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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	σ COURT USE ONLY σ
Douglas K. Wilson, Colorado State Public Defender SHANN JEFFERY, #28689 Senior Public Defender 1300 Broadway, Suite 300 Denver, CO 80203 PDApp.Service@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 12SC803

PETITIONER'S REPLY BRIEF

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CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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

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☒ It contains 4,813 words.

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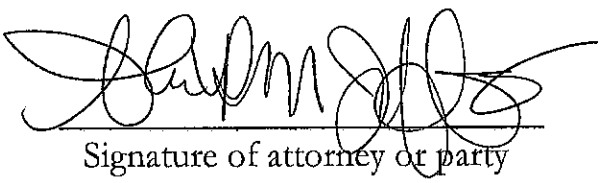

Signature of attorney or party

In response to the arguments and authorities raised by the Respondent in its Answer Brief, the Petitioner states as follows:

1. **The victim's violent past is relevant to the issues before this Court**.

In footnote 2, on page 2 of the Answer Brief, the Respondent argues that the victim's history of violence toward Sayesva and his children "has no relevance to the issues upon which this Court granted certiorari review." The petitioner disagrees. The victim's history of domestic violence is relevant to the likelihood that he was the initial aggressor or provocateur of violence in the yard. He had already announced over the phone that he intended to slice up everyone in the house, and the prosecution conceded that he was probably armed with a knife in the yard. (*See* Opening Brief, p3, 6, 7, fn5)

If the victim was the initial aggressor, or in any way provoked the initial gunfire that caused his non-fatal gunshot wounds, then this evidence is relevant to the character of the initial conflict in the yard and thus to the shooter's culpable mental state at that time. Against the backdrop of domestic violence, the inference is stronger that the initial gunfire was a reaction to the victim's provoking actions even if the jury concluded that the reaction was overzealous. The history of violence that existed between the victim and Sayesva supports the inference that the initial shooting was distinct in motive and different in character than Tapia's fatal shot to the victim's

head after the victim was dragged from the yard into the street. The distinction in character between the two different shooting episodes is relevant to both issues on appeal before this Court.

(REGARDING INSTRUCTIONAL ERROR)

2. Defense counsel objected to the time interval instruction as improperly altering the definition of deliberation and premeditation as defined in the pattern jury instruction

In discussing the standard of review on page 11 of the Answer Brief, the State argues that the court of appeals ***correctly*** concluded that since defense counsel had "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."

The court of appeals' conclusion is analytically flawed and misinterprets the record. It misinterprets the record because defense counsel never conceded that the holdings of *Bradney v. People*[1] and *Hinton v. People*[2] were "correct statements of the law" in the context of jury instructions. Instead, defense counsel stated that the prosecutor could attempt to convince the jury ***during argument*** that there was sufficient time

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[1] *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).

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

for deliberation in this case. Defense counsel stated, "They can certainly make that argument, but I do not think it's appropriate to give another instruction that further defines deliberation." (*See* Opening Brief, p16)

In the context of jury instructions, defense counsel argued ***against*** the application of *Bradney* and *Hinton* to justify the time interval language. Defense counsel argued, "But, Judge, these are 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." (*See* Opening Brief, p17) And, as discussed in the Opening Brief, to concede that "deliberation requires enough time for one thought to follow another" is not a concession that deliberation requires nothing more than that. If deliberation required nothing more, then the time interval instruction would not have contradicted the statutory definition of "after deliberation," and there would have been no grounds for a defense objection. (*See* Opening Brief, p19-21)

3. The time interval instruction was reversible error even under a plain error analysis

Even assuming, *arguendo*, that defense counsel's objection was insufficient to alert the trial court to the constitutional nature of the error, the trial court's error in giving the time interval instruction here requires reversal under a plain error analysis.

Plain error addresses error that is obvious and substantial and that so undermines the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction. *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005).

