No. S079925

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOSEPH ADAM MORA and RUBEN RANGEL,

Defendants and Appellants.

Los Angeles Co.
Superior Court
No. TA037999

APPELLANT MORA'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

FEDERAL CASES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

STATE CASES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

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TABLE OF AUTHORITIES

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TABLE OF AUTHORITIES

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TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

CONSTITUTIONS

STATUTES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Pages

JURY INSTRUCTIONS

COURT RULES

TABLE OF AUTHORITIES

Pages

TEXT AND OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **RUBEN RANGEL and JOSEPH ADAM MORA,** Defendants and Appellants.	No. S079925 Los Angeles Co. Superior Court No. TA037999

APPELLANT MORA'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, § 1239, subd. (b).)[1] The appeal is taken from a judgment which disposes of all of the issues between the parties.

STATEMENT OF THE CASE

On May 5, 1998, an information was filed in the Los Angeles County Superior Court charging appellant and co-appellant Ruben Rangel with Count 1, a violation of section 187 (first degree murder of Andres Encinas); Count 2, a violation of section 187 (first degree murder of Antonio Urrutia); Count 3, a violation of sections 211 and 644 (attempted second degree robbery of Andres Encinas); and Count 4, a violation of

[1] All statutory references are to the Penal Code unless otherwise indicated.

sections 211 and 644 (attempted second degree robbery of Antonio Urrutia). The information further alleged the following special circumstances: multiple murder (§ 190.2, subd. (a)(3)), and that appellant and Rangel committed the murders while engaged in the commission of robbery (§ 190.2, subd. (a)(17)). As to all four counts, it was alleged that appellant and Rangel personally used a firearm, to wit, a handgun, within the meaning of section 1203.06, subdivision (a)(1). Finally, it was alleged that all of the charged offenses were serious felonies within the meaning of section 1192.7, subdivision (c)(23), and violent felonies within the meaning of section 667.5, subdivision (c)(8). (2 CT 501-504.)[2]

On May 5, 1998, appellant and Rangel were arraigned on the information. Both pleaded not guilty to all of the charges and denied all of the special allegations. (2 CT 547-550; 1 RT A1-A3.)

Appellant and Rangel were tried together before the same jury. Jury selection began on January 11, 1999, and was completed the next day. On January 12, 1999, the prosecution began presenting its case. (4 CT 880-883, 893-896.)

On January 20, 1999, in the middle of the prosecution's case-in-chief, defense counsel moved for dismissal, or in the alternative for a continuance, because they had just learned that the Compton Police Department had not turned over police reports concerning the charged crimes. (4 CT 964-967; see 7 RT 1037-1055.) Included in those police reports were the statements of 13 percipient witnesses that had never been provided to the defense. (7 RT 1037-1041.) After reviewing those reports,

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[2] "CT" refers to the clerk's transcript on appeal; "Supp. CT" refers to the clerk's supplemental transcript on appeal; and "RT" refers to the reporter's transcript on appeal.

the court continued trial to January 25 so that defense counsel could investigate the information in these newly discovered reports. (4 CT 964-967; 7 RT 1047, 1052.) The court scheduled a hearing for January 22 so that defense counsel could report on the progress of their investigation. (4 CT 964-967; 7 RT 1047.)

Prior to the January 22 hearing, the prosecutor supplied the court with yet another case-related police report that had never been provided to the defense. (7 RT 1056.) At the January 22 hearing, the prosecutor informed the court that she had discovered additional materials that the Compton Police Department had failed to provide to the defense. (7 RT 1061.) Counsel for appellant again moved for a dismissal on the ground that the newly disclosed police reports contained witness statements that contradicted the People's case against appellant, and thereby undermined appellant's right to a fair trial. (7 RT 1061-1062.) The court said it did not believe dismissal was warranted, even though it believed that some of the statements in the police reports "might" be contrary to evidence which had already been presented by the prosecution. (7 RT 1062.)

The prosecution resumed its case on January 25, 1999, and rested on February 1, 1999. (4 CT 971-978, 982-993, 995-998.) Appellant moved for judgment of acquittal (§ 1118.1) on counts one and three, the charged murder and attempted robbery of Andres Encinas. The court denied that motion.[3] (4 CT 998; 12 RT 1896.)

Co-appellant Rangel began presenting his defense case on February 1, 1999. (4 CT 996; 12 RT 1897.)

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[3] The court also denied Rangel's motion for judgment of acquittal on counts two and four, the charged murder and attempted robbery of Antonio Urrutia. (4 CT 996; 12 RT 1895-1896.)

On February 2, 1999, defense counsel learned that the Compton Police Department had failed to disclose reports showing that certain evidence found at the crime scene had been analyzed for fingerprints, and that none were found. (13 RT 1990-1992.) Defense counsel again moved for a mistrial, on the ground that they had been defending this case by questioning police witnesses about their failure to conduct fingerprint testing on this evidence, and that this defense was now undermined by the revelation of these reports. (13 RT 1993-1997.) Appellant's counsel also moved for a mistrial on the ground that these newly disclosed reports were a continuum of repeated discovery violations that had harmed appellant's defense. (13 RT 1993-1994.) The court denied the motion. (4 CT 999, 1001; 13 RT 1998.) The court also denied defense counsel's alternative motions that the evidence of fingerprinting be excluded, and that the defense be allowed to argue in the same posture they were placed in when questioning the police witnesses without the withheld evidence – i.e., that there had been no fingerprint testing of this evidence. (13 RT 1994, 1997-1998, 2000-2001.) The court instructed the jury later that day that the Compton Police Department had just turned over to the defense attorneys and the prosecutor reports showing that fingerprint testing had been conducted on various items found at the crime scene, and that the defense attorneys did not know of these reports when they "asked the questions they did yesterday."[4] (13 RT 2112-2113.)

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[4] On three separate occasions, the trial court said that when this case was over, it would hold a hearing and order the Compton Police Department to show cause as to why monetary sanctions should not be imposed for their repeated failures to turn over their investigative reports. (7 RT 1047-1048; 13 RT 1997, 2005.) During the record correction

(continued...)

Co-appellant Rangel continued presenting evidence, and rested on February 3, 1999. (4 CT 1003.) Appellant's counsel called no witnesses and presented no evidence on appellant's behalf. (14 RT 2156, 2170.)

On February 3, 1999, over defense objection, the court allowed the prosecution to reopen its case in order to give an explanation for why the Compton Police Department failed to turn over reports showing that crime scene evidence had been tested for fingerprints. (4 CT 1001, 1005; 14 RT 2157-2161, 2162-2166.)

On February 4, 1999, the jury began its deliberations. (4 CT 1008.) On February 5, 1999, the jury found appellant and Rangel guilty of two counts of first degree murder (§ 187) and two counts of attempted second degree robbery (§§ 211 & 644). The jury found the multiple murder (§ 190.2, subd. (a)(3)) and robbery (§ 190.2, subd. (a)(17)) special circumstance allegations to be true. Finally, as to all four counts, the jury found true that both appellant and Rangel personally used a firearm (§ 12022.5, subd. (a)(1). (4 CT 1010-1019, 1036-1040.)

Prior to the start of the penalty trial, appellant's counsel turned over to the prosecution the names of the witnesses they intended to call on appellant's behalf, and 11 pages of discovery relating to the penalty evidence they intended to present. (15 RT 2472-2473; 16 RT 2487-2488; 4 CT 1009.) Included in the information provided to the prosecution were the names of three deputy sheriffs, who appellant's counsel represented would

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[4](...continued)
proceedings in this case, appellant's counsel requested a reporter's transcript of the order to show cause hearing, and was informed that no such hearing was ever held by the trial court. (RT of February 24, 2006, at pp. 10-11.)

testify that appellant had been a trustee while incarcerated in jail awaiting resolution of this case. (16 RT 2489-2490.) The prosecutor informed the court and appellant's counsel that she had provided to appellant's counsel all of the discovery that she felt that she was required to disclose. (15 RT 2471; 16 RT 2475.)

The penalty trial began on February 8, 1999. (4 CT 1045-1048.) On February 16, 1999, appellant's counsel requested an Evidence Code section 402 hearing out of the jury's presence regarding the scope of any rebuttal evidence the court would allow the prosecution to present in response to the testimony of the two sheriff's deputies appellant's counsel intended to call on appellant's behalf. (20 RT 3063-3066.) After appellant's counsel informed the court that the two sheriff's deputies would testify only that appellant had acted under their supervision as a jail trustee and had performed specific duties and followed the deputies' orders (20 RT 3063-3064), the prosecutor told the trial court:

> Your Honor, if they put it into issue, it's fair game in rebuttal to me. I'm not saying what I have or don't have[.] [¶] And I think if they choose to do that, you know, you can have your cake, but you can't eat it, too. So they have a choice. [¶] And I'm not obligated to tell what I might have in store, or maybe I don't have anything, but I think that's a chance. They put it on, and if they put it on, it's fair game.

(20 RT 3064-3065.)

Rather than making a ruling on the scope of rebuttal that it would allow, the court told appellant's counsel that the deputies' testimony would open the door for rebuttal evidence from the prosecution, and that it remained to be seen just how far that door would be opened. (20 RT 3065-3066.) The court said that was the best it could tell appellant's counsel at this time without knowing what rebuttal evidence the prosecutor intended to

present. (20 RT 3066.) Based on the trial court's rulings, appellant's counsel informed the court that they would not be calling the sheriff's deputies as witnesses, and rested. (20 RT 3070-3071.)

On February 17, 1999, the jury began its penalty phase deliberations. (5 CT 1087.)

On February 18, 1999, the jury returned death verdicts against both appellant and Rangel. (5 CT 1223-1230.)

On March 5, 1999, appellant's counsel requested that they be provided with the jurors' names and contact information so that they could investigate possible juror misconduct during the jury's penalty deliberations. (4 CT 11759-11769.) In support of their request, appellant's counsel informed the court that they had talked to some of the jurors after the jury returned its penalty verdict and learned that at least two of the jurors based their decision to impose the death penalty on evidence that had not been presented at trial, and that at least one juror had refused to consider or deliberate on the mitigating evidence presented at trial. (45 CT 11761, 11768.) The trial court set a hearing date of April 27, 1999, to address appellant's counsel's request. The court said that it would send a letter to each of the jurors to notify them of that hearing. (45 CT 11823-11825; 21 RT 3310-3312.)

On April 27, 1999, the court said that it had heard from nine of the twelve trial jurors, and they had informed the court that they did not want their names and information released to the defense. (21 RT 3318.) The court denied appellant's counsel's request for the jurors' names and information. (21 RT 3319; 45 CT 11828.) The court granted appellant's counsel's request as to the remaining three jurors who had not contacted the court, and released their names and contact information to defense counsel.

(*Ibid.*)

On May 17, 1999, appellant's counsel filed a motion for a new penalty trial based on the juror misconduct that some of the jurors had initially described to appellant's counsel, and based on the trial court's ruling that allowed the trial jurors to refuse to speak to appellant's counsel. (45 CT 11829-11839.)

On May 27, 1999, appellant's case came on for sentencing. The court denied appellant's motion for a new penalty trial and his motion to modify the verdict to life without the possibility of parole pursuant to Penal Code section 190.4, subdivision (e). The court sentenced appellant to death on Counts 1 and 2, first degree murder with special circumstances (multiple murder and robbery). On Counts 3 and 4, attempted second degree robbery with use of a firearm, the court sentenced appellant to the mid-term of two years on the attempted robbery counts plus an additional ten years for use of a firearm. The court ordered that the sentence on Counts 3 and 4 run concurrent with the sentence on Counts 1 and 2.[5] (45 CT 11916-11921.)

Appellant's appeal to this Court is automatic. (§ 1239, subd. (b).)

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[5] Co-appellant Rangel was sentenced on the same date as appellant, and received the same sentence. (45 CT 11906-11913.)

STATEMENT OF FACTS

A. Guilt Phase Evidence

1. The Crime

On August 24, 1997, at around 3:00 a.m., Andy Encinas, Anthony Urrutia, and Fidel Gregorio left a party in Wilmington, California, traveling in Encinas's car, a Toyota 4-Runner. (3 RT 400, 4 RT 625-626.) Encinas was driving, with Urrutia in the front passenger seat, and Gregorio seated behind Urrutia in the rear passenger seat. (3 RT 400, 4 RT 627-628.) As Encinas was driving, he received a page from his girlfriend, Paula Beltran. (3 RT 398-399, 4 RT 625.) Paula and two of her friends, Mayra Fonseca and Yesenia Jimenez, had been at a nightclub earlier that evening. (3 RT 398.) When Encinas answered the page, he learned that Paula's car, a Honda Civic, had a flat tire, and that she and her two friends were at a nearby gas station waiting for a tow truck to arrive and fix the flat. (3 RT 398-399, 4 RT 626.) Encinas drove to the gas station, and he, Urrutia and Gregorio waited with Paula and her friends until the tire was fixed. (3 RT 399-400, 4 RT 626-627.)

Encinas, Urrutia, and Gregorio then followed the three women in Encinas's car, as Paula drove Yesenia to her home on Castlegate Avenue in Compton. (3 RT 400-402, 4 RT 643.) Paula parked her car on the street near Yesenia's house, and Encinas parked the 4-Runner in front of Paula's car. (3 RT 402.) Encinas needed to use the bathroom, and he, Paula, Mayra, and Yesenia went into Yesina's house while Urrutia and Gregorio remained in Encinas's 4-Runner. (3 RT 402-403.) After using the bathroom in Yesina's house, Encinas walked Paula and Mayra back to Paula's car, and as they stood next to her car, two Hispanic males with short, almost "bald" hairstyles approached and one of them asked Encinas,

"Do you want to go to sleep?" (3 RT 403-405, 409-410.) When Encinas did not answer and instead told Paula to get into her car, this same person said something to the effect, "Why are you quiet? I asked you a question: Do you want to go to sleep?" (3 RT 405-406.) Encinas did not respond, but instead waited for Paula and Mayra to get into Paula's car. Encinas then walked to the 4-Runner. (3 RT 406-407.) The person who asked Encinas if he wanted to go to sleep followed Encinas to the driver's side of the 4-Runner, and the other Hispanic male went to the front passenger side of the 4-Runner where Urrutia was seated. (3 RT 407.)

After getting in her car, Paula searched for her cell phone to call for help but could not find it. (3 RT 407.) Mayra lowered her seat all the way down into the laying position and began screaming for Paula to drive away. (8 RT 1316-1317.) At that time, Paula saw that the two men were pointing their guns into the 4-Runner. Paula drove to a nearby payphone and called 911. (3 RT 408.)

The man on the driver's side of the 4-Runner displayed his gun and told Encinas, "Check yourself. Check yourself. Give me your wallet." (4 RT 632-633.) Before Encinas could reach for his wallet, this individual shot him in the chest, near the left armpit. (4 RT 635-636.) The person standing on the passenger side of the 4-Runner told Urrutia, "Give me your wallet." (4 RT 636-637, 5 RT 701.) Urrutia said something to the effect, "I have no money, but I'll give you my wallet anyway," and almost immediately, this person shot Urrutia in the right side of his face, near the cheekbone. (4 RT 637, 5 RT 702.) The man standing on the driver's side of the 4-Runner fired two more shots into the vehicle, before he and the other shooter ran away. (4 RT 638-639.)

Gregorio, who had been seated in the backseat of the 4-Runner when

Encinas and Urrutia were shot, got out of the vehicle and began banging on the doors of homes in the neighborhood, yelling for help. (4 RT 639-640.) Two men came out and told Gregorio they had called the police. Gregorio sat down on the curb and waited for the police to arrive. (4 RT 641-643.)

Both Encinas and Urrutia died as a result of the gunshot wounds they received. (11 RT 1718-1719, 1724-1725.) Nothing was taken from either Encinas or Urrutia. Encinas's wallet was found inside the closed console in the center of the 4-Runner. (9 RT 1432, 1452-1453.) Urrutia's wallet was found on the passenger seat of the vehicle. (9 RT 1432, 1453.)[6]

2. The Suspects

Police officers dispatched to the scene of the shooting received a radio description of the two shooting suspects as two male Latin adults with bald heads, one with a white t-shirt and one without a shirt, and both wearing dark pants. (11 RT 1761, 1785-1786.) Paula Beltran told the police that the two suspects were both Latin males with shaved heads. She said that both appeared to be about five-feet eight-inches tall and the same weight, and both appeared to be about 20 years old. (12 RT 1903-1904.)

The police talked to a number of people in the neighborhood in order to seek information about the shooting. (9 RT 1434-1435.) One person told the police that she saw two "bald men" run into the home of Lourdes

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[6] The prosecution presented conflicting evidence regarding where the wallets were found. Police officer Raymond Brown testified that Encinas's wallet was found inside the closed console in the center of the 4-Runner, and Urrutia's wallet was found on the passenger seat of the vehicle. (9 RT 1432, 1452-1453.) However, Detective Marvin Branscomb, the lead investigating officer on the scene, testified that it was Urrutia's wallet that was found inside the center console of the 4-Runner, and that Encinas's wallet was found on the floorboard of the vehicle. (10 RT 1521-1522, 1535, 1536-1537, 1539.)

Lopez, who lived at 1005 South Castlegate Avenue. (9 RT 1435, 11 RT 1762, 1765-1766.) Officers went to that home and detained Lopez, Lopez's three-year-old daughter, and nine other people, including appellant, co-appellant Ruben Rangel, and a person named Jade Gallegos. (6 RT 1004, 11 RT 1765-1770.)

Jade Gallegos lived in the house with Lopez and is similar in appearance to appellant. (8 RT 1283-1284.)[7] Both Gallegos and appellant had similar shaved-head hairstyles and tattoos on their stomachs, and neither was wearing a shirt prior to the shooting. (5 RT 656; 6 RT 979; 7 RT 1107, 1192-1193; 8 RT 1274-1275; 9 RT 1495; 12 RT 1947-1948, 1950.) Gallegos is approximately five-feet eight-inches tall, while appellant is approximately five-feet, eleven-inches tall. (9 RT 1499; 12 RT 1950-1951.)

3. The Weapons

In Lopez's kitchen, officers found a plastic gun case for a 9mm Intratec weapon. (11 RT 1771.) In appellant's car, which was parked halfway in Lopez's garage, officers found two weapons on the passenger floorboard – an Intratec 9mm. semiautomatic pistol, and an Astra 9mm. semiautomatic pistol with a bullet stuck in the breech. (9 RT 1436-1437, 10 RT 1540-1542, 1544, 1548, 11 RT 1807-1810.) A Los Angeles County Sheriff's Department criminalist subsequently determined that the bullet that killed Encinas was fired from the Astra pistol, and the bullet that killed Urrutia was fired from the Intratec pistol. (11 RT 1732-1735, 12 RT 1826, 1836.)

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[7] Even the prosecutor acknowledged this fact: "No doubt about it, he [Jade Gallegos] looks similar [to appellant]." (14 RT 2257.)

4. The Eyewitnesses

The prosecution presented testimony from the following seven eyewitnesses:

a. Sheila Creswell

At the time of the shooting, Sheila Creswell lived across the street from the house where Lourdes Lopez and Jade Gallegos were living. (5 RT 788.) Creswell testified that she saw Gallegos every day, sometimes doing "crazy things." (5 RT 804, 823, 826, 827.)

On the night of the shooting, Creswell could not sleep because of loud music coming from Lopez's house. (5 RT 788.) Sometime between 3:00 a.m. and 4:00 a.m., she heard gunshots and ran to her kitchen window. (5 RT 790.) At that time, she saw Rangel and Gallegos running from a parked vehicle and into Lopez's house. (5 RT 791-794, 801-803, 825-826, 831; see 6 RT 1014; 7 RT 1176.) She said that the lighting was good, and that she could see "really good" from her vantage point. (5 RT 805-806.) After Rangel and Gallegos ran into Lopez's home, Creswell observed all the lights inside the house, which had been on, go off. (5 RT 806.) At trial, Creswell testified that she was no longer sure that Gallegos was the person she saw the night of the shooting because she did not see him in the courtroom. (5 RT 831-832.) However, she testified that she expected to see Gallegos in court because he was in fact the person she saw the night of the shooting. (*Ibid.*)

b. John Youngblood

John Youngblood testified that he was watching television when he heard gunshots. (10 RT 1626-1628.) He looked out his window and saw two persons standing near the 4-Runner. (10 RT 1626-1628.) He identified Rangel as the person standing on the driver's side of the 4-Runner, but was

unable to identify the person standing on the passenger side of the vehicle because he only saw that person's back. (10 RT 1630-1632, 1649-1650, 1675-1676.)

c. Paula Beltran

The police conducted a crime scene show-up, and showed Paula Beltran some of the men they had detained in the house at 1005 South Castlegate Avenue. (3 RT 412; 4 RT 546-547.) Beltran was seated in the backseat of a patrol car, which was parked in the middle of the street, and several of the men in the house were displayed to her one at a time as the police shined lights on them. (3 RT 449-450; 4 RT 548.) Beltran identified Rangel as the person she had seen at the driver's side of the 4-Runner, and appellant as the person she had seen on the passenger side. (3 RT 413-414.) Beltran was not shown Jade Gallegos during the crime scene show-up.[8]

Beltran identified appellant at trial, but said she had trouble identifying him in court because she thought he looked different and appeared thinner when she saw him on the night of the shooting. (3 RT 413; 4 RT 582-583.)

d. Fidel Gregorio

Fidel Gregorio, who had been seated in the backseat of the 4-Runner at the time of the shooting, told the police that he, Encinas, and Urrutia had been drinking most of the night.[9] (12 RT 1970.) Gregorio said he

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[8] Appellant, Rangel, and Jade Gallegos all had similar "shaved head" haircuts. (6 RT 979.) Beltran testified that of the suspects displayed to her at the crime scene show-up, only appellant and Rangel had haircuts similar to the individuals she had seen at the 4-Runner. (4 RT 552; 6 RT 979.)

[9] At trial, Gregorio testified that he drank only four or five cups of (continued...)

"knocked out," meaning he fell asleep, in the 4-Runner as he, Encinas, and Urrutia followed Paula Beltran's car to Compton. (5 RT 694, 692; see 4 RT 628-629.) Gregorio woke up just before Encinas and Urrutia were shot. (5 RT 694-695, 700-701; see 4 RT 628-631.)

Gregorio told the police that the people who shot Encinas and Urrutia were "juveniles," one with a tattoo on his stomach and wearing sagging khaki pants, "Joe Boxer" shorts, and no shirt, and the other one wearing blue nylon jogging pants and a blue shirt with a red stripe. (4 RT 644-646; 5 RT 709; 12 RT 1975-1976.) According to Gregorio, the person with the tattoo on his stomach and no shirt was on the passenger side of the 4-Runner. Gregorio said that person was approximately five-feet eight- or nine-inches tall. (4 RT 645; 5 RT 709.)

At the crime scene show-up, Gregorio was nervous and shaken, almost to the point of tears. (12 RT 1979.) He was shown nine or ten men, all of whom had "shaved head" haircuts, and similar clothing. (4 RT 650-651, 684; 9 RT 1495.) Gregorio identified appellant by the tattoo on his stomach and the Joe Boxer shorts he was wearing under his sagging pants.[10]

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[9](...continued)
beer, and quit drinking around 11:00 p.m. (5 RT 687-688.) However, Compton police officer Ed'Ourd Peters testified that on the night of the shooting, Gregorio told him that he and his friends had been drinking most of the night. (12 RT 1970.)

[10] At the preliminary hearing, Gregorio testified that the tattoo he saw on the man at the passenger side of the 4-Runner was a cross, and he drew a picture of that cross. (5 RT 653-655, 704-705; Peo. Exh. 7.) The tattoo on appellant's stomach, like the tattoo on Jade Gallegos's stomach, is a handwritten name, and not a cross. (5 RT 656; 12 RT 1950.) When shown appellant's tattoo at trial, Gregorio said a scar running down appellant's stomach made the tattoo appear similar to a cross. (5 RT 657, (continued...)

(4 RT 645; 5 RT 652-653.) Gregorio was in the back seat of the patrol car and approximately 45 feet away when he made that identification, and the police were shining bright lights on appellant. (5 RT 709, 745.) Gregorio also identified appellant at trial. (4 RT 634.)

e. Mayra Fonseca

Mayra Fonseca was distraught and emotional when the two men responsible for the shootings approached her, Paula Beltran, and Andy Encinas on Castlegate Avenue. (8 RT 1314-1319; 9 RT 1403-1404.) She had her back to the two men, and was telling Beltran to hurry and open the door to her car. (8 RT 1311.) Fonseca got into Beltran's car and adjusted her seat's backrest so that it lay flat. She was screaming and crying for Beltran to drive away. (8 RT 1316-1319.) Fonseca claimed that she was able to see the men's faces when they walked past her. She identified Rangel as the man who followed Encinas to the driver's side of the 4-Runner. (8 RT 1323-1324, 1363-1365; 9 RT 1384, 1387-1388.) With respect to the other man, Fonseca said that he had a shaved head and was not wearing a shirt. Both at the crime scene show-up and at trial, Fonseca identified appellant as that person. (8 RT 1308, 1321-1322.) Fonseca testified that appellant did not look the same in court as she remembered him looking on the night of the shooting. (8 RT 1322.)

f. Ramon Valadez

Ramon Valadez was one of the men detained by the police at Lourdes Lopez's home. (11 RT 1768.) He had arrived there earlier in the

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[10](...continued)
704-705.) However, Gregorio never described to the police that the person on the passenger side of the 4-Runner had a scar on his stomach. (5 RT 705.)

evening to deliver a refrigerator. He then stayed there all night, drinking beer and snorting methamphetamine. (6 RT 843-844, 875, 884.)

Valadez testified at trial that in the early morning hours he heard shots outside the house and moments later saw Rangel and appellant run into the house carrying firearms. (6 RT 849-850.) Valadez claimed he was in the kitchen when he heard the shots, and that Rangel and appellant entered the house from a door that leads from outside into the kitchen. (6 RT 850, 943-944.) Valadez then changed his testimony and said he "guessed" he was in the living room when he heard shots being fired and saw Rangel and appellant run into the house. (6 RT 994, 997-998.)

Valadez said that appellant was carrying a black, "machine gun-type" gun, and Rangel was carrying a silver or chrome gun that had a bullet stuck in it. (6 RT 850.) Valadez initially claimed that he could see the bullet stuck in Rangel's gun, and that Rangel and appellant were "bragging" that they had shot someone. (6 RT 850, 853, 908.) Valadez later changed his testimony, and said he did not see a bullet stuck in Rangel's gun, but claimed he heard Rangel and appellant mention it. (6 RT 910.) Valadez testified that he told the police that Rangel and appellant had mentioned the stuck bullet. (6 RT 905.) However, after being shown a transcript of his police interview, Valadez acknowledged that he did not say this to the police. (6 RT 907.)

Valadez had never met appellant or Rangel before the night of the shooting. (6 RT 847.) However, Valadez was acquainted with Jade Gallegos. (6 RT 979.) Valadez and Gallegos were transported to the police station in the same squad car, and they discussed what had happened on the way. (6 RT 866-867, 966-967.)

g. Lourdes Lopez

Appellant and Lourdes Lopez have a three-year-old daughter together. They were not, however, in regular contact at the time of the shooting. (6 RT 1003-1004; see 8 RT 1261; 1 CT 32.)

On the night of the shooting, Lopez and her daughter were living with Jade Gallegos at the house on Castlegate Avenue, along with a woman named Nancy. (6 RT 1003-1004; 7 RT 1168; 8 RT 1283-1284.) Earlier that evening, Lopez, her daughter, Gallegos and three other friends attended a child's birthday party. (6 RT 1003; 7 RT 1177; 8 RT 1261; 1 CT 11-14.) At that party, they were threatened by several gang members and, as they were leaving, one of the gang members assaulted Gallegos. (7 RT 1176-1177, 1231; 8 RT 1261, 1280-1281; 1 CT 13-14.)

Lopez was concerned that these same gang members knew where she and Gallegos lived and would come to their house to continue the confrontation. When she got home, she contacted appellant to help protect her and their daughter. (6 RT 1005-1006, 1008-1010; 7 RT 1177; 1 CT 14-16, 32.) Appellant and Rangel subsequently showed up at Lopez's house. (6 RT 1010.)

After the shooting, Lopez gave a taped statement to the police. In that statement, she said that she saw appellant and Rangel exit her house to have a conversation, and a few minutes later, she heard gunshots and saw them run back into the house.[11] (1 CT 3-7, 18-22.) Lopez told police that she thought the gang members from the party had come by her house, and that either they had shot at appellant or appellant had shot at them. (1 CT

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[11] Audiotapes of Lopez's police interviews were played for the jury at trial. (8 RT 1261; Peo. Exhs. 16 & 17.) Transcripts of those audiotapes are found at 1 CT 1-34.

21.) Lopez said that appellant ran into the kitchen and grabbed Lopez's car keys, and told her to go into the bedroom and stay with their baby because he did not want his daughter to wake up with all the commotion, or see her daddy go to jail. (1 CT 4, 21, 28-31.) Lopez said appellant then moved his car into the garage and parked Lopez's car behind it. (1 CT 4.) Lopez also told the police that, prior to the shooting, she saw appellant with a gun. (1 CT 22-24.)

At trial, Lopez testified that much of what she told the detectives on the tape was not true. She said that her daughter was with her when she was taken to the police station, and that the detectives threatened to turn her daughter over to social services if Lopez did not tell them what they wanted to hear. (7 RT 1138, 1141-1143.) Lopez also said that the detectives threatened her and called her names, and were turning the tape recorder on and off during the interview. (7 RT 1138-1139, 1142-1146, 1158-1159, 1189.) Lopez testified that she was afraid she was going to lose her daughter, and was threatened into saying what she said on the tape. (7 RT 1137-1138, 1142-1143, 1158, 1183, 1219-1220; 8 RT 1238-1239, 1291-1293.) If she had not been threatened, she would not have said these things because they were not true. (See 7 RT 1219-1220; 8 RT 1291-1293.)

Lopez testified that she never saw appellant or Rangel leave the house, or run into the house after the shots were fired, and she did not know who was outside at the time the shots were fired. (6 R 1015; 7 RT 1069, 1108, 1132.) Lopez was in the bathroom when she heard shots, and when she came out, there was a lot of commotion as people in the house were turning off the lights and music. (6 RT 1016; 7 RT 1081, 1095-1096.) Everyone was talking, but no one in the house was bragging about the shooting. (7 RT 1200.) Appellant told her to go into the bedroom and stay

there with their baby because he was concerned the noise would wake her up. (7 RT 1088-1089.) Lopez said that was the only reason appellant told her to go into the bedroom. (7 RT 1089.) Lopez also testified that she did not see appellant or anyone else grab her car keys in order to move any of the cars that were parked outside. (7 RT 1081-1082, 1093.) Lopez could hear cars being moved, but she did not know who moved them. (7 RT 1191-1192.) Lopez testified that she saw Rangel with a gun tucked in his waistband, but never saw appellant with a gun. (7 RT 1075-1077, 1123-1124, 1146-1148, 1185-1186.)

B. The Defense Case

Appellant's counsel rested without calling any witnesses on appellant's behalf. (14 RT 2156.)[12]

C. The Prosecution's Penalty Phase Evidence

1. Evidence in Aggravation Relating to Both Appellant and Rangel

a. Victim Impact Evidence

The jurors were shown numerous photographs of Anthony Urrutia, as a boy, at his first communion, with his father and mother, and with other relatives and friends, as a high school football player, at his high school graduation, and as a loan assistant at a loan company. (16 RT 2593-2596.)

Urrutia's sister, Olivia Perez, described for the jury a photograph of her brother with their father, just before he passed away. She said that her brother had a hard time dealing with their father's illness and death. (16 RT

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[12] Co-appellant Rangel presented testimony from seven witnesses before resting at the guilt phase. (See 12 RT 1898-1986; 13 RT 2009-2107; 14 RT 2156.) The testimony from these seven witnesses has been incorporated in the summary of the guilt phase evidence, *ante*.

2595-2596.) She described her brother's childhood. He stayed away from gangs and was dedicated to his family and community. He was an explorer scout with the police department, and dreamed of being a police officer. He did volunteer work and helped others. He attended Long Beach City College. After his death, the college put up a mural dedicated to him. (16 RT 2596-2603.) Perez testified that her brother's death was "a tragedy that [she] would not wish on [her] worst enemy." From the witness the stand, she said to appellant and Rangel, "I don't understand why you guys did this." (16 RT 2604.) Perez said that her brother's death has left the family devastated. She recounted getting the call that her brother had been shot, and going to her mother's house together with her husband to tell her. Her mother "knew something was up 'cause she waited every night for him." (16 RT 2605.) Perez described going to the hospital that night, and the difficulty the hospital staff had in trying to locate her brother, because he had been brought in as a "John Doe." Finally, Perez told the jurors that she wanted justice for her brother's murder. (16 RT 2606.)

Urrutia's nephew, Javier Soto, described growing up with Urrutia, and how his death affected him and his family. (17 RT 2609-2616.) Soto testified that Urrutia was the type of person that if given five minutes of his life back, "he could have changed their mind[s] from killing him." (17 RT 2614.)

Anthony Urrutia's mother, Virginia Urrutia, testified that he was her only son and only natural child. (17 RT 2617-2618.) She described how her son wanted to be a police officer, how he was an altar boy, how they prayed together every night and went to church on Sunday, and how she would bless him with the sign of the cross every day and before he left the house. (17 RT 2618-2620.) She testified that her son never moved away

from home, and was living with her at the time of his death. (17 RT 2620.) She testified how she waited up for him all the time, and how she waited up for him the night he was killed. (17 RT 2620-2621.) She said she will suffer the rest of her life, and that when she is home, she hears her son saying, "Mom, I'm coming home." (17 RT 2623.)

The jury was also shown numerous photographs of Andy Encinas, including photos of Encinas being baptized, in the second grade, as a high school football player, at his high school graduation, and with various family members and relatives. (17 RT 2633-2635.)

Encinas's sister, Luz Gamez, described her brother as a child and as a young man, and she recounted the day he was killed. (17 RT 2635-2639.) Gamez testified that her mother also waited up for her brother, and she described how her mother called her at 6:00 in the morning, saying her brother had been shot and was in surgery. (17 RT 2638-2639.) Gamez testified that the family was not able to say goodbye to her brother because he was dead when they arrived at the hospital. (17 RT 2639.) Gamez testified that her mother was not able to come to court because she was in bad health due to the fact "somebody decided to take [her brother's] life." (17 RT 2639-2640.) Gamez also described how their father reacted to her brother's murder, and said he became a "madman." (17 RT 2640.) She said that her family has not told her father that this trial was going on because they were afraid of how he would react, and afraid the trial would affect his health. (17 RT 2641-2642.). She testified that her father also was in bad health, and that his health has deteriorated since her brother's death. (17 RT 2642.) Gamez testified that, like Anthony Urrutia, Andy Encinas wanted to be a police officer. (17 RT 2642.) Gamez told the jurors that her family did not understand "why certain people took [her brother's] life."

(17 RT 2643.)

Encinas's brother, Sergio Encinas, described his brother as a child and as an adult, and testified that, before his death, he had passed the test for the Los Angeles Police Department Academy. (17 RT 2645-2647.) Sergio told the jurors that his brother "was a big guy, six-three, 300-pound guy, when some people took him out of the world." (17 RT 2426.) Sergio described how their father sacrificed and worked hard so that he and his brother could attend private school and stay out of trouble. (17 RT 2648.) He also described how he heard about his brother's death, how he had to identify his body, how he had to tell the rest of the family at the hospital that his brother was dead, and how that experience "ruined" him, both physically and mentally. (17 RT 2648-2650.) Sergio testified that he did not tell his father about the trial in this case. (17 RT 2651.) He said that his father wanted to know when this trial would occur, but he would not tell him because of his father's poor health, and because he did not think his father could control himself in court. (17 RT 2651-2652.) Finally, Sergio described how his brother's death has affected both his father's health and his own life and health, and how the pain of his brother's death would never go away. (17 RT 2651-2654.)

