflection and judgment, which logically could not occur in less time than it takes for one thought to follow another. But this is not what the district attorney's tendered time interval instruction stated. Here, the district attorney's instruction stated that, "The ***only*** time requirement for deliberation and premeditation ***is an interval sufficient for one thought to follow another.*** The length of time for deliberation need not be long." (*See* Appendix A) (emphasis added)

Conceding that deliberation necessarily requires "enough" time for one thought to follow another is **not** tantamount to conceding that the "only" time requirement for deliberation and premeditation is an interval sufficient for one thought to follow another. The Court of Appeals erroneously conflated the defense argument with the significantly different language of the tendered time interval instruction that was based on cases discussing deliberation in the context of a challenge to the sufficiency of the evidence proving deliberation. While a more artful objection would have included reference to the holdings of *Key* and *Sneed*, defense counsel never conceded that the

district attorney's proffered instruction was a "correct statement of the law," especially as an instruction to the jury. Instead, defense counsel objected on numerous occasions to the use of that language as a jury instruction because it altered the definitions of deliberation and premeditation from the language as stated in the stock definitional instructions.

C. Law and analysis

Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution an accused may not be convicted of a criminal offense "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364 (1970). It is the duty of the trial court to properly instruct the jury on all matters of law, and instructions which fail to correctly define the elements of an offense charged, so that the jury may decide whether they have been established beyond a reasonable doubt, are constitutionally deficient. *Id.* Here, under its theory of complicity liability, the prosecution's burden included proving beyond a reasonable doubt that both Martinez and the co-defendant, Tapia, possessed the culpable mental state required by the applicable statute. (*See* v2, p396: Instruction No. 14 on complicity) *People v. Mattas,* 645 P.2d 254 (Colo. 1982).

First-degree murder after deliberation is a specific intent offense that requires the prosecution to prove beyond a reasonable doubt that the defendant formed an intent to kill *after* deliberation. *People v. Harlan*, 8 P.3d 448, 474 (Colo. 2000). The legislature has defined "after deliberation" as follows:

"(3) The term 'after deliberation' means not only intentionally but also that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act. An act committed after deliberation is never one which has been committed in a hasty or impulsive manner." Section 18-3-101(3), C.R.S. 2012.

In *Harlan, supra*, this Court held, "What makes the mental state required for first degree murder distinctive, therefore, is the context in which the intention is formed-namely, 'after the exercise of reflection and judgment.'" *Harlan*, 8 P.3d at 474 & fn 15 (finding "additional support for this proposition" in *Key v. People*, 715 P.2d 319, 322 (Colo. 1986)).

In *Key v. People*, 715 P.2d 319, 322-23 (Colo. 1986), this Court explained that it had disapproved the "interval sufficient for one thought to follow another" language as early as 1973 in *People v. Sneed*, 183 Colo. 96, 514 P.2d 776 (1973). *See also, People v. Grant,* 174 P.3d 798, 810 (Colo. App. 2007)(*citing Sneed* and *Key*).

This Court explained that "after deliberation" meant that "between the forming of the intent to do the act and the act itself, an appreciable length of time must have elapsed to allow deliberation, reflection and judgment . . . A premeditated act . . . is never one which has been committed in a hasty or impulsive manner." *Id.* This Court concluded that the time interval instruction was constitutional error, but that it was harmless beyond a reasonable doubt in *Key* due to overwhelming evidence of deliberation. *Id.*

Here, there was no overwhelming evidence of deliberation, especially with respect to Martinez. The district court dismissed a conspiracy to commit murder count prior to trial due to lack of evidence of any pre-conceived plan to kill the deceased. (Trial Transcript, p1045) And, as conceded by the prosecutor, the trial evidence did not overwhelmingly support any single theory of who fired the first round of non-fatal shots at the deceased and under what circumstances. . (Trial Transcript, p1363). Thus, the strongest evidence of any deliberation was with respect to Tapia's final, fatal shot to the deceased's head.

For Martinez to be complicit in Tapia's fatal shot to the deceased's head, he must have had knowledge that the principal (Tapia) intended to commit the crime, must intend to promote or facilitate the commission of the offense, and must aid, abet, advise, or encourage the principal in the commission or planning of the crime.