> To establish plain error with respect to jury instructions, the defendant must "demonstrate not only that the instruction affected a substantial right, but also that the record reveals a reasonable possibility that the error contributed to the conviction." Specifically, the court's failure to instruct the jury properly does not constitute plain error if the relevant instruction, read in conjunction with other instructions, adequately informs the jury of the law. Moreover, an erroneous jury instruction does not normally constitute plain error where the issue is not contested at trial or where the record contains overwhelming evidence of the defendant's guilt.

Id. (quoting *People v. Garcia*, 28 P.3d 340, 344 (Colo. 2001); citations omitted).

a. The error was obvious

In *Miller*, this Court explained that plain error must be both "obvious and substantial" and cited other cases holding that "plain" is synonymous with "clear" or "obvious." 113 P.3d at 750. Here, the error was obvious because it was directly contrary to long-established precedent from this Court since at least 1986, the year

this Court decided *Key*.[3] *See People v. Cook*, 197 P.3d 269, 275-76 (Colo. App. 2008) (error was obvious where the law was "both clear and long established"). The State

[3] It is arguable that the error has been obvious since this Court's holding in *People v. Sneed*, 514 P.2d 776 (1973). In *Sneed*, this Court disapproved of the time interval language ("the *Van Houton* language") in jury instructions and declared that the legislature intended to abandon the *Van Houton* definition of premeditation when it defined the culpable mental state of first-degree murder as "premeditated intent" and the culpable mental state of second-degree murder as "intentionally, but without premeditation." *Key*, 715 P.2d at 322-323; *Sneed*, 514 P.2d at 778. As this Court explained in *Key*:

> In effect, by emphasizing that "premeditated intent" and "intentionally, but without premeditation" were different, and that premeditation required design before the act, it indicated deliberation and reflection were necessary to create the premeditated intent. This means 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. *Sneed*, 183 Colo. at 100, 514 P.2d at 778 (citations omitted).
>
> Six months after *Sneed* was announced, the legislature amended the first-degree murder statute and defined "after deliberation" in terms substantially similar to those used by this court in its interpretation of the word "premeditation." *Compare* Ch. 52, sec. 1, § 40–3–101, 1974 Colo. Sess. Laws 251, *with Sneed*, 183 Colo. at 100, 514 P.2d at 778. Thus, the General Assembly did not resurrect the *Van Houton* definition, although it had an opportunity to do so.
>
> Our analysis of *Van Houton*, *Sneed*, and the series of statutory enactments defining the elements of first-degree murder lead us to the conclusion that the legislature accepted our holding in *Sneed* that the *Van Houton* instruction is incompatible with the legislatively mandated definition of "after deliberation."

Key, 715 P.2d at 322 -323.

concedes that the court of appeals "concluded that the instruction was plainly erroneous in light of *Key v. People*, 715 P.2d 319 (Colo. 1986)" but that there was no reasonable possibility that the instruction contributed to Martinez's conviction.

b. The error "affected a substantial right"

In *Key*, this Court concluded that the time interval instructional error was "of constitutional magnitude," stating:

> 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) [full citation omitted]. The prosecution's burden includes proving beyond a reasonable doubt that Key possessed the culpable mental state required by the applicable statute. *People v. Mattas*, 645 P.2d 254 (Colo. 1982). 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.* We believe that [the time interval instruction] was constitutionally deficient. Standing alone, the instruction defined the essential element of "deliberation" in a manner inconsistent with section 18-3-101(3), 8 C.R.S. (1978), and *Sneed*, 183 Colo. at 96, 514 P.2d at 776.