Paula Beltran testified that she and Andy Encinas had planned on marrying and having a family. (17 RT 2659.) She described how he wanted a son, and how he shared with her his dreams of wanting to be a police officer. (17 RT 2660.) Beltran testified that she felt guilty and blamed herself for Encinas's death because if she had not paged him for help that night, he would still be alive. (17 RT 2661.) She cannot get the images of the night Encinas was murdered out of her head, and she has nightmares. (17 RT 2661-2662.) She described how she goes to sleep

wishing she could dream of Encinas and his smile, but when she dreams it is appellant's and Rangel's faces that she sees. (17 RT 2662.) She testified that when she sleeps she does not want to wake and face another morning. (*Ibid.*)

2. Evidence in Aggravation Relating to Appellant

Paul Juhn testified that while he was incarcerated in the Los Angeles County Jail in 1996, a Hispanic inmate asked him for his mattress. (18 RT 2676.) When Juhn refused to give the man his mattress, the man asked Juhn if he was Chinese. Juhn replied that he was Korean. (18 RT 2677.) The man then took Juhn's mattress. The man returned a few minutes later with four or five other inmates, who called Juhn "chinky-chinky-chinky," and then beat him about the back, face and legs. (18 RT 2677-2678.) After the incident, Juhn identified the inmates who attacked him to jail deputies, but he could no longer recall who they were at the time of appellant's trial. (18 RT 2679-2681.)

Deputy Sheriff Kresimir Kovac testified he was with Juhn when he identified the inmates who he said had attacked him. (18 RT 2701-2703.) Kovac testified that Juhn identified these individuals through a procedure designed to protect Juhn from the threat of retaliation from "the suspect, or from one of his other gang members[.]" (18 RT 2701.) Kovac reviewed his incident report and testified that the report listed appellant, who was in custody at the time for a Vehicle Code violation, as one of the inmates identified by Juhn as having participated in the attack. (18 RT 2704, 2747.) Kovac was unable, however, to identify appellant in court as one of the men Juhn said had attacked him. (18 RT 2719-2720.)

Even though Kovac was unable to identify appellant in court, appellant's counsel offered to stipulate that appellant was in fact one of the

men identified by Juhn. The prosecutor refused to stipulate. (18 RT 2713-2714.) Instead, the prosecutor elicited Kovac's testimony that when identifying suspects in his reports, he tries to pick out tattoos "that shows a gang name, gang affiliation, anything like that," and that his report concerning Juhn listed appellant as having a phrase consisting of three words tattooed on his neckline, just above his chest. (18 RT 2722, 2726-2727.) Kovac examined appellant out of the presence of the jury and then testified in the jury's presence that he saw the same three-word phrase written in his report tattooed along appellant's neckline. (18 RT 2722-2723, 2726.)

3. Evidence in Aggravation Relating to Rangel

In 1995, Rangel was one of two individuals who vandalized a truck, removing the truck's radio and speakers. (16 RT 2509-2515.) When the truck's owner confronted Rangel and his companion as they were pushing the vehicle away from the owner's home, Rangel told the owner, "We know where you live," and threatened to kill him if he called the police. (16 RT 2510-2512, 2518, 2528-2529.) Rangel was arrested for burglary and making terrorist threats, and it subsequently was determined that he had spray-painted the letters "KCC" on the truck. (16 RT 2558-2560, 2567.) "KCC" stands for "King City Criminals," which is a street gang. (16 RT 2582-2583.) As result of this incident, Rangel suffered a felony conviction for second-degree burglary of an automobile. (18 RT 2753, 2758-2759.)

Compton school police officer Andrew Zembal testified that he is "a world renowned expert on gang graffiti and gangs," and that the King City Criminals is a gang that carries guns and commits serious offenses, including murder. (20 RT 3078-3080.) Zembal opined that, based on Rangel's shaved head and tattoos, Rangel was a "gang member of a hard-

core nature," and his tattoos signified that he was someone with a "wanton disregard or disrespect for life itself." (20 RT 3090-3095.) Zembal based that opinion in large part on a tattoo on Rangel's neck that reads, "King City Criminals." (20 RT 3091-3092, 3096.)

D. Appellant's Mitigating Evidence

Cruz Mora, appellant's putative father, testified that appellant's mother, Rosita Mendez, was a prostitute and that he, his uncles, brothers, and cousins were all her clients. She became pregnant and told Cruz the baby was his, although he is "not fully convinced" because he has "never had a blood test" to establish paternity. (19 RT 2994.) Even though he had doubts about whether appellant actually was his son, Cruz ended up marrying Rosita. Cruz said that their marriage was unpleasant, and he left her. (19 RT 2994-2995.) Cruz admitted that he was physically and verbally abusive toward Rosita, and on one occasion, appellant saw him throw a lamp at Rosita, hitting her in the head. (19 RT 3006.) Rosita had to have stitches as a result of injuries suffered during that incident. (*Ibid.*)

Cruz and Rosita divorced when appellant was four years old, and after that, Cruz had little contact with appellant. (19 RT 2995.) At the time of their divorce, Rosita was pregnant with appellant's sister, Alicia. (3043.)

After Rosita divorced appellant's father, she sent appellant to live with his aunt for a year. He was four years old at the time. Rosita did not see appellant during that time because she "was working a lot, and I [had] too many problems." (19 RT 3007, 3020.) (19 RT 3007, 3020.) He returned to live with her when he was five years old. When appellant was seven years old, Rosita sent him to Mexico for four or five months to live with his grandparents. (19 RT 3007-3008.) During that period of time, Rosita did not see her son. (19 RT 3008.) Rosita said that appellant lived

with her between the ages of five and thirteen, and during that time period, she would work during the day and frequent bars until 3:00 in the morning. She went out to the bars every night. (19 RT 3008-3009.) Rosita testified that she abused drugs and alcohol, and would often leave her children at home by themselves. (19 RT 3009-3010, 3012, 3044-3045.)

Rosita remarried when appellant was 13 years old. At that time, appellant was sent to live first with an aunt, and then with a cousin. (19 RT 3008, 3010, 3030.) Rosita testified that she had little contact with appellant after the age of 13. (19 RT 3010-3011.)

Rosita was asked how she would feel if her son were executed. She testified that she wished she was in her son's place because she had been a bad mother. (19 RT 3011.)

Candy Lopez, appellant's cousin, testified that appellant came to live with her family when he was around three years old. She was about 13 or 14 at the time. (19 RT 3037.) Appellant stayed with them until he was around five years old. (19 RT 3026.) Candy said that there were problems between appellant's father and his mother. Appellant's father was dating other women and this was causing problems. Candy testified that she witnessed "discord" in appellant's home. (19 RT 3028.)

Candy moved out of her mother's home and into her own apartment when she was 19 years old. When appellant was about 14 years old, he came to live with her. He lived with her until he was 18, when Lourdes Lopez gave birth to his daughter, Abigail. (19 RT 3030, 3038.)

Appellant moved out of Candy's apartment after Abigail was born, and lived with Lourdes and Abigail until they separated. (19 RT 3031-3033.) After appellant and Lourdes separated, appellant and Abigail went to live with Candy. Appellant was living with Candy at the time he was

arrested in connection with this case. (19 RT 3031-3033.) Appellant and Abigail occasionally stayed with Lourdes Lopez at Lourdes's house on Castlegate Avenue, but they did not live there with her because of the "environment." (19 RT 3040-3041.)

Appellant's sister, Alicia Mora, testified that when she was "seven, eight, nine," their mother was not around very much. Their mother would go out a lot and leave her, appellant and her younger brother, who was about two years old at the time, alone without any adult supervision. Their mother worked in a fast-food restaurant, and was also on welfare. (19 RT 3045-3046.)

Alicia testified that when appellant was 18 or 19 years old, he was shot in the back. (19 RT 2997, 3046.) He was hospitalized for weeks, almost died, suffered damage to his liver, and lost his spleen. (19 RT 2997, 3046, 3048.)

Appellant's trial counsel and the prosecutor stipulated to the following facts: that "other than in connection with this case," appellant had no prior felony convictions (18 RT 2760); that Arthur Close, one of appellant's planned mitigation witnesses,[13] was the victim of a home-

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[13] In his penalty-phase opening statement, appellant's counsel told appellant's jury that he expected Arthur Close to testify as follows:

> You will hear from a neighbor and a friend by the name of Art Close. And Mr. Close is an attorney, and he will tell you that he lived near Mr. Mora for about 11, 12 or 13 years. [¶] And he described him, and he will describe for you, as the nicest kid, someone who was there, good for his brother, good for his sister, a decent person in the neighborhood; a person, though, that was troubled; a person that he saw crying on numerous occasions because of the

(continued...)

invasion robbery and in the hospital, and was therefore unable to come to court to testify on appellant's behalf (19 RT 3018); that, prior to trial, a district attorney investigator interviewed Paul Juhn, the victim of the alleged jail assault, and Juhn said he could remember only the instigator of the jail assault, and appellant was not the instigator (19 RT 3018-3019).

Finally, at the request of appellant's counsel, the trial court took judicial notice of the fact that Javier Reveles, a former cellmate of appellant's at the county jail and another one of appellant's planned mitigation witnesses,[14] was no longer within the jurisdiction of the trial

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[13](...continued)
marriage and the abuse that was going on; that he felt unwanted at a very young age.

(16 RT 2504-2505.)

[14] In his opening statement at the penalty phase, appellant's counsel told appellant's jury that he expected Javier Reveles to testify as follows:

> You'll hear from a former cellmate of Mr. Mora's, a gentleman by the name of Javier Reveles. And Mr. Reveles will tell you that he did some time in county jail on some drug charges . . . [a]nd during that period of time when he was in the same cell with Mr. Mora, they became friendly; that Mr. Mora counseled him, advised him to stay away from drugs, to get his life straight; and they would read the bible together; they would go to church together, essentially that he was a positive influence on this young man, who was just recently released from the jail.

(16 RT 2506.)

court, and therefore could not be brought into court to testify on appellant's behalf.[15] (19 RT 3019.)

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[15] While Reveles was in the Los Angeles County Jail, he had been twice ordered by the trial court to appear at trial. (6 RT 1035; 13 RT 2150-2153.) At the time of the penalty phase, however, he had been released from the Los Angeles County Jail and turned over to the Immigration and Nationalization Service. At that point, Reveles was beyond the trial court's jurisdiction, and appellant's counsel had "no method of bring[ing] him to court." (19 RT 2989-2990.)

ARGUMENT

I

THE PROSECUTION'S REPEATED FAILURES TO TIMELY DISCLOSE MATERIAL EVIDENCE DURING THE GUILT PHASE PREJUDICIALLY IMPAIRED APPELLANT'S ABILITY TO PRESENT A DEFENSE AND VIOLATED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS

A. Introduction

The prosecution's repeated untimely disclosures of material evidence during the guilt phase violated appellant's state and federal constitutional rights to due process, a fair trial, equal protection, a reliable guilt determination, the right to meaningful confrontation and the right to the effective assistance of counsel. (U.S. Const. 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17.) The prosecution's failure to timely disclose evidence was not adequately remedied by the trial court's choice of sanctions and was not harmless as it hampered appellant's ability to present a cohesive defense and undermined the reliability of the proceedings.

B. The Facts

On September 11, 1997, appellant and co-appellant Rangel were arraigned on the charges. (1 CT 123-125.) During the next six months, the court and the parties met several times to discuss discovery issues and compliance. (See, e.g., 2 CT 127-128 [proceedings of October 9, 1997], 135-137 [proceedings of October 29, 1997], 140-141 [proceedings of November 20, 1997], 144-145 [proceedings of December 17, 1997]; 158-159 [proceedings of March 17, 1998].)

A preliminary hearing was held on April 20 and 21, 1998 (2 CT 270-378), and appellant and co-appellant Rangel were held to answer on April 21, 1998 (2 CT 385). The information was filed on May 5, 1998. (2 CT

501-504.)

On July 9, 1998, appellant and co-appellant Rangel filed an informal request for discovery. (3 CT 553-564; 1 RT A-7.) Over the course of the next six months, several pre-trial hearings were held and discovery was exchanged by the parties. (See, e.g., 1 RT A-11 [proceedings of August 10, 1998], 1 RT A-23 [proceedings of October 1, 1998]; 1 RT A-34-36, A-38 [proceedings of October 29, 1998] A-42-A52 [proceedings of November 23, 1998], A-104-A105 [proceedings of December 8, 1998], 2-3 [proceedings of December 17, 1998]; 63-70 [proceedings of January 8, 1999].)

On January 12, 1999, the prosecution began presenting evidence in its case-in-chief. (3 RT 397.)

On January 19, 1999, during the testimony of the prosecution's fifth witness,[16] Lourdes Lopez, Rangel's counsel discovered that she had been given only one of the two transcripts of taped police interviews with Lopez. (6 RT 1022-1024.) Rangel's counsel voiced her concern with the court about this, and also that she had not received all of the discovery from the prosecution. She told the court that a few days earlier she saw a diagram in Detective Mike Piaz's notebook "that I didn't have." (6 RT 1026.)[17] She

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[16] The jury had already heard testimony from the following four key prosecution witnesses: Paula Beltran (3 RT 398-457; 4 RT 460-622); Fidel Gregorio (4 RT 625-647; 5 RT 649-768); Sheila Creswell (5 RT 788-839); and Ramon Valadez (6 RT 842-1000).

[17] Detective Mike Piaz was the lead investigator assigned to appellant's case. (14 RT 2165.) He was the prosecutor's investigating officer at trial, and he provided assistance to the prosecutor throughout appellant's trial. (4 RT 475.) Piaz also served as the prosecutor's investigating officer at appellant's preliminary hearing. (2 CT 272.)

told the court that she asked Piaz to make her a copy of the diagram, and that he had just provided her with that diagram and another, both dated "8-26-97." (6 RT 1026-1027.) Rangel's counsel expressed her concern that there may be other reports that the prosecution had failed to give to her. The prosecution replied that it had turned over "every single piece of paper I have." (6 RT 1027.) The court suggested that Rangel's counsel go to Detective Piaz's office that afternoon to ascertain whether there were other items she had not received. (6 RT 1021-1028.) The court asked appellant's counsel whether she had received "copies of those diagrams as well," and she replied that she had not. (6 RT 1028.)

The next morning, Rangel's counsel reported that after going to the Compton Police Department, she discovered at least four major reports that the prosecution had not turned over to either defense counsel, at least one of which was a critical six-page report with witness statements from thirteen different percipient neighborhood witnesses she had never heard of before. Rangel's counsel said that at least two of the witness statements appeared "to be directly relevant to the credibility of some of the witnesses that had already testified." (7 RT 1038.) Rangel's counsel said that if she had had the witness statements earlier they would have affected her cross-examination of the four witnesses who had already testified. Rangel's counsel stated that some of the information she found contradicted Ramon Valadez's testimony. (7 RT 1039-1040.) Rangel's counsel requested a dismissal of the case based on the prosecution's violation of the discovery rules. (7 RT 1038.)

Appellant's counsel joined in Rangel's counsel's request, noting that at least three of the undisclosed witness statements contradicted the first two prosecution witnesses, Paula Beltran and Fidel Gregorio, and "had we

had these reports at the beginning, . . . we would have been able to cross-examine those witnesses a lot differently . . . . And these are independent witnesses that we had no knowledge of." (7 RT 1041.)

The court took a recess to review the newly-discovered reports. The court said that it was "more than a little concerned" and that there were certain things that warranted follow-up, particularly about a statement from witnesses who heard a car taking off after the shots, a statement that a woman's voice was heard outside arguing, and a statement by William Florence who claimed he saw a black Hyundai or Honda traveling northbound on Castlegate out of view. (7 RT 1046-1047.) The court declined to dismiss the case or to order a continuance, but ordered the case in recess from that morning (Wednesday) until Monday (January 25) morning with a status conference to be held on Friday (January 22).[18] (7 RT 1043-1048, 1052-1053.)

At the Friday status conference, the prosecution turned over yet another witness statement attributed to Yesenia Jimenez, someone who had been mentioned in the testimony previously presented which was "totally contradictory to [an]other report" previously disclosed. (7 RT 1060.) The

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[18] The court also stated:

> I fully intend to have a hearing once this matter is concluded, and I will order to show cause why monetary sanctions shouldn't be imposed on the Compton Police Department because of their failure to produce important information in a timely fashion. [¶] And that will probably involve, other than the investigating officer, who is in court, I expect that I will be seeking to hear from the Chief of the Compton Police Department at a minimum as to why this has occurred.

(7 RT 1048.) However, no such hearing on the discovery violations in this case was ever held.

prosecution also turned over a warrant regarding Jade Gallegos, the person appellant claimed he had been mistakenly identified for as the person who had shot Anthony Urrutia, and two receipts for the gun shot residue ("G.S.R.") testing conducted in this case by the Los Angeles County Sheriff's Department.[19] Appellant argued that the prosecution's nondisclosure of so many reports and witness statements that contradicted the prosecution's case affected appellant's right to a fair trial, and again requested the case be dismissed. (7 RT 1061-1062.)[20] The court denied that request, stating: "I have suspended the trial to give you an opportunity to communicate with these witnesses and will entertain any other request you have by way of sanctions for these – for this failure to comply with the discovery requirements that is allowed by law." Counsel for both appellant and co-appellant Rangel responded that they would be requesting a jury

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[19] The G.S.R. test results as to appellant were excluded due to their late disclosure on the eve of trial by the prosecution. (1 RT 63-68; 13 RT 2039.) The G.S.R. test results were negative for co-appellant Rangel, even though the prosecution had previously told his counsel that they were positive. (1 RT 66; 13 RT 2000.)

[20] Appellant's counsel made the following statement:

> Your Honor, for the record on behalf of Mr. Mora, I'm deeply distressed about this late discovery, and all of it appears to be discovery that contradicts the People's case. [¶] All of the discovery that is missing is not just one report, but several reports, and they are all in my estimation material that should have been turned over long ago. They are all – every statement of every witness contradicts the other statements, and it's hard for me to believe that all of these reports just didn't happen to get turned over, Your Honor. I'm very concerned that perhaps Mr. Mora's right to a fair trial has been undermined.

(7 RT1061-1062.)

instruction and the court told them to have one prepared for when they got to that stage of the trial.[21] (7 RT 1056-1063.)

The guilt phase proceeded on Monday, January 25, with the testimony of Lourdes Lopez. (7 RT 1064; 4 CT 971.) After the court recessed for the day, the prosecution notified the court and defense counsel that four of the witnesses from the untimely disclosed reports (John and Barbara Youngblood, William Florence and Armando Martinez) had arrived in court as a result of prosecution subpoenas. The prosecution disclosed that in its interview of John Youngblood, he had identified appellant, where in his previous witness statement disclosed to the defense he had not identified anyone. The prosecution also disclosed that one of the other witnesses[22] stated they did "see the back of the car," where previously they had stated they did not see anything. The prosecution indicated its intention to call John Youngblood and possibly William Florence. (7 RT 1228-1232.) Appellant's counsel said that she had sent her investigator to interview the Youngbloods, but they refused to talk to him because "the police had already been out there that morning, showed their badges, and

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[21] The court again indicated it would give a formal instruction toward the end of the guilt phase covering the additional discovery violations that had come to light. (13 RT 1998, 2003-2005.) However, when defense counsel presented a special instruction on the prosecution's various discovery violations, the court declined to give it and instead gave a modified version of CALJIC No. 2.28. (5 CT 1114, 1169; 13 RT 2132; 14 RT 2174-2176, 2197-2198.)

[22] The prosecutor could not remember which witness this was. She thought that it could have been either Armando Martinez or John Youngblood. (7 RT 1230.)

told them they didn't have to talk." (7 RT 1231.)[23] Rangel's counsel objected to the prosecution calling any of the witnesses based upon the late disclosure, and the court found the issue to be premature. (7 RT 1232.)

On Thursday, January 28, 1999, the prosecution sought to call John Youngblood. Before he testified, he agreed to be interviewed, and defense counsel for both appellant and co-appellant Rangel interviewed him that day during court recesses. During the recess just prior to his testimony, Youngblood changed his story when speaking with appellant's investigator and stated that he would be identifying Rangel instead of appellant as one of the perpetrators. Youngblood wrote a six-page statement for appellant's investigator. Rangel's counsel requested that she be given some time to review Youngblood's six-page statement prior to Youngblood's testimony, but the court refused. (10 RT 1621-1622.)[24]

On February 1, 1999, the prosecution recalled Detective Branscomb. (12 RT 1866-1892.) Following the completion of Branscomb's testimony, the prosecution rested, and co-appellant Rangel began calling witnesses in his defense. (12 RT 1893, 1897.)

On February 2, 1999, during co-appellant Rangel's defense case, the

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[23] The trial court did not appear to be troubled by the prosecution's concerted efforts to dissuade the Youngbloods from talking to the defense. Here, after being informed that the police had told the Youngbloods that they did not have to talk to the defense, the court said:

> The witnesses are entitled to speak to whomever they choose to. They don't have to talk to anybody, and if they do, that's fine.

(7 RT 1231.)

[24] Rangel objected to the admission of Youngblood's testimony; appellant did not. (See 10 RT 1622.)

prosecution turned over to the defense a four-page fingerprint report dated December 3, 1997. Throughout the proceedings, defense counsel for appellant and co-appellant had been told by the prosecution that no fingerprint testing had been done. (13 RT 1990-1991.) However, the newly-disclosed report indicated that four expended shell casings and a beer can had in fact been tested for fingerprints and none matching either appellant or co-appellant Rangel had been found. (13 RT 1991.)[25] Counsel for both appellant and co-appellant Rangel requested a mistrial, arguing that they had been misled, and that the failure to timely disclose the report adversely affected their cross-examination of police witnesses who had already testified. They also argued that the disclosure of the report after all the prosecution witnesses had testified undermined a large portion of the defense and that had they had it earlier they could have proceeded differently. (13 RT 1993-1998.)

Moreover, counsel for both appellant and co-appellant Rangel argued that the repeated and continuing discovery violations, including having to scramble to interview 13 previously undisclosed witnesses mid-trial, had altered and ultimately hampered their ability to present a defense. The court agreed that a discovery violation had occurred, but declined to grant a mistrial and instead heard arguments on what it should do.[26] (13 RT

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[25] The four-page report was not included in the earlier undisclosed materials co-appellant Rangel's counsel discovered at the Compton Police Department on January 19, 1999, but was "discovered" by Detective Piaz after Detective Branscomb had testified that no fingerprinting analysis had been done in this case. (13 RT 1990-1992.)

[26] The court again expressed its intention to set an order to show cause with regard to monetary sanctions from the Compton Police

(continued...)

1994-2005.)

Finally, counsel for both appellant and co-appellant Rangel argued for exclusion of the fingerprint report and the right to argue in the same posture as if there had been no examinations since they had both cross-examined witnesses under the premise that the fingerprinting had never been done, and to now admit the report would make them look like fools and erode the defense argument. Over defense objection, the court decided to admit the report and admonish the jury that the report was made available to all counsel that day, thus the defense did not know about it when they cross-examined the witnesses the day before.[27] (13 RT 1994-2005, 2109-2113, 2128-2129.)

C. The Prosecution's Untimely Disclosure of Material Evidence Violated California's Discovery Statutes as Well as the State and Federal Constitutions

In criminal cases, discovery is available under the reciprocal-discovery provisions of Penal Code sections 1054 through 1054.10, the California Constitution (Cal. Const., art. I, § 30, subd. (c),[28] and as

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(...continued)
Department for the various discovery violations in this case, stating: "I will add this to my list." (13 RT 1997.) However, as noted previously, no such post-trial hearing was ever held by the trial court.

[27] At the close of the guilt phase, the court instructed the jury with a modified version of CALJIC No. 2.28 regarding the Compton Police Department's failure to timely produce the witness statements and the fingerprint analysis report. (5 CT 1114.)

[28] California Constitution, article 1, section 30, subdivision (c), provides in relevant part:

> In order to provide for fair and speedy trials, discovery

(continued...)

mandated by the Due Process Clause of the United States Constitution (U.S. Const., 14th Amend.). This discovery scheme is intended to promote the ascertainment of the truth; to save court time; to protect victims and witnesses from danger, harassment, and undue delay; and to prevent trial by ambush. (*In re Littlefield* (1993) 5 Cal4th 122, 131.) These objectives are consistent with "'the true purpose of a criminal trial, ascertainment of the facts.'" (*Ibid.*, quoting *People v. Riser* (1956) 47 Cal.2d 566, 586, overruled on other grounds in *People v. Morse* (1964) 60 Cal.2d 631.)

Penal Code section 1054.1 provides:

> The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:
>
> (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
>
> (b) Statements of all defendants.
>
> (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
>
> (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.
>
> (e) Any exculpatory evidence.
>
> (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case,

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(...continued)

> in criminal cases shall be reciprocal in nature, as prescribed by the Legislature or by the people through the initiative process.

> including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

Here, all of the evidence discussed in Part B, *ante*, was found by the trial court to have been untimely disclosed by the prosecution under California's discovery law. The prosecution's untimely disclosure of evidence and its concerted efforts to thwart appellant's efforts to investigate that evidence also violated appellant's federal constitutional right to a fair trial in accordance with due process.

Under the Due Process Clause of the United States Constitution, the prosecution must disclose to the defense any "evidence favorable to the accused" that is "material either to guilt or to punishment." (*United States v. Bagley* (1985) 473 U.S. 667, 676; *Brady v. Maryland* (1963) 373 U.S. 83, 87; see Pen. Code, § 1054, subd. (e); *People v. Cook* (2006) 39 Cal.4th 566, 587; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 378.) The failure to do so, regardless of the good faith of the prosecution, violates the accused's constitutional right to due process. (*Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 52.)

In *Brady v. Maryland*, *supra*, 373 U.S. 83, the high court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Id.* at p. 87.) Pursuant to *Brady*, the prosecution must disclose material exculpatory evidence whether the defendant makes a "specific request" (*ibid.*), a general request, or none at all (*United States v. Agurs* (1976) 427 U.S. 97, 107; *In re Brown* (1998) 17 Cal.4th 873, 879).

Brady "is a disclosure rule, not a discovery rule." (*United States v.*

Higgins (7th Cir. 1996) 75 F.3d 332, 335.) Evidence is favorable and must be disclosed if it will either help the defendant or hurt the prosecution. (*People v. Coddington* (2000) 23 Cal.4th 529, 589-590.) Impeachment, as well as exculpatory, evidence falls within the *Brady* rule. (See *United States v. Bagley*, *supra*, 473 U.S. at p. 676; People v. Ochoa (1998) 19 Cal.4th 353, 473.) "*Brady* information [therefore] includes 'material . . . that bears on the credibility of a significant witness in the case.'" (*United States v. Brumel-Alvarez* (9th Cir. 1993) 991 F.2d 1452, 1461, quoting *United States v. Strifler* (9th Cir. 1988) 851 F.2d 1197, 1201.)

In *In re Brown*, *supra*, 17 Cal.4th 873, this Court emphasized that neither the prosecutor's good faith nor actual awareness (or lack thereof) of exculpatory evidence in the government's hands is determinative of the prosecution's disclosure obligations: "The scope of this disclosure obligation extends beyond the prosecutor's case file and encompasses the duty to ascertain as well as divulge 'any favorable information known to others acting on the government's behalf. [Citation omitted.]'" (*In re Brown*, *supra*, 17 Cal. 4th at p. 879; see also *Carriger v. Stewart* (9th Cir. 1997) 132 F.3d 463, 479 (en banc); *United States v. Kearns* (9th Cir. 1993) 5 F.3d 1251, 1254.) Because the prosecution is in a unique position to obtain information known to other agents of the government, it may not be excused from disclosing what it does not know but could have learned. Rather, the prosecution has a duty to learn of any exculpatory evidence known to others acting on the government's behalf. (*In re Brown*, *supra*, 17 Cal. 4th at pp. 879-880; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 437-438.)

In this case, the issue is not that material evidence was *never* disclosed, but that its *untimely* disclosure so interfered with appellant's

ability to effectively mount a defense to the charges that it undermined confidence in the fairness and reliability of the guilt and penalty verdicts. Delayed disclosure is considered a *Brady* violation if the defense does not receive the information in time for its effective use at trial or is prejudiced by the delay. (See *People v. Wright* (1985) 39 Cal.3d 576, 590-591; *In re United States v. Coppa* (2nd Cir. 2001) 267 F.3d 132, 144; accord, *Knighton v. Mullin* (10th Cir. 2002) 293 F.3d 1165, 1172-1173; *United States v. Ingraldi* (1st Cir. 1986) 793 F.2d 408, 411-412.)

Here, appellant was seriously misled by the prosecution's failure to comply with its discovery obligations, and thus was unable to change course mid-trial and make effective use of the untimely disclosed evidence. (See *In re Brown, supra*, 17 Cal. 4th at p. 887.) In addition, appellant's efforts to conduct a mid-trial investigation of the untimely disclosed evidence was unfairly hampered by the police, who went out of their way to dissuade witnesses from speaking to the defense. (See 7 RT 1231.) Further, the sanctions offered by the trial court for the various discovery violations were inadequate to cure the harm. Appellant's counsel was forced to investigate appellant's case mid-trial, to cross-examine witnesses without the benefit of relevant impeachment evidence, and to alter the defense theory. It is well established that defense counsel in a criminal case cannot provide effective representation unless his or her tactical choices are fully informed. (See, e.g., *Wiggins v. Smith* (2003) 534 U.S. 510; *In re Jones* (1996) 13 Cal.4th 552.) If this principle holds true when the lack of information is the result of counsel's own dereliction, it certainly applies when the absence of critical information is the fault of the prosecution. Appellant's defense should not have been penalized because information critical to his counsel's rational strategic choices was not available to defense counsel through no

fault of his own. Such a result would be a perversion of due process, as well as the constitutional guarantee of equal protection of the law. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 474.)

Thus, the discovery violations in this case constitute both statutory and constitutional error. As discussed below, the error requires reversal.

D. Reversal Is Required since Appellant's Ability to Present a Defense and Receive a Fair Trial Was Irreparably Damaged by the Prosecution's Numerous Discovery Violations

A trial court's rulings on matters regarding discovery are reviewed under an abuse of discretion standard. (*People v. Ayala* (2000) 23 Cal.4th 225, 299.) "[A] trial court may, in the exercise of its discretion, 'consider a wide range of sanctions' in response to the prosecution's violation of a discovery order." (*Ibid.*, quoting *People v. Wimberly* (1992) 5 Cal.App.4th 773, 792.) Trial courts may prohibit testimony of witnesses if other sanctions have been exhausted, and may dismiss charges if "required . . . by the Constitution of the United States." (Pen. Code, § 1054.5, subd. ©.) A trial court's ruling on motions for mistrial are also reviewed under an abuse of discretion standard. (*People v. Lewis* (2006) 39 Cal.4th 970, 1029; *People v. Ayala, supra*, 23 Cal.4th at pp. 282-283.) A mistrial should be granted when the moving party's chances of receiving a fair trial have been irreparably damaged. (*Id.* at pp. 283-284.)

Here, the prosecution's failure to timely disclose the identity and statements of at least 13 witnesses, diagrams, arrest warrants, and fingerprint results prejudiced appellant since it undermined the presentation of his defense case and ultimately the reliability of the jury's guilt and penalty determinations. The trial court's denial of appellant's request for a reasonable continuance, repeated requests for a mistrial and exclusion of the

fingerprint analysis report were erroneous. The trial court's choice of remedies, a two-day recess to locate and interview some 13 witnesses, an admonishment to the jury regarding the fingerprint report and the giving of a faulty jury instruction (see Argument II, *post*)[29] concerning the prosecution's many discovery violations provided little, if any, relief from the damage done to appellant's fundamental due process right to receive a fair trial.

Violations of California's reciprocal-discovery statute (Pen. Code, § 1054.1) are subject to the harmless-error standard of prejudice set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, i.e., reversal is required where it is reasonably probable that the error affected the trial result. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1135, fn. 13; *People v. Bohannon* (2000) 82 Cal.App.4th 798, 805.) "Reasonably probable" is defined as a probability sufficient to undermine confidence in the outcome. (*In re Sassounian* (1995) 9 Cal.4th 535, 544 fn. 6; see also *Kyles v. Whitley*, *supra*, 514 U.S. at p. 419.)

Violations of federal constitutional rights are subject to the harmless beyond a reasonable doubt standard of prejudice set forth in *Chapman v. California* (1967) 386 U.S. 18, i.e., such errors will be found prejudicial unless the state can show beyond a reasonable doubt that the error did not contribute to the verdict.

In either instance, the reviewing court may consider any directly

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[29] In Argument II, *post*, appellant argues that the trial court's refusal to give his requested jury instruction regarding the prosecution's failure to fully and timely produce evidence and its giving of CALJIC No. 2.28, as modified, in its stead violated appellant's state and federal constitutional rights to due process, a fair trial, to the effective assistance of counsel, and a reliable penalty determination

adverse effect that the prosecutor's actions may have had on the preparation or presentation of the defendant's case. (See *People v. Hoyos* (2007) 41 Cal.4th 872, 918-923.) Reversal is warranted if the collective effect of the discovery violations could reasonably have put the case in such a different light as to undermine confidence in the verdict. (See *People v. Kasim* (1997) 56 Cal.App.4th 1360, 1383.)

In *United States v. Bagley*, *supra*, 473 U.S. 667, the court first explained the meaning of the term "material." In *Kyles v. Whitley*, *supra*, 514 U.S. at p. 434, the high court held that evidence is "material" if there is a "reasonable probability" that the outcome of the trial would have been different had the evidence been disclosed, which occurs when the undisclosed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."

In *Kyles v. Whitley*, *supra*, the high court identified four aspects to the materiality (i.e., prejudice) component of a *Brady* violation. (*Kyles*, *supra*, 514 U.S. at pp. 434-437.) First, "[a]lthough the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). [Citations.] *Bagley*'s touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly

shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.' [Citation.]" (*Kyles*, *supra*, 514 U.S. at p. 434, quoting *Bagley*, *supra*, 473 U.S. at p. 678.)

Second, "it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (*Kyles v. Whitley*, *supra*, 514 U.S. at pp. 434-435, fn. omitted.)

Third, "once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review. Assuming, arguendo, that a harmless-error enquiry were to apply, a *Bagley* error could not be treated as harmless, since 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,' [citation] necessarily entails the conclusion that the suppression must have had '"substantial and injurious effect or influence in determining the jury's verdict,"' [citations]." (*Kyles v. Whitley*, *supra*, 514 U.S. at p. 435.)

Fourth, while the tendency and force of undisclosed evidence is evaluated item by item, its cumulative effect for purposes of materiality must be considered collectively. (*Kyles*, *supra*, 514 U.S. at pp. 436-437 & fn. 10; see also *United States v. Agurs* (1976) 427 U.S. 97, 112, [omission must be evaluated in the context of the entire record].)

In *In re Brown, supra*, 17 Cal.4th 873, this Court specifically adopted these four criteria as applicable to California cases. (*Id.* at pp. 886-887.) The *Brown* court also discussed another relevant consideration identified by the high court in *Bagley*:

> In *Bagley*, the court identified another relevant consideration in noting that "an incomplete response to a specific [*Brady*] request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued." [Citation.] Given this possibility, "under the ['reasonable probability'] formulation the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response." [Citations.]

(*In re Brown, supra*, 17 Cal.4th at p. 887.)

Here, the police diagrams, witness statements and fingerprint reports went to the heart of the guilt-phase evidence. Appellant reasonably prepared his case and theory of defense based upon the discovery disclosed pre-trial, e.g., that all the percipient witnesses to the shootings and interviewed by police had been disclosed and that no fingerprinting had ever been done. Yet, mid-trial, appellant discovered that the Compton Police Department had been withholding material evidence that its own investigating officer was using at trial to assist the prosecution. That evidence included four major police reports, police diagrams, statements

from at least 13 additional neighborhood witnesses who had been interviewed by the police, and that the evidence actually had been tested for fingerprints, but with negative results. Appellant was then stuck with his trial strategy when the prosecution's failure to provide this critical evidence pre-trial meant that his strategic decisions were made on the basis of erroneous assumptions.