Bogdanov v. People, 941 P.2d 247, 253-54 & n.10 (Colo. 1997), *modified* 955 P.2d 997 (Colo. 1997), *disapproved of on other grounds by Griego v. People*, 19 P.3d 1 (Colo. 2001).

Here, however, there was insufficient evidence that Martinez, in particular, ***deliberated*** before Tapia fired the final, fatal shot to the head that killed the deceased. Likewise, there was insufficient evidence that Martinez ever ***intended*** for Tapia to fatally shoot the deceased in the head or even ***knew*** that Tapia intended to do so. The prosecution conceded that Tapia fired the fatal shot. (Trial Transcript, p1364) There was no evidence in the record (overwhelming or otherwise) that Martinez ever encouraged Tapia to fire the fatal shot. The defense expert crime scene analyst testified that in his opinion, only one person dragged the deceased to the street by the leg. (Trial Transcript, p1215) No witnesses ever saw the defendant close to the deceased's legs/feet and Tapia was positioned at the deceased's feet when he fired the fatal shot. Therefore, there was insufficient evidence that Martinez even assisted in dragging the deceased to the street where the fatal shot occurred.

The strongest evidence of anything connecting Martinez to the final shot was the fact that he was standing somewhere in the vicinity of the deceased's head when the shot was fired. (Trial Transcript, p1045-47, 1369) But mere presence in the vicinity of the deceased is far from overwhelming evidence of complicity in first-degree murder. *See generally, Feltes v. People*, 178 Colo. 409, 416, 498 P.2d 1128, 1132

(Colo. 1972) (mere proof of defendant's presence at party with opportunity to possess marijuana insufficient to convict); *People v. Chavez*, 190 P.3d 760, 769 (Colo. App. 2007) (jury instructions must convey that mere presence at the scene of a crime is insufficient for a finding of guilt). Because there was no overwhelming evidence that Joe Martinez formed an intent to kill the deceased after deliberation, the unconstitutional time interval instruction cannot be harmless beyond a reasonable doubt.

On this point, the Court of Appeals erred in its perception that the constitutional error was not reversible error in this case. (COA Opinion, p14) As discussed previously, the Court of Appeals acknowledged that defense counsel twice objected to the time interval instruction at trial, but concluded that the objection did not preserve the issue for harmless error analysis. (Opinion, p15-16)

In the motion for new trial, however, the defense specifically used the term "erred":

> 35. The Court erred in instructing the jury with the further definition of "after deliberation" when it was already defined in the jury instructions. This definition was unnecessary and prejudicial as it further limited the element of "after deliberation."

(*See* Appendix B)

The district court's written order proves that the defense objection was sufficient to put the court on notice of the error when the court actually took the time

to research the propriety of the time interval language in the context of jury instructions. The court acknowledged its error in the written order, concluding that "the instruction was improper pursuant to the holding of *Key v. People*, 715 P.2d 319 (Colo. 1986)." The district court then applied the standard of review for preserved error of constitutional dimension (harmless beyond a reasonable doubt) but concluded it was harmless based on overwhelming evidence of deliberation with respect to co-defendant Tapia's actions. The district court's analysis was misguided, however, given that there was no overwhelming evidence that Martinez shared Tapia's intent or deliberation at the moment of the fatal shot.

Here, the district attorney made assurances to both defense counsel and the trial court that "case law" supported the court giving the time interval instruction in this case (and the co-defendant Tapia's case). Defense counsel never withdrew her objection, she simply explained that deliberation did indeed require sufficient time for one thought to follow another. This is factually correct. If not enough time passes for one thought to follow another, then there can be no deliberation (or premeditation). But that is not all that deliberation and premeditation require. Deliberation requires that an appreciable length of time must have elapsed to allow deliberation, reflection and judgment. Premeditation requires that the act is never one that is committed in a hasty or impulsive manner.

The Court of Appeals attempted to force responsibility on defense counsel for failing to put the trial court on notice of the more recent cases disapproving of the language used in the prosecution-tendered older cases, but it was the district attorney that made assurances about the validity of the "case law" upon which it relied. The prosecutors should have checked the continuing validity of their own tendered authority before making such assurances, especially given that the tendered language deviated from the stock instructions defining deliberation.