Key, 715 P.2d at 323. Thus, this Court has explicitly recognized the substantial nature of the due process right at issue here.

c. The error was not harmless beyond a reasonable doubt

i. The erroneous instruction, read in conjunction with other instructions, did NOT adequately inform the jury of the law

As the State points out on page 15 of the Answer Brief, the court of appeals concluded in pertinent part:

"First, ***considering the instructions as a whole***, we conclude that they did not permit the jury to return a verdict without finding beyond a reasonable doubt that defendant acted 'after deliberation,' as the term is defined in section 18-3-101(3), C.R.S. 2011. [Instruction 11], defining 'after deliberation,' was identical to the statutory language in section 18-3-101(3)." (emphasis added) (Slip Op. p17)

When an incorrect statement of the law is presented to the jury in its instructions, other instructions in the jury packet correctly stating the law and the prosecutor's burden of proof do not necessarily cure the harm of the erroneous instruction. *See Sandstrom v. Montana*, 442 U.S. 510, 518-19, fn7 (1979)(reversing first-degree murder conviction based on erroneous "presumed intent" instruction despite other instructions correctly defining the requisite culpable mental state and the prosecution's burden of proof).

In *Francis v. Franklin*, 471 U.S. 307, 322 (1985), a follow-up case to *Sandstrom*, the United States Supreme Court explained:

> Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict.

Likewise, this Court has held, "[i]f . . . two instructions are in direct conflict on the requisite culpable mental state, and one of the instructions is an incorrect and clearly prejudicial statement of the law, the fact that the other instruction contains a correct statement of law cannot cure the error." *People v. Riley*, 708 P.2d 1359, 1365 (Colo. 1985)(reversing based on conflicting jury instructions regarding the requisite culpable mental state for charged offense); *see Bollenbach v. U.S.*, 326 U.S. 607, 612 (1946)(same); *Chambers v. People*, 682 P.2d 1173 (Colo. 1984)(omission of culpable mental state from second-degree murder reversible error despite inclusion of joint operation instruction); *People v. Mascarenas*, 666 P.2d 101 (Colo. 1983)(reversing based on inadequacy of culpable mental state instruction where court's other instructions created confusion); *People v. Archuleta*, 503 P.2d 346, 347 (1972)(reversing where trial court's theft instruction was deficient and instructions in their entirety were "confusing and conflicting, and they do not cure the defect").

Here, the court of appeals observed that the statutory definition of "after deliberation" contradicted the "clearly erroneous" time interval instruction. The court offered no explanation, however, for how the statutory definition might "explain" or

reconcile the constitutional infirmity of the time interval instruction such that the jury would disregard it and focus solely on the statutory instruction.

Here, there was no qualifying language to explain or reconcile the conflicting instructions bearing on the definition of "after deliberation." A somewhat stronger argument might be made that a reasonable juror could not have understood the time interval instruction as lessening the prosecution's burden to prove deliberation if the instructional packet had included an instruction such as the following:

> "The only time requirement for premeditation and deliberation is an interval sufficient for one thought to follow another. ***However, the word 'thought' in this context actually refers to the entire thought process, of an appreciable length of time, including sufficient time to form intent and to reach a decision to commit the act made after the exercise of reflection and judgment concerning the act.*** The length of time required for deliberation need not be long; ***however, an act committed after deliberation is never one which has been committed in a hasty or impulsive manner. Therefore, 'need not be long' refers to an amount of time sufficient in length that cannot be characterized as "hasty or impulsive" and sufficiently long to include the exercise of reflection and judgment."***

Whether or not such explanatory language might have been sufficient, however, no such language is present in this jury charge. Here, with inconsistent and conflicting instructions to guide its deliberations, the jury could not properly evaluate the evidence to determine whether the prosecution had met its burden of proof on the element of "after deliberation."

Implicit in the court of appeals' ruling is the conclusion that no reasonable juror could have disregarded the statutory definition in favor of the contradictory time interval instruction. The question, after all, is not what a state appellate court "declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning." *Franklin*, 471 U.S. at 315-316 (1985)(citing *Sandstrom*, 442 U.S. at 516-517). The court of appeals' conclusion is erroneous and unsupported by the record.