The only remedies offered by the trial court for the various discovery violations were a two-day recess of the proceedings so that defense investigators could find and interview the newly-disclosed witnesses, an admonishment to the jury to essentially disregard the defense's cross-examination about the failure to test the evidence for fingerprints, a jury instruction regarding the Compton Police Department's failure to timely produce evidence, and a sanctions hearing, post-trial, which never happened in any event. All of these remedies not only were inadequate, but served to further prejudice appellant's defense case by forcing appellant's trial counsel to re-investigate the case mid-trial; to cross-examine critical prosecution witnesses without the benefit of impeachment evidence; to proceed with a defense theory developed through cross-examination that was later proven untrue (i.e., that the police failed to analyze the evidence for fingerprints despite the opportunity to do so); and to have the jury instructed without any guidance as to how to evaluate how the untimely disclosures affected the defense case. (See Argument II, *post.*)

It is impossible to reconstruct how appellant's trial would have gone had the prosecution fully and timely complied with its discovery obligations. The prosecution's failure to provide appellant's trial counsel with full and timely discovery meant that they had a materially incorrect understanding of the state of the evidence when developing appellant's

defense theory and when cross-examining prosecution witnesses. This violation of clearly established law deprived appellant of the effective assistance of counsel, his right to effective confrontation, equal protection, a fair trial and due process of law. It rendered these proceedings fundamentally unfair, and requires reversal of the judgment of conviction, because there is a "reasonable probability" that, had the evidence been disclosed to the defense pre-trial, the result of the instant proceeding would have been different. (*In re Brown*, *supra*, 17 Cal.4th at p. 887; see also *Kyles v. Whitley*, *supra*, 514 U.S. at p. 435; *United States v. Bagley*, *supra*, 473 U.S. at p. 678.)

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II

THE TRIAL COURT'S REFUSAL TO GIVE APPELLANT'S REQUESTED JURY INSTRUCTION REGARDING THE PROSECUTION'S FAILURE TO FULLY AND TIMELY PROVIDE PRETRIAL DISCOVERY TO APPELLANT'S TRIAL COUNSEL PREJUDICIALLY VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND A RELIABLE PENALTY DETERMINATION

A. Factual Summary

After counsel for appellant and co-appellant Rangel discovered mid-trial that the prosecution had failed to provide them with essential pretrial discovery – police diagrams, police reports, arrest warrants, and statements from 13 percipient neighborhood witnesses – they moved for a mistrial. (See 7 RT 1038, 1061-1062.)[30] The trial court denied counsel's request, stating:

> I have suspended the trial to give you an opportunity to communicate with these witnesses and will entertain any other request you have by way of sanctions for these – for this failure to comply with the discovery requirements that is allowed by law.

(7 RT 1062.) Both counsel for appellant and co-appellant Rangel told the court that they would be requesting a jury instruction concerning the prosecution's many discovery violations, and the court agreed to so instruct the jury, telling them to have one prepared for when they got to that stage of the trial. (*Ibid.*)

At the close of the prosecution's case at the guilt phase, appellant and co-appellant Rangel again requested a mistrial based on not only the earlier discovery violations, but on a multitude of continuing discovery violations, including an untimely-disclosed fingerprint report. The court

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[30] See Argument I, *ante*.

again declined to grant a mistrial. The court said that it would give a formal instruction toward the end of the guilt phase covering the additional discovery violations that had come to light during trial. (13 RT 1998, 2003-2005.)

However, when appellant presented a special instruction on how the jury should consider the prosecution's various discovery violations,[31] the court declined to give it and instead gave a modified version of CALJIC No. 2.28 limited to the Compton Police Department's failure to timely produce witness statements and the fingerprint report.[32] (5 CT 1114, 1169;

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[31] Appellant requested that the jury be instructed as follows concerning the many discovery violations in this case:

> In this case the prosecution violated the Discovery Laws by failing to turn over to the Defense, police reports involving this case, and other evidence. The law requires that all discovery must be reciprocal and given to the defense 30 days prior to the start of trial.
>
> This violation was unfair to the defense and put them in a position where they had to continue to investigate this case during the course of the trial.
>
> This violation was largely attributed to the Investigative officers and Detectives from the Compton Police Department who withheld these reports from the Defense.
>
> You may consider this violation and give it whatever weight and/or significance you believe it deserves in your deliberations.

(5 CT 1169.)

[32] The trial court instructed the jury as follows:

> The prosecution and the defense are required to disclose to each other before trial the evidence each intends to

(continued...)

13 RT 2130-2132; 14 RT 2174-2176, 2197-2198.)

The trial court deleted language from CALJIC No. 2.28 that suggested that the evidence was intentionally concealed by the Compton Police Department "because I don't think there is any showing of intent. I think it's more negligence than anything else based on what I have heard."

(...continued)

> present at trial so as to promote the ascertainment of the truth, save court time and avoid any surprise which may arise during the course of the trial. Delay in the disclosure of evidence may deny a party a sufficient opportunity to subpoena necessary witnesses or produce evidence which may exist to rebut the non-complying party's evidence.
>
> Disclosures of evidence are required to be made at least 30 days in advance of trial. Any new evidence discovered within 30 days of trial must be disclosed immediately. In this case, the Compton Police Department failed to timely disclose the following evidence:
>
> (1) Witness statements elicited from people residing on Castlegate Avenue on August 24, 1997, including the statement from John Youngblood; and
>
> (2) Fingerprint analysis report dated December 3, 1997.
>
> Although the Compton Police Department's failure to timely disclose evidence was without lawful justification, the Court has, under the law, permitted the production of this evidence during the trial.
>
> The weight and significance of any delayed disclosure are matters for your consideration. However, you should consider whether the untimely disclosed evidence pertains to a fact of importance, something trivial or subject matters already established by other credible evidence.

(5 CT 1114; 14 RT 2197-2198.)

(14 RT 2175.) The trial court also refused a defense request to insert language that a beer can was not turned over until the defense requested that it be tested for fingerprints by an expert. (14 RT 2176.) In addition, the trial court granted the prosecutor's request that defense counsel not be allowed to argue that the untimely disclosure of evidence by the Compton Police Department was intentional. (14 RT 2175.)[33]

The trial court's refusal to give appellant's requested instruction and its giving of CALJIC No. 2.28, as modified, in its stead violated appellant's state and federal constitutional rights to due process, a fair trial, to the effective assistance of counsel, and a reliable penalty determination. (U.S. Const. 6, 8 & 14 Amends; Cal. Const., art. I, §§ 7, 15, 16, 17.)

Reversal of the entire judgment is thus required.

B. The Governing Legal Principles

A trial court has a duty to instruct the jury on every principle of law necessary to decide the case, including defenses. (*People v. St. Martin* (1970) 1 Cal.3d 524, 531; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1424.)

> "'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. [Citation.]'"

(*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

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[33] In Argument III, *post*, appellant argues that this ruling by the trial court, precluding defense counsel from arguing that the withholding of evidence by the Compton Police Department was intentional, also constitutes reversible error.

A defendant has the right to an instruction "relating particular facts to any legal issue." (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885; *People v. Sears* (1970) 2 Cal.3d 180, 190.) Such instructions may direct the jury's attention to evidence that could raise a reasonable doubt about the defendant's guilt. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119; *People v. Granados* (1957) 49 Cal.2d 490, 496.) Moreover, trial courts must give the instructions required by the facts of the case on trial and standard instructions may need modification given the facts of the particular case. (See *People v. Pulido* (1997) 15 Cal.4th 713, 729; *People v. Runnion* (1994) 30 Cal.App.4th 852, 858; see also Cal. Rules of Court, rule 2.1050, subd. (e).)

The reviewing court independently reviews issues pertaining to jury instructions. (*People v. Waidla* (2000) 22 Cal.4th 690, 733, 737.)

C. The Trial Court's Giving of CALJIC No. 2.28, as Modified, Was Erroneous Because It Failed to Provide Adequate Guidance to Appellant's Jury

Giving CALJIC No. 2.28, which permits the jury to consider the failure to timely produce evidence, has been held to be prejudicial error because, among other reasons, the instruction provides no guidance as to how the tardy disclosure might legitimately affect the jury's deliberations and it injects discovery compliance issues into the jury's evaluation of the evidence, inviting mini-trials on collateral issues such as what happened and why. (*People v. Lawson* (2005) 131 Cal.App.4th 1242; *People v. Cabral* (2004) 121 Cal.App.4th 748; *People v. Saucedo* (2004) 121 Cal.App.4th 937; *People v. Bell* (2004) 118 Cal.App.4th 249.)[34] Although

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[34] CALJIC No. 2.28 has since been replaced by CALCRIM No. 306 entitled "Untimely Disclosure of Evidence," which reads as follows:

(continued...)

in each of these cases the instruction was given as a result of the defendant's failure to timely produce evidence, the giving of the instruction in appellant's case as a result of the prosecution's delayed disclosure was prejudicial error for the reasons discussed in those cases.

In *People v. Bell, supra*, the court found that the use of CALJIC No. 2.28 was reversible error, in part because the instruction given in that case did not provide explicit guidance to the jury regarding why and how the discovery violation would be relevant to its deliberations. In the court's view, the instruction was faulty because, while it informed the jury "that tardy disclosure might deprive an opponent of the chance to subpoena witnesses or marshal evidence in rebuttal, there was no evidence that such an eventuality transpired here." (*People v. Bell, supra,* 118 Cal.App.4th at p. 255.) As the court stated, "if there were no diminution of the People's right to subpoena witnesses or present rebuttal, it is unclear how the jurors were to evaluate the weight of the potentially affected testimony. Certainly,

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(...continued)

> Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial.
>
> An attorney for the (People/Defense) failed to disclose <describe evidence that was not disclosed> [within the legal period].
>
> In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure.

(CALCRIM 306; see *People v. Lawson, supra* 131 Cal.App.4th at pp. 1248-1249.)

in the absence of any practical impact on the fact-finding process, the only sphere of jury responsibility here, the jurors were not free to somehow fashion a punishment to be imposed on Bell because his lawyer did not play by the rules." (*Ibid.*) The court explained that the failure of the trial court to adequately explain how the discovery failure should be taken into account created a likelihood that the jury would be prejudiced.

> The instruction implied that the jurors should "do something" but they were given no idea what that something should be. Their alternatives were severely limited. They could disbelieve, discount, or look askance at the defense witnesses. But it is not clear why, or to what extent, they should do so in the absence of evidence that the prosecution was unfairly prevented from showing that the witnesses were unreliable.

(*People v. Bell, supra*, 118 Cal.App.4th at p. 255.)

Similarly, in *People v. Cabral, supra*, 121 Cal.App.4th 748, the court said that:

> "It is axiomatic that a trial is a search for the truth. [Citation.]" The rationale of the discovery statute is to prevent "trial by ambush." "[T]he court has a variety of remedies available to penalize those who fail to comply with its rulings and the requirements of the statute. [Citation.]" "Inviting the jury to speculate, or to punish a defendant for the malfeasance of someone else, however, are not among the weapons in its arsenal."

(*Id.* at p. 752, citations omitted.)

In this case, like *People v. Bell, supra*, and *People v. Cabral, supra*, the trial court's giving of CALJIC No. 2.28, as modified, was faulty because it failed to articulate how the untimely disclosed evidence affected appellant's ability to effectively present his case, not only through the denial of the opportunity to subpoena necessary witnesses and produce rebuttal evidence, but also through the denial of the myriad of other rights affected

by the late disclosures. (See Argument I, *ante*.) Thus, the instruction left appellant's jury with no way to evaluate the weight and significance of the delayed disclosure by the prosecution on the defense case or the evidence presented.

Further, the instruction was incomplete, as it only named the Compton Police Department for the failure to timely disclose the evidence. It did not list the "People" or the prosecution as the party responsible for the delayed disclosure. The prosecution is presumed to have knowledge of and a duty to disclose all information gathered by all agencies to which the prosecution has access. (*In re Brown* (1998) 17 Cal.4th 873, 879; *In re Littlefield* (1993) 5 Cal.4th 122, 135; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 437-438.) Each untimely disclosed item was "reasonably accessible" to the prosecution and turned over late in violation of Penal Code section 1054.1. (*In re Littlefield*, *supra*, 5 Cal.4th at p. 135; *People v. Little* (1997) 59 Cal.App.4th 426, 431-433; see Argument I, *ante*.) Because of this instructional omission, the prosecution was able to distance itself from the many discovery violations in this case by blaming them on "mistakes" made by the investigating officers. (See, e.g., 15 RT 2412 ["These police reports are riddled with mistakes."], 2413 ["There are tons of mistakes in these reports."], 2414 ["Talk about making mistakes. This case is filled with mistakes."].) In fact, in her closing argument, the prosecutor argued in regard to the things the Compton Police Department did not do in this case, saying:

> Don't take that out on the People. Don't say, oh, well, Compton didn't do this, Compton didn't do that, so I'm not going to decide. If you are upset at how they handled this case, you write a letter.

(15 RT 2415.)[35]

Moreover, the instruction not only failed to point out that it was the *People* who failed to timely produce the evidence, but that the evidence was "concealed" by the Compton Police Department in that they withheld it from the defense knowing full well that this evidence was of a kind that they had a duty to provide to defense counsel. This seemingly was undisputed and borne out by the trial court's repeated comments that it would hold a hearing for monetary sanctions against the Compton Police Department post-trial. (7 RT 1048; 13 RT 1997.) All of these issues are of particular concern here, in a capital trial, requiring special attention to the fairness of the proceedings and the concomitant reliability of the jury's verdicts.

The trial court erred in giving its version of CALJIC No. 2.28 since it invited the jury to speculate as to the effect of the discovery violations and gave no guidance as to how they might have affected the defense case. The instruction, as chosen and given by the trial court as a sanction for the delayed disclosure, was simply an inadequate cure for the prosecution's repeated discovery violations.

D. The Trial Court's Error Requires Reversal

The trial court's instructional error requires reversal because it

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[35] The prosecutor also attempted to deflect the jury's attention from the many discovery violations made by the Compton Police Department in this case by making the following improper argument:

> And the fact that Compton Police Department botched it up, do not take that out on the victims' family. Do not say _"

(15 RT 2414.) Defense counsel immediately objected to this line of argument, and their objections were sustained by the trial court. (*Ibid.*)

cannot be shown that it was harmless error.

An erroneous instruction requires reversal when it appears that the error was likely to have misled and prejudiced the jury. (*People v. Owens* (1994) 27 Cal.App.4th 1155, 1159; see also *People v. Hernandez* (2003) 111 Cal.App.4th 582, 589 ["'If a jury instruction is ambiguous, we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction"]; *People v. Guiton* (1993) 4 Cal.4th 1116, 1130 [in determining whether there is prejudice from instructional error, "the entire record should be examined, including" the jury instructions given at trial].)

Here, the repeated untimely disclosures of evidence to the defense by the prosecution were unknown to the jurors until they were instructed with CALJIC No. 2.28. The circumstances surrounding those untimely disclosures were never revealed to the jury. The jury was not privy to the fact that the defense was unaware of important impeachment evidence during the cross-examination of the prosecution's first four witnesses. Nor was it privy to the fact that the defense was forced to investigate its case and interview witnesses mid-trial instead of being able to focus on the evidence being presented. The jury did not know that there were 13 witnesses to the crime that had not been disclosed by the prosecution or interviewed by the defense prior to trial. Nor did appellant's jury know that when the defense sought to interview the witnesses mid-trial, the witnesses were told not to talk to them by the police, forcing interviews to be conducted in the courthouse hallways during court recesses. (See 7 RT 1231.) Appellant's jury was also unaware that the defense had been repeatedly and affirmatively told that no fingerprint testing had been done, despite the fact that it had been. The jury never knew that the "delay in

disclosure" by the prosecution was actually a concealment of evidence by the Compton Police Department, and that the only reason the evidence was ever discovered by defense counsel was because counsel for co-appellant Rangel happened to see, on the third day of trial, a diagram in Detective Piaz's[36] trial notebook which she did not have and then, after informing the court of her deep concern that there may be other items that the prosecution had failed to provide in discovery, examining Piaz's trial notebook at the direction of the court on the fifth day of trial and finding numerous other previously undisclosed reports and witness statements.

The trial court's instructional error in this case was further exacerbated by the court's erroneous ruling forbidding defense counsel from arguing that the Compton Police Department's repeated failures to turn over evidence that they knew they had a legal obligation to provide to the defense was, based on the facts and circumstances of this case, intentional. (See Argument III, *post.*)[37]

In sum, the trial court's giving of CALJIC No. 2.28, as modified, was error because it was incomplete and inadequate, and trivialized the jury's assessment of the numerous discovery violations in this case, leaving the jury with the false impression that it could give weight and significance to the "delayed disclosure" without giving them any guidance how to do so.

The trial court's refusal to give appellant's requested instruction and

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[36] Detective Piaz was the prosecution's investigating officer in this case. He provided courtroom assistance to the prosecutor at both appellant's preliminary hearing and in the trial court. (2 CT 272; 4 RT 475.)

[37] As previously noted, the trial court's erroneous ruling limiting defense counsel's closing argument is raised in Argument III, *post.*

its giving of CALJIC No. 2.28, as modified, in its stead violated appellant's state and federal constitutional rights to due process, a fair trial, and a reliable penalty determination, and reversal of the entire judgment is required. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT RULED THAT DEFENSE COUNSEL COULD NOT ARGUE IN HIS GUILT PHASE CLOSING ARGUMENT THAT THE MANY DISCOVERY VIOLATIONS COMMITTED BY THE COMPTON POLICE DEPARTMENT WERE INTENTIONAL

A. Introduction

As discussed in Argument II, *ante*, at a hearing on guilt phase jury instructions, appellant requested a special instruction that would have informed his jury that the prosecution's many discovery violations – i.e., the failure to provide the defense with "police reports and other evidence" – were attributable "to the Investigating officers and Detectives from the Compton Police Department who withheld these reports from the Defense." (5 CT 1169.)[38] The court refused appellant's special instruction, but instead gave a modified version of CALJIC No. 2.28 ("Failure to Timely Produce Evidence"). (5 CT 1114; 14 RT 2197-2198.)[39]

At that same hearing, the prosecutor objected to the defense being allowed to argue that the police "intentionally hid evidence in this case," and requested that the court "limit [defense] counsel to state that [the police were] negligent in what they did instead of giving an argument that [they] intentionally withheld evidence." (14 RT 2175.) The court ruled that defense counsel could not argue that the many discovery violations committed by the Compton Police Department were intentional. The court said that, "based on what I have heard," there was "no showing of intent"

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[38] Argument I, *ante*, discusses each of the many discovery violations committed by the Compton Police Department in this case.

[39] For the text of appellant's requested instruction, see footnote 31, *ante*. For the text of the trial court's instruction, see footnote 32, *ante*.

on the part of the police department, and that the numerous mistakes made by the police in this case were the result of negligence on their part. (*Ibid.*)

The trial court's ruling, forbidding appellant from arguing that members of the Compton Police Department were guilty of intentionally withholding evidence from the defense, based on its interpretation of the evidence that the numerous discovery violations made by the police in this case were the result of negligence on their part, was error because there was also evidence from which a rational jury could conclude that members of the Compton Police Department were guilty of intentionally withholding evidence from the defense. This error denied appellant his state and federal constitutional rights to the effective assistance of counsel, which in turn resulted in the denial of appellant's state and federal constitutional rights to due process, a fair trial, and a reliable penalty determination. (U.S. Const. 6, 8 & 14 Amends; Cal. Const., art. I, §§ 7, 15, 16, 17.) The denial of these important constitutional rights requires reversal of the entire judgment.

B. The Evidence Was Sufficient to Support the Inference That Members of the Compton Police Department Intentionally Withheld Evidence from the Defense, and Appellant Should Have Been Allowed to Argue That Inference to His Jury

The evidence in this case was such as to support a reasonable inference by appellant's jury that the many egregious discovery violations committed by the Compton Police Department in this case were intentional and not negligent. Hence, the trial court erred in finding otherwise and forbidding appellant from arguing that members of the Compton Police Department intentionally withheld evidence from the defense.

In a different, but related context, where the prosecution wants to argue that the defendant has suppressed or attempted to suppress adverse

evidence and requests that the jury be so instructed, the law requires only that

> "'there must be some evidence in the record which, if believed by the jury, will sufficiently support the suggested inference.'" (*People v. Hart* (1999) 20 Cal.4th 546, 620, quoting *People v. Hannon* (1977) 19 Cal.3d 588, 597; *People v. Valdez* (2004) 32 Cal.4th 73, 137.) . . . [T]he prosecution need not "conclusively establish [ ]" that suppression of evidence occurred; there need only be "some evidence in the record" that would support the inference. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103.)

That is the law with respect to inferences and instructions, and it should apply equally to both the defense and the prosecution. (Cf. *People v. Vasco* (2005) 131 Cal.App.4th 137, 158 ["rights and obligations applying to both parties are enforced neutrally, '[w]hat is sauce for the People's goose is sauce for the defendant's gander.'"].) The law with respect to inferences and closing argument should be no different than it is with respect to inferences and requested jury instructions, as counsel is allowed to refer to the court's jury instructions during closing argument and to argue matters even where there is no right to a specific jury instruction on the subject. (See, e.g., *People v. Howard* (1994) 25 Cal.4th 1660, 1663 [prosecutor's reading of reasonable doubt instruction during his closing argument was not misconduct], disapproved on other grounds in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fn. 3; *People v. Johnson* (1992) 3 Cal.4th 1183, 1252 ["A defendant has no federal or state constitutional right to have the penalty phase jury instructed to consider any residual doubt about defendant's guilt. . . . [But] defendant may urge his possible innocence to the jury as a factor in mitigation."].)

In appellant's case, there was more than "some evidence" in appellant's case that would support both the inference and appellant's

proposed jury argument that members of the Compton Police Department intentionally withheld evidence from the defense.

First, the discovery violations in this case were many and egregious. They included, inter alia, failing to give to the defense police reports, including police interviews of 13 percipient neighborhood witnesses, and failing to give the defense the results of fingerprint and gun-residue testing.

Second, the discovery violations in this case were not made by rookie police officers, but by two very senior and experience homicide detectives, Detectives Marvin Branscomb and Mike Piaz. Branscomb was the lead detective on appellant's case from the date of the incident, August 24, 1997, until April 1, 1998, when the case was reassigned to Detective Piaz. (14 RT 2167.) Piaz was the prosecution's designated investigator in the courtroom at both appellant's preliminary hearing and at trial. (2 CT 272; 4 RT 475.) Both Branscomb and Piaz were highly experienced law enforcement officers. For example, at the time of appellant's trial, Branscomb had been in law enforcement for "28 years, 29 days." (10 RT 1522.) As lead officers in a capital case, both must be charged with knowing the rules of discovery in criminal cases. In fact, Branscomb testified that when he was acting as the lead investigator in this case, his duties included seeing that evidence was booked, giving reports to defense attorneys, if that was needed to be done, and to do other things related to the case." (14 RT 2167-2168.)

Third, that members of the Compton Police Department withheld evidence that they knew or should have known they had a duty to provide to defense counsel was undisputed below. Indeed, it was serious enough to move the trial court to say that it planned to issue an order to show cause and hold a hearing post trial for monetary sanctions against the Compton

Police Department "because of their failure to produce important information in a timely fashion." (7 RT 1048; see also 13 RT 1997 ["I have previously indicated that it is my intention at the conclusion of this trial to set an order to show cause with regard to monetary sanctions on a previously discussed discovery violation with the Compton Police Department. I will add this to my list."].)

As there was sufficient evidence to support the inference that members of the Compton Police Department intentionally withheld evidence from the defense, appellant had the right to make that argument to his jury. (See *People v. Steele* (2002) 27 Cal.4th 1230, 1244, and authorities cited therein ["the doctrine of chances teaches that the more often one does something, the more likely that something was intentional, and even premeditated, rather than accidental or spontaneous"].)

As held by this Court in *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780:

> In conducting closing argument, attorneys for both sides have wide latitude to discuss the case. """"The right of counsel to discuss the merits of a case, both as to the law and facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom. The adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury.'''' [Citations.] 'Counsel may vigorously argue his case and is not limited to "Chesterfieldian politeness."' [Citations.] 'An attorney is permitted to argue all reasonable inferences from the evidence . . . .' [Citation.] 'Only the most persuasive reasons justify handcuffing attorneys in the exercise of their advocacy within the bounds of propriety.' [Citation.]" *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 798-799, 174 Cal.Rptr. 348.) The same rules apply in a criminal case. (See *People v. Hill*, *supra*, 17 Cal.4th at p. 819, 72 Cal.Rptr.2d 656, 952 P.2d 673.)

Cassim v. Allstate Ins. Co., *supra*, 33 Cal.4th at pp. 795-796 [40]

C. The Trial Court's Erroneous Ruling Forbidding Appellant to Argue That the Discovery Violations Committed by the Compton Police Department Were Intentional Denied Appellant His Right to the Effective Assistance of Counsel in Violation of the Sixth and Fourteenth Amendments to the United States Constitution

The law governing the right to present closing argument in a criminal case, and how the infringement of that right constitutes a violation of the defendant's constitutional right to the effective assistance of counsel, is well settled:

Closing argument is a critical stage of the proceedings, at least insofar as the defendant's right to present a summation is concerned. (See *Herring v. New York* (1975) 422 U.S. 853, 858-859.) "[C]losing argument for the defense is a basic element of the adversary fact-finding process in a criminal trial," and the complete denial of an opportunity to make a closing argument is a violation of the federal constitutional right to counsel under the Sixth Amendment to the United States Constitution. (*Id.* at pp. 858-859, 863.) A defendant's right to counsel is also denied where the court

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[40] In criminal cases, this issue usually arises in the context of a defendant's claim that the prosecutor committed misconduct during closing argument. In that context, the law is that a prosecutor has "wide latitude to discuss and draw inferences from the evidence at trial," and it is for the jury to decide whether the inferences the prosecutor draws are reasonable. *(People v. Dennis* (1998) 17 Cal.4th 468, 522; see also *People v. Avila* (2009) 46 Cal.4th 680, 712, fn. 13; *People v. Thornton* (2007) 41 Cal.4th 391, 454.) The prosecutor has broad discretion to state his or her views as to what the evidence shows and what inferences may be shown therefrom. (See *People v. Welch* (1999) 20 Cal.4th 701, 752-753.) Again, these rules should apply equally to the defense in a criminal case and grant defense counsel the same "wide latitude" that is afforded to the prosecution during closing argument.

seriously limits defense closing argument, as by precluding reference to an entire theory of defense (*Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739), or preventing counsel from arguing the significance of evidence critical to a theory of defense (*United States v. Kellington* (9th Cir. 2000) 217 F.3d 1084, 1099-1100).

Appellant's defense was that he had been mistakenly identified by several prosecution witnesses as the person who approached the passenger side of Andres Encinas's car and shot Anthony Urrutia. An important aspect of appellant's defense was that members of the Compton Police Department had manufactured, manipulated witnesses and withheld evidence in order to convict appellant of Urrutia's murder. (See, e.g., 15 RT 2332-2333, 2365-2368, 2370.) Therefore, appellant had the right to argue that the Compton Police Department's many discovery violations in this case were deliberate and intentional and not, as contended by the prosecutor in her final closing argument, just a series of unintentional mistakes. (See, e.g., 15 RT 2412 ["These police reports are riddled with mistakes."], 2413 ["These police aren't intentionally lying. They're not lying. They are mistaken. [¶] And not to mention a little sloppy, as you have seen."], 2414 ["Talk about mistakes. This case is filled with mistakes."].)

In this case, there was more than sufficient evidence from which appellant's jury could find, if it so believed, that the Compton Police Department's many blatant and inexcusable discovery violations constituted an intentional concealment of evidence on their part. And had appellant's jury been permitted to make that finding, it would surely have viewed with a jaundiced eye all of the evidence produced by the Compton Police Department. (See, e.g., *Kyles v. Whitley* (1995) 514 U.S. 419, 443-454;

United States v. Sager (9th Cir. 2000) 227 F.3d 1138, 1145-1146 [trial court committed plain error in excluding evidence relating to police investigation and instructing jurors to refrain from "grading" the investigation; "to tell the jury that it may assess the product of an investigation, but that it may not analyze the quality of the investigation that produced the product, illogically removes from the jury potentially relevant information"].) Accordingly, appellant should have been allowed to make this argument to his jury.

D. CONCLUSION

The trial court's erroneous ruling forbidding appellant from arguing that the Compton Police Department's many discovery violations in this case were intentional seriously undercut appellant's counsel's ability to defend effectively against the charges by preventing counsel from making the argument that the Compton Police Department engaged in a series of intentional and improper acts in order to convict appellant of a crime he did not commit. As such, it struck a devastating blow to appellant's sole defense of innocence. It is well recognized that errors which undercut an accused's sole defense are extraordinarily prejudicial and rarely harmless under any standard. (See, e.g., *Francis v. Franklin* (1985) 471 U.S. 307, 325-326; *People v. Roe* (1922) 189 Cal. 548, 565-566; *People v. Thurmond* (1985) 175 Cal.App.3d 865, 873-874; *People v. Hayes* (1985) 172 Cal.App.3d 517, 525; *People v. Galloway* (1979) 100 Cal.App.3d 551, 561; *Luna v. Cambra* (9th Cir. 2002) 306 F.3d 954, 962; *United States v. Lawrence* (9th Cir. 1999) 189 F.3d 838, 842; *United States v. Flynt* (9th Cir. 1985) 756 F.2d 1352, 1361; *United States v. Arroyave* (9th Cir. 1972) 465 F.2d 962, 963.) The trial court's error thus resulted in a denial of appellant's right to the effective assistance of counsel at a critical stage of the proceedings. This error also compounded the trial court's instructional

error in this case concerning the prosecution's many discovery violations. (See Argument II, *ante*.)

The error here requires reversal of the entire judgment because it cannot be shown that it was harmless beyond a reasonable doubt under the test for federal constitutional error. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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IV

THE CUMULATIVE EFFECT OF THE ERRORS RAISED IN ARGUMENTS I THROUGH III, *ANTE*, DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL AND REVERSAL OF THE ENTIRE JUDGMENT IS REQUIRED

In the three preceding arguments, appellant has argued that reversal is required because he was denied his state and federal constitutional rights to a fair trial and a fair penalty determination as a result of the many discovery violations committed by the Compton Police Department (Argument I); the trial court's refusal to give appellant's requested jury instruction regarding the prosecution's failure to fully and timely provide pretrial discovery to appellant's trial counsel (Argument II); and the trial court's erroneous ruling forbidding appellant's trial counsel from arguing that the many discovery violations committed by the Compton Police Department were intentional (Argument III). In this argument, appellant argues that should this Court find that none of these three errors when viewed individually is sufficiently prejudicial to warrant reversal, the cumulative effect of these three related errors is sufficiently prejudicial to warrant reversal of the guilt and penalty verdicts. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

Even where no single error when examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be such that reversal is required. (See *People v. Hill* (1998) 17 Cal.4th 800, 844 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"]; *People v. Holt* (1984) 37 Cal.3d at 436, 459 [cumulative

effect of multiple errors requires reversal]; *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [same]; *People v. Underwood* (1964) 61 Cal.2d 113, 125 [same]; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 436-437 [the cumulative effect of errors, none of which individually is significant, could be collectively significant]; *Greer v. Miller* (1987) 483 U.S. 756, 764; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"].)

In *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, the Ninth Circuit Court of Appeals noted that, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*Id.* at p. 1476.) The court's observation is uniquely applicable to this case, given not only the number of substantial related errors, but the way in which those errors operated synergistically to deny appellant his state and federal constitutional rights.

In appellant's case, because it cannot be shown beyond a reasonable doubt that the three related errors raised in Arguments I through III, *ante*, either individually or collectively, had no effect on the jury's guilt or penalty verdicts, reversal of the entire judgment is required. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; see *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341); see also appellant's Argument XXI, *post* [reversal of the entire judgment is required based on the cumulative effect of all of the errors raised by appellant in his opening brief].)

V

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE PROSECUTOR TO PLAY FOR IMPEACHMENT PURPOSES TWO UNREDACTED TAPE-RECORDED STATEMENTS LOURDES LOPEZ GAVE TO THE POLICE SHORTLY AFTER THE SHOOTINGS IN THIS CASE

A. Introduction

At trial, over defense objection, the prosecutor was permitted to impeach prosecution witness Lourdes Lopez by playing for the jury two tape- recorded statements Lopez gave to the police shortly after the shootings in this case. The tape recordings, which were played for the jury in their entirety, contained improper inferences that the crimes in this case may have been gang-related; that appellant had a propensity for violence; that he had recently been in jail for some unspecified crime; and that he had some type of an outstanding warrant.

The trial court's ruling allowing the prosecutor to play the two tapes was error which resulted in the denial of appellant's state and federal constitutional rights to a fair trial, due process and a reliable penalty determination. (U.S. Const. 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17.) Reversal of the entire judgment is required.

B. Summary of Facts

Lourdes Lopez was interviewed by the police (Detective Branscomb and Sergeant Swanson) concerning the events on the night of the shooting, and two statements implicating appellant and co-appellant Rangel in the shootings were tape recorded by the police. (1 CT 1, 11.)[41]

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[41] In her taped statements, Lopez said that she saw appellant and co-appellant Rangel exit the house to have a conversation, and a few minutes later, she heard gunshots and saw them run back into the house. (1 CT 3-7, (continued...)

Lopez was called as a prosecution witness at trial to testify about the events on the night of the shooting. However, much to the prosecutor's dismay, Lopez's trial testimony differed markedly from what she had told the police in her two taped interviews. When confronted with these differences, Lopez said that what she told the police in her two taped statements was not true, and the product of police intimidation and coercion. Lopez's three year old daughter was with her when she was taken to the police station, and the police threatened to turn her daughter over to social services if Lopez did not tell them what they wanted to hear. (7 RT 1138, 1141-1143.) Lopez also said that the police threatened her repeatedly and called her names, and turned the tape recorder on and off at least twice during the interview. (7 RT 1138-1139, 1142-1146, 1158-1159, 1189.) She testified that she was afraid she was going to lose her daughter, and was threatened into saying what she said on the tape. (7 RT 1137-1138, 1142-1143, 1158, 1183, 1219-1220; 8 RT 1238-1239, 1291-1293.) She testified that if she had not been threatened by the police, she would not have said the things she said concerning appellant's involvement in the shootings because they were not true. (See 7 RT 1219-1220; 8 RT 1291-1293.)

During her re-direct examination of Lopez, the prosecutor

(...continued)
18-22.) She thought that gang members from a party she had attended earlier that evening had come by her house, and that either they had shot at appellant or appellant had shot at them. (1 CT 21.) Lopez said that after the shooting, appellant ran into the kitchen and grabbed Lopez's car keys. At that time, he told her to go into the bedroom and stay with their baby because he did not want his daughter to wake up with all the commotion, or see her daddy go to jail. (1 CT 4, 21, 28-31.) Appellant then moved his car into the garage and parked Lopez's car behind it. (1 CT 4.) Lopez also said that prior to the shooting, she saw appellant with a gun. (1 CT 22-24.)

questioned Lopez further about the police intimidation and the tape recorder being turned on and off. (7 RT 1219-1220; 8 RT 1238-1240.) The prosecutor told the court that she wanted to play the two tape-recorded statements between Lopez and police, so that Lopez could listen to the tapes and identify where the tapes had been stopped and started during her interrogation, and so the jury could hear the tone of the taped conversation. (8 RT 1240, 1242; 12 RT 1847-1848.) The prosecutor also wanted to give the jury transcripts of the tapes to follow along with the tapes while they were being played.

Defense counsel objected vigorously to the playing of the tapes for the jury, noting that the tapes contained improper inferences that the crimes may have been gang-related; that appellant had a propensity for violence; and that he had recently been in jail. Defense counsel requested an Evidence Code section 402 hearing so that Lopez could "listen to the tape outside the jury." (8 RT 1242.) Defense counsel also objected to the playing of the tapes on the ground that much of the information on the tapes was irrelevant and hearsay. Moreover, defense counsel argued that there was insufficient foundation for Lopez to listen to the tapes and give an expert opinion regarding whether the tapes had been turned on and off or otherwise tampered with, and that if the prosecution wanted to present such evidence, the tapes should have been sent to a lab for a scientific evaluation followed by proper expert opinion testimony. Further, defense counsel argued that the ruling undermined the selection of the jury panel since the jury was voir dired based upon the gang evidence having been excluded and the prosecutor's promise not to elicit such evidence. The court agreed that this case was not a gang case, but held that defense counsel made a tactical decision at the beginning of trial to exclude the gang evidence and that

"these things come out sometimes." (8 RT 1240-1256.) Finally, the defense asked that the tapes and transcripts be redacted to remove the prejudicial references, but the court refused, and this was even after the prosecutor had offered to skip over a portion of the tape which had been objected to by appellant. (8 RT 1252.)[42]

Defense counsel's objections to the playing of the tapes were overruled by the trial court, and the two tapes were played for the jury in their entirety. In addition, unredacted transcripts of the tapes were given to the jury so that they could follow along with the tapes while they were being played.