Under the incorrect plain error standard of review, the Court of Appeals concluded (correctly) that the instructional error was obvious, but incorrectly concluded that there was no "reasonable possibility that the instruction contributed to the defendant's conviction." (Opinion, p17) The Court explained its reasoning as follows:

> "[I]n our view there was ample evidence in this case that the victim was shot after deliberation of an appreciable length of time. Here, the evidence established that the victim was shot several times while in the yard, fracturing his right leg, rendering his right arm useless, and causing him to fall to the ground. The victim was then dragged from the yard into the street where defendant and Tapia stood over the victim and yelled obscenities at him. At that point, Tapia shot the victim in the head. Even assuming, though highly unlikely, that the shots fired in the yard were inadvertent, there is certainly evidence of an appreciable length of time between the first shots and the fatal shot. That is, sufficient for several neighbors in the early morning hours to be alerted by the first shots and get to a position to hear the shouts of profanity from both defendant and Tapia and to observe the firing of the fatal shot." (Opinion, p19)

One major problem with this analysis is that it conflates evidence of Tapia's intent with that of the defendant, Martinez. Even assuming, *arguendo*, that Tapia's final shot was executed with intent and after deliberation, overwhelming evidence did not exist to prove that Martinez was complicit in Tapia's ultimate act of shooting the deceased in the head. (*See* Opening Brief, p38 – 41) *Compare, e.g., Key v. People*, 715 P.2d 319, 324 (Colo. 1986) (concluding that overwhelming evidence of deliberation existed after defendant himself shot victim four times in the head, mashed his head with a rock, and drove over his head with a truck). There is no direct evidence in the record proving that Martinez was complicit in Tapia's decision to execute the final shot to the head. There is no evidence that Martinez verbally or non-verbally encouraged this final act in any manner. The complicity theory is purely circumstantial.

The other major problem with the Court of Appeals' analysis is that it assumes that any intent or deliberation connected to the first round of non-fatal shots necessarily extended to Tapia's firing of the fatal shot to the head. The trial evidence, however, does not support this assumption. If Tapia had intended to kill the deceased from the beginning of the encounter, then he could have shot the deceased in the head during the first series of shots. Instead, the first series of shots were fired into the deceased's body in a manner that suggests the intent was merely to

incapacitate him. In contrast, it appears that Tapia fired the final shot acting on an impulse of self-congratulatory bravado. It is not at all clear that Martinez even *knew* that Tapia would fire the fatal shot, much less that he was complicit in the firing of the final shot.

With respect to Martinez, the jury could have misused the erroneous time interval instruction to incorrectly assume that, even if Martinez did not know in advance that Tapia intended to shoot the deceased in the head, once Tapia took aim at the deceased, there was sufficient time for one of Martinez's thoughts to follow another before Tapia fired the gun, even if Martinez did not have sufficient time to reflect upon what Tapia was doing. Based on the fact that Martinez did not prevent the final shot to the deceased's head, the jury may have incorrectly assumed that he shared Tapia's "intent after deliberation" when there was insufficient time for Martinez to reflect on Tapia's final impulsive act until it was too late. Because the evidence does not prove beyond a reasonable doubt that Martinez shared Tapia's ultimate culpable mental state when Tapia impulsively fired the fatal shot to the deceased's head, there was a reasonable possibility that the erroneous time interval instruction contributed to Martinez's guilty verdict. Under either standard of review, therefore, the instructional error mandates reversal.

II. The evidence was insufficient to support the first-degree murder conviction.

A. Standards of review

1. Issue preservation

At trial, defense counsel moved for judgment of acquittal at the close of the prosecution's case-in-chief. (Trial Transcript, p1044-1047) Defense counsel argued that, while a motion for judgment of acquittal is normally a perfunctory motion that counsel makes in order to preserve the record, that "this case is very much different than most cases." Defense counsel argued that the evidence was insufficient to send the first-degree murder charge to the jury for the following reasons: Tapia was undisputedly the shooter of the final, fatal shot to the head; there was no evidence that Martinez did anything to aid, encourage, or assist Tapia in the final shot; the conspiracy to commit murder count was dismissed at the preliminary hearing because probable cause did not exist to proceed on the theory that there was a preconceived plan to murder Medina; there was no evidence from any eyewitness or physical evidence or any other evidence showing that Martinez assisted Tapia in dragging Medina from the yard to the street where the final shot occurred; and the only eyewitness to the final shot (Mr. Albanese) testified that Martinez was standing about three feet away from Medina's head when Tapia fired the fatal shot into Medina's

head, but that Martinez was not doing anything to encourage it—he did not waive his arms or encourage Tapia in any way to shoot Medina. (Trial Transcript, p1044-1047)