Confronted with the erroneous time interval instruction that deliberation may occur in an interval "sufficient for one thought to follow another," a reasonable juror here could have concluded that this instruction contradicted, and in fact ***superseded***, the contradictory (and correct) language contained in the statutory definition. The erroneous time interval instruction here ***followed*** the statutory definition, and was thus the final authority on the definition of deliberation and premeditation in the jury instructions. (v1, p393-394; *see* Appendix A of State's Answer Brief) "Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Bollenbach,* 326 U.S. at 612 (reversing conviction based on erroneous jury instruction that was the judge's final statement on the subject); *see also People v. Bachicha*, 940 P.2d 965, 967 (Colo. App. 1996)(trial court's supplemental instruction was reversible error even where original instructions properly stated the law.).

ii. The record reveals "a reasonable possibility that the error contributed to the conviction"

> "In the context of an erroneous jury instruction on a culpable mental state, we have previously considered 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. Second, we consider whether the evidence on the issue of *mens rea* was overwhelming."

Key v. People, 715 P.2d 319, 323 (Colo. 1986).

In *Key*, a narrow majority of this Court[4] concluded that the erroneous time interval instruction was harmless due, in part, to the fact that the erroneous instruction (Instruction 15) was couched in between the statutory definition of deliberation (Instruction 14) and the defendant's theory of the case instruction which "also employed the statutory language defining 'after deliberation'" (Instruction 18). *See Key*, 715 P.2d at 323.

Here, however, we do not have the correct definition of deliberation appearing on both sides of the erroneous instruction; thus, we do not have the couching effect. Martinez's theory of the case instruction read as follows:

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[4] Chief Justice Quinn and Justices Lohr and Neighbors dissented from majority's conclusion that the error was harmless and would have reversed the conviction and remanded for a new trial. *Key*, 715 P.2d at 324 -329.

INSTRUCTION NO. 23

> Mr. Martinez asserts that following an argument and confrontation with Danny Medina, Mr. Tapia shot Mr. Medina. Mr. Tapia pulled Mr. Medina from the yard and fired the last shot in the street area. Mr. Martinez did not know what Mr. Tapia was going to do and did not have the intent to promote or facilitate his actions. Furthermore, Mr. Martinez did not aid, abet, advise or encourage Mr. Tapia to take the actions that he did. Therefore, Mr. Martinez is not guilty of the crimes for which he has been charged.

(v2, p406)

This instruction mirrored the language of the instruction defining complicity liability, and never "employed the statutory language defining 'after deliberation.'" Unlike *Key*, therefore, it cannot be relied upon as the final authority on the definition of deliberation, because it does not include that definition. The last instruction on deliberation from the judge here was the erroneous time interval instruction, and a reasonable juror could have understood it as superseding the statutory definition. *See Bollenbach,* 326 U.S. at 612; *Bachicha*, 940 P.2d at 967.

The State urges this Court to conclude, as the court of appeals did, that no plain error occurred here because "no reference was made to the erroneous instruction in the course of closing arguments." (Answer Brief, p19-20) While this may be true, none of the State's cases proffered in support of this proposition involved erroneous jury instructions. The State's cases dealt only with the question of whether prosecutorial misconduct in closing argument was sufficient to constitute

plain error when the jury was properly instructed. *See People v. Grant*, 174 P.3d 798, 810-11 (Colo. App. 2007)(prosecutor's reference to "deliberation" as requiring only the time necessary for "one thought to follow another" in closing argument not plain error where "the instructions correctly defined the term 'after deliberation' for the jury"); *People v. Cevallos-Acosta*, 140 P.3d 116, 123 (Colo. App. 2005)(brief references to deliberation as "one thought to follow another" during jury voir dire and closing argument not plain error where "[t]he jury instructions included the correct definition of 'after deliberation.'"); *People v. Caldwell*, 43 P.3d 663, 672 (Colo. App. 2001)(single statement in closing argument that "deliberation only requires the time necessary for one thought to follow another" did not constitute plain error where "the trial court properly instructed the jury on the elements of first degree murder after deliberation and provided the correct definition of deliberation").