C. Applicable Law

Evidence Code section 352 requires the trial court to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption. "A careful weighing of prejudice against probative value under [section 352] is essential to protect a defendant's due process right to a fundamentally fair trial." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.) For purposes of section 352, "prejudicial evidence" is evidence that evokes an emotional bias against the defendant without regard to its relevance to material issues or creates a tendency to prejudge a person or cause on the basis of extraneous factors. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121; *People v. Zapien* (1993) 4 Cal.4th 929, 958.)

If the prejudicial effect outweighs the probative value, the

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[42] The trial court rejected the prosecutor's offer, saying: "That wouldn't make any difference, because the jurors would have a copy of the transcript if we were to play it." (8 RT 1243.) The trial court's statement is remarkable in view of the fact that statements, whether written or recorded, are redacted all of the time to remove prejudicial material.

> trial court should exclude the evidence. "[T]he fundamental rule [is] that relevant evidence whose probative value is outweighed by its prejudicial effect should not be admitted." [Citation.]

(*People v. Cardenas* (1982) 31 Cal.3d 897, 904.)

On appeal, a trial court's ruling under Evidence Code section 352 is reviewed for abuse of discretion. (*People v. Jablonski* (2006) 37 Cal.4th 774, 805.)

D. The Trial Court Abused its Discretion under Evidence Code Section 352 When it Allowed the Jury to Hear Two Unredacted Tape- Recorded Statements Which Contained Irrelevant and Prejudicial Evidence

The trial court abused its discretion when it allowed the prosecution to play Lourdes Lopez's tape-recorded statements for the jury. The playing of the tapes was wholly unnecessary and irrelevant to the material issue in this case, i.e., whether appellant and co-appellant Rangel were guilty of the charged crimes. The tapes contained cumulative evidence, inadmissible hearsay, and improper character evidence. Furthermore, they created a "mini-trial" on the collateral issue of Lopez's allegations of coercion and resulted in prejudicial and otherwise inadmissible evidence being heard by the jury. (8 RT 1240-1258.)

The prosecution initially used the transcripts of the two taped statements to impeach Lopez with her prior inconsistent statements, being careful not to make any reference to gangs or other inadmissible evidence. Lopez admitted making the inconsistent statements, but explained that she made them because of police coercion and intimidation. Lopez testified that the police were mean to her, turned the tape recorder on and off until she said what they wanted her to say, threatened to take her daughter away, and threatened to have her prosecuted for perjury. (8 RT 1269-1270, 1289-

1295.) The prosecution and defense not only conducted an extensive examination of Lopez regarding these claims, but also later examined and elicited denials from Detective Branscomb regarding Lopez's claims that either he or Sergeant Swanson ever threatened her. (6 RT 1003-1021; 7 RT 1064-1222; 8 RT 1235-1299; 10 RT 1549-1552, 1606-1619.)

"If the witness, after admitting to making the prior statement, offers an explanation, evidence contradicting the explanation has nothing to do with the issues and will normally be excluded. And in a criminal case to allow such evidence against the defendant may be seriously prejudicial." (3 Witkin Cal. Evidence (4th Ed. 2000) Presentation at Trial, § 337, p. 420.) There is an exception to this rule where the witness is claiming that the prior statement was the result of police coercion. In those cases, this Court has held that "the police certainly should have an opportunity to refute such a charge." (*People v. Underwood* (1964) 61 Cal.2d 113, 125.)

Here, the police had such an opportunity through the examination of Detective Branscomb. However, since part of Lopez's testimony included a claim that the police turned the tape recorder on and off "at least twice" (8 RT 1240), the prosecutor was allowed to play the tapes for the jury so Lopez could listen to the tapes and point out where the tape recorder had been stopped and started again. Defense counsel objected because Lopez, as a lay witness, had no expertise in determining whether the tape recorder had indeed been turned on and off just by listening to the tapes. Further, the tapes contained irrelevant and prejudicial information which was either otherwise inadmissible or, as in the case of the gang references, had been excluded by the court prior to trial. (8 RT 1240-1258.)

As previously noted, Evidence Code section 352 provides that the "court in its discretion may exclude evidence if its probative value is

substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice." "[A]dmissible evidence often carries with it a certain amount of prejudice." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369.) However, Evidence Code section 352 is designed to prevent the admission of evidence having little evidentiary impact, but which evokes an emotional bias. (*Ibid.*)

Here, nothing on the tapes had any tendency to prove any disputed facts as to whether appellant or co-appellant Rangel were guilty of the crimes charged – only that appellant and Rangel were most likely gang members and that appellant had a propensity for violence, that he had recently gotten out of jail for some unspecified offense, and that he had some type of an outstanding warrant at the time of the shootings.

By playing the tapes in their entirety, the jury heard that: Lopez was at a party earlier in the evening where members of the "North County Locos" gang tried to start a fight with her companions, Jose, Jade (a.k.a Dreamer), and Kiki, who were members of the "Tiny Locos" gang, as they left in Lopez's car with her baby daughter; "one of the [gang members] reached in the car and stopped [Jade or Dreamer]"; a gang member who shot "Dreamer" saw Lopez with Dreamer, and she was afraid this gang member would come back to her house and "shoot it up or something"; she paged appellant to come to her house in case the other gang-members came back; appellant showed up with Rangel and they went outside; when Lopez heard the shots, she assumed the other gang-members came by; appellant made statements regarding what he "did" outside; those same gang-member friends of hers that were in her car earlier that evening were at her house during the shootings; appellant frequently got into fights with others;

appellant had recently gotten out of jail for some unspecified crime; and appellant "could have [had] a warrant." (1 CT 7-9, 13-21, 30-32.)

Courts have recognized that evidence of a criminal defendant's gang membership or affiliation can create a grave risk that the jury will improperly base its verdict on an inference that the defendant was criminally disposed. (*People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Luparello* (1986) 187 Cal.App.3d 410, 426.) Evidence of gang affiliation is not admissible to show a defendant's character or criminal disposition. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.) "Gang evidence should not be admitted at trial where its sole relevance is to show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense." (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449.) Evidence of gang membership and activity is admissible only if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192.) "Evidence of the defendant's gang affiliation – including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like – can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]" (*People v. Hernandez*, *supra*, 33 Cal.4th at p. 1049.) Nonetheless, even if the evidence is found to be relevant, the trial court must carefully scrutinize gang-related evidence before admitting it because of its potentially inflammatory impact on the jury. (*People v. Williams*, *supra*, 16 Cal.4th at p. 193; *People v. Carter* (2003) 30 Cal.4th 1166, 1194 [evidence of defendant's gang membership, although relevant to motive or

identity, creates a risk the jury will improperly infer defendant has a criminal disposition and is therefore guilty of the charged offense and thus must be carefully scrutinized].)

In this case, the evidence was not admitted to show appellant's motive or intent. The only issue for which the tapes were admitted was for the collateral issue of whether Lopez's statements to the police had been coerced, but instead all the tapes did was inject prejudice into the case. Generally, evidence is deemed relevant and thus admissible if it has any tendency in reason to prove a disputed material fact. (Evid. Code, § 210.) When it comes to gang evidence, however, a higher degree of relevancy is required than just "any tendency" to prove a disputed fact.

> "Because evidence that a criminal defendant is a member of a . . . gang may have a 'highly inflammatory impact' on the jury [citation], trial courts should carefully scrutinize such evidence before admitting it." [Citation.] Such evidence should not be admitted if only tangentially relevant [citation] because of the possibility that the jury "will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged" [citation] . . . .

(*People v. Gurule* (2002) 28 Cal.4th 557, 653; see also *People v. Cox* (1991) 53 Cal.3d 618, 660 ["we have condemned the introduction of evidence of gang membership if only tangentially relevant, given its highly inflammatory impact."].)

The prejudicial evidence presented in the two unredacted tape recordings did not have any tendency to prove a material disputed fact. The crimes committed in this case were not alleged to be gang related, and any evidence of gangs had been excluded for purposes of voir dire and trial.

E. The Error in this Case Was Not Cured by the Trial Court's Vague and Inadequate Admonishment Regarding the "Limited" Use of the Evidence

The trial court's improper admission of the gang and bad character evidence violated appellant's federal and state constitutional rights. Although a state court's evidentiary errors do not, standing alone, violate the federal Constitution, state law errors that render a trial fundamentally unfair violate the Due Process Clause of the Fourteenth Amendment. (*Romano v. Oklahoma* (1994) 512 U.S. 1, 12.) That is the case here, where the inadmissible evidence served no legitimate purpose, and where, as described below, the prejudicial effect of that evidence was such that it could only have influenced the jurors' decision by inflaming them to a degree that infected the guilt phase with unfairness.

Because the defense relied upon the prosecutor's representations that she would not present any gang evidence during trial (2 RT 266; see 3 RT 358) and, based on those representations, did not voir dire the jurors on their views about gangs and gang members (see 8 RT 1246-1249), this error also violated appellant's right under the Sixth and Fourteenth Amendments to a reliable verdict by an impartial jury. (*Morgan v. Illinois* (1992) 504 U.S. 719, 729 ["part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors"]; *id.* at p. 736 ["The risk that . . . jurors [who were not impartial] may have been empaneled in this case and 'infected petitioner's capital sentencing [is] unacceptable.'"].) Likewise, because the right to an impartial jury guarantees voir dire that will allow a criminal defendant's counsel to identify unqualified jurors and raise peremptory challenges (*id.* at pp. 729-730), this error further violated appellant's Sixth Amendment guarantee to the effective assistance of counsel. Here, defense counsel argued that had

they known that gang evidence was going to be admitted they would have handled voir dire differently. Further, at least one seated juror said it would make a difference to her whether the defendants were gang members. (8 RT 1246-1248.)

As described below, the prosecution cannot show beyond a reasonable doubt that this violation of state and federal law could not have contributed to the jury's decision to find appellant guilty in this case. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 446-448.)

As recognized by this Court, because evidence of a defendant's gang affiliation can have a highly inflammatory and prejudicial impact on jurors, such evidence creates a risk that the jury will improperly base its verdict on an inference that the defendant was criminally disposed. (*People v. Kennedy* (2005) 36 Cal.4th 595, 624; *People v. Gurule, supra,* 28 Cal.4th at p. 653; *People v. Williams*, *supra*, 16 Cal.4th at p. 193.) The Courts of Appeal have reached the same conclusion, noting that in Los Angeles County, where this case was tried, just the word "gang" "connotes opprobrious implications" and "takes on a sinister meaning[.]" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223; accord, *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1497; *People v. Perez* (1981) 114 Cal.App.3d 470, 479.) It breeds an equal tendency to condemn, not because the defendant is guilty of the present charge, but because the jury fears he will commit a similar crime in the future or, conversely, because it believes that he likely committed previous crimes for which he has escaped unpunished. (See, e.g., *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1230 [despite absence of "formal convictions," it is "reasonable to infer" prior criminality from gang membership]; *People v. Thompson* (1980) 27 Cal.3d 303, 317

[prior criminality breeds tendency to condemn because defendant has previously escaped punishment]; *People v. Lopez* (1998) 66 Cal.App.4th 615, 624 [gang involvement suggests future criminality]; *In re Laylah K.* (1991) 229 Cal.App.3d 1496, 1501 [same]; see also *Simmons v. South Carolina* (1994) 512 U.S. 154, 163 [evidence relating to defendant's future criminality irrelevant and inadmissible in trial on guilt or innocence because "jury is not free to convict a defendant simply because he poses a future danger"].)

In addition, with respect to the evidence that appellant frequently got into fights, that he had been in jail prior to the shootings in this case, and that he had some type of an outstanding warrant at the time of the shootings, this Court has recognized that the "admission of any evidence that involves crimes other than those for which a defendant is being tried has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson*, *supra*, 27 Cal.3d at p. 314, fn. omitted; see also *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1007.)

Moreover, no adequate admonishment or instruction was given to limit the purpose for which the jury could consider the erroneously admitted gang and other-crimes evidence. Rather, the admonishment that was given allowed the jury to consider the information on the tapes for *any* purpose which clarified Lopez's testimony. The court, in explaining that the prosecutor was about to play the taped statements and that they were to be given transcripts with which to follow along, first explained to the jurors how to handle any hearsay they may encounter, and then explained why the evidence was being presented:

> I explained to you earlier in this trial about out-of-court statements. That's hearsay. Things that are being offered for

> their truth. There may be a couple of instances where statements of other people are included in part of the question and answer process. [¶] Those, if it's hearsay and it's not something that this witness talked about, then . . . they are *probably* things that you are not going to need to consider. *The purpose for you hearing this is to clarify the issues that have come up in the course of this witness' testimony.*

(8 RT 1257-1258, italics added.) This was hardly an admonishment at all, since it did almost nothing to limit the jury's consideration of the evidence. Moreover, by the time the court "admonished" the jury, Lopez had already been on the stand for two-and-a-half days. Thus, the jury was free to consider the evidence on the tapes for any purpose which clarified any subject with which Lopez had already testified.

The jury was later instructed with the standard version of CALJIC No. 2.09 which read:

> Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted.

(5 CT 1105; 14 RT 2192.) However, the jury was not given that instruction until just prior to deliberations after seven more days of testimony from seven other witnesses. The jury could not possibly have been able to glean from the trial court's inadequate admonishment nor its later CALJIC instruction which evidence, *if any*, was being admitted for a limited purpose, or what the limited purpose was for the admission of the erroneously admitted gang and other-crimes evidence.

Further, given the highly inflammatory and prejudicial effect both gang and other-crimes/propensity/bad character evidence has on the trier of

fact (*People v. Kennedy, supra,* 36 Cal.4th at p. 624 [gang evidence]; *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1007 [other-crimes evidence]), it is the "essence of sophistry and lack of realism" to think that an instruction or admonition to the jurors to limit their consideration of such highly prejudicial evidence could have had any realistic effect. (*People v. Gibson* (1976) 56 Cal.App.3d 119, 130.)

Here, the trial court's erroneous admission of the unredacted tapes made it appear that appellant was a violent and dangerous gang member, that the instant crimes were gang-related, and that appellant was therefore guilty of those crimes.

The prosecution cannot demonstrate beyond a reasonable doubt that the erroneous admission of this irrelevant and highly inflammatory evidence could not have contributed to at least one juror's decision to find appellant guilty, particularly in light of one seated juror having already admitted her bias against gang members in voir dire. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Thus, appellant's conviction and sentence of death must be reversed.[43]

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[43] The erroneous admission of the gang-related evidence described above, when coupled with the erroneous admission of the gang-related evidence at the penalty phase, denied appellant his state and federal constitutional rights to a fair and reliable penalty determination. (See Argument XIII, and fn. 77, both *post*.)

VI

THE TRIAL COURT'S REFUSAL TO GIVE APPELLANT'S REQUESTED INSTRUCTIONS ON THE OFFENSE OF ACCESSORY AFTER THE FACT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND REQUIRES REVERSAL OF BOTH THE GUILT AND PENALTY VERDICTS

A. Introduction

The trial court's refusal to instruct on the offense of accessory after the fact (Pen. Code, § 32)[44] violated appellant's federal constitutional rights under the Sixth, Eighth, and Fourteenth Amendments to a fair trial, to due process of law, to present a defense, to a properly-instructed jury, and to a reliable adjudication at all stages of a death penalty case. Because the defense posed by the omitted instruction was (1) genuinely disputed at trial, (2) not peripheral to the main issues, and (3) supported by substantial evidence, the trial court's error was not harmless. This error requires reversal of both the guilt and death verdicts.

B. Factual Background

The prosecution's theory at trial was simple: appellant and Rangel shot and killed Andy Encinas and Anthony Urrutia. Appellant's defense theory was equally simple: appellant was mistakenly identified as one of the two shooters, and that Jade Gallegos, not appellant, was one of the actual killers.

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[44] Penal Code section 32 provides:

> Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

Substantial evidence supported appellant's defense. Sheila Creswell testified at trial that at the time of the shooting she lived across the street from Lourdes Lopez and Jade Gallegos, and saw Jade Gallegos every day, sometimes doing "crazy things." (5 RT 788, 804, 823, 826, 827.) Creswell testified that after hearing gunshots, she looked out her window and saw Rangel and Jade Gallegos running away from Encinas's 4-Runner and into Lopez and Gallegos's house. (5 RT 790-794, 801-803, 825-826, 831; see 6 RT 1014, 7 RT 1176.) Creswell testified that the lighting was good, and she could see "really good" from her vantage point.[45] (5 RT 805-806.)

Paula Beltran told the police that both of the shooting suspects were Latin males with shaved heads, and that both appeared to be about five-feet eight-inches tall. (12 RT 1903-1904.) Fidel Gregorio told the police that the person with Rangel had no shirt, a tattoo on his stomach, and was five-feet eight or five-foot nine-inches tall. (4 RT 644-645; 5 RT 709.) At the time of the shooting, both Gallegos and appellant had similar shaved-head hairstyles and tattoos on their stomachs, and neither was wearing a shirt prior to the shooting (5 RT 656; 6 RT 979; 7 RT 1107, 1192-1193; 8 RT 1274-1275; 9 RT 1495; 12 RT 1947-1948, 1950), and even the prosecutor acknowledged, "No doubt about it, he [Jade] looks similar [to appellant]." (14 RT 2257.) Jade Gallegos is approximately five-feet eight-inches tall, while appellant is approximately five feet, eleven-inches tall. (9 RT 1499; 12 RT 1950-1951.)

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[45] After realizing that the prosecution was not charging Gallegos with the murders, Creswell said she was no longer sure that Gallegos was the person she saw that night because she did not see him in the courtroom. (5 RT 831-832.) However, Creswell testified that she had expected to see Gallegos in court because he was in fact the person she saw the night of the shooting. (*Ibid.*)

At the close of the evidence, appellant requested that the trial court instruct the jury on accessory after the fact to the charged crimes (§ 32). (13 RT 2132.) The prosecutor opposed the instruction, stating that her witnesses had positively identified appellant as the person with Rangel, and that there was no evidence to support appellant's role as an accessory. (13 RT 2132-2133.) Appellant disagreed, arguing that Creswell had identified Jade Gallegos as the person with Rangel, and that other evidence had likewise pointed toward Gallegos as being one of the shooters. (13 RT 2133.) Noting that the prosecutor had presented evidence that appellant had moved his and Lopez's cars in an apparent attempt to cover-up the shooting, appellant argued that the jurors could reasonably believe that Gallegos, not appellant, was the shooter, and that appellant's attempt to hide evidence made him an accessory after the fact to that shooting. (*Ibid.*) The trial court denied appellant's request for an accessory after the fact instruction, saying that it did not believe the instruction was warranted under the facts of this case. (14 RT 2171-2172.)

C. Legal Principles

Acting as an accessory after the fact to murder is a lesser related offense to murder. (*People v. Majors* (1998) 18 Cal.4th 385, 408.)

In *People v. Geiger* (1984) 35 Cal.3d 510, this Court held that, upon request, a criminal defendant has a state constitutional right to instructions on uncharged lesser offenses that are supported by the evidence and are closely related to the charged offense. The *Geiger* court reasoned as follows:

> Considerations similar to those which led this court to conclude that instructions on lesser included offenses are required by due process appear in decisions of other jurisdictions holding that instructions on uncharged related

> offenses must also be given if it would be fundamentally unfair to deny the defendant the right to have the court or jury consider the "third option" of convicting the defendant of the related offense.

(*People v. Geiger*, *supra*, 35 Cal.3d at p. 520.) The *Geiger* court also held:

> We have repeatedly recognized the defendant's right to have the jury or court determine every material issue presented by the evidence. Denial of instructions on related offenses may affect the reliability of that fact finding process. By affording no option other than acquittal or conviction of a greater offense than that which the jury believes to have been committed, denial of instructions on related offenses may in some cases create a 'substantial risk that the jury's practice will diverge from theory' [citation] and thereby undermine the reasonable doubt standard. Therefore, in the absence of substantial countervailing considerations justifying continuation of the rule that instructions need be given only on included offenses, due process requires that instructions on related offenses be given on request of the defendant in appropriate circumstances.

(*Id.* at p. 526.)

People v. Geiger, *supra*, was overruled by this Court in *People v. Birks* (1998) 19 Cal.4th 108, 112-113, 136, where this Court held that a criminal defendant does not have a unilateral, state entitlement to requested instructions on lesser offenses that are not necessarily included in the charge without the prosecutor's permission.

However, *Birks* can be distinguished from appellant's case on two grounds. First, *Birks* did not involve or address the situation where, as in appellant's case, the failure to instruct on a lesser related offense results in instructions that weigh unfairly in favor of the prosecution's theory of the case. Second, *Birks* did not address the situation, also found in appellant's case, where the failure to instruct on a lesser related offense unfairly

restricts a criminal defendant's Sixth and Fourteenth Amendment rights to instructions on his theory of defense. Where, as here, a requested instruction on a lesser related offense is founded on the federal constitutional rights to balanced instructions that neither favor the prosecution's theory of the case nor curtail the defendant's defense, the *Birks* rule cannot be applied without running afoul of appellant's Sixth and Fourteenth Amendment rights to due process, to present his defense, and to a fair trial by jury, as well as his Eighth Amendment right to a reliable guilt determination in a capital trial.

D. The Trial Court's Refusal to Give Appellant's Requested Instruction on Accessory after the Fact Resulted in Jury Instructions That Unfairly and Unconstitutionally Favored the Prosecution's Theory of the Case

In *Wardius v. Oregon* (1973) 412 U.S. 470, the United States Supreme Court warned that trial rules which provide nonreciprocal benefits to the state violate the Fourteenth Amendment right to due process when the lack of reciprocity interferes with the defendant's ability to secure a fair trial. Noting that the Due Process Clause speaks to "the balance of forces between the accused and his accuser" (*id.* at p. 474, fn. 6), the high court held that "in the absence of a strong showing of state interests to the contrary," there "must be a two-way street" as between the prosecution and the defense. (*Id.* at p. 475.) Although *Wardius* involved reciprocal discovery rights, both the United States Supreme Court and this Court have long recognized this due process balancing principle in the context of jury instructions. (*Reagan v. United States* (1895) 157 U.S. 301, 310 ["The court['s instructions to the jury] should be impartial between the

government and the defendant."];[46] *People v. Moore* (1954) 43 Cal.2d 517, 526 ["'There should be absolute impartiality as between the People and the defendant in the matter of instructions[.]'"].)[47]

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[46] In *Reagan v. United States*, *supra*, 157 U.S. 301, the high court held that the jury could be instructed that the peculiar and deep interest that the defendant has in the result of the trial is a matter affecting his credibility, as long as the court is impartial in its appraisal of credibility for all the witnesses who testify at the trial. (*Id.* at p. 310.)

[47] In *People v. Moore*, *supra*, 43 Cal.2d 517, this Court considered the defendant's right to have the jury fully instructed concerning her theory of the defense. In that case, defendant was charged with the killing of her husband and convicted of manslaughter. At trial, defendant claimed that her husband had attacked her and that she shot him in self-defense. The prosecution's theory of the case was that the defendant was the aggressor and not acting in self-defense when she killed her husband. Defendant requested two instructions concerning her theory of self defense, both of which were refused by the trial court. The trial court did, however, give two instructions requested by the prosecution, which focused on its theory of the case. Finding that this was error, this Court held:

> Under the circumstances of this case, where self-defense is relied upon, and where the question of whether [the victim or the defendant] was the aggressor is one of the major issues, if not the major issue, in the case, it would appear that the giving of the two instructions stated from the viewpoint of the prosecution and the failure to give the two requested by the defendant, could have constituted a weighting of the scales in favor of the People.

(*Id.* at p. 526; see also *People v. Hatchett* (1944) 63 Cal.App.2d 144, 158 [same]; *People v. Estrada* (1923) 60 Cal.App. 477, 483 ["the absence of a statement of the law of self-defense from the viewpoint of the defendant[] tended to create the impression in the minds of the jury that the judge was of the opinion that self-defense had not been established"].)

Based on the trial court's failure to fully instruct defendant's jury on her theory of self-defense, this Court reversed the judgment and the trial

(continued...)

Thus, fundamental due process requires balanced instructions that do not unfairly favor the state's theory of the case. But that is not what happened here.

After the trial court denied appellant's requested accessory instruction, the prosecutor requested that the trial court give CALJIC No. 2.03 (Consciousness of Guilt – Falsehood), which instructs the jurors that a defendant's false or misleading statements concerning the charged crime may be considered as a circumstance proving he is guilty of that crime. (13 RT 2141-2142.)[48] The prosecutor said that this instruction applied to appellant because after the police had found the murder weapons in a car parked in Lourdes Lopez's garage, Lopez told the officers that the car belonged to appellant, but when appellant was asked about the car, he denied that the car was his. (13 RT 2141-2142.) The prosecutor wanted the jurors to be instructed that they could use appellant's statement denying ownership of the car to prove he was guilty of the charged crimes. (*Ibid.*) The court granted the prosecutor's request, and the jury was instructed in

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(...continued)
court's denial of defendant's motion for a new trial. (*People v. Moore*, *supra*, 43 Cal.2d at pp. 530-531.)

[48] CALJIC No. 2.03 reads:

> If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

the language of CALJIC No. 2.03.[49] (13 RT 2142; 14 RT 2191; 5 CT 1103.)

The court's giving of CALJIC No. 2.03 allowed the prosecutor to argue – and more importantly for the jury to conclude – that appellant did not want to admit ownership of his car because he knew the murder weapons were inside the car, and he knew that because he shot Anthony Urrutia with one of the guns. (See 15 RT 2424.) While appellant's trial counsel was allowed to argue that appellant's statement denying ownership of the car "may have something to do with accessory after the fact" (15 RT 2335; see 14 RT 2172), the jurors were not instructed, as appellant had requested, on the definition of accessory after the fact, or that being an accessory was a crime. Absent such an instruction, the jurors effectively were precluded under CALJIC No. 2.03 (and the prosecutor's argument based on that instruction) from considering that appellant's post-offense conduct may have indicated that he was guilty only of the crime of being an accessory, as opposed to the crimes of robbery and murder. This is so because the express language of CALJIC No. 2.03 speaks of the defendant's consciousness that he had committed a crime. Because the only crimes that were defined for the jury were the crimes of robbery and murder, the instruction apprised jurors that they could consider appellant's statement denying ownership of the car solely for the purpose of indicating that he was guilty of those crimes.

In other words, notwithstanding appellant's trial counsel's argument, if the jurors believed appellant made the false statement, they could

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[49] Both appellant and co-appellant Rangel's counsel objected to the giving of this instruction. (13 RT 2141-2142.)

consider the falsehood under the instructions given only for the purpose of proving that he committed the charged robberies and murders. This plainly benefitted the prosecution, as the trial evidence supported an alternative interpretation – i.e., that Jade Gallegos, not appellant, committed the charged crimes, and that appellant's false statement was evidence that he was involved in a lesser related offense involving the cover-up of those charged crimes and was, therefore, guilty only of being an accessory after the fact to murder and robbery.

Accordingly, the trial court's refusal to give the requested accessory instruction denied appellant his Sixth and Fourteenth Amendment jury trial and due process rights because, in the absence of that instruction, the instructions given unduly favored the prosecution's theory of the case. Further, because the Eighth Amendment requires heightened reliability in the decisions made by the jury during the guilt phase of a capital trial (see *Beck v. Alabama* (1980) 447 U.S. 625, 637-638), this error also rendered the resulting penalty verdict unreliable under the Eighth Amendment.

1. The Trial Court's Refusal to Give the Requested Accessory Instruction Violated Appellant's Right to Instructions on His Defense Theory

The trial court's refusal to give the requested accessory instruction did more than just favor prosecution's theory of the case – it also unconstitutionally restricted appellant's theory of defense.

A defendant may not be deprived of "an adequate opportunity to present [his] claims fairly within the adversary system." (*Ross v. Moffitt* (1974) 417 U.S. 600, 612.) The right to present a defense "would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense." (*Tyson v. Trigg* (7th Cir. 1997) 50 F.3d 436, 448.)

Both the United State Supreme Court and the Ninth Circuit Court of Appeals recognize that a criminal defendant has the right to requested instructions on his or her defense theory. (*Mathews v. United States* (1988) 485 U.S. 58, 63 ["as a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor"]; *Conde v. Henry* (9th Cir. 2000) 198 F.3d 734, 739 ["It is well established that a criminal defendant is entitled to adequate instructions on the defense theory of the case"]; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1198, quoting *United States v. Winn* (9th Cir. 1978) 577 F.2d 86, 90 ["A defendant is entitled to an instruction concerning his theory of the case if it is supported by law and has some foundation in the evidence"].)

This Court goes even further, recognizing that "[e]ven absent a request, . . . [t]he trial court must give instructions on every theory of the case supported by substantial evidence, including defenses that are not inconsistent with the defendant's theory of the case." (*People v. Young* (2005) 34 Cal.4th 1149, 1200, citing *People v. Koontz* (2002) 27 Cal.4th 1041, 1085; *People v. Montoya* (1994) 7 Cal.4th 1027, 1047.)

Both this Court and the United States Supreme Court likewise have recognized that lesser related offenses such as accessory after the fact may serve as a theory of defense. (See *Lankford v. Idaho* (1991) 500 U.S. 110, 113 [noting "[p]etitioner testified in support of a defense theory that he was only an accessory after the fact"]; *People v. Gordon* (1990) 50 Cal.3d 1223, 1236, overruled on another point in *People v. Edwards* (1991) 54 Cal.3d 787, 835 [noting the defendant's theory of the defense was that he was not involved at all in the charged crimes, or that at most he may have been an accessory]; *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 809 [noting

lesser related offenses may be an aspect of the defendant's defense, and thus a component of his constitutional right to a fair trial].) That certainly was the case here, where appellant did not dispute that Encinas and Urrutia were killed, or that someone was with the person that witnesses identified as Rangel. Instead, the jury could have found from the evidence that appellant was not involved in the killing but did try to cover it up, and that appellant's conduct on the night of the killing showed that he was guilty of being an accessory after the fact. (See, e.g., 15 RT 2335.)

The crime of being an accessory after the fact therefore functioned as a significant part of appellant's defense theory that he was mistakenly identified as one of the two shooters. This theory became all the more crucial when the jury was allowed to consider appellant's actions after the killings as a circumstance proving his guilt of the charged murders. As noted above, the express language of CALJIC No. 2.03 speaks of the defendant's consciousness that he had committed a crime. Because the only crimes on which the jurors were instructed were the charged crimes, the jurors had two choices – they could either give no weight whatsoever to appellant's statement denying ownership of the car, or they could consider it as indicative of his guilt of the charged crimes, notwithstanding the fact that there was another interpretation, namely the defense theory that appellant's conduct indicated consciousness of his guilt as an accessory after the fact.[50]

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[50] Given the fact that the prosecutor both believed and argued that appellant's statement denying ownership of the car was important to her case (see, e.g., RT 2424), it is highly unlikely that the jurors gave no weight whatsoever to this evidence. (See *People v. Powell* (1967) 67 Cal.2d 32, 56-57, citing *People v. Cruz* (1964) 61 Cal.2d 861, 868 [recognizing that where the prosecution believes evidence important to its case, there is no (continued...)

Put simply, the lesser offense of accessory was a primary focus of the defense theory of this case, and the jury could reasonably have found that the evidence of the crime and appellant's post-crime conduct supported the defense theory that appellant was at most an accessory after the fact to the charged offenses. Under these circumstances, the *Birks* rule is not controlling, and it was error for the trial court to refuse the defense request to instruct the jury on the law pertaining to accessories after the fact. This error denied appellant his Sixth and Fourteenth Amendment rights to jury trial, due process, and instruction on his defense, and it violated the Eighth Amendment by diminishing the reliability of the guilt determination in this capital case. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638.)

2. The Trial Court's Refusal to Give Appellant's Requested Accessory After the Fact Instruction Requires Reversal

Under state law, the longstanding rule of this Court is that the failure to instruct on a theory relied upon by a defendant is reversible error unless "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." (*People v. Stewart* (1976) 16 Cal.3d 133, 141, quoting *People v. Sedeno* (1974) 10 Cal.3d 703, 721.)[51] Here, none of the other instructions given to the jury permitted the jury to determine – outside the

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[50](...continued)
reason to believe the jurors treated it any differently].)

[51] In non-capital cases, this Court has rejected the *Sedeno* standard where the trial court fails to instruct on lesser included offenses. (*People v. Breverman* (1998) 19 Cal.4th 142, 165, 178.) This Court has, however, continued to apply that standard in capital cases. (See, e.g., *People v. Chatman* (2006) 38 Cal.4th 344, 392; *People v. Koontz*, *supra*, 27 Cal.4th at pp. 1085-1086; *People v. Lewis* (2001) 25 Cal.4th 610, 646.)

context of an all-or-nothing decision – whether the offense appellant committed was that of being an accessory after the fact. Because this factual question was not presented or resolved under other instructions, this error requires reversal.

Under federal law, the test for prejudice is even stricter. "The right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct where there is evidence to support the instruction can never be considered harmless error." (*United States v. Escobar de Bright, supra,* 742 F.2d at p. 1201.) Thus, where, as here, the defendant's theory of the case is supported by the law and the evidence in the case, the failure to give the defendant's proposed jury instruction concerning his or her defense theory is reversible per se. (*Ibid.*)

Moreover, even if the trial court's erroneous refusal to give appellant's requested accessory instruction is not reversible per se, reversal is still required. As discussed above, the trial court's refusal to instruct on the offense of accessory after the fact violated appellant's Sixth, Eighth, and Fourteenth Amendment rights to a fair trial, to due process of law, to present a defense, to a properly instructed jury, and to a reliable adjudication at all stages of a death penalty prosecution. Accordingly, the state has the burden of showing that this federal constitutional error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 23-24.) Under this standard, reversal is required unless the state proves there is no "reasonable possibility" that the trial court's refusal to give the requested accessory instruction "might have contributed to [appellant's] conviction." (*Id.* at p. 24, citing *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87; see also *Arizona v. Fulminante* (1991) 499 U.S. 279,

296.) The essential inquiry is whether the verdict rendered at trial "was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) The state cannot meet that burden here. Reasonable jurors could have found that prosecution witnesses Paula Beltran, Mayra Fonseca, and Fidel Gregorio were highly distraught and emotional when they first saw, and later identified appellant as one of the two shooters (see, e.g., 3 RT 414, 5 RT 757, 8 RT 1316-1317, 1358, 12 RT 1919), and that Gregorio may have been under the influence of alcohol (12 RT 1970). And, as previously noted, even the prosecutor acknowledged the striking similarities between Jade Gallegos and appellant. (14 RT 2257.)

Under these circumstances, appellant's jury may well have believed that he was the victim of mistaken identification, but that he nevertheless was guilty of the crime of being an accessory after the fact to robbery and murder because he attempted to hide evidence. However, absent appellant's requested accessory instruction, the instructions given to appellant's jury benefitted the prosecution by precluding the jurors from considering this scenario as an alternative explanation of appellant's post-crime conduct. The instructions also provided an unfair advantage to the prosecution by undermining the defense theory that appellant was, at the most, an accessory after the fact to robbery and murder. Absent an accessory instruction, the jury was not allowed to consider the law that supported that defense.

The absence of the requested accessory instruction also left the jury with the unjust, Hobson's choice of either convicting appellant of a crime it believed the prosecution had failed to prove, or totally exonerating appellant, despite an acknowledgment by appellant's trial counsel that appellant may have committed a lesser, related crime. (15 RT 2335.)

Given the tearful presence of the victims' relatives in the courtroom during the guilt trial (see 16 RT 2589), it is highly unlikely the jurors would have chosen the latter choice.

On this record, it cannot be said that the trial court's refusal to give appellant's requested accessory instruction was harmless beyond a reasonable doubt. And this is especially so here in light of the trial court's additional instructional error in the giving of CALJIC No. 2.03 on consciousness of guilt. (See Argument IV, *post.*) Accordingly, reversal of the entire judgment is required.

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VII

THE TRIAL COURT'S GIVING OF CALJIC NO. 2.03 ON CONSCIOUSNESS OF GUILT DENIED APPELLANT HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND REVERSAL IS REQUIRED

A. Introduction

As noted in Argument V, *ante*, the trial court gave, over defense objection, CALJIC No. 2.03 (Consciousness of Guilt – Falsehood),[52] which instructed appellant's jury that it could consider appellant's statement to the police denying ownership of the car containing the murder weapons as proof that he committed the charged robberies and murders. (13 RT 2142-243, 2191; 5 CT 1103.) Giving this instruction was error because it was unnecessary and impermissibly argumentative, and because it permitted the jury to draw an irrational and unjust inference from the evidence. This instructional error deprived appellant of his constitutional rights under the Sixth, Eighth, and Fourteen Amendments and their state constitutional counterparts to due process, trial by jury, equal protection, and a reliable jury determination on issues of guilt, the special circumstances, and penalty.