The prosecutor argued that the trial court should deny the motion because: "the gun that was used in this case came from Martinez's girlfriend, not from Mr. Tapia's girlfriend"; "[b]etween the time the defendant decided to go to that location they were able to obtain bullets and load it"; "[t]he bullets that the item took to load it was bullets that were found in the possession of Mr. Martinez at the time the vehicle was stopped"; "when the vehicle was stopped, they had the murder weapon, which was found under the car, which we know fired the fatal bullets"; the jury could infer that two people may have dragged Medina's body to the street; neighbors testified that they heard arguing and then a series of shots and then one party said we need to get the hell out of here and the other party saying well we got the M Fer; and one neighbor testified that, prior to the fatal shot, the man standing at the head of Medina stated "that will teach you to come into my yard. Do you see what you get." (Trial Transcript, p1048-1049)

The trial court denied the defense motion, concluding:

> "It is certainly true that the evidence points to Mr. Tapia being the person that pulled the trigger. However, the evidence also certainly does place this defendant a few feet from the head of the victim at the time of the fatal shot. That a person certainly could when viewed in the light most favorable to the prosecution the jurors certainly could conclude that it would take two people to drag Mr. Medina out into the street

> from the yard and certainly a juror could believe testimony of a neighbor that the statement was made that we got him. Then certainly a juror could find beyond a reasonable doubt that this defendant was involved in this homicide."

(Trial Transcript, p1049-1050)

Thus, while the trial court concluded that Mr. Martinez "could have been involved in this homicide," (or at least the events leading up to the homicide) the trial court never concluded that a reasonable juror could find beyond a reasonable doubt that Martinez knew that Tapia intended to fire the fatal shot into Medina's head and, after deliberation, intended for Tapia to kill Medina in that manner.

Mr. Martinez raised this issue in the Court of Appeals. (*See* Issue V of Amended Opening Brief to that court). The Court of Appeals erroneously concluded that the evidence was sufficient to affirm the conviction. (*See* Opinion, p21-22)

2. Standard of review and reversal

An appellate court reviews *de novo* whether the evidence before the jury was sufficient to sustain defendant's conviction and must determine "whether the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt.." *Clark v. People*, 232 P.3d 1287, 1281 (Colo. 2010).

B. Proceedings below

At a conference outside of the jury's hearing, defense counsel argued that the district attorney should be precluded from contradicting the arguments he made characterizing Tapia's culpability in Tapia's first-degree murder trial. The district attorney conceded on the record that, during Tapia's trial, he argued that it was clearly Tapia who fired the final, fatal shot, and argued that it was most likely Tapia who fired all of the preceding shots. The prosecutor explained,

> "I argued at the time at Mr. Tapia's trial I thought was clear that he fired the fatal shot and that there was some argument about whether he fired the shots up by the house. I did argue, well, do you think they passed the gun back and forth. What we do know for sure, he fired the fatal shot in the street. I've not changed my opinion on that. I think he fired the fatal shot in the street. I don't intend to argue different than that." (Trial transcript, p1053)

The reason that Tapia and Martinez would have needed to "pass[] the gun back and forth" if Tapia alone were not responsible for all of the shooting is because all of the bullets removed from Medina's body came from the same gun—the one that Tapia used to fire the fatal shot. (Trial Transcript, p1367) At Tapia's trial, therefore, the prosecution attempted to convince the jury that Tapia alone fired all of the shots by rhetorically asking whether the jurors believed that Tapia and Martinez passed the gun back and forth during the few seconds that it took to fire the first series of shots in the yard.