These cases demonstrate that, absent a contrary showing in the record, an appellate court normally presumes that the jury follows the instructions of law given by the trial court over any contradictory legal argument by the prosecutor in closing argument. *See People v. Moody*, 676 P.2d 691 (Colo. 1984)(court instructed the jurors to rely on the evidence and the instructions, not on closing arguments; absent a contrary showing, jury is presumed to have heeded the court's instructions). This underscores the paramount importance of the constitutional sufficiency of the jury instructions to

the reliability of the verdict. Viewed in this light, the State's proffered cases support the argument for reversible error here, where the instructional error was presented to the jury by the trial court in written form for continuous review over the course of deliberations, and not some fleeting statement by the prosecutor in closing argument.

Next, the State urges this Court to conclude, as the court of appeals did, that no plain error occurred here because "there was ample evidence in this case that the victim was shot after deliberation of an appreciable length of time." (*See* Answer Brief, p15-16, 20) This "ample evidence" standard is not the correct standard of review for harmless error involving jury instructions. Instead, this Court must consider "whether the evidence on the issue of [the defendant's] *mens rea* was overwhelming." *Key*, 715 P.2d 323. The evidence of Martinez's *mens rea* when Tapia fired the fatal shot is far from overwhelming.

The State concedes that "overwhelming and undisputed evidence in this case demonstrates that Tapia [co-defendant] fired the final, fatal shot to the victim's head" and not the defendant, Mr. Martinez. (*See* Answer Brief, p20) In the Opening Brief, Mr. Martinez argued that the court of appeals erroneously conflated evidence of Tapia's intent with that of the defendant, Martinez. (*See* Opening Brief, p28-29, 38-41) The State's Answer Brief suffers from the same flaw. The State argued:

> Moreover, overwhelming and undisputed evidence in this case demonstrates that Tapia fired the final, fatal shot to the victim's head after the victim had suffered multiple gunshot wounds, including one which had broken his right leg and another that had rendered his right arm useless, and had been dragged from the yard to the street. Enough time had elapsed after the initial gunshots for numerous neighbors to witness the final shooting. Those circumstances amply demonstrate that the final shot was fired intentionally, after deliberation of an appreciable length of time. Thus, as the Court of Appeals correctly concluded, the error did not raise a reasonable possibility that it contributed to the guilty verdict.

(Answer Brief, p20)

What is missing from this paragraph is any mention of Martinez. The State identifies the co-defendant, Tapia, as the shooter of the fatal shot. Every other piece of evidence is discussed in the passive voice, because it is not clear from the record, ***who*** shot the victim multiple times in the yard,[5] ***who*** fired the shots that broke the victim's right leg and rendered his arm useless, and ***who*** dragged the victim from the yard to the street.

The State does not argue, nor did the court of appeals conclude, that the evidence overwhelmingly proved that ***Martinez*** ever shot the victim or dragged him to the street. Any such argument would be unsupported by the record. This case stands in stark contrast to the situation in *Key*, *supra*, where this Court found harmless

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[5] Outside of the jury's hearing, 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 probably Tapia who fired all of the preceding shots. (*See* Opening Brief, p33)

error in the jury instructions based on overwhelming evidence of the defendant's deliberation after the ***defendant himself*** shot the victim four times in the head, mashed his head with a rock, and drove over his head with a truck. *Key*, 715 P.2d at 324.

The other flaw with the opinion and State's argument is that they assume a continuity of intent throughout the entire conflict between the victim, Tapia, and Martinez. The trial court correctly found, however, that there was insufficient evidence of a conspiracy to commit first-degree murder[6] and dismissed that charge at the preliminary hearing. (*see* Trial Transcript, p1044; v1, p5-6) The trial court also found that there was sufficient evidence of self-defense in the record (presumably with respect to the initial shots fired at the victim) to warrant giving the affirmative defense of self-defense to the jury. (*See* v2, p400, Instruction No. 17) It is clear that from the trial court's perspective, a reasonable juror could have found that the initial shots were fired out of a perceived need to defend, while Tapia's final shot may have been of a different character altogether.

The State's argument ignores the distinct possibility that the mental states of Martinez and Tapia evolved independently after the initial round of shots were fired. If there had been overwhelming evidence of a conspiracy to shoot the victim in the

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

head that was in place prior to the victim's appearance on the scene, that would be a different story. But that is not this case.