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[52] CALJIC No. 2.03, as given to appellant's jury, reads as follows:

> As to defendant Mora only: If you find that before this trial defendant Mora made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt.
>
> However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

(14 RT 2191.)

B. The Consciousness of Guilt Instruction Improperly Duplicated the Circumstantial Evidence Instruction

The giving of CALJIC No. 2.03 was both unnecessary and repetitive of other instructions in this case. As a general rule, a defendant in a criminal case is not entitled to specific instructions on how the jury can consider evidence when those instructions simply reiterate a general principle upon which the jury has already been instructed. (See *People v. Ochoa* (2001) 26 Cal.4th 398, 444-445.) This rule applies equally to the prosecution. (*People v. Moore* (1954) 43 Cal.2d 517, 526 ["There should be absolute impartiality as between the People and the defendant in the matter of instructions"]; *Reagan v. United States* (1895) 157 U.S. 301, 310 [jury instructions "should be impartial between the government and the defendant"]; see also *Wardius v. Oregon* (1973) 412 U.S. 470, 475 [there "must be a two-way street" as between the prosecution and the defense.])

The trial court gave appellant's jury three instructions concerning the subject of circumstantial evidence, CALJIC Nos. 2.00 (Direct and Circumstantial Evidence – Inferences), [53] 2.01 (Sufficiency of

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[53] CALJIC No. 2.00, as given to appellant's jury, reads as follows:

> Evidence consists of the testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or non-existence of a fact.
>
> Evidence is either direct or circumstantial.
>
> Direct evidence is evidence that directly proves a fact. It is evidence which by itself, if found to be true, establishes that fact.
>
> Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn.

(continued...)

Circumstantial Evidence – Generally)[54] and 2.02 (Sufficiency of

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[53](...continued)

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

It is not necessary that facts be proved by direct evidence. They also may be proved by circumstantial evidence or by a combination of direct and circumstantial evidence. Both direct and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

(5 CT 1100; 14 RT 2187-2188.)

[54] CALJIC No. 2.01, as given to appellant's jury, reads as follows:

However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant's guilt and the other to [his] [her] innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to [his] [her] guilt.

If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the

(continued...)

Circumstantial Evidence to Prove Specific Intent or Mental State).[55] (14 RT 2187-2191; 5 CT 1100-1102.) Those three instructions amply informed the jurors that they could draw inferences of appellant's guilt from the circumstantial evidence in the case, including his state of mind. There was no need to repeat this general principle in the form of a permissive inference of consciousness of guilt, particularly since the trial court did not similarly instruct the jury on permissive inferences of reasonable doubt about appellant's guilt that could be drawn from the evidence. Nor, as previously described (see Argument V, *ante*), were the jurors given specific

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[54](...continued)
reasonable interpretation and reject the unreasonable.

(5 CT 1101; 14 RT 2188-2189.)

[55] CALJIC No. 2.02, as given to appellant's jury, reads:

> The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find a defendant guilty of the crime charged . . . in the information unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required specific intent or mental state but (2) cannot be reconciled with any other rational conclusion.
>
> Also, if the evidence as to any specific intent or mental state permits two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(14 RT 2190-2191; see also 5 CT 1102.)

instructions from which they could have inferred that appellant's alleged falsehood may have indicated cognizance that he was guilty of the crime of being an accessory after the fact to robbery and murder, as opposed to being guilty of the charged crimes of robbery and murder. This unnecessary benefit to the prosecution plainly violated Fourteenth Amendment due process and equal protection principles. (See *Wardius v. Oregon*, *supra*, 412 U.S. at p. 474 [Due Process Clause speaks to "the balance of forces between the accused and his accuser"]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [arbitrary preference to particular litigants violated equal protection].)

C. The Consciousness of Guilt Instruction Was Impermissibly Partisan and Argumentative

A trial court must not give instructions that are argumentative. (*People* v. *Sanders* (1995) 11 Cal.4th 475, 560.) Argumentative instructions are those that "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]." (*People* v. *Mincey* (1992) 2 Cal.4th 408, 437.) Such instructions unfairly single out isolated facts favorable to one party, thereby "intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.) Even neutrally phrased, instructions that "ask the jury to consider the impact of specific evidence" (*People* v. *Daniels* (1991) 52 Cal.3d 815, 870-871) or "imply a conclusion to be drawn from the evidence" (*People* v. *Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9) are argumentative and must be refused (*ibid.*).

Judged by theses standards, CALJIC No. 2.03 is impermissibly argumentative. Structurally, it is no different than the instruction that was found to be argumentative in *People v. Mincey*, *supra*, 2 Cal.4th 408:

> If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may conclude that they were not in a criminal sense willful, deliberate, or premeditated.

(*Id.* at p. 437, fn. 5.)

Like CALJIC No. 2.03, the instruction in *Mincey* told the jury that "if you find" certain facts, then "you may" consider that evidence for a specific purpose. This Court held that the trial court properly refused to give this requested instruction because it asked the jurors to "infer the existence of [the proposing party's] version of the facts[.]" (*People v. Mincey*, *supra*, 2 Cal.4th at p. 437.) This Court should likewise hold that CALJIC No. 2.03 is impermissibly argumentative.

In *People v. Nakahara* (2003) 30 Cal.4th 705, 713, this Court rejected a challenge to consciousness of guilt instructions based on an analogy to *People v. Mincey*, *supra*, holding that *Mincey* was "inapposite for it involved no consciousness of guilt instruction," but rather a proposed defense instruction which "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense. [Citation omitted].'" *Nakahara*'s holding does not explain why two instructions that are identical in structure should be analyzed differently, or why instructions that highlight the prosecution's version of the facts are permissible, while ones highlighting the defendant's version are not. Nor does that holding explain how an instructional analysis that arbitrarily distinguishes between parties to the defendant's detriment can survive scrutiny under the Due Process and Equal Protection Clauses. (See *Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon*, *supra*, 412 U.S. at p. 474; *Lindsay v. Normet*, *supra*, 405 U.S. at p. 77.)

The alternate rationale that this Court has employed to uphold the use of CALJIC No. 2.03 focuses on the allegedly protective nature of the instruction by noting that it informs the jury that consciousness of guilt evidence is not sufficient by itself to prove guilt. (See, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 142; *People* v. *Kelly* (1992) 1 Cal.4th 495, 531-532.) This rationale is equally flawed, as the instruction does not specify what else is required beyond the suggested inference that the defendant feels conscious of his guilt before the jury can find guilt has been established beyond a reasonable doubt. The instruction thus permits the jury to seize upon an isolated piece of evidence, perhaps nothing more than evidence establishing the only undisputed element of the crime, and use it *in combination* with the consciousness of guilt evidence to find that the defendant is guilty.

Indeed, in *People v. Seaton* (2001) 26 Cal.4th 598, this Court abandoned any pretext that CALJIC No. 2.03 is protective or neutral when it held that the failure to give this instruction constitutes harmless error because the instruction"benefit[s] the prosecution, not the defense[.]" (*Id.* at p. 673.) *Seaton*, however, did not go far enough in considering the full impact of the instruction. The instruction not only benefits the prosecution, it also lowers the prosecution's burden of proof, and thereby violates the Due Process Clause of the federal Constitution. (See *In re Winship* (1970) 397 U.S. 358, 364.) As noted above, while CALJIC No. 2.03 states that consciousness of guilt evidence is not sufficient by itself to prove guilt, it does not specify what else is required before the jury can find that guilt has been established beyond a reasonable doubt, and therefore permits the jury to conclude that the defendant is guilty based on the mere combination of the consciousness of guilt evidence and a single piece of evidence that does

no more than establish an undisputed element of the charged crime. This is an unconstitutional lessening of the burden of proof.

In short, CALJIC No. 2.03 is an impermissibly argumentative instruction that invades the province of the jury by focusing the jury's attention on evidence favorable to the prosecution, by placing the trial court's imprimatur on the prosecution's theory of the case, and by lessening the prosecution's burden of proof. The instruction therefore violated appellant's state and federal constitutional rights to due process and a fair trial, to equal protection of the law, to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial and properly-instructed jury, and to a fair and reliable capital trial. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

D. The Consciousness of Guilt Instruction Permitted the Jury to Draw an Irrational and Unjust Inference about Appellant's Guilt

Under the facts of appellant's case, CALJIC No. 2.03 embodied both an irrational and unfair permissive inference. The consciousness of guilt instruction told appellant's jurors that they could infer that appellant lied about ownership of the car because he knew he was responsible for the charged murders and robberies. (See *People* v. *Ashmus* (1991) 54 Cal.3d 932, 977.) As recognized by this Court, the Due Process Clause of the Fourteenth Amendment "demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313, citing *Ulster County Court v. Allen* (1979) 442 U.S. 140, 157, *Barnes v. United States* (1973) 412 U.S. 837, 844-845, and *Leary v. United States* (1969) 395 U.S. 6, 46.) In this context, an inference will be deemed rational, and hence constitutional, only if the surrounding circumstances

give "substantial assurance that the [inferred] fact is more likely than not to flow from the proved fact on which it is made to depend." (*Ulster County Court v. Allen*, *supra*, 442 U.S. at p. 166, fn. 28, citing *Leary v. United States*, *supra*, 395 U.S. at p. 36; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 316 [noting the high court requires substantial assurances that an inferred fact is more likely than not to flow from the proved fact on which it is made to depend].) This test judges the inference under the specific facts of the individual case in which it operates. (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 157, 162-163.)

By its terms, CALJIC No. 2.03 permitted the jury to infer that appellant's statement denying ownership of the car was a circumstance that proved he was guilty of murdering and attempting to rob Encinas and Urrutia – "the crimes for which he [was] tried." (14 RT 2191; 5 CT 1103.) Under the facts of this case, however, the jury could have found that appellant was mistakenly identified as one of the perpetrators and that his false statement related to his attempts to help the real killers by covering up the crime. Because it was just as likely that appellant's falsehood related to his knowledge that he had helped cover up the charged crimes, and not that he was guilty of committing those crimes, it cannot be said with "substantial assurance" that the presumed inference upon which the jury was instructed was "more likely than not to flow from the proved fact on which it is made to depend." (*Ulster County Court v. Allen*, *supra*, 442 U.S. at p. 166 fn. 28.) The presumed inference therefore was irrational and unconstitutional. (*People v. Castro*, *supra*, 38 Cal.3d at p. 313; *Ulster County Court v. Allen*, *supra*, 442 U.S. at p. 166, fn. 28; *Schwendeman v. Wallenstein*, *supra*, 971 F.2d at p. 316.)

Moreover, even assuming the inference upon which the jury was

instructed could be considered more likely than not to flow from the proved fact on which it was made to depend, CALJIC No. 2.03 still was defective under the facts of this case. The language of CALJIC No. 2.03 focused solely on the prosecution's inculpatory interpretation of appellant's conduct, even though the evidence also supported an alternative, exculpatory interpretation that appellant's conduct indicated consciousness that he was merely an accessory after the fact to robbery and murder. The instruction thereby improperly intruded on the jury's exclusive role as fact-finder by impermissibly focusing the jury on some, rather than all, of the facts in this case. (See *United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 899; *United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 299-300.)

In short, under the circumstances of this case, the giving of CALJIC No. 2.03 denied appellant his Sixth, Eighth, and Fourteenth Amendment rights, as well as his rights under the state Constitution, to due process and a fair and reliable trial, at which a properly-instructed jury can determine whether all of the elements of the charged crimes have been proven beyond a reasonable doubt.

E. Reversal is Required

Because the giving of CALJIC No. 2.03 violated several provisions of the federal Constitution, the state must show that giving the jury this instruction was harmless beyond a reasonable doubt. (*Chapman* v. *California* (1967) 386 U.S. 18, 24.) In other words, the state must prove there is no "reasonable possibility" that this error "might have contributed to [appellant's] conviction." (*Ibid.*) The state cannot meet this burden.

As previously discussed, evidence presented at trial pointed to Jade Gallegos as one of the two perpetrators of the charged crimes, the other being co-appellant Rangel, and the jurors could have believed that appellant

was the victim of mistaken identity, but nevertheless committed the crime of being an accessory by attempting to hide evidence after the shootings in order to help Gallegos and Rangel. CALJIC No. 2.03 directed the jurors away from this interpretation of the evidence, and unfairly focused their attention on the prosecution's theory that appellant's conduct after the shooting inferred that he was guilty of the charged crimes. Thus, under the facts of this case, it is reasonably possible that the erroneous instruction "might have contributed" to the jury's decision to convict appellant of the charged crimes. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) This is especially so here in light of the trial court's additional error of refusing to instruct appellant's jury concerning the lesser, related offense of being an accessory after the fact to robbery and murder. (See Argument V, *ante*.) Because the state cannot show the verdicts rendered at trial were "surely unattributable" to the trial court's error of giving CALJIC No. 2.03 on consciousness of guilt (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279), the entire judgment must be reversed.

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VIII

THE TRIAL COURT ERRED IN INSTRUCTING APPELLANT'S JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE-MURDER IN VIOLATION OF PENAL CODE SECTION 187

Appellant's jury was instructed that it could convict appellant of first degree murder if he committed a deliberate and premeditated murder (CALJIC No. 8.20; 5 CT 1134-1135; 14 RT 2212-2213), if he killed during the commission or attempted commission of robbery (CALJIC No. 8.21; 5 CT 1136; 14 RT 2214), or if he aided and abetted an attempted robbery during which a killing occurred. (CALJIC No. 8.27; 5 CT 1137; 14 RT 2214-2215.) The jurors convicted appellant of two counts of first degree murder. (4 CT 1015-1016.) As discussed below, the instructions on first degree murder were erroneous, and the resulting first degree murder convictions must be reversed, because the information did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder.[56]

Counts 1 and 2 of the information alleged appellant "unlawfully, and with malice aforethought murder[ed]" Andres Encinas and Antonio Urrutia, and charged appellant with "the crime[s] of murder, in violation of Penal Code section 187(a)." (2 CT 501-502.) Both the description of the crime

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[56] Appellant is not arguing that the information was defective. On the contrary, as explained in this argument, counts 1 and 2 of the information were entirely correct charges of second degree malice-murder in violation of Penal Code section 187. The error arose when the trial court instructed the jury on the separate uncharged crimes of first degree premeditated murder and first degree felony murder in violation of Penal Code section 189.

("unlawfully, and with malice aforethought"), and the statutory reference ("Penal Code section 187(a)") establish that appellant was charged exclusively with second degree malice murder in violation of Penal Code section 187, not with first degree murder in violation of Penal Code section 189.

Penal Code section 187, the statute appellant was charged with violating, describes second degree murder, which this Court has defined as "the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 307.)[57] Penal Code "[s]ection 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated felonies[.]" (*People v. Watson* (1981) 30 Cal.3d 290, 295.)[58]

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[57] Subdivision (a) of Penal Code section 187, unchanged since its enactment in 1872 except for the addition of the phrase "or a fetus" in 1970, provides as follows: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

[58] In 1997, when the murders at issue allegedly occurred, Penal Code section 189 provided in pertinent part:

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 286, 288, 288a,

(continued...)

Because the information charged only second degree malice murder in violation of Penal Code section 187, the trial court lacked jurisdiction to try appellant for first degree murder. A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information charging that specific offense. (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7; *People v. Granice* (1875) 50 Cal. 447, 448-449 [defendant could not be tried for murder after the grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon].)

Nevertheless, this Court has held that a defendant may be convicted of first degree murder even though the information or indictment charged only murder with malice in violation of Penal Code section 187. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 368-370; see also *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1034.) These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are defined by Penal Code section 187, so that an accusation in the language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary. Thus, in *People v. Witt* (1915) 170 Cal. 104, this Court declared:

Whatever may be the rule declared by some cases from other

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[58](...continued)
or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree.

> jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto*, 63 Cal. 165, "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought' (Pen. Code, sec. 187). Murder, thus defined, includes murder in the first degree and murder in the second degree.[59] It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

(*People v. Witt*, *supra*, 170 Cal. at pp. 107-108.)

However, the rationale of *People v. Witt*, *supra*, and all similar cases has been completely undermined by the decision in *People v. Dillon* (1983) 34 Cal.3d 441. Although this Court has noted that "[s]ubsequent to *Dillon*, *supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely" (*People v. Hughes*, *supra*, 27 Cal.4th at p. 369), it has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*.

Witt reasoned that "it is sufficient to charge murder in the language

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[59] This statement alone should preclude placing any reliance on *People v. Soto* (1883) 63 Cal. 165. It is simply incorrect to say that a second degree murder committed with malice, as defined in Penal Code section 187, includes a first degree murder committed with premeditation or with the specific intent to commit a felony listed in Penal Code section 189. On the contrary, "Second degree murder is a lesser included offense of first degree murder" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344, citations omitted), at least when the first degree murder does not rest on the felony murder rule. A crime cannot both include another and be included within it.

of the statute defining it." (*People v. Witt*, *supra*, 170 Cal. at p. 107.) *Dillon* held that Penal Code section 187 was *not* "the statute defining" first degree felony murder. After an exhaustive review of statutory history and legislative intent, the *Dillon* court concluded that "[w]e are therefore required to construe [Penal Code] section 189 as a statutory enactment of the first degree felony murder rule in California." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472, italics added and fn. omitted.)

Moreover, in rejecting the claim that *People v. Dillon*, *supra*, 34 Cal.3d 441, requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, quoting *People v. Pride* (1992) 3 Cal.4th 195, 249; accord, *People v. Box* (2000) 23 Cal.4th 1153, 1212.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute which defines that offense must be Penal Code section 189.

No other statute purports to define premeditated murder (see Pen. Code, § 664, subd. (a), referring to "willful, deliberate, and premeditated murder, as defined by Section 189") or murder during the commission of a felony, and *People v. Dillon*, *supra*, 34 Cal.3d at page 472, expressly held that the first degree felony murder rule was codified in Penal Code section 189. Therefore, if there is a single statutory offense of first degree murder, it is the offense defined by Penal Code section 189, and the information did not charge first degree murder in the language of "the statute defining" that crime.

Under these circumstances, it is immaterial whether this Court was correct in concluding that "[f]elony murder and premeditated murder are

not distinct crimes." (*People v. Nakahara* (2003) 30 Cal.4th 705, 712.) First degree murder of any type and second degree malice murder clearly *are* distinct crimes. (See *People v. Hart*, *supra*, 20 Cal.4th at pp. 608-609 [discussing differing elements of those crimes]; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1344 [second degree murder is lesser offense included within first degree murder].)[60]

The greatest difference is the one between second degree malice murder and first degree felony murder. By the express terms of Penal Code section 187, second degree malice murder includes the element of malice. (*People v. Watson*, *supra*, 30 Cal.3d at p. 295; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475.) Malice, however, is not an element of felony murder. (*People v. Box*, *supra*, 23 Cal.4th at p. 1212; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 475, 476, fn. 23). In *Green v. United States* (1957) 355 U.S. 184, the United States Supreme Court reviewed District of Columbia statutes identical in relevant respects to Penal Code sections 187 and 189 (*id.* at pp. 185-186, fns. 2 & 3) and declared that "[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense"

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[60] Justice Schauer emphasized this fact when, in the course of arguing for affirmance of the death sentence in *People v. Henderson* (1963) 60 Cal.2d 482, he stated that: "The fallacy inherent in the majority's attempted analogy is simple. It overlooks the fundamental principle that even though different degrees of a crime may refer to a common name (e.g., murder), *each of those degrees is in fact a different offense, requiring proof of different elements for conviction.* This truth was well grasped by the court in *Gomez* [*v. Superior Court* (1958) 50 Cal.2d 640, 645], where it was stated that 'The elements necessary for first degree murder differ from those of second degree murder. . . .'" (*People v. Henderson*, *supra*, at pp. 502-503 (dis. opn. of Schauer, J.), italics in original.)

(*id.* at p. 194, fn. 14).

Furthermore, regardless of how this Court construes the various statutes defining murder, it is now clear that the federal Constitution requires more specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court held that, under the notice and jury trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment*, submitted to a jury and proved beyond a reasonable doubt." (*Id.* at p. 476, italics added, citation omitted.)[61]

Premeditation and the facts necessary to bring a killing within the first degree felony murder rule (commission or attempted commission of a felony listed in Penal Code section 189 together with the specific intent to commit that crime) are facts which increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. (Pen. Code, § 190, subd. (a).) Therefore, those facts should have been charged in the information. (See *State v. Fortin* (N.J. 2004) 843 A.2d 974, 1035-1036.)

Permitting the jury to convict appellant of an uncharged crime violated his right to due process of law. (U.S. Const., 14th Amend.; Cal.

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[61] See also *Hamling v. United States* (1974) 418 U.S. 87, 117: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' [Citation.]"

Const., art. I, §§ 7 & 15; *DeJonge* v. *Oregon* (1937) 299 U.S. 353, 362; *In re Hess* (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instructions on first degree felony murder, also violated appellant's right to due process and trial by jury because it allowed the jury to convict him of murder without finding the malice which was an essential element of the crime alleged in the information. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423; *People v. Henderson* (1977) 19 Cal.3d 86, 96.) The error also violated appellant's right to a fair and reliable capital guilt trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

These violations of appellant's constitutional rights were necessarily prejudicial because, if they had not occurred, appellant could have been convicted only of second degree murder, a noncapital crime. (See *State v. Fortin*, *supra*, 843 A.2d at pp. 1034-1035.) Appellant's convictions for first degree murder therefore must be reversed.

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IX

A SERIES OF GUILT PHASE INSTRUCTIONS UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT, IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS, TRIAL BY JURY, AND RELIABLE VERDICTS

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle" (*In re Winship, supra*, at p. 363) at the heart of the right to trial by jury (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278). Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood [them] to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

Here, the trial court instructed the jury with a series of standard CALJIC instructions which individually and collectively violated the above principles, and thereby deprived appellant of his constitutional rights to due process and trial by jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16.) These instructions also violated the fundamental requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution having to present the full measure of proof. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17.) Because the instructions violated the federal Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279.)

Appellant recognizes that this Court has previously rejected many of

these claims. Nevertheless, he raises them here in order for the Court to reconsider those decisions, and in order to preserve these claims for federal review, if necessary.

A. The Instructions on Circumstantial Evidence under CALJIC Nos. 2.01 and 2.02 Undermined the Requirement of Proof Beyond a Reasonable Doubt

The jury was instructed with CALJIC Nos. 2.01 and 2.02 that if one interpretation of the evidence "appears to you to be reasonable, and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (5 CT 1101-1102; 14 RT 2188-2191.)[62] These instructions effectively informed the jurors that if appellant reasonably appeared to be guilty, they could find him guilty - even if they entertained a reasonable doubt as to guilt. This twice-repeated directive undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17). (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

First, the instructions compelled the jury to find appellant guilty of murder and to find the special circumstances to be true using a standard lower than proof beyond a reasonable doubt. The instructions directed the jury to convict appellant based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the

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[62] The text of CALJIC Nos. 2.01 and 2.02 is set forth in footnotes 53 and 54, *ante*.

evidence if it "appear[ed]" to be "reasonable." (5 CT 1101-1102; 14 RT 2188-2191.) An interpretation that appears reasonable, however, is not the same as the "subjective state of near certitude" required for proof beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty."].) Thus, the instructions improperly required conviction on a degree of proof less than the constitutionally required standard of proof beyond a reasonable doubt.

Second, the circumstantial evidence instructions required the jury to draw an incriminatory inference when such an inference appeared "reasonable." In this way, the instructions created an impermissible mandatory inference that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted it by producing a reasonable exculpatory interpretation. Mandatory presumptions, even ones that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Francis v. Franklin* (1985) 471 U.S. 307, 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

Here, the instructions plainly told the jurors that if only one interpretation of the evidence appeared reasonable, "you must accept the reasonable interpretation and reject the unreasonable." (5 CT 1101-1102; 14 RT 2188-2191.) In *People v. Roder*, *supra*, 33 Cal.3d at page 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. This Court likewise should invalidate the instructions given in this case, which required the jury

to presume all elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

The instructions had the effect of reversing, or at least significantly lightening, the burden of proof, since they required the jury to find appellant guilty unless he came forward with evidence reasonably explaining the incriminatory evidence put forward by the prosecution. The jury may have found appellant's defense unreasonable but still have harbored serious questions about the sufficiency of the prosecution's case. Nevertheless, under the erroneous instructions, the jury was required to convict appellant if he "reasonably appeared" guilty of murder, even if the jurors still entertained a reasonable doubt of his guilt. The instructions thus impermissibly suggested that appellant was required to present, at the very least, a "reasonable" defense to the prosecution case when, in fact, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684.)

For these reasons, there is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find appellant guilty under a standard that was less than the federal Constitution requires.

B. The Instructions Pursuant to CALJIC Nos. 2.21.1, 2.21.2, 2.22, 2.27, and 8.20 Also Vitiated the Reasonable Doubt Standard

The trial court gave five other standard instructions which magnified the harm arising from the erroneous circumstantial evidence instructions, and individually and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC No. 2.21.1 (Discrepancies in

Testimony), CALJIC No. 2.21.2 (Wilfully False Witnesses), CALJIC No. 2.22 (weighing conflicting testimony), CALJIC No. 2.27 (Sufficiency of Testimony of One Witness), and CALJIC No. 8.20 (Deliberate and Premeditated Murder). (5 CT 1110-1113, 1134; 14 RT 2194-2196, 2212-2213.). Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. By doing so, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, and vitiated the constitutional prohibition against the conviction of a capital defendant upon any lesser standard of proof. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Cage v. Louisiana*, *supra*, 498 U.S. at pp. 39-40; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC Nos. 2.21.1 and 2.21.2 lessened the prosecution's burden of proof by authorizing the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless, "from all the evidence, [they believed] the probability of truth favors his or her testimony in other particulars." (5 CT 1111; 14 RT 2195.) These instructions lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses if their testimony had a mere "probability of truth." The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case must be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable," or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.22 instructed the jurors:

> You are not bound to decide an issue of fact in

> accordance with the testimony of a number of witnesses which does not convince you as against the testimony of a lesser number or other evidence which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

(5 CT 1112; 14 RT 2195-2196.)

This instruction specifically directed the jury to determine each factual issue in the case by deciding which version of the facts was more credible or more convincing. Thus, the instruction replaced the constitutionally mandated standard of "proof beyond a reasonable doubt" with one indistinguishable from the lesser "preponderance of the evidence standard." As with CALJIC Nos. 2.21.1 and 2.21.2, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (5 CT 1113; 14 RT 2196), was likewise flawed. The instruction erroneously suggested that the defense, as well as the prosecution, had the burden of proving facts. The defendant, however, is only required to raise a reasonable doubt about the prosecution's case, and cannot be required to establish or prove any "fact." (See *People v. Serrato* (1973) 9 Cal.3d 753, 766.)

Finally, CALJIC No. 8.20, which defines premeditation and deliberation, misled the jury regarding the prosecution's burden of proof. The instruction told the jury that the necessary deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation. . . ." (5 CT 1134; 14 RT 2212-2213.) In that context, the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation, as opposed to raising a reasonable doubt. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632 [recognizing that "preclude" can be understood to mean "'absolutely prevent'"].)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally mandated standard under which the prosecution must prove each necessary fact of each element of each offense "beyond a reasonable doubt." In the face of so many instructions permitting conviction upon a lesser showing, no reasonable juror could have been expected to understand that he or she could not find appellant guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated appellant's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

C. This Court Should Reconsider Its Prior Rulings Upholding the Defective Instructions

Although each of the challenged instructions violated appellant's federal constitutional rights by lessening the prosecution's burden, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751; *People v. Riel* (2000) 22 Cal.4th 1153, 1200; *People v. Crittenden* (1994) 9 Cal.4th 83, 144; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634; *People v. Jennings* (1991) 53 Cal.3d 334, 386.) While recognizing the shortcomings of some of these instructions, this Court has consistently concluded (1) that the instructions must be viewed "as a whole," and when so viewed the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and give the defendant the benefit of any reasonable doubt, and (2) that jurors are not misled when they are also instructed with CALJIC No. 2.90 regarding the presumption of innocence. This Court's analysis is flawed.

First, what this Court characterizes as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood that the jury applied the challenged instructions in a way that violates the federal Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions are "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the beyond-a-reasonable-doubt standard of proof on a specific point

is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin*, *supra*, 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the challenged instructions, as they were given in this case, explicitly told the jurors that those instructions were qualified by the reasonable doubt instruction. It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions which contain their own independent references to reasonable doubt.

D. Reversal is Required

Because the erroneous instructions described above allowed conviction on a standard of proof less than proof beyond a reasonable doubt, giving these instructions was a structural error that is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) And, even if the harmless-error standard were applicable, these instructions violated appellant's federal constitutional rights and, thus, reversal is required unless the state can show that the error was harmless beyond a reasonable doubt.

(See *Carella v. California*, *supra*, 491 U.S. at pp. 266-267.) The prosecution cannot make that showing here for all of the reasons discussed above. Accordingly, the dilution of the reasonable-doubt requirement by the guilt phase instructions must be deemed reversible, and appellant's murder convictions, special circumstance findings, and death sentence must be reversed.

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X

THE TRIAL COURT COMMITTED REVERSIBLE ERROR, AND DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS, IN FAILING TO REQUIRE THE JURY TO AGREE UNANIMOUSLY ON WHETHER APPELLANT HAD COMMITTED A PREMEDITATED MURDER OR A FELONY MURDER BEFORE RETURNING A VERDICT FINDING HIM GUILTY OF MURDER IN THE FIRST DEGREE

The trial court instructed appellant's jury on first degree premeditated murder (CALJIC No. 8.20; 5 CT 1134-1135; 14 RT 2212-2213) and on first degree felony murder predicated on robbery (CALJIC No. 8.21; 5 CT 1136; 14 RT 2214). The trial court also instructed the jury that if it found that appellant had committed murder, it had to agree unanimously on whether appellant was guilty of first degree murder or second degree murder. (CALJIC No. 8.74; 5 CT 1141; 14 RT 2216-2217.) The trial court did not, however, instruct the jury that it had to agree unanimously on which type of first degree murder appellant had committed.

The failure to require the jury to agree unanimously as to whether appellant had committed a premeditated murder or a first degree felony murder was erroneous, and the error denied appellant his right to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to a unanimous jury verdict, and his right to a fair and reliable determination that he committed a capital offense. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

Appellant acknowledges that this Court has rejected the claim that the jury cannot return a valid verdict of first degree murder without first agreeing unanimously as to whether the defendant committed a premeditated murder or a felony murder. (See, e.g., *People v. Nakahara* (2003) 30 Cal.4th 705, 712-713; *People v. Kipp* (2001) 26 Cal.4th 1100,

1132; *People v. Carpenter* (1997) 15 Cal.4th 312, 394-395.) However, appellant submits that this conclusion is erroneous and should be reconsidered, particularly in light of recent decisions of the United States Supreme Court.

This Court consistently has held that the elements of first degree premeditated murder and first degree felony murder are not the same. In the watershed case of *People v. Dillon* (1983) 34 Cal.3d 441, this Court acknowledged first that "In every case of murder other than felony murder the prosecution undoubtedly has the burden of proving malice as an element of the crime. [Citations.]" (*Id.* at p. 475.) Then it declared that "in this state the two kinds of murder [felony murder and malice murder] are not the 'same' crimes and malice is not an element of felony murder." (*Id.* at p. 476, fn. 23; see also *id.* at pp. 476-477.)[63]

In subsequent cases, this Court retreated from the conclusion that felony murder and premeditated murder are not the same crime (see, e.g., *People v. Nakahara*, *supra*, 30 Cal.4th at p. 712 [holding that "[f]elony murder and premeditated murder are not distinct crimes"]), but it has continued to hold that the elements of those crimes are not the same. Thus, in *People v. Carpenter*, *supra*, 15 Cal.4th at page 394, this Court explained that the language from footnote 23 of *People v. Dillon*, *supra*, 34 Cal.3d

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[63] "It follows from the foregoing analysis that the two kinds of first degree murder in this state differ in a fundamental respect: in the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all important and must be proved beyond a reasonable doubt; in the case of first degree felony murder it is entirely irrelevant and need not be proved at all. . . . [This is a] profound legal difference . . . ." (*People v. Dillon*, *supra*, at pp. 476-477, fn. omitted.)

441, quoted above, "meant that the elements of the two types of murder are not the same." Similarly, this Court has declared that "the elements of the two kinds of murder differ" (*People v. Silva* (2001) 25 Cal.4th 345, 367) and that "the two forms of murder [premeditated murder and felony murder] have different elements" (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 712; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1131).

"Calling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813, 817.) Examination of the elements of the crimes at issue is the method used both to determine whether crimes that carry the same title are in reality different and distinct offenses (see *People v. Henderson* (1963) 60 Cal.2d 482, 502-503 (dis. opn. of Schauer, J.), quoted in fn. 27, *supra*, at p. 97), and also to determine to which facts the constitutional requirements of trial by jury and proof beyond a reasonable doubt apply (see *Jones v. United States* (1999) 526 U.S. 227, 232). Both of those determinations are relevant to the issue of whether the jury must find those facts by a unanimous verdict.

Comparison of the elements of the crimes at issue is the traditional method used by the United States Supreme Court to determine if those crimes are different or the same. The question first arose as an issue of statutory construction in *Blockberger v. United States* (1932) 284 U.S. 299, when the defendant asked the Court to determine if two sections of the Harrison Narcotic Act created one offense or two. The Court concluded that the two sections described different crimes, and explained its holding as follows:

> Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there

> are two offenses or only one, is whether each provision requires proof of an additional fact that the other does not.

(*Id.* at p. 304, citing *Gavieres v. United States* (1911) 220 U.S. 338, 342.)

Later, the "elements" test announced in *Blockberger* was elevated to a rule of constitutional dimension. It is now the test used to determine what constitutes the "same offense" for purposes of the Double Jeopardy Clause of the Fifth Amendment (*United States v. Dixon* (1993) 509 U.S. 688, 696-697), the Sixth Amendment right to counsel (*Texas v. Cobb* (2001) 532 U.S. 162, 173), the Sixth Amendment right to trial by jury, and the Fourteenth Amendment right to proof beyond a reasonable doubt *(Monge v. California* (1998) 524 U.S. 721, 738 (dis. opn. of Scalia, J.);[64] see also *Sattazahn v.* Pennsylvania (2003) 537 U.S. 101, 111 (lead opn. of Scalia, J.)).

Malice murder and felony murder are defined by separate statutes and "each . . . requires proof of an additional fact that the other does not." *(Blockberger v. United States*, *supra*, at p. 304.) Malice murder requires proof of malice and, if the crime is to be elevated to murder of the first degree, proof of premeditation and deliberation; felony murder does not. Felony murder requires the commission of or attempt to commit a felony

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[64] "The fundamental distinction between facts that are elements of a criminal offense and facts that go only to the sentence provides the foundation for our entire double jeopardy jurisprudence – including the 'same elements' test for determining whether two 'offence[s]' are 'the same,' see *Blockberger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and the rule (at issue here) that the Clause protects an expectation of finality with respect to offences but not sentences. The same distinction also delimits the boundaries of other important constitutional rights, like the Sixth Amendment right to trial by jury and the right to proof beyond a reasonable doubt." (*Monge v. California*, *supra*, at p. 738 (dis. opn. of Scalia, J.).)

listed in Penal Code section 189 and the specific intent to commit that felony; malice murder does not. (Pen. Code, §§ 187 & 189; *People v. Hart* (1999) 20 Cal.4th 546, 608-609.)

Therefore, it is incongruous to say, as this Court did in *People v. Carpenter*, *supra*, 15 Cal.4th 312, that the language in *People v. Dillon*, *supra*, 34 Cal.3d 441, on which appellant relies, "only meant that the *elements* of the two types of murder are not the same." (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 394, italics in original.) If the elements of malice murder and felony murder are different, as *Carpenter* acknowledges they are, then malice murder and felony murder are different crimes. (*United States v. Dixon*, *supra*, 509 U.S. at p. 696.)

Examination of the elements of a crime is also the method used to determine which facts must be proved to a jury beyond a reasonable doubt. (*Monge v. California*, *supra*, 524 U.S. at p. 738 (dis. opn. of Scalia, J.); see *People v. Sakarias* (2000) 22 Cal.4th 596, 623.) Moreover, the right to trial by jury attaches even to facts that are not "elements" in the traditional sense if a finding that those facts are true will increase the maximum sentence that can be imposed. "[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 476; see also *id.* at p. 490.)