At the co-defendant Tapia's trial, the prosecutor apparently did not argue that it was Martinez's intention to kill Medina from the beginning of the encounter (or that he was the only person with a motive to do so.) Instead, the prosecutor explained that,

> "It didn't make any difference who made or fired the shots up there [at the house]. We don't know who fired the shots and nothing I said indicates any different." (Trial Transcript, p1054)

Later the prosecutor conceded that "I don't know who took the gun outside initially. I don't know who fired the shots up by the porch." (Trial Transcript, p1078-1079) These concessions were made outside of the presence of the jury, although the district attorneys admitted in closing argument that they did not know who fired the first series of shots and he didn't know what happened. (Trial Transcript, p1397)

> "Now, what happened outside during that period of time? Initially, we can't tell you for sure because nobody saw what took place with these initial five or six shots. Everybody heard them, but there were no eyewitnesses to those shots. But there are a number of things that witnesses have told you and the witness' statements have all been consistent. These have to do with what happened after Mr. Medina was drug from the front yard out to the gutter."

(Trial Transcript, p1363)

Despite this concession that it was unclear who fired any of the shots and under what circumstances, except for the final fatal shot fired by Tapia, the prosecutor argued in closing that Tapia had no motive to shoot the victim without

Martinez's urgings because Tapia had "no dog in this fight." (Trial Transcript, p1399,1417) This argument was arguably made in bad faith, however, since the prosecution was aware that Medina had threatened to slice up everyone in the house, which included Tapia, but the jury was not allowed to know of Medina's threat.

The district attorneys also had to concede that it was unclear ***who*** was yelling at Medina after he was dragged from the yard. In closing, the prosecutor could only argue that "one of the people" and "somebody" was heard yelling obscenities at Medina before Tapia fired the fatal shot: "He heard ***one of the people*** say get the fuck up" . . . "Mr. Alcon heard ***somebody*** say get the fuck up. I'm going to fuck you up" . . . "Vicky Caduff heard ***somebody*** say I'm going to put a bullet in your head" . . . "Matt Cordova heard ***somebody*** say I got that mother fucker." (Trial Transcript, p1364) (emphasis added) The district attorney did not have a sufficient good faith basis to even argue that it was Martinez, in particular, who yelled these statements at Medina. Clearly, then, reasonable doubt existed that it was Joe Martinez who was doing the yelling.

The prosecutor then erroneously suggested that Martinez was guilty as a complicitor to first-degree murder if he acted as the get-away driver (accessory after the fact) knowing that Tapia possessed the murder weapon:

"How many times does a guy have to be shot before he realizes Mr. Tapia had a gun and he's aiding him and he's aiding himself by getting away from that particular area?" (Trial Transcript, p1413)

C. Law and analysis

The Due Process Clauses of the United States and Colorado constitutions prohibit criminal conviction except on proof of guilt beyond a reasonable doubt on each of the essential elements of the crime. *People v. Gonzales,* 666 P.2d 123 (Colo.1983). Proof beyond a reasonable doubt is proof that would lead a reasonable person to act without hesitation in matters of importance to himself. *COLJI–Crim.* No. 3:04. In *Jackson v. Virginia,* 443 U.S. 307, 320 (1979), the Supreme Court discussed the level of evidence necessary to sustain proof beyond a reasonable doubt. "Any evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, *cf.* Fed.R.Evid. 401—could be deemed a 'mere modicum.' But it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt."

A challenge to the sufficiency of the evidence requires a reviewing court to determine whether the evidence, both direct and circumstantial, when viewed as a whole and in a light most favorable to the prosecution, is substantial and sufficient to

support a conclusion by a reasonable person that the defendant is guilty of the charge beyond a reasonable doubt. *People v. Gonzales, supra*; *People v. Bennett,* 183 Colo. 125, 515 P.2d 466 (1973). The evidence here overwhelmingly proved that Tapia fired the fatal shot, so the prosecution's murder case against Martinez depended on complicity liability. The evidence, however, was insufficient to support a jury determination that Martinez was liable either as a principal or a complicitor for first-degree murder after deliberation.