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) There is no evidence that Martinez verbally or non-verbally encouraged Tapia in this final act in any manner. The complicity theory was purely circumstantial, and even the court of appeals conceded that it was "not the strongest circumstantial case." (Slip opinion, p22) Thus, the time interval instruction was not harmless error here, where intent was plainly at issue and not overwhelmingly proved by the evidence with respect to Martinez.

(UNDER INSUFFICIENT EVIDENCE)

4. <u>No proof beyond a reasonable doubt of complicity in the fatal shot</u>

The State correctly acknowledges that, to convict a defendant of murder as a complicitor, the prosecution must prove beyond a reasonable doubt that the defendant: (1) had the culpable mental state required for murder (here intent after deliberation) and (2) must have intended that his or her conduct promote or facilitate the commission of first degree murder committed by the principal. (Answer Brief, p25)(citing *People v. Candelaria*, 107 P.3d 1080, 1090-91 (Colo. App. 2004)).

a. Insufficient evidence of Martinez's conduct

As argued above, even viewed in the light most favorable to the prosecution, the evidence was inconclusive concerning ***who*** fired the shots in the yard and ***who*** dragged the victim from the yard to the street. The State argues that the jury could have fairly inferred from injuries on the victim's body that the victim had been dragged to the street through the combined efforts of Martinez and Tapia. (Answer Brief, p26) The State argues, in the alternative, that the jury could have reasonably inferred that only one person dragged the victim while the other reloaded the revolver. (Answer Brief, p26-27)

The State's contradictory factual arguments illustrate the weakness of the prosecution's complicity theory at trial. There is simply no proof beyond a reasonable doubt of what conduct Martinez engaged in prior to the victim's relocation onto the street. With insufficient evidence of Martinez's conduct at this juncture, any speculation about how his potential conduct under different hypothetical scenarios might have revealed an intent to promote or facilitate first degree murder is highly speculative. If the trial evidence did not reveal with fair assurance what Martinez did prior to standing at the victim's head, then the evidence does not prove that Martinez intended his (hypothetical) conduct to promote or facilitate Tapia's fatal shot to the victim's head.

b. Insufficient evidence of Martinez's mental state

The State argues that, viewing the evidence in the light most favorable to the prosecution, a reasonable juror could infer that Martinez yelled, "[s]ee what happens when you mess with my house," when the victim was lying in the street, and that one man said, "I got the motherfucker" to the other before the final shot. (Answer Brief, p27) Even if we assume that Martinez yelled, "[s]ee what happens when you mess with my house," however, this statement was a retrospective comment on the shots fired in the yard, and in no way instructed or explicitly encouraged Tapia to then shoot the victim in the head.

The expression, "I got the motherfucker" could have retrospectively referred to the shots fired in the yard, or prospectively referred to the shot that was about to enter the victim's head, but either way the strongest inference is that the comment came from Tapia, since Tapia was the one in possession of the gun when the witness heard that comment. Neither of these comments sufficiently proved any intent by Martinez to encourage Tapia to shoot the victim in the head.

Finally, the fact that Martinez had a romantic relationship with Sayesva, had bullets in his pocket at the time of arrest, and drove the get-away car, sheds no light on the specific question of whether he deliberated and subsequently formed an intent for Tapia to shoot the victim in the head after the victim was dragged to the street.

(*See* Answer Brief, p27-28) As the trial court found at the preliminary hearing, there was insufficient evidence to prosecute Martinez based on a conspiracy theory, and nothing about this evidence reveals anything about any evolution in Martinez's mental state between the firing of the first round of shots that merely incapacitated the victim, and the final shot by Tapia that killed him.

CONCLUSION

THEREFORE, based on the arguments and authorities presented in the Petitioner's Opening Brief, in this Reply Brief, and in the record on appeal: 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 April 16, 2014, a copy of this Reply Brief of Defendant-Appellant was electronically served through ICCES on Elizabeth Rohrbough of the Attorney General's Office.