When the right to jury trial applies, the jury's verdict must be unanimous. The right to a unanimous verdict in criminal cases is secured by the state Constitution and state statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163 & 1164; *People v. Collins* (1976) 17 Cal.3d 687, 693) and protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment to the United States Constitution (*Hicks v.*

Oklahoma (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488).

Because this is a capital case, the right to a unanimous verdict is also guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (See *Schad v. Arizona* (1991) 501 U.S. 624, 630-631 (plur. opn.) [leaving this question open].) The purpose of the unanimity requirement is to insure the accuracy and reliability of the verdict (*Brown v. Louisiana* (1980) 447 U.S. 323, 331-334; *People v. Feagley* (1975) 14 Cal.3d 338, 352), and there is a heightened need for reliability in the procedures leading to the conviction of a capital offense (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9; *Beck v. Alabama* (1980) 447 U.S. 625, 638). Therefore, jury unanimity is required in capital cases.

This conclusion cannot be avoided by recharacterizing premeditation and the facts necessary to invoke the felony murder rule as "theories" rather than "elements" of first degree murder. (See, e.g., *People v. Millwee* (1998) 18 Cal.4th 96, 160, citing *Schad v. Arizona*, *supra*, 501 U.S. 624.) There are three reasons why this is so.

First, in contrast to the situation reviewed in *Schad*, where the Arizona courts had determined that "premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element" (*Schad v. Arizona*, *supra*, 501 U.S. at p. 637), the California courts repeatedly have characterized premeditation as an element of first degree premeditated murder. (See, e.g., *People v. Thomas* (1945) 25 Cal.2d 880, 899 [premeditation and deliberation are essential elements of premeditated first degree murder]; *People v. Gibson* (1895) 106 Cal. 458, 473-474 [same]; *People v. Albritton* (1998) 67 Cal.App.4th 647, 654, fn. 4 [malice and premeditation are the ordinary

elements of first degree murder].) The specific intent to commit the underlying felony likewise has been characterized as an element of first degree felony murder. (*People v. Jones* (2003) 29 Cal.4th 1229, 1257-1258; *id.* at p. 1268 (conc. opn. of Kennard, J.).)

Moreover, this Court has recognized that it was the intent of the Legislature to make premeditation an element of first degree murder. In *People v. Stegner* (1976) 16 Cal.3d 539, it declared:

> We have held, "By conjoining the words 'willful, deliberate, and premeditated' in its definition and limitation of the character of killings falling within murder of the first degree, the Legislature apparently emphasized its intention to require as an element of such crime substantially more reflection than may be involved in the mere formation of a specific intent to kill." [Citation.]

(*Id.* at p. 545, quoting *People v. Thomas*, *supra*, 25 Cal.2d at p. 900.)[65]

As the United States Supreme Court has explained, *Schad* held only that jurors need not agree on the particular means used by the defendant to

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[65] Specific intent to commit the underlying felony, the mens rea element of first degree felony murder, is not specifically mentioned in section 189. However, ever since its decision in *People v. Coefield* (1951) 37 Cal.2d 865, 869, this Court has held that such an intent is required (see, e.g., *People v. Hernandez* (1988) 47 Cal.3d 315, 346, and cases there cited; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), and that authoritative judicial construction "has become as much a part of the statute as if it had been written by the Legislature" (*People v. Honig* (1996) 48 Cal.App.4th 289, 328; accord, *Winters v. New York* (1948) 333 U.S. 507, 514; *People v. Guthrie* (1983) 144 Cal.App.3d 832, 839). Furthermore, section 189 has been amended and reenacted several times in the interim, but none of the changes purported to delete the requirement of specific intent, and "There is a strong presumption that when the Legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts." (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 433, citations and internal quotation marks omitted.)

commit the crime or the "underlying brute facts" that "make up a particular element," such as whether the element of force or fear in a robbery case was established by the evidence that the defendant used a knife or by the evidence that he used a gun. (*Richardson v. United States*, *supra*, 526 U.S. at p. 817.) This case involves the elements specified in the statute defining first degree murder (§ 189), not the particular means or the "underlying brute facts" which may be used at times to establish those elements.

Second, no matter how they are labeled, premeditation and the facts necessary to support a conviction for first degree felony murder are facts that operate as the functional equivalent of "elements" of the crime of first degree murder, and, if found, increase the maximum sentence beyond the penalty that could be imposed on a conviction for second degree murder. (§§ 189 & 190, subd. (a).) Therefore, they must be found by procedures that comply with the constitutional right to trial by jury (*Ring v. Arizona* (2002) 536 U.S. 584, 603-605; *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 494-495), which, for the reasons previously stated, include the right to a unanimous verdict.

Third, at least one indisputable "element" is involved. First degree premeditated murder does not differ from first degree felony murder only in that the former requires premeditation while the latter does not. The two crimes also differ because first degree premeditated murder requires malice while felony murder does not. "'The mental state required [for first degree premeditated murder] is, of course, a deliberate and premeditated intent to kill with malice aforethought. (See . . . §§ 187, subd. (a), 189.)'" (*People v. Hart*, *supra*, 20 Cal.4th at p. 608; accord, *People v. Visciotti* (1992) 2 Cal.4th 1, 61.) Malice is a true "element" of murder in anybody's book.

Thus, it was error for the trial court to fail to instruct the jury that it

had to agree unanimously on whether appellant had committed a premeditated murder or a felony murder. Because the jurors were not required to reach unanimous agreement on the elements of first degree murder, there is no valid jury verdict on which harmless error analysis can operate. The failure to instruct was a structural error and therefore reversal of the entire judgment is required. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.)

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XI

THE EVIDENCE WAS INSUFFICIENT TO CONVICT APPELLANT OF THE TWO CHARGES OF ATTEMPTED ROBBERY. AS A RESULT, THOSE CONVICTIONS, ALONG WITH THE MURDER CONVICTIONS AND THE TRUE FINDING ON THE ROBBERY SPECIAL CIRCUMSTANCE, MUST BE REVERSED

The evidence was legally insufficient to sustain appellant's attempted robbery convictions, and those convictions must be reversed. In the absence of sufficient evidence of attempted robbery, appellant could not properly be convicted of felony murder. This insufficiency of the evidence requires reversal of the murder convictions because it cannot be ascertained whether the jury based its decision to convict appellant of first degree murder on a felony murder theory. In addition, because the charged robbery-murder special circumstance could only be found true if the murders were committed while appellant was engaged in robbery or the attempted commission of robbery (Pen. Code, § 190.2, subd. (a)(17)(A)), the true findings on this special circumstance also must be reversed.

A. The Applicable Legal Principles

A criminal conviction premised on insufficient proof of an element of the charged offense violates the due process clauses of both the United States and California Constitutions. (U.S. Const., 14th Amend.; *Jackson v. Virginia* (1979) 443 U.S. 307, 316; Cal. Const., art. I, § 15; *People v. Rowland* (1992) 4 Cal.4th 238, 269.) The lack of sufficient proof for a conviction also violates a defendant's rights to a fair trial, trial by jury, effective assistance of counsel, equal protection, and reliable guilt and penalty verdicts in a capital case, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and article I, sections 7, 15, and 17 of the California Constitution.

As formulated by the United States Supreme Court in *Jackson v.*

Virginia, *supra*, 443 U.S. at page 319, the relevant question in determining if evidence is sufficient to sustain a criminal verdict is whether a rational trier of fact could have found each element of the charged crime beyond a reasonable doubt. *Jackson* defined the requisite evidence as being sufficient to allow the trier of fact to reach a "subjective state of near certitude of the guilt of the accused[.]" (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 315; see also *Victor v. Nebraska* (1994) 511 U.S. 1, 15.)

This Court states the standard in terms of whether the record "discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496, quoting *People v. Johnson* (1980) 26 Cal.3d 557, 578.) "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises the possibility, and this is not a sufficient basis for an inference of fact." (*People v. Reyes* (1974) 12 Cal.3d 486, 500, citing *People v. Redmond* (1969) 71 Cal.2d 745, 755.) Nor can "substantial evidence" be based on speculation:

> We may speculate about any number of scenarios that may have occurred on the morning in question. A reasonable inference, however, "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence."

(*People v. Morris* (1988) 46 Cal.3d 1, 21,[66] citations omitted; see also

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[66] *People v. Morris*, *supra*, was disapproved on another point in *In* (continued...)

People v. Marshall (1997) 15 Cal.4th 1, 35.)

Application of these principles to this case shows that the evidence presented was insufficient to convict appellant of attempted robbery.

B. The Evidence Was Insufficient to Support Appellant's Convictions of Attempted Robbery

To prove appellant guilty of attempted robbery, the prosecution had to prove beyond a reasonable doubt that appellant had the specific intent to permanently deprive, or to aid co-appellant Rangel in permanently depriving, Encinas and Urrutia of their wallets. (*People v. Huggins* (2006) 38 Cal.4th 175, 214; *People v. Marshall, supra*, 15 Cal.4th at p. 34; see also Pen. Code, § 21 [attempt to commit a crime requires specific intent to perpetrate the crime].) The prosecution's evidence of an attempted robbery came exclusively from Fidel Gregorio, who testified that the two individuals he identified as appellant and Rangel told Encinas and Urrutia to give them their wallets. (4 RT 632-633, 636-637, 5 RT 701.) The prosecutor characterized these statements as her "undisputed" evidence of an attempted robbery. (14 RT 2240.)

A demand for someone's wallet may, in the appropriate case, indicate an intent to permanently deprive that person of his property. However, the test for sufficient evidence that the defendant is guilty beyond a reasonable doubt looks at *all* the evidence presented at trial, and is not limited to "isolated bits of evidence selected by the [prosecutor]." (*People v. Johnson, supra*, 26 Cal.3d at p. 577, citing *People v. Bassett* (1968) 69 Cal.2d 122.) As stated in *Johnson*, "it is not enough for the [prosecutor] simply to point to 'some' evidence supporting the finding, for [not all]

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[66](...continued)
re Sassounian (1995) 9 Cal.4th 535, 543, footnote. 5.

evidence remains substantial in the light of other facts." (*Ibid.*) That certainly is the case here, where "all the facts and circumstances surrounding the crime" (*People v. Lewis* (2001) 25 Cal.4th 610, 643, citing Pen. Code, § 21, subd. (a) ["intent or intention is manifested by the circumstances connected with the offense"]) show that neither appellant nor Rangel actually intended take the victims' wallets.

According to Gregorio, the man he identified as Rangel displayed his gun and told Encinas, "Check yourself. Check yourself. Give me your wallet" (4 RT 632-633), and the man he identified as appellant told Urrutia, "Give me your wallet" (4 RT 636-637, 5 RT 701). However, Gregorio testified that immediately after Rangel's statement, and before Encinas could even reach for his wallet, Rangel shot Encinas in the chest. (4 RT 635-636.) The man Gregorio identified as appellant shot Urrutia within "seconds" of his statement, and without ever giving Urrutia any opportunity to hand over his wallet. (5 RT 702; 4 RT 637.) Rangel immediately fired two more shots. Rangel and the person identified as appellant then ran away; neither Rangel nor appellant made any attempt to take the victims' wallets or anything else from either of the victims or from their vehicle. (4 RT 638-639, 9 RT 1432, 1452-1453.)

On this evidence, the only argument that the prosecutor could make was that "for whatever reason" the shooters did not actually take the victims' wallets (14 RT 2238), and "for whatever reason, maybe they got scared, maybe – whatever reason of why they didn't actually take money. Maybe a light went on. Maybe someone opened their door. Maybe someone like Mr. Youngblood was looking out his window. They left." (15 RT 2431.) However, the prosecutor's arguments were nothing more than "speculation, supposition, surmise, conjecture, or guess work" (*People*

v. Morris, *supra*, 46 Cal.3d at p. 21), and on the facts and circumstances of this crime, neither those arguments nor Gregorio's testimony constituted evidence sufficient to allow the trier of fact to reach a "subjective state of near certitude" (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 315) that the people who shot Encinas and Urrutia acted with the specific intent to permanently deprive them of their wallets. Appellant's attempted robbery convictions must therefore be reversed.

C. Appellant's Murder Convictions Must Also Be Reversed Because There Was Insufficient Evidence That the Killings Were Committed During the Commission of an Attempted Robbery

Appellant could be convicted of first degree felony murder only if he intended to actually take Encinas's and Urrutia's wallets, thereby satisfying the intent to permanently deprive element of the crime of robbery. (*People v. Pollack* (2005) 32 Cal.4th 1153, 1175 [felony murder in the commission of a robbery "requires specific intent to steal the victim's property, which includes a specific intent to permanently deprive the victim of the property"].) Thus, there was insufficient evidence to support one of the prosecution's two theories of first degree murder.[67]

In *People v. Green* (1980) 27 Cal.3d 1, this Court stated the "settled and clear" rule on appeal that "when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction

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[67] The jury returned general verdicts of first degree murder after the case was presented to the jury on alternate theories of premeditated murder and felony murder during the commission of an attempted robbery. (4 CT 1015-1016; 5 CT 1134-1137.)

cannot stand." (*Id.* at p. 69.) "The same rule applies when the defect in the alternate theory is not legal but factual, i.e., when the reviewing court holds the evidence insufficient to support the conviction on that ground." (*Id.* at p. 70.)

In *People v. Guiton* (1993) 4 Cal.4th 1116, this Court relied on *Griffin v. United States* (1991) 502 U.S. 46, and created the following exception to the *Green* rule: "If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground." (*People v. Guiton, supra*, 4 Cal.4th at p. 1129.) The *Guiton* court based its holding on the following reasoning:

> In analyzing the prejudicial effect of error, . . . an appellate court does not assume an unreasonable jury. Such an assumption would make it virtually impossible to ever find error harmless. An appellate court necessarily operates on the assumption that *the jury has acted reasonably, unless the record indicates otherwise*. [¶] . . . Thus, if there are two possible grounds for the jury's verdict, one unreasonable and the other reasonable, we will assume, *absent a contrary indication in the record*, that the jury based its verdict on the reasonable ground.

(*Id.* at p. 1127, italics added.)

According to this Court, "[t]he jury [i]s as well equipped as any court to analyze the evidence and to reach a rational conclusion. The jurors' 'own intelligence and expertise will save them from' the error of giving them 'the option of relying upon a factually inadequate theory.'" (*Id.* at p. 1131, quoting *Griffin v. United States, supra*, 502 U.S. at p. 59.)

Thus, the *Guiton* exception is based on the assumption that the jury has acted reasonably, and that it did not base its finding on insufficient

evidence. This assumption cannot apply here where, absent sufficient evidence, the record shows that the jury acted unreasonably in convicting appellant of attempted robbery, and in finding true the robbery-murder special circumstance. (See Section D, *post.*) Thus, even assuming that the evidence was sufficient to support an alternative theory of premeditated murder, the *Guiton* exception does not apply and the first degree murder verdicts must be reversed. (*People v. Green*, *supra*, 27 Cal.3d at p. 70; see also *Sandstrom v. Montana* (1979) 442 U.S. 510, 526 ["'[It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside'"]; *In re Winship* (1970) 397 U.S. 358, 364 [conviction based on insufficient evidence violates defendant's constitutional right to due process of law]; accord, *Martinez v. Garcia* (9th Cir. 2004) 379 F.3d 1034, 1035-1036, 1041; *Keating v. Hood* (9th Cir. 1999) 191 F.3d 1053, 1062.)

Moreover, even under *Guiton*, appellant's murder convictions must be reversed because there is "an affirmative indication in the record that the verdict[s] actually did rest on the inadequate ground." (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1129.) The prosecution's theory was that appellant was guilty of the first degree murder of Andy Encinas based on an aiding and abetting theory. (See 14 RT 2267-2273.) While the jurors were instructed on both premeditated murder and felony murder in the attempted commission of a robbery (4 CT 1134-1136), they specifically were instructed that in order to find appellant guilty as an aider and abettor to Encinas's murder, they had to find appellant's intent was to aid Rangel in

robbing Encinas.[68] (5 CT 1128; see also 5 CT 1137.) Thus, the jury's verdict against appellant on Count 1 was necessarily based on a felony murder theory, as the jurors were expressly told they could only find appellant guilty of aiding and abetting Encinas's murder (which was the prosecution's theory) if they found (as they erroneously did) that appellant was aiding and abetting an attempted robbery.

Furthermore, the jury's erroneous verdicts, finding appellant guilty on the attempted robbery charges and the robbery special circumstance allegation true, must be viewed as proof positive that the jury found appellant guilty of first degree murder on a felony murder theory. (See *People v. Marshall*, *supra*, 15 Cal.4th at p. 38 [true finding on allegation that murder was committed in course of attempted rape "necessarily" meant that jury found defendant guilty of felony-murder on that theory]; *People v. Kelly* (1992) 1 Cal.4th 495, 531 [because jury found rape-murder special circumstance, it necessarily relied on rape-murder theory of first degree murder]; *People v. Hernandez* (1988) 47 Cal.3d 315, 351 [court can tell that general verdict of guilt rested on rape and sodomy felony murder because jury found true the rape and sodomy special circumstances].) While the jury received instructions on malice aforethought, deliberation, and premeditation, there is nothing in the record that would similarly indicate that the jury found any such facts.

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[68] While the jury was instructed that they did not need to unanimously agree as to which originally-contemplated crime appellant aided and abetted, so long as they were satisfied beyond a reasonable doubt that he aided and abetted "an identified and defined target crime and that the crime of murder was a natural and probable consequence of that target crime," the only target crime identified in the "natural and probable consequences" instruction was attempted robbery. (5 CT 1128.)

Because there is an affirmative indication in the record that appellant's first degree murder convictions rested on the inadequate felony murder theory, those convictions must be reversed.

D. The Evidence Was Insufficient to Support the Jury's Special Circumstance Finding That the Killings Were Committed During the Commission of Robbery or Attempted Robbery

"A robbery-murder special circumstance may only be found true if the murder was committed while the defendant was engaged in 'the commission of, or the attempted commission of' a robbery." (*People v. Marshall*, *supra*, 15 Cal.4th at pp. 40-41, quoting Pen. Code, § 190.2, subd. (a)(17)(A).) Because the evidence was insufficient to show that Encinas and Urrutia were killed during the commission of robbery or attempted robbery, the robbery-murder special circumstance finding, as well at the attempted robbery convictions, must be reversed. (*Ibid.*)

Moreover, even assuming the evidence presented at trial was sufficient to support appellant's attempted robbery convictions, reversal of the robbery-murder special circumstance would still be required because there was insufficient evidence establishing that Encinas and Urrutia were killed in order to advance the independent felonious purpose of robbery.

"[T]he felony-based special circumstances reflect[] a legislative belief that it [i]s appropriate to make those who kill[] 'to advance an independent felonious purpose' death eligible, but . . . this goal [i]s not achieved when the felony [i]s 'merely incidental to the murder[.]'" (*People v. Horning* (2004) 34 Cal.4th 871, 907, quoting *People v. Green*, *supra*, 27 Cal.3d at p. 61.) Thus, "if the felony is merely incidental to achieving the murder – the murder being the defendant's primary purpose – then the special circumstance is not present[.]" (*People v. Navarette* (2003) 30

Cal.4th 458, 505.) In other words:

> A murder is not committed during a robbery within the meaning of the [robbery-murder special circumstance] statute unless the accused has killed . . . *in order to advance an independent felonious purpose*[.] A special circumstance allegation of murder committed during a robbery has not been established where the accused's primary criminal goal is not to steal but to kill and the robbery is merely incidental to the murder[.]

(*People v. Morris*, *supra*, 46 Cal.3d at p. 21, quoting *People v. Thompson* (1980) 27 Cal.3d 303, 322, italics in original, internal quotation marks and citation omitted; see also *People v. Marshall*, *supra*, 15 Cal.4th at p. 41 ["The robbery-murder special circumstance applies to a murder in the commission of a robbery, not to a robbery committed in the course of a murder."].)

Here, even if appellant had committed an attempted robbery, there was no evidence that reasonably suggested that the killings were committed in order to carry out or advance that attempt. The prosecutor herself argued that the evidence showed appellant and Rangel's primary goal was to murder Encinas and Urrutia, not to rob them. (20 RT 3199-3200.) Paradoxically, the prosecutor's guilt phase argument was that appellant and Rangel decided that if they killed Encinas and Urrutia, they could then reach into the 4-Runner, grab Encinas's and Urrutia's wallets, and prevent Encinas and Urrutia from calling 911 and later identifying them.[69] (15 RT

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[69] The prosecutor argued:

> The murder was committed in order to carry out or – that's an "or" – advance the commission of the crime of attempted robbery, or to facilitate the escape or to avoid detection. [¶] Meaning, hey, you know, what if you shoot – if you ask

(continued...)

2431.)

Once again, however, the prosecutor's argument was speculation and conjecture, and entirely unsupported by the facts and circumstances surrounding the crime. On the evidence presented at trial, a rational trier of fact could not have concluded beyond a reasonable doubt that appellant and Rangel killed Encinas and Urrutia in order to advance the independent, felonious purpose of committing a robbery. As such, the robbery-murder special circumstance finding, along with the attempted robbery and murder convictions, must be reversed.

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[69](...continued)
someone for their wallet, "Oh, man, let's just shoot them. I can get it myself. I can reach in and get it. [¶] And then you know what? They don't run after you. They don't call 9-1-1. They can't I.D. you later. What a great idea. [¶] Meaning attempted robbery, not merely incidental to the . . . commission of the murder.

(15 RT 2431.)

XII

THE JURY'S TRUE FINDING ON THE MULTIPLE-MURDER SPECIAL CIRCUMSTANCE MUST BE SET ASIDE BECAUSE IT CANNOT BE DETERMINED BEYOND A REASONABLE DOUBT WHETHER IT WAS BASED ON A FINDING BY THE JURY THAT APPELLANT ACTED WITH THE INTENT TO KILL ANDY ENCINAS, OR ON THE ERRONEOUS PREMISE THAT APPELLANT, WITH RECKLESS INDIFFERENCE TO HUMAN LIFE, INTENDED TO AID CO- APPELLANT RANGEL IN ROBBING ENCINAS

A. Introduction

As argued in Argument X, *ante*, the jury's two robbery-murder special circumstance findings must be reversed because of insufficiency of the evidence. Absent these special circumstance findings, appellant's eligibility for the death penalty rests solely on the jury's multiple-murder special circumstance finding. Because the prosecution's theory at trial was that appellant was guilty of killing Encinas on an aiding and abetting theory (see 14 RT 2267-2273), the multiple-murder special circumstance could be found true only if appellant acted with the intent to kill Encinas. (Pen. Code, § 190.2, subd. (c);[70] *People v. Anderson* (1987) 47 Cal.3d 1104, 1149-1150 ["intent to kill is not an element of the multiple-murder special circumstance; but when the defendant is an aider and abetter rather than the

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[70] Penal Code section 190.2, subdivision (c), reads:

> Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4.

actual killer, intent must be proved."].)[71] Under the facts of this case and the instructions given to appellant's jury, it cannot be determined beyond a reasonable doubt whether appellant's jury based its true finding on the multiple-murder special circumstance on a finding that appellant acted with the intent to kill Andy Encinas, or on the erroneous premise that appellant, with reckless indifference to human life, intended to aid Rangel in robbing Encinas. Therefore, the multiple murder special circumstance and the death sentence must be reversed.

B. Standard of Review

Both the state and federal Constitutions require proof beyond a reasonable doubt of each element of an offense as a basis for sustaining a judgment. Proof of guilt beyond a reasonable doubt is an essential facet of Fourteenth Amendment due process and is required for a constitutionally valid conviction. (*In re Winship* (1970) 397 U.S. 358, 361-364.) On appeal, the test of whether the evidence is sufficient to support a conviction is "whether a rational trier of fact could find the defendant guilty beyond a

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[71] This Court's statement in *People v. Dennis* (1998) 17 Cal.4th 468 that "[w]e have never held that the multiple-murder special circumstance requires a jury to find the defendant intended to kill every victim (*id.* at p. 516; see also *People v. Rogers* (2006) 39 Cal.4th 826, 892) is inapplicable to appellant's case. The defendant in *Dennis* was the actual killer in a case that occurred during the "window period" between *Carlos v. Superior Court* (1983) 35 Cal.3d 131 and *People v. Turner* (1984) 37 Cal.3d 302 – both of which held that held that intent to kill was an essential element of the felony murder and multiple-murder special circumstances – and *People v. Anderson* (1987) 43 Cal.3d 1104, which overruled these cases and held that intent to kill is not an element of either of these special circumstances when the defendant is the actual killer. *Dennis* did not involve Penal Code section 190.2, subdivision (c), which requires that where, as here, the defendant is not the actual killer, he must act with the intent to kill in the crime he is alleged to have aided and abetted.

reasonable doubt." (*People v. Holt* (1997) 15 Cal.4th 619, 667.) "The relevant question is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia*, (1979) 443 U.S. 307, 318-319.) This Court, however, does not limit its review to the evidence favorable to the People. (*People v. Miranda* (1987) 44 Cal.3d 57, 78.)

> As *People v. Bassett* [1968] 69 Cal.2d 122, explained, "our task . . . is twofold. First, we must resolve the issue in the light of the *whole* record – i.e., the entire picture of the defendant put before the jury – and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is *substantial*; it is not enough for the respondent simply to point to 'some' evidence supporting the finding, for 'Not every surface conflict of evidence remains substantial in the light of other facts.'" (69 Cal.2d at p. 138.) (Fn. omitted.)

People v. Johnson (1980) 26 Cal.3d 557, 577, italics in original; see also *People v. Barnes* (1986) 42 Cal.3d 284, 303.)

To satisfy this due process standard and to avoid an affirmance based primarily on speculation, conjecture, guesswork or supposition, the record must contain substantial evidence of each of the essential elements. (*People v. Morris* (1988) 46 Cal.3d 1, 21, overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543.) In order for the evidence to be "substantial," it must be "of ponderable legal significance . . . reasonable in nature, credible, and of solid value." (*People v. Johnson, supra*, 26 Cal.3d at pp. 576-578.) "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for

an inference of fact." (*People v. Kunkin* (1973) 9 Cal.3d 245, 250.)

The test for the sufficiency of a special circumstance finding is essentially the same. This Court must view the evidence in the light most favorable to the state and determine whether any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt. (*People v. Cain* (1995) 10 Cal.4th 1, 38; *People v. Roland* (1992) 4 Cal.4th 238, 271; *People v. Mickey* (1991) 54 Cal.3d 612, 678.)

Further, the evidence cannot satisfy the heightened-reliability requirement mandated in capital cases by the Eighth and Fourteenth Amendments and the analogous provisions of the California Constitution. Even if the evidence were sufficient, in a noncapital context, to support a murder conviction on an aiding and abetting theory, the evidence of intent to kill necessary for a multiple-murder finding is too weak and uncertain to serve as a constitutionally valid basis for establishing death-eligibility and turning a noncapital homicide into capital murder. Thus, permitting appellant's multiple-murder special circumstance finding to stand would violate not only *Winship*'s due process standard for a criminal conviction, but also would violate the special reliability standards mandated in capital cases by due process and the Eighth Amendment, and California state constitutional analogues. (U.S. Const., 8 & 14 Amends.; Cal. Const., art. 1, §§ 1, 7, 15, 17.)

C. The Multiple-murder Special Circumstance must Be Reversed since There Was Insufficient Evidence Presented That Appellant Intended to Kill Andy Encinas and Because the Jury Was Instructed That it Could Find the Multiple-murder Special Circumstance True Without Finding an Intent to Kill

In *People v. Williams* (1997) 16 Cal.4th 635, the trial court failed to instruct the jury that the multiple-murder special circumstance required

them to find that the defendant acted with the intent to kill. (*Id.* at pp. 687, 689.) The state argued that the guilt jury nevertheless must have found that the defendant had the requisite intent to kill when it found him guilty of aiding and abetting four first degree murders because the prosecution's only theory at trial was that the defendant shared the actual killer's intent to kill the victims. (*Id.* at p. 690.) This Court rejected that argument, noting that it could not be certain that the jury found that the defendant harbored an intent to kill because the jury also was instructed on the alternative theory of aider and abettor liability under the "natural and probable consequences" doctrine, which did not require that the defendant share the perpetrator's intent to kill. (*Ibid.*) Because this Court could not "conclude beyond a reasonable doubt" that the jury, in determining the truth of the multiple-murder special circumstance necessarily found that the defendant acted with the intent to kill (*id.* at p. 689, citing *Chapman v. California* (1967) 386 U.S. 18, 24, this Court reversed the special circumstance finding and the death sentence (*id.* at p. 690).

Here, while the jurors were instructed on the intent to kill requirement for the multiple-murder special circumstance (5 CT 1144-1145; 14 RT 2219-2222), they also were allowed the option of convicting appellant of the multiple-murder special circumstance by finding that, "with reckless indifference to human life and as a major participant," he intended to aid Rangel in attempting to rob Encinas (*ibid.*). That was error, however, as this exception to the intent to kill requirement applies only to the felony murder special circumstance. (Pen. Code, § 190.2, subd. (d).)[72]

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[72] Penal Code section 190.2, subdivision (d), reads:

(continued...)

As in *Williams*, appellant's jurors were instructed on aider and abettor liability under the "natural and probable consequences" doctrine, which did not require that appellant act with the intent to kill Encinas. (5 CT 1128; 14 RT 2207-2208; see also 5 CT 1137; 14 RT 2214-2215 [where the jury was instructed that it could find appellant guilty as an aider and abettor to first degree felony murder in the absence of an intent to kill].) And, as described in Argument X, *ante*, the jury's verdict finding appellant guilty of murdering Encinas appears to have been based on a felony murder theory (as opposed to an intent to kill theory), since the jurors were expressly instructed that they could find appellant guilty of aiding and abetting Encinas's murder only if they found that appellant was aiding and abetting an attempted robbery. (5 CT 1128; see also 5 CT 1137.)

Further, on this trial record, this Court cannot determined beyond a reasonable doubt whether appellant's jurors based their multiple-murder finding on an intent to kill, or on their erroneous belief that appellant, with reckless indifference to human life, intended to aid Rangel in robbing Encinas as they were instructed by the trial court with CALJIC No. 8.80.1. (5 CT 1144-1145.) Where, as here, there is evidence from which the jury

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[72](...continued)

> Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4.

could have based its verdict on an accomplice theory, the jury must be required to find that the defendant intended to aid another in the killing of a human being. (*People v. Garrison* (1989) 47 Cal.3d 746, 789; see *People v. Jones* (2003) 30 Cal.4th 1084, 1118; see also *People v. Williams*, *supra*, 16 Cal.4th at p. 689.) Here, in light of the instructions as a whole, the jury could not have believed it was required to make this finding.

Even assuming arguendo that the evidence was sufficient to find that appellant had the intent to kill Encinas, this Court cannot know whether the jury actually based its true finding of multiple murder on this theory or on the invalid theory of reckless indifference to human life. When, as here, a jury is instructed on alternate theories of liability, some of which are legally correct and others which are not, a reversal is required unless there is a basis in the record to conclude the jury actually based its verdict on a legally correct theory. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) Jurors are presumed to be intelligent people who are capable of understanding and following the trial court's instructions. *(People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) But "'[j]urors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law. . . . When, therefore, jurors have been left with the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.' [Citation.]" (*People v. Guiton*, *supra*, 4 Cal.4th 1116, 1125, quoting *Griffin v. United States* (1991) 502 U.S. 46, 59.) Because this Court cannot determine from the record whether the jury based its murder verdict on a legally correct theory or a legally incorrect theory, it must deem the error to be prejudicial

For these reasons, and because there was insufficient evidence of appellant's intent to aid Rangel in killing Encinas, the multiple murder special circumstance finding and the judgment of death must be reversed.

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XIII

THE DEATH JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY AND UNCONSTITUTIONALLY ALLOWED THE PROSECUTOR TO ELICIT IRRELEVANT AND PREJUDICIAL GANG EVIDENCE DURING THE PENALTY TRIAL

Prior to the start of the penalty phase, the prosecutor informed the court and counsel for appellant and co-appellant Rangel that the only evidence she would present against appellant involved the jail assault on Paul Juhn. The prosecutor also said that she would present evidence of Rangel's gang affiliation as part of her case against Rangel, but that no gang evidence would be presented against appellant. Nevertheless, over appellant's objection, and in the face of appellant's offer to stipulate that he was in fact identified as one of the individuals involved in the assault on Juhn, the trial court allowed the prosecutor to elicit testimony from a jail deputy that Juhn identified appellant through a procedure designed to protect Juhn from one of appellant's "gang members," and that the deputy was able to identify appellant at trial by his gang tattoo. As argued below, the trial court prejudicially erred by allowing the prosecutor to present this evidence, this error violated both state law and appellant's rights under the Sixth, Eighth, and Fourteenth Amendments of the federal Constitution, and reversal of appellant's death sentence is required.

A. Factual Background

The crimes in this case were not alleged to be gang related. In fact, during jury selection the prosecutor informed both the trial court and opposing counsel that she would not present any gang evidence during trial. (2 RT 266; see 3 RT 358.) The prosecutor said there were indications that both appellant and Rangel were gang members, but that she would

admonish her witnesses not to mention this. (3 RT 358.) Based on the prosecutor's representations, appellant's and Rangel's defense counsel did not voir dire any of the potential jurors on their views about gangs or gang membership. (See 8 RT 1246-1249; see also 6 RT 1007.)

Later, at the conclusion of the guilt phase, the court and counsel discussed the evidence that would be presented at the penalty phase. (16 RT 2475-2495.) The prosecutor said that she intended to present evidence that Rangel had been previously convicted of auto burglary. (16 RT 2478-2479.) She also said that she intended to present evidence that during the auto burglary, Rangel spray painted "KCC" on the hood of the vehicle, and when confronted by the owner of the vehicle, threatened to kill him if he went to the police. (16 RT 2479, 2483.) The prosecutor said that she would present evidence that KCC stands for "King City Criminals," which is a notorious street gang, and that this added to the victim's fear by informing him that Rangel was a gang member. (16 RT 2483.) Over Rangel's objection, the court ruled that this evidence was admissible. (*Ibid.*)

The prosecutor said that other than victim impact testimony from Encinas's and Urrutia's relatives, the only other aggravating evidence she intended to present against appellant was his involvement in a 1996 assault in the county jail. (16 RT 2486-2488; see also 3 CT 786.) The prosecutor stated that she had no gang evidence as to appellant. (16 RT 2488.) Appellant's counsel specifically requested that there be no mention of any gang activity as to appellant during the penalty phase. The trial court asked the prosecutor if she had any such evidence, and she responded that she did not. The court then explicitly ruled that there would be "no gang evidence as it relates to Mr. Mora." (*Ibid.*)

In the prosecution's penalty case against Rangel, Deputy Sheriff

Kevin Hilgendorf testified that during the automobile burglary, Rangel spray painted the letters "KCC" on the front of the vehicle, and that Rangel and an accomplice told the owner of the vehicle that if he called the police, "they would kill him because they knew where he lived." (16 RT 2558-2560, 2567.) Hilgendorf testified that "KCC" is the initials of a street gang named the "King City Criminals," and that the owner of the vehicle took the threat seriously because he knew Rangel and his accomplice were gang members. (16 RT 2569-2570, 2582-2583.) The prosecutor elicited testimony about this incident from the vehicle's owner, Alejo Esquer Corral, who, prompted by the prosecutor, told the jurors that he expressed concerns to the prosecutor that Rangel's "friends" would be in the courtroom during his testimony. (16 RT 2527.) Esquer further testified that, as a result of the automobile incident, he made a point of moving to a new address before Rangel got out of jail. (16 RT 2550.)

The prosecution also called Compton school police officer Andrew Zembal to rebut Rangel's mitigating evidence of his good character. Officer Zembal testified that he is "a world renowned expert on gang graffiti and gangs," and that "KCC" stands for the "King City Criminals." (20 RT 3078-3079.) Zembal told the jurors that the "King City Criminals" started out as a tagging crew involved in graffiti. (20 RT 3079.) As a result of a 1992 triple homicide involving three KCC members, and a 1994 order handed down by the jailed leaders of numerous street gangs who met to resolve various gang matters, the King City Criminals became a full-fledged criminal street gang that carries guns and commits serious offenses, including murder. (20 RT 3079-3081.)