The Court of Appeals recently held that merely "being present there, and being associated with [the principal who fired the deadly shot] are insufficient to support a determination of complicity" for causing the death of the victim. *People v. Duran*, 272 P.3d 1084, 1092-1093 (Colo. App. 2011)(*citing United States v. Murray*, 988 F.2d 518, 522 (5th Cir. 1993) (mere presence and association are insufficient to sustain a conviction for aiding and abetting). Evidence that the defendant was "looking to start a fight" and knew that his associate had a gun was insufficient to prove that the defendant intended to facilitate or promote a later shooting. *Id.* Evidence that the defendant drove a get-away car *after* the fatal shooting was likewise insufficient to prove intent to aid, abet, advise or encourage the principal in firing the fatal shot. *Id.* (*citing People v. Green*, 884 P.2d 339, 344 (Colo. App. 1994) (later discovery that the principal committed a crime cannot provide a basis for complicity liability).

For the same reasons that the evidence was insufficient to support the reckless manslaughter conviction in *Duran* based on principal or complicity liability, the evidence here was insufficient to support the defendant's conviction for first-degree murder after deliberation. The Court of Appeals, however, incorrectly held that "we disagree with defendant's contention that the evidence was insufficient to convict him of after deliberation first degree murder either as a principal or complicitor." (Opinion, p19)

First, with respect to principal liability, both the prosecution and the Court of Appeals itself acknowledged that the eyewitness testified that Tapia, and not the defendant Martinez, fired the final, fatal shot to the deceased's head. (Opinion, p1-3) It was undisputed at trial that Tapia fired the fatal shot to the deceased with Martinez standing in the vicinity. (Trial Transcript, p1049, 1053) Thus, any conclusion that the evidence was sufficient beyond a reasonable doubt to convict Martinez of first-degree murder ***as the principal***[9] was clearly erroneous.

Second, with respect to complicity liability, the Court of Appeals erred and applied the wrong standard of review. While the Court was correct in noting that it must review the evidence "in the light most favorable to the prosecution and give[] it

[9] For purposes of this argument, the Petitioner assumes "principal" to mean "the one who, with the requisite mental state, engages in the act or omission concurring with the mental state which causes the criminal result." *See* BLACK'S LAW DICTIONARY 1192 (6th ed. 1990) (defining "*Principal in the first degree*").

the benefit of every reasonable inference," the Court forgot that in doing so, it must still conclude its analysis with the substantial evidence test. (*See* Opinion, p19)

In order to conclude that Martinez acted with the intent to promote or facilitate the commission of first-degree murder, the Court of Appeals merely ***assumed*** that Martinez knew and intended for Tapia to kill the deceased based on a series of factual findings that do not pass the substantial evidence test. (*See* Opinion, p21-22) Nothing in the Court's first eleven findings proves beyond a reasonable doubt that Martinez even knew that Tapia would fire the fatal shot. The Court found:

> "(1) the victim was shot five times while he was in the yard; (2) the initial five shots were not fatal, but they would have rendered the victim helpless; (3) the victim weighed approximately 180 pounds; (4) it would have been difficult to drag the victim by the legs because of the fracture injury to his right leg; (5) the victim was still alive when he was dragged from the yard to the street; (6) both defendant and Tapia yelled obscenities at the victim before the latter shot him fatally in the head; (7) defendant lived, and was in a romantic relationship, with mother, the former wife of the victim; (8) the gun used to kill the victim belonged to mother and was a six-shot revolver; (9) in addition to the five shots to the victim, another bullet hole was discovered on the front porch, leading to a reasonable inference that the gun was reloaded before the victim was shot in the head; (10) bullets capable of being fired from the gun were found in defendant's pants pockets; (11) defendant was identified by one witness as the man standing near the victim's head; . . . (Opinion, p21-22)

Nothing about the initial conflict that resulted in the deceased's non-fatal gunshot injuries proved that Martinez realized that Tapia would execute the deceased after he was dragged out of the yard. The initial, non-fatal shots were fired out of a

perceived need to protect the premises and the people residing in the house. The initial shots were fired to "render[] the victim helpless" or at least to incapacitate him to the extent that he could not make good on his threat to slice up everyone in the house. The final shot was of a different character altogether.