Zembal testified that law-enforcement agencies are able to determine whether an individual is a gang member by the way they dress, their tattoos,

and whom they associate with. (20 RT 3083, 3085.) Zembal also testified that gang members have monikers or "gang name[s]," such as Rangel's moniker, "Stranger" (20 RT 3086), and that having a shaved head is a "way of recognition" among certain street gangs, including the King City Criminals. (20 RT 3094.) Zembal further testified that he had examined Rangel's tattoos. (20 RT 3089; see 20 RT 3074.) Zembal described those tattoos and their meaning, noting several that identified Rangel as a member of the Compton King City Criminals. (20 RT 3090-3094.) Zembal said that he could tell from Rangel's shaved head and tattoos that he was a "gang member of a hard-core nature," and that his tattoos and gang membership signified someone with a "wanton disregard or disrespect for life itself." (20 RT 3094-3096.)

As promised by the prosecutor, other than victim impact testimony from Encinas's and Urrutia's relatives, the only evidence offered by the prosecutor against appellant in support of the death penalty was an incident that occurred two-and-a-half years prior to the penalty trial in this case when appellant, who was in the county jail for driving on a suspended license, was identified as one of four or five inmates who struck, and possibly kicked, another jail inmate named Paul Juhn. (18 RT 2676-2679, 2747, 2760.) After the incident Juhn identified the inmates who had attacked him, but he could no longer recall who they were at the time of appellant's trial in this case. (18 RT 2679-2681.)

Deputy Sheriff Kresimir Kovac told the jurors he was with Juhn when he identified the inmates who he said had attacked him, and that his report of the incident listed appellant as one of the inmates that Juhn had identified. (18 RT 2701-2704, 2747.) Over appellant's counsel's objection, the prosecutor elicited Kovac's testimony that Juhn identified appellant

through a procedure designed to protect him from retaliation by "the suspect, or from one of his other gang members[.]" (18 RT 2701.)

Out of the presence of the jury, the prosecutor informed the trial court that Kovac's incident report identified appellant as having "King City Criminals" tattooed on his chest. (18 RT 2706-2707, 2710, 2715.) The prosecutor said that if Kovac could not identify appellant by his face, she would have him identify appellant by that tattoo. (18 RT 2706-2707.) Appellant's counsel objected to the introduction of this highly prejudicial gang evidence merely for the purpose of having Kovac identify appellant, and offered to stipulate that appellant was one of the people identified by Juhn and contacted by Kovac as a result of Juhn's identification. (18 RT 2710, 2713) The prosecutor refused to accept that stipulation (18 RT 2714), and wanted Kovac to inform the jurors that appellant's tattoo read "King City Criminals." (18 RT 2723-2724.) Noting that the prosecutor would not accept appellant's counsel's stipulation, the trial court ruled that if Kovac was unable to recognize appellant by his face, the prosecutor could have Kovac look at appellant's tattoo out of the jury's presence and then say in the jury's presence whether that was the same tattoo he had recorded in his report, but without stating what the tattoo said. (18 RT 2712, 2714, 2716-2719.)

Back before the jury, Kovac testified that his report listed appellant as one of the individuals involved in the assault on Juhn, but that he was unable to identify appellant in court. (18 RT 2719-2721.) Kovac testified that he noted in his incident report that appellant had a phrase consisting of three words tattooed on his neckline, just above his chest. (18 RT 2722, 2726-2727.) The jury was then excused so that Kovac could examine appellant's chest area out of the jury's presence to see if he recognized the

tattoo identified in his report. Back before the jury, Kovac testified that he had examined appellant and saw the "three-word phrase" he had listed in his report tattooed along appellant's neckline. (18 RT 2723-2726. The prosecutor then elicited Kovac's testimony that when he identifies suspects in his reports, like appellant, he includes tattoos, like appellant's "that shows a gang name, gang affiliation, anything like that." (18 RT 2722, 2726-2727.)

At the next court recess, appellant's counsel noted that when the prosecutor asked if Kovac looked for any particular type of tattoo to describe in his report, he testified that he lists tattoos that show gang affiliation. (18 RT 2764; see 18 RT 2726-2727.) Appellant's counsel objected to the prosecutor making any references in her closing argument to Kovac's testimony "that this was a gang tattoo, or [Kovac] was looking for gang tattoos." (18 RT 2764.) The court said, "There won't be. There can't be. There is no evidence to support that. . . . The nature of the tattoo is not in evidence." (18 RT 2764-2765.)

B. The Trial Court Erred in Allowing the Prosecutor to Elicit Irrelevant and Highly Prejudicial Gang Evidence as to Appellant

While Deputy Kovac never specifically stated that appellant was a gang member, his testimony clearly implied that he was by informing appellant's jury that Juhn identified appellant through a procedure designed to protect Juhn from appellant "or from one of his other gang members[.]" (18 RT 2701.) The trial court's decision to admit Kovac's gang reference was founded on its belief that this evidence was relevant. (*Ibid.*) Generally, evidence is deemed relevant and thus admissible if it has any tendency in reason to prove a disputed material fact. (Evid. Code, § 210.) When it comes to gang evidence, however, and in particular gang evidence offered

in the penalty phase of a capital trial, this Court has demanded a higher degree of relevancy than just "any tendency" to prove a disputed fact.

> Because evidence that a criminal defendant is a member of a . . . gang may have a highly inflammatory impact on the jury, trial courts should carefully scrutinize such evidence before admitting it. Such evidence should not be admitted if only tangentially relevant because of the possibility that the jury will improperly . . . jump to the conclusion the defendant deserves the death penalty.

(*People v. Gurule* (2002) 28 Cal.4th 557, 653, internal citations and quotation marks omitted; see also *People v. Cox* (1991) 53 Cal.3d 618, 660 ["we have condemned the introduction of evidence of gang membership if only tangentially relevant, given its highly inflammatory impact"].)

Such careful scrutiny did not occur here. The crimes committed in this case were not alleged to be gang related, and the prosecutor essentially conceded that gang evidence was irrelevant to the jury's penalty determination when she informed the trial court that she had no gang evidence as to appellant. (16 RT 2488.) Indeed, as recognized by the United States Supreme Court, evidence of a defendant's mere membership in a gang, which is what Kovac's testimony established, is irrelevant in a capital sentencing proceeding. (*Dawson v. Delaware* (1992) 503 U.S. 159, 165-168 [receipt of evidence at sentencing phase of capital murder prosecution regarding defendant's membership in Aryan Brotherhood was constitutional error where his membership was not relevant to any of the issues being decided in the proceeding].)

Moreover, even if the fact that Juhn identified appellant through a procedure designed to protect him from appellant "or from one of [appellant's] other gang members" (18 RT 2701) could be deemed a circumstance of the jail assault (see *People v. Gurule*, *supra*, 28 Cal.4th at

p. 654, citing *People v. Scott* (1997) 15 Cal.4th 1188, 1219 [prosecution may present evidence showing the circumstances of the prior violent criminal activity], this evidence was at best only tangentially relevant to the issue of whether appellant should live or die. The prosecutor expressly stated that she had no guilt or penalty phase evidence of appellant's gang membership or activity, and apart from Kovac's testimony describing the procedure used to identify Juhn's assailants, there was no evidence that the assault on Juhn was gang related. Because this gang evidence was at most only superficially related to the jury's penalty determination, the trial court abused its discretion when it overruled appellant's objection and allowed the jury to hear it. (*People v. Gurule*, *supra*, 28 Cal.4th at p. 653; *People v. Cox*, *supra*, 53 Cal.3d at p. 660; see also *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 ["In cases not involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal."].)

So too did the trial court abuse its discretion by allowing the prosecutor to elicit evidence of how Kovac was able to identify appellant at trial as one of the individuals involved in the Juhn assault. Kovac testified that his incident report listed appellant as having a phrase consisting of three words tattooed on his neckline, just above his chest, that he examined appellant during trial and observed the three-word phrase listed in his report tattooed along appellant's neckline, and that when identifying suspects in his reports, he picks out tattoos "that shows a gang name, gang affiliation, anything like that." (18 RT 2722-2727.)

As with Kovac's testimony that Juhn identified appellant through a process designed to protect him from appellant or from "one of his other gang members," the manner in which the court allowed Kovac to identify

appellant as one of the individuals listed in his report plainly implied that appellant was a gang member. This evidence, however, was relevant only to the issue of whether Kovac could identify appellant at trial as one of the individuals that Juhn pointed out as being involved in the assault. (18 RT 2706-2707, 2710-2713.) As such, this evidence was unnecessary and irrelevant, as appellant's counsel offered to stipulate that appellant was in fact one of the individuals identified by Juhn as one of his assailants. (18 RT 2713.)

"[I]f a defendant offers to admit the existence of an element of a charged offense, the prosecutor must accept that offer and refrain from introducing evidence . . . to prove that element to the jury." (*People v. Bonin* (1989) 47 Cal.3d 808, 849, quoting *People v. Hall* (1980) 28 Cal.3d 143, 152.)[73] This requirement applies to all undisputed foundational facts, including identity, and not just the elements of the offense. (*People v. Bonin, supra*, 47 Cal.3d at pp. 848-849.) Thus, applying this Court's words in *Bonin* to this case: "'If a fact is not genuinely disputed, evidence offered to prove that fact is irrelevant and inadmissible under Evidence Code sections 210 and 350 respectively.' Through the offer of the defense, the facts covered by the proposed stipulation – [here, that appellant was in fact one of the individuals identified by Juhn and listed in Kovac's report] – were removed from dispute. Therefore, the testimony elicited to prove such facts was irrelevant and inadmissible." (*People v. Bonin, supra*, 47 Cal.3d at pp. 848-849.) Thus, as in *Bonin*, "the court should have compelled the prosecution to accept the defense's offer and barred it from eliciting

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[73] *People v. Hall, supra*, 28 Cal.3d 143, was overruled on different grounds in *People v. Valentine* (1986) 42 Cal.3d 170, 173, and *People v. Newman* (1999) 21 Cal.4th 413, 415.

testimony on the facts covered by the proposed stipulation." (*Id.* at p. 849, quoting *People v. Hall*, *supra*, 28 Cal.3d at p. 152.).)

The obvious implication derived from Kovac's testimony – that appellant's three-word tattoo identified him as a gang member – would never have arisen had the trial court, as it should have, compelled the prosecutor to accept the defense stipulation. The court abused its discretion by refusing to require the prosecutor to do so.

The improper admission of the gang evidence described above violated appellant's federal and state constitutional rights. Although a state court's evidentiary errors do not, standing alone, violate the federal Constitution, state law errors that render a trial fundamentally unfair violate the Due Process Clause of the Fourteenth Amendment. (*Romano v. Oklahoma* (1994) 512 U.S. 1, 12.) That is the case here, where this gang evidence served no legitimate purpose, and where, as described below, the prejudicial effect of this gang evidence was such that it could only have influenced the jurors' decision by inflaming them to a degree that infected the sentencing proceeding with fundamental unfairness.

Additionally, the mere fact that appellant is a gang member, whether true or not, was irrelevant to the jurors' sentencing determination. (*Dawson v. Delaware*, *supra*, 503 U.S. 159, 166-168 quoting *People v. Hall* (1980) 28 Cal.3d 143, 152.).) Evidence of appellant's gang membership nevertheless was wrongly injected into the jury's penalty decision, thereby creating a danger that the jurors used appellant's gang membership as a basis for sentencing him to death. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585, quoting *Zant v. Stephens* (1982) 462 U.S. 862, 884-885, 887, fn. 24 [death penalty cannot be predicated on "factors that are . . . irrelevant to the sentencing process"].) That risk further renders this trial

fundamentally unfair, and violated appellant's Eighth and Fourteenth Amendment rights to a fair and reliable penalty trial and death sentence, based on a proper consideration of relevant sentencing factors, and undistorted by improper aggravation. (*Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 584-585; see also *Penry v. Lynaugh* (1989) 492 U.S. 302, 328, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 605 [circumstances creating a risk that a death sentence will be erroneously imposed are "unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments."]; *Mills v. Maryland* (1988) 486 U.S. 367, 376 [Eighth and Fourteenth Amendments demand "even greater certainty" that the jury's death penalty determination rested on proper grounds].)

Furthermore, because appellant's trial counsel relied upon the prosecutor's representations that she would not present any gang evidence during trial (2 RT 266; see also 3 RT 358) and, based on those representations, did not voir dire the jurors on their views about gangs or gang members (see 8 RT 1246-1249), this error also violated appellant's right under the Sixth and Fourteenth Amendments to a reliable verdict by an impartial jury. (*Morgan v. Illinois* (1992) 504 U.S. 719, 729 ["part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors"]; *id.* at p. 736 ["The risk that . . . jurors [who were not impartial] may have been empaneled in this case and 'infected petitioner's capital sentencing [is] unacceptable'"].) Likewise, because the right to an impartial jury guarantees voir dire that will allow a criminal defendant's counsel to identify unqualified jurors and raise peremptory challenges (*id.* at pp. 729-730), this error further violated appellant's Sixth and Fourteenth Amendment guarantee to the effective assistance of counsel.

In terms of prejudice, it matters not whether this error is assessed as

one of state or federal law, for the test for penalty phase error is the "same in substance and effect." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 961 & fn. 6; *People* v. *Ashmus* (1991) 54 Cal.3d 932, 965.) As discussed below, the People cannot show beyond a reasonable doubt that this violation of appellant's state and federal constitutional rights did not contribute to the jury's decision to impose the death penalty in this case. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 446-448.)

C. The Trial Court's Error Requires Reversal of Appellant's Death Sentence

As recognized by this Court, evidence of a defendant's gang affiliation has an inflammatory and prejudicial effect on jurors. (*People v. Kennedy* (2005) 36 Cal.4th 595, 624; *People v. Gurule*, *supra*, 28 Cal.4th at p. 653.) The Court of Appeal has reached the same conclusion, noting that in Los Angeles County, where this case was tried, just the word "gang" "connotes opprobrious implications" and "takes on a sinister meaning[.]" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223; *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1497; *People v. Perez* (1981) 114 Cal.App.3d 470, 479.) The risk that gang evidence will inflame and prejudice a jury's verdict is even more acute in the penalty phase of a capital trial, where jurors are expected to apply their own moral standards to the evidence (*People v. Mendoza* (2000) 24 Cal.4th 130, 192) and, in so doing, are allowed to consider their own emotional responses to the evidence presented (*People v. Belmontes* (1988) 45 Cal.3d 744, 801, fn. 20, citing *California v. Brown* (1987) 479 U.S. 538, 542). As recognized by this Court, a defendant's gang affiliation is the type of evidence that may lead capital case jurors to "jump to the conclusion the defendant deserves the

death penalty." (*People v. Gurule*, *supra*, 28 Cal.4th at p. 653.)

Here, the prejudice inherent in gang-affiliation evidence in general was amplified in two ways. First, Deputy Kovac's testimony that Juhn identified appellant through a procedure designed to protect him from appellant "or from one of his other gang members" (18 RT 2701) left the jurors with the erroneous impression that the attack on Juhn was gang-related, thereby giving the further impression that the one and only piece of evidence that the prosecutor introduced against appellant in the penalty trial was made even more aggravating by the fact that it was part of "a larger social evil" (*People v. Gurule*, *supra*, 28 Cal.4th at p. 654, quoting *People v. Tuilaepa* (1992) 4 Cal.4th 569, 588). These erroneous impressions also increased the specter that appellant would associate with gangs and engage in future gang violence in prison, and would thus pose the serious risk of future dangerousness if sentenced to prison for life without the possibility of parole.

Secondly, the inherent prejudice of this gang evidence was magnified by the gang evidence that appellant's jury heard that was presented against co-appellant Rangel. Officer Zembal, the self-proclaimed "world renowned expert" on gangs, testified that law-enforcement agencies are able to determine whether individuals are gang members by their dress, tattoos, shaved heads, and associates (20 RT 3078, 3083, 3085, 3094), thereby leaving the jurors with the belief that appellant, who they had now heard was a gang member, and co-appellant Rangel belonged to the same criminal street gang. This belief was furthered by evidence introduced at trial showing that both appellant and Rangel wore the same shaved, bald hairstyles that Zembal testified were a means of recognition among the King City Criminals (3 RT 410; 6 RT 979; 20 RT 3094), and by Zembal's

testimony about gang "monikers" (i.e., a gang member's "gang name or street name"), such as Rangel's moniker "Stranger" (20 RT 3086), which appellant's jury reasonably would have concluded applied equally to appellant's moniker, 'Joker."[74] Given this testimony and Zembal's detailed descriptions of Rangel's tattoos, several of which identified Rangel as a member of the "King City Criminals" (20 RT 3089-3094), appellant's jury would have been hard-pressed not to believe that the "one very distinguishable" "three-word phrase" tattoo "show[ing] a gang name [or] gang affiliation" (18 RT 2726-2727) by which Deputy Kovac chose to identify appellant by in his report read "King City Criminals," the same gang to which Rangel belonged. This notion was reinforced by testimony appellant's jury heard during Rangel's case in mitigation, where the prosecutor elicited evidence from Rangel's father that gang members usually have their gang affiliation tattooed on their bodies. (19 RT 2902.)

In short, the testimony the prosecutor elicited from Officer Zembal, combined with the testimony the prosecutor elicited from Deputy Kovac, could only have left appellant's jury with the impression that appellant, with his shaved head, tattoos, and moniker was – like Rangel – a "gang member of a hard-core nature," with a "wanton disregard or disrespect for life itself" (20 RT 3094-3096), and that appellant, like Rangel, belonged to the "King City Criminals," a notorious criminal street gang whose members carry guns, commit serious offenses, including murder (20 RT 3078-3080), and terrorize and threaten to kill victims of their crimes who reported them to

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[74] Throughout trial, appellant and Rangel were repeatedly referred to by the monikers "Joker" and "Stranger," respectively. (See, e.g., 1 CT 2-3; 8 RT 1261 [audiotape of Lourdes Lopez's police interview played at trial]; 6 RT 847.)

the police.[75] (16 RT 2567, 2569-2570.)

The fact that the trial court read CALJIC No. 2.07 to the jurors does not establish otherwise. That instruction stated:

> Evidence has been admitted against one of the defendants, and not admitted against the other. [¶] At the time this evidence was admitted you were instructed that it could not be considered by you against the other defendant. [¶] Do not consider the evidence against the other defendant.

(5 CT 1175; 20 RT 3164.) This instruction undoubtedly was confusing to the jurors, as it was given after all of the evidence at trial had been presented, and specified neither the evidence in question, nor the defendant against whom the evidence was admitted. Furthermore, when gang evidence was admitted against Rangel, the trial court did not, as the instruction stated, instruct the jurors that it "could not be considered against the other defendant."

Appellant's counsel twice requested that evidence of Rangel's vehicle burglary, during which Rangel was identified as a gang member, shown to have spray-painted the initials of the King City Criminals on the hood of the vehicle, and threatened to kill the vehicle's owner if he went to the police, be limited to Rangel. (16 RT 2526, 2557.) In response to appellant's counsel's request, the trial court merely stated that this evidence "so far has been limited to Mr. Rangel," and "so far it seems to be that way." (16 RT 2526-2527, 2557.) And when Officer Zembal's gang testimony was admitted, the court did not specifically instruct the jurors, as stated in the instruction, that this evidence "could not be considered"

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[75] This could possibly explain why, even though the prosecutor said no gang evidence would be presented against appellant, she plainly wanted the jurors to know that the tattoo on appellant's chest read "King City Criminals." (18 RT 2723-2724.)

against appellant. Instead, the court simply told the jurors that this self-lauded "world renowned expert" on gangs was "being called in rebuttal to evidence offered on behalf of Mr. Rangel only." (20 RT 3078.)

Moreover, even if the trial court had explicitly admonished the jurors not to consider this gang evidence against appellant, it is unlikely they could have followed this admonition. Given the "highly inflammatory impact" of gang evidence (*People v. Kennedy*, *supra*, 36 Cal.4th at p. 624), it is the "essence of sophistry and lack of realism" to think that an instruction or admonition to the jurors to limit their consideration of such highly prejudicial evidence could have had any realistic effect. (*People v. Gibson* (1976) 56 Cal.App.3d 119, 130.) In the words of the United States Supreme Court, "in some circumstances 'the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.'" (*Simmons v. South Carolina* (1994) 512 U.S. 154, 171.) And in the words of this Court, "[i]t does not reflect in any degree upon the intelligence, integrity, or the honesty of purpose of the juror that matters of a prejudicial character find a permanent lodgment in his mind, which will, inadvertently and unconsciously, enter into and affect his verdict." (*People v. Albertson* (1944) 23 Cal.2d 550, 577.) Or, as aptly stated by the Fifth Circuit Court of Appeals, "'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.'" (*Dunn v. United States* (5th Cir. 1962) 307 F.2d 883, 886; see also United States v. Rudolph (6 Cir. 1968) 403 F.2d 805, 807 ["It must be remembered that after the saber thrust, the withdrawal of the saber still leaves the wound."].)

This was not a case in which there were numerous aggravating factors that appellant would have had to overcome in order to receive a

sentence of life without the possibility of parole. To the contrary, the sole aggravating evidence other than the circumstances of the crime itself was the single incident in which appellant, while incarcerated in the county jail on a vehicle code violation, was identified as one of four or five inmates who struck, and possibly kicked, fellow inmate Paul Juhn. Appellant was not the instigator of this incident (19 RT 3018-3019), and the District Attorney saw no need to file charges and prosecute appellant. (18 RT 2688-2689, 2746-2747.) The trial court's erroneous refusal to exclude Deputy Kovac's gang references made it appear that the Juhn incident was gang related and therefore more serious, and allowed appellant's jury to view appellant, like Rangel, as a member of a hardcore gang that commits murder and other serious crimes, and threatens the victims of its crimes with retaliation should they go to the police. The People cannot demonstrate that it is beyond reasonable possibility that the erroneous admission of this irrelevant and highly inflammatory evidence could have contributed to at least one juror's decision to impose a death sentence (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People* v. *Ashmus*, *supra*, 54 Cal.3d at p. 965); therefore, appellant's death sentence must be reversed.[76]

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[76] The prejudice flowing from the trial court's error allowing the prosecutor to elicit irrelevant and highly prejudicial gang evidence as to appellant is exacerbated by the trial court's earlier erroneous ruling at the guilt phase allowing the prosecutor to play for the jury tape-recorded statements Lourdes Lopez gave to the police shortly after the shootings in this case which contained improper inferences that the charged crimes may have been gang-related. (See Argument V, *ante*.)

XIV

APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE HE WAS ERRONEOUSLY AND UNCONSTITUTIONALLY DENIED THE ABILITY TO PRESENT AN INTELLIGENT DEFENSE AND TO MAKE AN INFORMED DECISION WHETHER TO PRESENT ADDITIONAL MITIGATING EVIDENCE

A. Introduction

A defendant in a capital case has a fundamental right to a fair penalty trial and an intelligent defense in light of all relevant and reasonably accessible evidence, and cannot be forced to make an uniformed decision on whether to present or forgo mitigating evidence. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 959-960.) However, as a result of several erroneous rulings by the trial court concerning penalty phase defense discovery, appellant was denied that fundamental constitutional right and others, and reversal of his death sentence is required.

As required by statute and the trial court in this case, appellant's counsel disclosed that they intended to present the testimony of three Los Angeles County deputy sheriffs, who would testify that appellant, while incarcerated in the county jail in this case, was trusted to perform various jobs, and that he had followed their orders and posed no disciplinary problems. In response, the prosecutor said that if appellant chose to present this testimony, it was "fair game in rebuttal" for her. The prosecutor also said that she did not have to disclose what she might or might not have as rebuttal evidence to the deputies' testimony, a view that was shared by the trial court. Based on the prosecutor's statements, appellant's counsel attempted to secure a ruling from the trial court regarding the scope of the evidence the court would permit the prosecutor to present in rebuttal to the deputies' testimony. The trial court declined to make any ruling, saying that

without knowing the nature of the rebuttal evidence the prosecutor might have, it could not make a ruling as to what it would allow the prosecutor to present in rebuttal. The court said that the prosecutor might have admissible rebuttal evidence, and that was the best it could say without knowing what in fact the prosecutor had.

Based on the trial court's rulings, appellant's counsel did not call the sheriff's deputies. The loss of this important mitigating evidence concerning appellant's good behavior and favorable institutional adjustment in the county jail was devastating to appellant's defense and his case for life. Appellant's counsel had already lost, through no fault of their own, two of the witnesses they had intended to call in their case in mitigation – Art Close and Javier Reveles (see fns. 13 & 14, *ante*) – and were left without any evidence to counter the prosecutor's aggravating evidence concerning the incident involving Paul Juhn in the county jail.

As argued below, the prosecutor was required to disclose any rebuttal evidence she intended to present in the event appellant actually presented the deputies' testimony, and appellant's counsel was entitled to a ruling from the trial court on the scope of any prosecution rebuttal that it would allow to the deputies' testimony so that appellant's counsel could make an intelligent tactical decision as to whether to present this important mitigating evidence. The only way the trial court could make that ruling was to require the prosecutor to disclose her rebuttal evidence – if indeed she had any – so that the court could then determine whether this evidence fell within the proper scope of rebuttal. The prosecutor's refusal to disclose her rebuttal evidence was a willful violation of the discovery statutes. The trial court's error in not requiring the prosecutor to provide discovery of what evidence she intended to present in rebuttal to appellant's proffered

testimony of the sheriff's deputies violated appellant's federal and state rights to the assistance of counsel and an informed decision on whether to present mitigating evidence (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15), his rights to due process, a fair trial, and a meaningful opportunity to present a defense (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15), his right to reciprocal discovery (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; Pen. Code, § 1054 et seq.), and his right to a reliable determination of penalty in a capital case (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 15 & 17). These violations of appellant's rights, both individually and collectively, require that his death sentence be reversed.

B. Factual Background

Prior to the start of the guilt phase, the trial court discussed "discovery by the defendant to the People." (1 RT A-89.) The court made the following statement:

> I looked at the only case I could find on that subject, *People vs. Superior Court, Mitchell* . . ., found at 5 Cal.4th, 1229. It's a 1993 case. It seems to be a similar case on that issue. It talks about how Penal Code section 1054 mandates discovery exchange 30 days prior to the guilty [*sic*] phase of the trial or later within the court's discretion. The idea behind it all is that we don't want to necessarily prolong or postpone the time between the phases so that the People have all the time they need to get ready for it.

(1 RT A-89-90.) Based on its understanding of the law, the trial court ordered counsel for appellant and Rangel to turn over penalty phase discovery within 24 hours of any guilt verdict, after finding that the prosecutor did not need this evidence any sooner. (1 RT A-104.)

At the conclusion of the guilt phase, the court and counsel discussed the evidence the parties intended to present at the penalty phase. (15 RT

2470-2471.) The prosecutor told the court she had disclosed all of her penalty evidence to the defense. (15 RT 2471.) Appellant's defense counsel requested a penalty phase witness list from the prosecutor, and the prosecutor said that all of her penalty phase witnesses were listed on the juror questionnaire that had been used during jury selection. (15 RT 2471.) The court then ordered the defense to provide discovery of its penalty phase evidence to the prosecution. (1 RT A-104.) Appellant's counsel filed a list of the witnesses they intended to call at the penalty trial. (15 RT 2472-2473.) Included on that list were Los Angeles County Sheriff's Deputies Tabby Hoffman, John McDonald and Page.[77] (4 CT 1009 [Confidential Pages].)

At the next hearing, the court and counsel for the parties again discussed penalty phase discovery and the evidence counsel intended to present at the penalty phase. (16 RT 2475-2495.) The court asked if the prosecutor had disclosed her penalty witnesses to the defense, and she again said that she had, that her witnesses were listed on the juror questionnaire. (16 RT 2475.) The prosecutor said she and defense counsel also had an informal discussion of discovery during which she provided them with this information. (*Ibid.*)

Appellant's counsel informed the court that appellant had provided the prosecutor with the names of additional penalty witnesses and 11 pages of discovery relating to the penalty evidence the defense intended to present. (16 RT 2487-2488.) Appellant's counsel said she had subpoenaed one of the three sheriff's deputies she intended to call – Deputy Page – to testify on February 11, 1999, but he was going on vacation that day so she

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[77] Deputy Page's first name is not listed on appellant's list of penalty phase witnesses. (4 CT 1009 [Confidential Pages].)

would try to have him testify on February 10. (16 RT 2488-2489.) The prosecutor told the court that the discovery she had received from the defense indicated that appellant had been a trustee while incarcerated in the county jail pending resolution of this case. (16 RT 2489.) The prosecutor said that, while she was subpoenaing records, she spoke to Deputy Maria Lucero, who, told her that appellant "was not a trustee per se; . . . that she had no information that he was a trustee; he wasn't housed with the trustees." (16 RT 2489-2490.) The prosecutor said she might present that information in rebuttal, depending on what the deputies subpoenaed by the defense testified to as to appellant's trustee status. (16 RT 2490.) Appellant's counsel responded that all of the deputies appellant intended to call had given statements that appellant was a trustee and that they were directly in charge of him as a trustee, and that discovery had been given to the prosecutor. (16 RT 2490.)

In his penalty phase opening statement, appellant's counsel told the jurors that they would hear from Sheriff's Deputies Hoffman and McDonald, and possibly from Deputy Page, that appellant was a trustee in the county jail where he had been incarcerated since his arrest. (16 RT 2506.) Appellant's counsel told the jurors that these deputies would testify that appellant had been trusted to prepare and serve food and to clean up throughout the day, and that he had been respectful, followed orders, posed no problems, and not been violent in that controlled setting. (*Ibid.*)[78]

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[78] This is what appellant's counsel said to appellant's jury in his opening statement at the penalty phase:

> You will hear from – essentially three deputy sheriffs, that during the time Mr. Mora has been incarcerated on these crimes, that he acted as a model trustee. And what that meant

(continued...)

After the prosecution presented its case in aggravation, and near the conclusion of appellant's case in mitigation, appellant's counsel said that the only remaining defense witnesses were the sheriff's deputies, who would be available for the next scheduled day of trial. (19 RT 3053.) Appellant's counsel asked the prosecutor if she had any rebuttal to any of appellant's penalty phase evidence. (19 RT 3055.) The prosecutor said that she had no rebuttal to any of the evidence presented so far. However, she said that she was certain appellant's counsel were going to call the deputies to testify on appellant's behalf, and that she planned to have someone available "just in case" to rebut that testimony. (*Ibid.*) The prosecutor stated she had no idea what this witness would say in rebuttal because she had not yet heard the deputies' testimony. (*Ibid.*) The prosecutor said she had an idea that the deputies would testify about appellant being a trustee, but had no statement to that effect. (19 RT 3055-3056.)

At the next trial proceeding, appellant's counsel requested a hearing out of the jury's presence on the testimony they intended to elicit that morning from Deputies McDonald and Hoffman. (20 RT 3063.) Appellant's counsel said these deputies would testify that since his arrest in

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[78](...continued)

> was, they trusted him every day to get the food together, to serve chow, to clean up, to clean the showers. [¶] These deputies . . . will testify that he would work throughout the day; that he was very respectful in that controlled area; that he followed orders; that he was not violent and he posed no problems. [¶] And you will hear from Deputy McDonald and Deputy Hoffman and possibly Deputy Page, three deputies who, over the course of time from 1997 until now, Mr. Mora has worked for, worked under in the county jail.

(16 RT 2506.)

this case, appellant had been incarcerated at the Century Regional Detention Center and had acted under their supervision as a module trustee. (*Ibid.*) Appellant's counsel said the only evidence the defense would elicit from the deputies was that appellant served meals, cleaned showers, and worked throughout the day, and that he followed the deputies' orders. (20 RT 3063-3064.) Appellant's counsel said that they intended to limit the deputies' testimony to the area of appellant's ability to adjust in a custodial setting, and did not intend to go any further into appellant's character. (*Ibid.*) The court asked the prosecutor for a response and she answered:

> Your honor, if they put it into issue, it's fair game in rebuttal to me. I'm not saying what I have or don't have, but if they put that in, I believe I have a case that says rebuttal testimony in penalty phase is admissible to correct misleading impressions of the defense case. People vs. Mason 52 Cal.3d 909 at 961. [¶] And I think if they choose to do that, you know, you can have your cake, but you can't eat it, too. So they have a choice. [¶] And I'm not obligated to tell what I might have in store, or maybe I don't have anything, but I think that's a chance. They put it on, and if they put it on, it's fair game.

(20 RT 3064-3065.)

Appellant's counsel reiterated that they intended to elicit only that appellant was told to do things and given various responsibilities in the jail, and that he followed orders. (20 RT 3065.) The court said the defense could present that evidence, but it would open the door for rebuttal evidence from the prosecution. (*Ibid.*) The court said it remained to be seen just how far the defense evidence would open the door for rebuttal. (*Ibid.*) The court also said that it would not allow the prosecutor to present something "remote" in rebuttal to the defense evidence, but would have no trouble allowing something else about appellant's jail behavior that was "less than

positive." (20 RT 3065-3066.) Appellant's counsel asked if the court would allow the prosecutor to rebut the deputies' testimony with conduct that occurred prior to the one-and-a-half years that appellant had spent in jail after his arrest in this case. (20 RT 3066.) The court said that it was possible it would let the prosecutor bring in evidence of appellant's conduct prior to his being in jail the past year and a half, but it could not say for certain and would have to wait and hear the nature of the prosecutor's rebuttal evidence. (*Ibid.*) The court said that it was up to the defense to decide if they wanted to present the deputies' testimony, and that the prosecutor "may [have] something appropriate in rebuttal to that." (*Ibid.*) The court said that was the best it could tell the defense without knowing what the prosecutor intended to present. (*Ibid.*) The trial court's subsequent statements to co-appellant Rangel's trial counsel show that the court believed that the prosecutor was not required to disclose to the defense the identity of her rebuttal witness, a gang expert. (See 20 RT 3069 [responding to co-appellant Rangel's counsel's statement that she wanted to know the identity of the prosecutor's rebuttal witness, the trial court stated: "I appreciate that you do, but they are not required to tell you."].)

A few minutes later, appellant's counsel informed the trial court that they had no additional mitigating witnesses to present on appellant's behalf and the deputies were released by appellant. (20 RT 3070-3071.) The prosecutor, after noting that appellant's "counsel is not going to call the deputies," released "the one witness in the hall to rebut any information that [the deputies] were going to give." (20 RT 3070.)

C. The Trial Court's Error Requires Reversal of Appellant's Death Sentence

The prosecutor and, more importantly, the trial court were both

wrong in believing that the prosecutor was not required to reveal her penalty phase rebuttal witnesses and evidence to the defense; she was. Penal Code section 1054.3[79] required appellant's counsel to disclose to the prosecution the penalty phase evidence they intended to present on appellant's behalf. (*People v. Superior Court* (*Mitchell*) (1993) 5 Cal.4th 1229, 1231.) The trial court ordered appellant's counsel to disclose this evidence to the prosecution based on its reading of Penal Code section 1054 and *People v. Superior Court* (*Mitchell*), *supra*, (see 1 RT A-89-90, A-104), and they did (15 RT 2472-2473). After appellant's counsel disclosed their intent to call the three sheriff's deputies, the prosecutor was in turn obligated to disclose to appellant's counsel evidence she intended to use to rebut the testimony from these witnesses. This obligation was imposed by statute (Pen. Code, § 1054.1;[80] *People v. Gonzalez*, *supra*, 38 Cal.4th at pp.

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[79] Penal Code section 1054.3 provides:

The defendant and his or her attorney shall disclose to the prosecuting attorney:

> (a) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial.
>
> (b) Any real evidence which the defendant intends to offer in evidence at the trial.

[80] Penal Code section 1054.1 provides:

The prosecuting attorney shall disclose to the

(continued...)

956-957, citing *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 375-376 [disclosure of defense witnesses under Penal Code section 1054.3 triggers a defendant's right to discover the prosecution's rebuttal witnesses under Penal Code section 1054.1]), and by the due process clauses of the federal and state Constitutions. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15.) As recognized by this Court in *People v. Gonzalez, supra*, the United States Supreme Court held in *Wardius v. Oregon* (1973) 412 U.S. 470, that due process requires that "when the prosecution is allowed discovery of the defense, that discovery must be reciprocal." (*People v. Gonzalez, supra*, 38 Cal.4th at p. 956, citing *Izazaga v. Superior Court*,

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[80](...continued)
defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:

(a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.

(b) Statements of all defendants.

(c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.

(d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.

(e) Any exculpatory evidence.

(f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

supra, 54 Cal.3d at p. 373, and *Wardius v. Oregon*, *supra*, 412 U.S. at p. 474.)