The Court of Appeals assumed that Martinez had a stronger motive to kill the deceased than did the co-defendant, Tapia, because Martinez was in a romantic relationship with Sayesva. This suggests a theory that Martinez was the mastermind of the murder and Tapia was his agent. The district court rightly rejected that notion, however, when it dismissed the conspiracy count at the preliminary hearing due to the lack of any evidence to support a conspiracy theory. Furthermore, it might be rational to assume that Martinez's relationship with Sayesva would have motivated him to seek to protect her, but no underlying motive is necessary to inspire irrational, impulsive behavior such as the final shot fired by Tapia.

Next, the Court found:

> "(12) another witness testified that the man standing near the victim's head said to the victim, prior to the final shot, 'see what happens when you mess with my house';" (Opinion, p22)

Concerning finding number 12, even assuming, *arguendo*, that Martinez or both men boasted about incapacitating the deceased prior to the fatal shot, nothing about this evidence proves beyond a reasonable doubt that Martinez shared Tapia's intent or

alleged deliberation to take the final step of fatally shooting the deceased in the head. The evidence does not prove beyond a reasonable doubt that the defendant had any knowledge that Tapia intended to shoot the deceased in the head, intended to promote or facilitate the shooting to the head, or that he aided, abetted, advised, or encouraged Tapia to shoot the deceased in the head. *See Bogdanov v. People*, 941 P.2d 247, 253-54 & n.10 (Colo. 1997), *modified*, 955 P.2d 887 (Colo. 1997) (explaining the requirements of proving complicity liability)(disapproved of on other grounds by *Griego v. People*, 19 P.3d 1 (Colo. 2001).

Even assuming, *arguendo*, that Martinez yelled belligerent statements at the deceased prior to the fatal shot, and even if Tapia *felt* encouraged to kill the deceased based on Martinez's belligerent attitude toward the deceased, this does not mean that Martinez intended to encourage the killing with his hostile yelling. Complicity is not proven by unintentional assistance or encouragement, but instead requires that the complicitor assists or encourages the commission of the crime committed by the principal "with the intent to promote or facilitate" the crime. *See Bogdanov*, 941 P.2d at 251. A verdict in a criminal case may not be based on guessing, speculation, or conjecture. *People v. Sprouse*, 983 P.2d 771, 778 (Colo. 1999); *People v. Duran*, 272 P.3d 1084, 1092 (Colo. App. 2011) (neither the defendant's acquiescence in his associates' confrontational and belligerent actions nor his knowledge that his associate had a gun

supports a determination that he intended to facilitate or promote a later shooting for purposes of complicity liability). Finally, the Court found:

> "(13) the victim drove Tapia from the scene of the crime; and (14) when questioned by the police, defendant denied any knowledge of the shooting." (Opinion, p22)

Findings 13 and 14 prove beyond a reasonable doubt that Martinez was an accessory after the fact—but in no way prove that he shared any intent, after deliberation, to kill the deceased at the moment that Tapia pulled the trigger. Providing transportation to another to assist that person in avoiding punishment for the commission of a crime is the very definition of "accessory to a crime"[10] but does not prove complicity. The fact that Martinez employed deceit in an attempt to distance himself from Tapia's impulsive act was less than admirable, but it is not probative of Martinez's mental state at the moment that Tapia shot the deceased.

Thus, while there may have been a modicum of purely circumstantial evidence to support the theory that Tapia and Martinez shared an intent to incapacitate the deceased by any means necessary, the circumstantial evidence was neither substantial nor sufficient to conclude that Martinez in particular ever deliberated or premeditated Tapia's final, impulsive act to shoot Medina in the head. The weak circumstantial evidence of complicity liability for first-degree murder in this case depends on

[10] *See* § 18-8-105(1),(2)(c), C.R.S., (defining accessory as "[p]roviding such person with . . . transportation . . . to be used in avoiding discovery or apprehension").

inference upon inference and simply does not pass the substantial evidence test. Mr. Martinez's conviction for the intentional murder of Mr. Medina after deliberation should be reversed and remanded for dismissal.

CONCLUSION

Therefore, if this Court concludes that the evidence in this case was insufficient to convict Mr. Martinez of first-degree murder with intent and after deliberation, then Mr. Martinez respectfully requests reversal of his conviction and sentence and remand for dismissal of the case. If this Court affirms the first-degree murder conviction, but concludes that the constitutionally erroneous "time interval" jury instruction was not harmless under the circumstances here, then Mr. Martinez respectfully requests reversal of his conviction and sentence and remand for a new trial.

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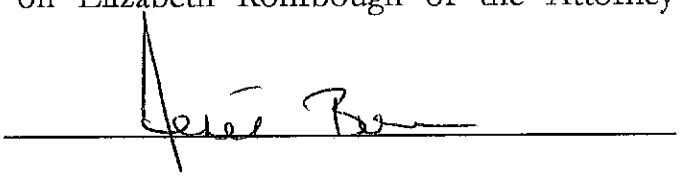
CERTIFICATE OF SERVICE

I certify that, on August 19, 2013, a copy of this Opening Brief was electronically served through ICCES on Elizabeth Rohrbough of the Attorney General's Office.



APPENDIX A

INSTRUCTION NO. 12

The only time requirement for deliberation and premeditation is an interval sufficient for one thought to follow another. The length of time required for deliberation need not be long.

APPENDIX B

30. A bill of particulars does not require the prosecution to state in detail particulars of its evidence as to each element of the charged offenses. Mr. Martinez requested specific, extremely limited and highly relevant information that was essential to enable him to prepare his defense for trial and to avoid prejudicial surprise at trial, which is actually what occurred.

31. A bill of particulars is necessary in order to provide the defendant with a statement of the evidence that the prosecution intends to present against him, and to limit the prosecution's proof at trial to those areas in the bill of particulars. *People v. District Court*, 603 P.2d 127.

32. In fact, the defense never was informed of what the district attorney's theory of prosecution was until the rebuttal closing.

33. At that point in time, the defense had absolutely no opportunity to rebut or challenge the theories that were expressed by the district attorney.

ERRORS IN INSTUCTIONS

34. The Court erred in allowing the prosecution the complicity instruction.

35. The Court erred in instructing the jury with the further definition of "after deliberation" when it was already defined in the jury instructions. This definition was unnecessary and prejudicial as it further limited the element of "after deliberation."

36. The Court did not allow the jury instruction on the victim's violent character as evidence that the victim was the initial aggressor. That instruction reads as follows:

> "You may consider evidence of the victim's character for violence when determining whether the victim would be likely to be the initial aggressor."

37. The authority for this instruction is the case of *People v. Jones*, 675 P.2d 9 (Colo. 1984), and C.R.E. 405(a).

38. Not only was the defense precluded from presenting this evidence to the jury, the Court denied the instruction, and the district attorney was allowed to argue, without any evidence to support it, that the victim was lured into the yard.

39. Evidence of Mr. Medina's violent character should have been admitted into trial and would have provided the jury with crucial evidence.

PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT

40. To safeguard a defendant's right to a fair trial, a prosecutor must stay within the limits of appropriate prosecutorial advocacy during closing argument. Domingo-Gomez v. People, 125 P.3d 1043 (Colo.2005); *see also* Harris v. People, 888 P.2d 259 (Colo.1995). For example, it is not proper for a prosecutor to refer to facts not in evidence or to make statements reflecting his or

APPENDIX C

a hasty or impulsive manner." (Instruction No. 11; v. 2, p. 393). The jury was also instructed, "The only time requirement for deliberation and premeditation is an interval sufficient for one thought to follow another. The length of time required for deliberation need not be long." (Instruction No. 12; v. 2, p. 394).

During an initial discussion of jury instructions after the prosecution rested, defense counsel objected that it was inappropriate to give the jury the additional instruction defining deliberation (trial-4/16/08, pp. 1084-85). After the prosecution gave case citations to support its position, defense counsel stated, "Clearly the law is now and has been recently that deliberations requires enough time for one thought to follow another. That's what those cases say" (trial-4/16/08, p. 1090). When jury instructions were discussed again after both sides had rested, the defense again objected that "having two separate instructions like this is unnecessary and unduly highlights this time period" (4/17/08, p. 1303; *see also* pp. 1306-1307). While the trial court gave both instructions over the defense objections, the prosecution did