The prosecutor's duty of disclosure under section 1054.1 is, by its terms, mandatory ("The prosecuting attorney shall disclose to the defendant or his or her attorney. . . ."), and the prosecutor could not, as she and the court believed she could, ignore this mandate and thereby force appellant's counsel to gamble on whether there was a "chance" the prosecution had admissible rebuttal evidence. (20 RT 3065.) The prosecution is required "to disclose rebuttal witnesses as well as witnesses it intends to use in its case-in-chief." (5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 33, p. 79, citing *Izazaga v. Superior Court*, *supra*, 54 Cal.3d at pp. 375-376; see also *People v. Jordan* (2003) 108 Cal.App.4th 349, 356, 360.) "[T]he only reasonable interpretation of the requirement that the prosecution disclose '[t]he names and addresses of persons the prosecutor intends to call as witnesses at trial' is that this section includes both witnesses in the prosecution's case-in-chief and rebuttal witnesses that the prosecution intends to call. The phrase 'at trial' means exactly that – at the trial, not merely during the prosecution's case-in-chief." (*Izazaga v. Superior Court*, *supra*, 54 Cal.3d at p. 375.) This Court has made clear that after the defense provides discovery of its intent to call witnesses in mitigation at the penalty phase of a capital trial, "the prosecution [i]s obligated to provide reciprocal discovery of 'any of its witnesses who will be used in refutation of the defense witnesses if called.'" (*People v. Gonzalez*, *supra*, 38 Cal.4th at p. 957, citing *Izazaga v. Superior Court*, *supra*, 54 Cal.3d at p. 375.) The United States Supreme Court effectively has said the same:

The State may not insist that trials be run as a 'search for

> truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.

(*Wardius v. Oregon*, *supra*, 412 U.S. at pp. 475-476, fn. omitted.)

In the present case, the prosecutor had a duty to disclose what, if any, rebuttal evidence she had, and her refusal to do so (see 20 RT 3065 ["I'm not obligated to tell what I might have in store, or maybe I don't have anything, but . . . that's a chance."]) constituted "willful conduct motivated by a desire to obtain a tactical advantage at trial" (*People v. Jordan*, *supra*, 108 Cal.App.4th at p. 358), and denied appellant his statutory and due process-protected discovery rights (Pen. Code, § 1054 et seq; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *People v. Webster* (1991) 54 Cal.3d 411, 439 [due process violation may occur when the state arbitrarily withholds a right provided by its laws]) and his constitutional rights to due process, a fair trial, and reciprocal disclosure of the state's penalty trial evidence. (U.S. Const., 14th Amend; Cal. Const., art. I, §§ 7 & 15; *Wardius v. Oregon*, *supra*, 412 U.S. 470; *Izazaga v. Superior Court*, *supra*, 54 Cal.3d at p. 373).

Moreover, appellant's trial counsel were entitled to a specific ruling from the trial court regarding the scope of the rebuttal evidence the court would allow the prosecutor to present to the deputies' testimony so that appellant's counsel could make an informed and intelligent decision whether to present the deputies' testimony concerning appellant's favorable institutional adjustment. This Court has "repeatedly said that '[t]he possibility of damaging rebuttal is a necessary consideration in counsel's decision whether to present mitigating evidence[.]'" (*People v. Gonzalez*,

supra, 38 Cal.4th at p. 960, quoting *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1251.) The high court has recognized the same, holding that a defense attorney's decision not to present mitigation is reasonable if any attempt to do so would open the door for known rebuttal evidence. (*Darden v. Wainwright* (1986) 477 U.S. 168, 186; see also *Burger v. Kemp* (1987) 483 U.S. 776, 791-794 [failure to present mitigating evidence reasonable where counsel could have made an informed judgment that the mitigation risked bringing before the jury evidence of the defendant's unremorseful attitude, violent tendencies, and prior criminal acts]; *Strickland v. Washington* (1984) 466 U.S. 668, 699 [counsel's decision not to present mitigating evidence was a reasonable strategic choice in part because the mitigating evidence would have opened the door to damaging rebuttal evidence].)

Stated differently, the decision of a capital defense attorney not to present mitigating evidence on behalf of his client must be the "'*result of an informed tactical decision.*'" (*People v. Gonzalez*, *supra*, 38 Cal.4th at p. 960, italics in original, quoting *People v. Miranda* (1987) 44 Cal.3d 57, 121; see also *Wiggins v. Smith* (2003) 539 U.S. 510, 521-522 [counsel's strategic choices must be based on informed and reasonable decisions]; *People v. Lucas* (2004) 33 Cal.4th 682, 726, quoting *In re Marquez* (1992) 1 Cal.4th 584, 606 [in order to make a reasonable decision not to present mitigating evidence, counsel must understand "what aggravating evidence, if any, might be admissible in rebuttal"']); *People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1252 ["Only when counsel is reasonably informed about the available evidence can he make an informed tactical choice how to proceed"].) "*This requirement presupposes that the information necessary to an informed decision will be available to defense counsel.*" (*People v.*

Gonzalez, *supra*, 38 Cal.4th at p. 960, italics added; see also *Reynoso v. Giurbino* (9th Cir. 2006) 462 F.3d 1099, 1112 [counsel cannot make a reasonable tactical decision without having the information necessary to make such a decision].) That was not the case here.

Appellant's trial counsel obviously were attempting to make an informed decision whether or not to present the testimony of the three jail deputies concerning appellant's favorable institutional adjustment when they requested an Evidence Code section 402 hearing to ascertain the scope of any rebuttal evidence that the court would allow to the deputies' testimony. (20 RT 3063.) Appellant's counsel were specific as to the scope of the particular mitigating evidence they intended to present and, in return, were entitled to a ruling on the scope of evidence the trial court would allow in rebuttal. (See *In re Jackson* (1992) 3 Cal.4th 578, 611-612, disapproved on other grounds in *In re Sassonian* (1995) 9 Cal.4th 535, 545, fn. 6 [recognizing that where trial counsel has doubts as to whether the introduction of particular mitigating evidence will open the door for the introduction of rebuttal evidence, counsel can request an in limine hearing under Evidence Code section 402 and obtain an advance ruling on the evidentiary question]; Evid. Code, § 310, subd. (a) ["All questions of law (including . . . the admissibility of evidence, and other rules of evidence) are to be decided by the court"]; Assem. Com. on Judiciary, com. foll. Evid. Code, § 402 ["Under Section 310, the court must decide preliminary questions of fact upon which the admissibility of evidence depends"]; *Geders v. United States* (1976) 425 U.S. 80, 86 [trial judge "'is the governor of the trial for the purpose of . . . determining questions of law'" and therefore "control[s] the scope of rebuttal testimony"].)

The only way the trial court could make that necessary ruling was to

require the prosecutor to disclose her rebuttal evidence, so it could then make the determination whether that evidence fell within the proper scope of rebuttal. (See *People v. Lucas*, *supra*, 33 Cal.4th at p. 733 [scope of rebuttal must be specific and relate directly to the particular mitigating evidence offered by the defense].) Indeed, as recognized by this Court in *People v. Gonzalez*, *supra*, 38 Cal.4th 932, the very reason the prosecution is required to disclose potential rebuttal evidence is the existence of "the 'fundamental proposition that [an accused] is entitled to a fair trial and an *intelligent defense* in light of all relevant and reasonably accessible information.'" (*Id.* at p. 960, italics in original.) In line with that "fundamental proposition," the trial court could not, as it did here, "thwart[] defense counsel's ability to present an intelligent defense and make an informed tactical decision whether to present mitigating evidence" by simply listening to the prosecutor say she may or may not have something in store, and then informing defense counsel that was a risk they had to take. (*Ibid.*; see *People v. McKenzie* (1983) 34 Cal.3d 616, 626, disapproved on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 365 [trial judge has a duty "to assure, to the extent possible under all the circumstances," that a criminal defendant receives effective assistance of counsel]; *Wheat v. United States* (1988) 486 U.S. 153, 161 ["trial courts, when alerted . . ., have an independent duty to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment"]; *Glasser v. United States* (1942) 315 U.S. 60, 71 ["The trial court should protect the right of an accused to have the assistance of counsel."].)

The trial court's failure to require the prosecutor to disclose her rebuttal evidence so it could then provide appellant's counsel with their requested ruling on the scope of rebuttal that would be allowed to the

deputies' testimony denied appellant's counsel the ability to make an intelligent defense in light of all pertinent and readily available information, and placed them in the untenable position of having to make an uninformed tactical decision on whether to present this highly critical mitigating evidence concerning appellant's favorable institutional adjustment. The trial court's actions adversely impacted the effectiveness of appellant's trial counsel, and thereby violated appellant's state and federal constitutional right to the effective assistance of counsel. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15; *Strickland v. Washington*, *supra*, 466 U.S. 668, 686, and cases cited therein [right to effective assistance of counsel denied where government or trial court impairs counsel's ability to make informed decisions about how to conduct the defense]; *People v. Gonzalez*, *supra*, 38 Cal.4th at p. 960 [defense unable to make informed tactical decision where they are denied the information necessary to make that decision]; *People v. Lucas*, *supra*, 33 Cal.4th at p. 726 [decision not to present mitigating evidence can be reasonable only if counsel knows "'what aggravating evidence, if any, might be admissible in rebuttal"'].)

By forcing appellant's counsel to make an uninformed decision whether to present mitigating evidence, the trial court also denied appellant his constitutional rights to a fair trial and a meaningful opportunity to present a defense. (U.S. Const., 6th & 14th Amends; Cal. Const., art. I, §§ 7 & 15; *Holmes v. South Carolina* (2006) 547 U.S. 319, 324 ["'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense"'"]; *Crane v. Kentucky* (1986) 476 U.S. 683, 690 [same].) The trial court's failure to ensure a ruling that

would have allowed appellant's counsel to make an informed and intelligent defense in light of all available evidence likewise denied appellant his constitutionally recognized right to heightened reliability in the determination that death is the appropriate penalty in a capital case. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 15 & 17; see *Gilmore v. Taylor* (1993) 508 U.S. 333, 342 ["we have held that the Eighth Amendment requires a greater degree of accuracy" in capital cases]; *Herrera v. Collins* (1993) 506 U.S. 390, 405 ["Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed"]; *Mills v. Maryland* (1988) 486 U.S. 367, 376-377 [stating the need for "even greater certainty" when reviewing death sentences]; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 340, quoting *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [recognizing "the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case'"]; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885 ["because there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'"].)

In short, the prosecutor's adamant refusal to disclose her rebuttal evidence to the proffered defense testimony, the trial court's refusal to require the prosecutor to disclose her rebuttal evidence, and the trial court's refusal to provide appellant's counsel with a ruling on the scope of rebuttal evidence it would permit to the deputies' testimony, denied appellant his state statutory rights as well as his federal and state rights to the assistance of counsel, due process, a fair trial, and a meaningful opportunity to present a defense, and rendered the resulting death sentence unreliable in violation

of both the federal and state Constitutions.

D. The Trial Court's Erroneous Rulings Require Reversal of Appellant's Death Sentence

Whether viewed as violations of state or federal constitutional law, the test for whether the errors described above require reversal of the death verdict rendered upon appellant is the same: The People must prove beyond a reasonable doubt that (1) there is no reasonable possibility that defense counsel would have presented the deputies' testimony had the trial court required the prosecutor to disclose her rebuttal evidence and provided the defense with the requested ruling on the scope of rebuttal to this testimony; and (2) there is no reasonable possibility the verdict would have been different had the defense presented this mitigating evidence. (*People v. Gonzalez*, *supra*, 38 Cal.4th at p. 961 & fn. 6 [recognizing that the reasonable possibility test for state law penalty phase error and the *Chapman* harmless beyond a reasonable doubt standard for federal constitutional error are the "same in substance and effect."].) The People cannot meet this burden.

1. The People Cannot Prove Beyond a Reasonable Doubt That Appellant's Counsel Would Not Have Presented the Deputies' Testimony Had the Trial Court Required the Prosecutor to Disclose Her Rebuttal Evidence to Appellant's Counsel and Provided Appellant's Counsel with the Requested Ruling on the Scope of Any Rebuttal Evidence to this Testimony

Without question, appellant's counsel planned on presenting the deputies' testimony concerning appellant's favorable institutional adjustment at the penalty trial. Soon after the guilt verdicts, appellant's counsel disclosed to the court and prosecutor that they intended to call the deputies on appellant's behalf, and they disclosed to the court and

prosecutor the nature of the testimony these witnesses would give. (15 RT 2472-2473, 16 RT 2487-2490; 4 CT 1009.) Though the prosecutor indicated that she had spoken to a deputy named "Lucero," who claimed appellant was not a trustee "per se," and that she might present this information in rebuttal to the deputies' testimony (16 RT 2489-2490), the record shows that appellant's counsel's intent to call the deputies was not deterred by this possible rebuttal evidence. The defense informed the court that, notwithstanding this possible rebuttal evidence, the information they provided to the prosecutor showed that all three of the deputies they intended to call had given statements that appellant was a trustee, and that they were directly in charge of him as a trustee. (16 RT 2490.) Then, with knowledge of this possible rebuttal evidence, appellant's counsel in their penalty phase opening statement expressly told the jurors that they would call the deputies as witnesses in this case. (16 RT 2506.) Plainly, appellant's counsel intended to call the deputies, and they were not dissuaded from doing so as a result of any possible rebuttal evidence from Deputy Lucero.

It is possible that Deputy Lucero's testimony that appellant was not a trustee "per se" was all that the prosecutor had in the way of rebuttal evidence. But appellant's counsel had no way of knowing that because the prosecutor steadfastly refused to tell the defense what her witness would say. After learning that the only remaining witnesses for the defense were the sheriff's deputies, and that they would be available for the next scheduled day of trial, the prosecutor informed both appellant's counsel and the trial court that she understood the deputies would testify about appellant being a trustee and that she planned on having someone available to rebut that testimony. (19 RT 3053, 3055-3056.) In requesting a ruling on the

scope of rebuttal to the deputies' testimony, appellant's counsel made an offer of proof that specifically detailed the purpose and content of the testimony they intended to elicit from the deputies. The defense told the trial court that the deputies' testimony would be limited to the facts that appellant had acted under the deputies' supervision as a module trustee, that he had been given certain responsibilities, such as serving meals, cleaning showers, and working other chores throughout the day, and that he had followed their orders. (20 RT 3063-3064, 3065.) Given that the prosecution's rebuttal evidence in the penalty phase of a capital trial must relate specifically and directly to the particular mitigating evidence offered by the defense (*People v. Lucas*, *supra*, 33 Cal.4th at p. 733, citing *People v. Rodriguez* (1986) 42 Cal.3d 730, 792, fn. 24), it is doubtful the prosecutor would have been allowed under the law to present rebuttal evidence beyond what she claimed Deputy Lucero had supposedly told her.

Nevertheless, "the record indicates that [the defense] had good reason to fear the unknown." (*People v. Gonzalez*, *supra*, 38 Cal.4th at p. 962.) As was the case in *Gonzalez*, the prosecutor here went out of her way to state that she did not have to reveal her potential rebuttal evidence, and strongly suggested that she might be withholding something substantial. (20 RT 3065 ["And I'm not obligated to tell what I might have in store, or maybe I don't have anything, but I think that's a chance. They put it on, and if they put it on, it's fair game."].) Again, as in *Gonzalez*, the defense could reasonably have feared that the prosecutor was making the statements she made for a reason. That fear could only have been heightened by the trial court's statements that all it could tell the defense without knowing what the prosecutor intended to present was that the prosecutor "may [have] something appropriate in rebuttal to [the deputies' testimony]." (20 RT

3066.)

Under these circumstances, it is more than reasonably possible that appellant's counsel would have presented the deputies' testimony had the trial court required the prosecutor to disclose her rebuttal evidence, and then provided the defense with a ruling on the scope of the rebuttal that it would allow the prosecutor to present to the deputies' testimony. In any event, it is the People who must prove beyond a reasonable doubt that there is no reasonable possibility that appellant's counsel would have presented the deputies' testimony had the trial court required the prosecutor to disclose her rebuttal evidence and provided the defense with the requested ruling on the scope of rebuttal to this testimony. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

2. The People Cannot, as They Must, Prove Beyond a Reasonable Doubt That There Is No Reasonable Possibility the Penalty Verdict Would Have Been Different Had Appellant's Jury Received this Critical Mitigating Evidence

"Although the crime here was egregious, a death verdict was not a foregone conclusion." (*People v. Gonzalez*, *supra*, 38 Cal.4th at p. 962.) Appellant had no prior felony convictions and, other than the circumstances of the crime, the only evidence the prosecutor offered in support of a death verdict was a single incident that had occurred two-and-a-half years prior to the penalty trial, when appellant was incarcerated in the county jail on a vehicle code violation, and was identified as one of four or five inmates who struck, and possibly kicked, another inmate. (18 RT 2676-2679, 2747, 2760.) Appellant was not the instigator of this incident (19 RT 3018-3019), and while the alleged victim of this assault said he wanted to press charges, the District Attorney refused to prosecute the case (18 RT 2688-2689, 2746-

2747).

The testimony the defense intended to elicit from the three deputies was essential mitigating evidence that could have served "as a basis for a sentence less than death." (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5, quoting *Lockett v. Ohio* (1978) 438 U.S. 568, 604.) In the words of the United States Supreme Court, "evidence of adjustability to life in prison unquestionably goes to a feature of the defendant's character that is highly relevant to a jury's sentencing determination." (*Skipper v. South Carolina*, *supra*, 476 U.S. at p. 7, fn. 2.)

The promised testimony from the three deputies also was crucial defense evidence to the prosecution's evidence and arguments that appellant, if sentenced to state prison for life without the possibility of parole, would pose a substantial danger to the safety of others, and for that reason had to be executed. As recognized by the United States Supreme Court, evidence of a capitally charged defendant's violent behavior in jail raises a "strong implication of 'generalized future dangerousness'" such that "[a] jury hearing evidence of a defendant's demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior, whether locked up [for life] or free[.]" (*Kelly v. South Carolina* (2002) 534 U.S. 246, 253-256, quoting *Simmons v. South Carolina* (1994) 512 U.S. 154, 171.) The prosecutor obviously accentuated this "strong implication" that appellant posed a risk of violent behavior in prison, arguing: "And what do we know about him from that [alleged prior jail assault]? We know that this defendant, while in jail, will prey on a very vulnerable person." (20 RT 3209; see also 20 RT 3212 ["this defendant . . . committed that violent act and preyed upon somebody in county jail"].) The deputies' testimony was precisely the type of evidence that could have

countered this "strong implication," showing, as it would have, that in the year and a half that appellant had been incarcerated in the county jail since his arrest in this case, he had been trusted by deputies charged with jail security to perform various jobs and had been respectful and followed those deputies' orders, and that he had posed no custodial problems in that controlled setting. (See 16 RT 2490, 2506, 20 RT 3063-3064, 3065.)

Thus, the promised testimony from the deputies was central to appellant's defense in two respects: it was essential and "highly relevant" mitigating evidence that could have justified a life sentence (*Skipper v. South Carolina*, *supra*, 476 U.S. at pp. 4-5 & p. 7, fn. 2), and it was crucial rebuttal evidence that could have refuted the prosecutor's evidence and arguments for death. (See *id.* at p. 5, fn. 1; *id.* at p. 9 (conc. opn. of Powell, J.); *People v. Frye* (1998) 894, 1017.) This by itself requires reversal of the death sentence, for where, as here, trial error results in the erroneous exclusion of evidence that could have both served as a basis for a sentence less than death and rebutted the prosecutor's arguments for a death sentence, that error is "under any standard . . . sufficiently prejudicial to constitute reversible error." (*Skipper v. South Carolina*, *supra*, 476 U.S. at p. 8.)

The promised testimony of the deputies was crucial in another respect, as well. Appellant had already lost, through not fault of his own, two other critical pieces of mitigating evidence that had been promised to the jurors by appellant's counsel, one of which also reflected on appellant's positive conduct in the county jail. In his penalty phase opening statement, appellant's counsel informed the jurors that they would hear from appellant's former cellmate in the county jail, Javier Reveles, who would testify that while he shared a cell with appellant, appellant had advised and

counseled him, and had positively influenced his life. (16 RT 2506.) However, while the trial court had twice ordered Reveles to appear at trial (6 RT 1035, 13 RT 2150-2153), he was unavailable and no longer under the court's jurisdiction at the time of the penalty trial because the Sheriff's Department had turned him over to the INS. (19 RT 2989-2990.)

Appellant's counsel also told the jurors that an attorney named Art Close would testify that he had known appellant for over a decade while appellant was growing up, and that he would testify how appellant helped support his younger siblings, and how appellant was troubled from a young age and often seen crying in the neighborhood because of the abuse in his family and his feelings that he was unwanted by his parents. (16 RT 2504-2505.) However, Close was unable to come to court to testify on appellant's behalf because he had been seriously injured during a home-invasion robbery and was in the hospital at the time of the penalty phase. (19 RT 3018.) With the loss of the deputies' testimony, appellant's counsel was left without another piece of "highly relevant" mitigating evidence (*Skipper v. South Carolina*, *supra*, 476 U.S. at 7, fn. 2) that he had expressly promised to appellant's jury that he would be presenting on appellant's behalf (see 16 RT 2506). The absence of the deputies' promised testimony at trial, without any explanation to the jurors as to why they would not be hearing from any of the three deputies, an explanation that the jurors would have reasonably expected to receive in light of the previous explanations they did receive as to why they would not be hearing from appellant's mitigating witnesses Close and Reveles, would have caused a reasonable juror to conclude to appellant's detriment that the reason appellant's counsel did not present the deputies' testimony is because, in the end, none of the deputies had anything positive to say about appellant or his

behavior as an inmate in the county jail. (See *Lafrenz v. Stoddard* (1942) 50 Cal.App.2d 1, 9 ["Juries are frequently adversely impressed when proof falls short of promise"].)

Even in the absence of promised mitigating evidence, this case was a close case as to penalty. The crimes were not the rare case of a murder so heinous that any juror would have to conclude that death was the appropriate punishment. The jurors heard significant evidence of appellant's troubled home life and childhood neglect, and reasonable jurors could have found that this was not one of the "extreme" cases that actually warrant selection of society's ultimate punishment. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 182, 184.)

Indeed, the closeness of this case is demonstrated by a declaration filed with the court by one of appellant's attorneys, which was attached to appellant's motion for a new trial and showed that, during deliberations, at least four of the jurors initially favored life for appellant. (45 CT 11839.) The trial court deemed counsel's declaration inadmissible hearsay under state law. (21 RT 3352.) However, to the extent state law could be read to preclude this Court from considering the prejudice caused by capital case error that precluded the jurors from taking into account significant mitigating evidence, that law undermines reliability in the determination that death was the appropriate punishment in this case, thereby violating appellant's rights under the Eighth and Fourteenth Amendments to the United States Constitution. (See, e.g., *Green v. Georgia* (1979) 442 U.S. 95, 97; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302 [state evidentiary rules "may not be applied mechanistically to defeat the ends of justice."].)

With or without counsel's declaration, the People cannot prove beyond a reasonable doubt that the loss of the deputies' testimony, as

promised by appellant's counsel in their opening statement, could not possibly have contributed to at least one juror's decision to impose a death sentence on appellant. (*Chapman v. California* (1967) 386 U.S. 18, 23-24, citing *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87; *People v. Gonzalez*, *supra*, 38 Cal.4th at p. 961 & fn. 6.) Accordingly, appellant's death sentence must be reversed.

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XV

THE TRIAL COURT REFUSAL TO GIVE APPELLANT'S REQUESTED MODIFICATION TO CALJIC NO. 8.85 REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE BECAUSE THERE IS A REASONABLE LIKELIHOOD THAT THE JURORS UNDERSTOOD THE TRIAL COURT'S INSTRUCTIONS TO ALLOW THEM TO SENTENCE APPELLANT TO DEATH BY DOUBLE-COUNTING AND OVER WEIGHING THE STATE'S AGGRAVATING EVIDENCE IN VIOLATION OF EIGHTH AND FOURTEENTH AMENDMENT PRINCIPLES

The trial court instructed appellant's jury in the language of CALJIC No. 8.85, which sets forth the various factors in aggravation and mitigation the jury is required to consider in determining penalty. The jurors were instructed that in determining whether appellant would live or die, they should consider "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true." (5 CT 1194; 20 RT 3176-3177; Pen. Code, § 190.3, para. (a); CALJIC No. 8.85.) Appellant requested that the jurors be further instructed as follows: "However, you may not double count any 'circumstances of the offense' which are also 'special circumstances.' That is, you may not weigh the special circumstance[s] more than once in your sentencing determination." (5 CT 1214; see also 20 RT 3118-3119.) The trial court believed there was no limit on how many times the jurors could use the circumstances of the offense and the existence of any special circumstances in reaching their penalty decision, and denied appellant's requested instruction on the ground that it was not an accurate statement of the law. (20 RT 3119-3120.)

The trial court erred by refusing to give appellant's requested modification to CALJIC No. 8.85. As a result of this error, there is a reasonable and substantial likelihood that the jurors understood the court's

charge as allowing them to sentence appellant to death by double-counting and over weighing the same facts as both circumstances of the crime and as special circumstances. The likelihood that appellant's jury interpreted and applied the court's instruction in this manner violated appellant's rights under the Eighth and Fourteenth Amendments, and requires reversal of the death judgment.

A. The Trial Court Erred by Refusing to Give Appellant's Requested Modification to CALJIC No. 8.85

"*Furman* [*v. Georgia* (1972) 408 U.S. 238] mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia* (1976) 428 U.S. 153, 189.) Accordingly, a basic principle of modern death penalty jurisprudence is that "[capital sentencing] juries [must] be carefully and adequately guided in their deliberations." (*Id.* at p. 193.) To this extent, California law lists 11 factors that jurors shall take into account, if relevant, in determining whether a capital defendant will live or die. (§ 190.3.) The first of these factors – "factor (a)" – provides that the jurors shall take into account and consider "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true[.]" (§ 190.3, factor (a).)

As recognized by this Court, "the manifest purpose of factor (a) [is] to inform jurors that they should consider, *as one factor*, the totality of the circumstances involved in the criminal episode that is on trial." (*People v.*

Morris (1991) 53 Cal.3d 152, 224, italics added.)[81] As also recognized by this Court, "the literal language of [factor] (a) presents a theoretical problem . . . since it tells the penalty jury to consider the 'circumstances' of the capital crime and any attendant statutory 'special circumstances.' Since the latter are a subset of the former, a jury given no clarifying instructions might conceivably double-count any 'circumstances' which were also 'special circumstances.'" (*People v. Young* (2005) 34 Cal.4th 1149, 1225, quoting *People v. Melton* (1988) 44 Cal.3d 713, 768.) Accordingly, this Court has held that on a defendant's request, the trial court must admonish the jury not to double-count any circumstances of the crime which were also special circumstances. (*Ibid.*)

In line with this Court's holdings in *Young* and *Melton*, the trial court plainly erred when it failed to admonish the jurors, as appellant had requested, that they may "not double count any 'circumstances of the offense' which [were] also 'special circumstances.'" (5 CT 1214.)

B. The Trial Court's Error Requires Reversal of the Death Judgment

This Court has taken the position that where, as here, a trial court errs by failing to give a defendant's requested admonition that the jury is not to double-count any circumstances of the crime which were also special circumstances, reversal is not required "in the absence of any misleading argument by the prosecutor or an event demonstrating the substantial likelihood of 'double-counting'[.]" (*People v. Monterroso* (2004) 34 Cal.4th 743, 790; see also *People v. Morris*, *supra*, 53 Cal.3d at pp. 224-225.) This position rests upon this Court's assumption that absent such

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[81] *People v. Morris*, *supra*, was overruled on another point by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, footnote 1.

misleading argument or other event, "a hypothetical 'reasonable juror' would understand an instruction [to consider the circumstances of the crime and the existence of any special circumstances found to be true] to allow only 'single counting.'" (*People v. Ashmus* (1991) 54 Cal.3d 932, 997.)[82]

Appellant's case demonstrates both the fault with this Court's assumption, and a "substantial likelihood" that appellant's jurors understood their instructions to permit double-counting those circumstances of the crime which were also special circumstances. Both the trial court and the prosecutor erroneously believed that factor (a) – which is described to the jury in CALJIC No. 8.85 – allowed appellant's jurors to double-count the same facts as both circumstances of the crime and special circumstances. The trial court believed that appellant's requested clarification that the jurors "may not double count any circumstances of the offense which are also special circumstances," and therefore could "not weigh the special circumstance[s] more than once in [their] sentencing determination" was an inaccurate statement of the law. (20 RT 3118-3120.) As stated by the trial court, "I don't think there is any limit on how many times they use it." (20 RT 3119.) The prosecutor erroneously concurred, stating, "I agree with the court's reading. It's – there is no bar in double counting in this area." (20 RT 3120.)

If, as their statements reflect, both the trial court and the prosecutor believed that the law, as reflected in CALJIC No. 8.85, allowed appellant's jurors to consider and double-count the same facts as both circumstances of the crime and special circumstances, it is unreasonable to assume the lay jurors would have understood the instruction as allowing only "single

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[82] *People v. Ashmus*, *supra*, was disapproved on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.

counting." (*People v. Ashmus*, *supra*, 54 Cal.3d at p. 997.) Instead, like the trial court and prosecutor, a "hypothetical reasonable juror" (*id.* at pp. 977-978) would have understood the wording of the instruction as allowing them to count and weigh the special circumstances more than once in their penalty determination. (See *United States v. Darby* (9th Cir. 1988) 857 F.2d 623, 626-627 [misunderstanding of the law by trial court and the attorneys makes it likely that instructions misled jurors]; *People v. Fletcher* (1996) 13 Cal.4th 451, 471 ["if the legally trained prosecutor was unable to" understand relevant law, "we safely can infer that this was true of the lay jurors as well"].) In other words, the circumstances of this case plainly demonstrate a "substantial likelihood of 'double-counting.'" (*People v. Monterroso*, *supra*, 34 Cal.4th at p. 790; *People v. Morris*, *supra*, 53 Cal.3d at p. 225; see also *People v. McPeters* (1992) 2 Cal.4th 1148, 1191 [test for penalty phase instructional error "is whether there is a 'reasonable likelihood that the jury . . . understood the charge' in a manner that violated defendant's rights"]; *Estelle v. McGuire* (1991) 502 U.S. 62, 72 & fn. 4, quoting *Boyde v. California* (1990) 494 U.S. 370, 380 [examining "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution"].)

The likelihood that the jurors understood the trial court's instructions in a manner that allowed them to sentence appellant to death by double-counting and over weighing the same facts as both circumstances of the crime and special circumstances renders this trial fundamentally unfair, in violation of appellant's Eighth and Fourteenth Amendment rights to a fair and reliable penalty trial and death sentence, based on a proper consideration of relevant sentencing factors. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585 [recognizing the "special 'need for reliability

in the determination that death is the appropriate punishment' in any capital case"]; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-329 [constitutionally impermissible to rest a death sentence on a determination made by jurors that have been misled as to the nature of their sentencing discretion]; *Penry v. Lynaugh* (1989) 492 U.S. 302, 328, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 605 [circumstances creating a risk that a death sentence will be erroneously imposed "unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"]; *Mills v. Maryland* (1988) 486 U.S. 367, 376 [Eighth and Fourteenth Amendments demand "even greater certainty" that the jury's death penalty determination rested on proper grounds]; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428, quoting *Gregg v. Georgia*, *supra*, 428 U.S. at p. 198 [a State wishing to authorize capital punishment "must channel the sentencer's discretion by 'clear and objective standards'"].) Because appellant was entitled under state law to have the jurors consider *as one factor* the totality of the circumstances of the crime (Pen. Code, § 190.3, factor (a); *People v. Morris*, *supra*, 53 Cal.3d at p. 224), the likelihood that the jurors double-counted and over weighed the same facts as both circumstances of the crime and special circumstances violated both his state statutory rights, and his right to due process under the Fourteenth Amendment of the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *Clemons v. Mississippi* (1990) 494 U.S. 738, 746 ["Capital sentencing proceedings must of course satisfy the dictates of the Due Process Clause[.]"]; *Fetterly v. Puckett* (9th Cir. 1993) 997 F.2d 1295, 1300-1301 [state statutory laws designed to protect the substantive rights of capital-case defendants create liberty interests protected under the federal Constitution].)

The death penalty was by no means a foregone conclusion in this case, and, on the evidence presented, reasonable jurors could have spared appellant's life. With the exception of a single, uncharged incident in which appellant was alleged to have participated in a jail assault, the prosecution's case for death was based entirely on evidence of the circumstances of the crime, presented under Penal Code section 190.3, factor (a). The trial court's refusal to instruct appellant's jurors that they were not to double-count any circumstances of the offense which were also special circumstances not only failed to adequately guide the jurors, it falsely inflated the aggravating circumstances of the crime. On the facts of this case, the state cannot prove "beyond a reasonable doubt" that the trial court's failure to give appellant's requested clarifying instruction could not have contributed to appellant's death sentence. (*Chapman v. California* (1967) 386 U.S. 18, 24.)[83] Accordingly, appellant's death sentence must be reversed.

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[83] Even if this error is viewed solely as a state law violation of Penal Code section 190.3, factor (a), the standard for assessing this error is "the same in substance and effect" as that articulated in *Chapman v. California* (1967) 386 U.S. 18, 24. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 479, quoting *People v. Ashmus*, *supra*, 54 Cal.3d at p. 965.)

XVI

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO GIVE SEVEN ADDITIONAL PENALTY PHASE INSTRUCTIONS REQUESTED BY APPELLANT

In addition to refusing appellant's requested instruction that the jurors were to not double-count any circumstances of the offense that were also special circumstances (see Argument XV, *ante*), the trial court refused a number of other specially-tailored instructions that appellant requested that would have addressed various aspects of the jury's penalty determination.[84] As discussed below, taken alone or in the aggregate, the trial court's refusal of each of these requested instructions was reversible error. Appellant was entitled upon request to instructions that related the evidence presented in the penalty trial to the jurors' determination of whether he should live or die, and that pinpointed the crux of his case for life. (See *People v. Saille* (1991) 54 Cal.3d 1103, 1119, citing *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885, *People v. Sears* (1970) 2 Cal.3d 180, 190.) Even absent a request, appellant was entitled to have his jury instructed on the general principles of law which governed his penalty trial and were necessary for the jurors' understanding of the appropriate penalty in this case. (*People v. Blair* (2005) 36 Cal.4th 686, 744; *People v. Breverman* (1998) 19 Cal.4th 142, 154; see also *Carter v. Kentucky* (1981) 450 U.S. 288, 302 ["Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law."]. The trial court's refusal to give these requested instructions deprived appellant

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[84] The special instructions discussed herein were submitted by co-appellant Rangel. (4 CT 1057-1074.) Appellant's trial counsel joined in Rangel's request for these instructions, and in all objections made by Rangel's attorney to the trial court's refusal to give these instructions. (20 RT 3113, 3160-3161.)

of these rights and, more importantly, of his rights to a fair and reliable penalty determination, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the applicable sections of the California Constitution.

A. The Trial Court Erred by Refusing Appellant's Request to Instruct the Jury That it Would Be Misconduct to Regard Death as a less Severe Penalty than Life in Prison Without Possibility of Parole

Appellant requested that the trial court instruct the jury:

> You are instructed that death is qualitatively different from all other punishments and is the ultimate penalty in the sense of the most severe penalty the law can impose. It would be a violation of your duty, as jurors, if you were to fix the penalty at death with the view that you were thereby imposing the less severe of the two available penalties.

(4 CT 1060; 20 RT 3113.)

The prosecutor objected to this instruction, saying there was no authority for the proposition that death was the most severe punishment and that it was up to the jurors to decide which punishment they thought was the most severe. (20 RT 3131.) The trial court refused appellant's request on the ground there was no legal authority for the instruction. (20 RT 3132.)

The trial court and the prosecutor were wrong. Both this Court and the United States Supreme Court have recognized that death is the most severe penalty under the law. (*People v. Memro* (1996) 11 Cal.4th 786, 879 ["[P]rosecutor's comment that life imprisonment without possibility of parole was 'legally not worse' than death was accurate as a legal matter . . . for indeed death is the worse punishment"]; *People v. Hernandez* (1988) 47 Cal.3d 315, 362, citing *Caldwell v. Mississippi* (1985) 472 U.S. 320, 329, *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 ["Obviously death is qualitatively different from all other punishments and is the 'ultimate

penalty' in the sense of the most severe penalty the law can impose"]; *Roper v. Simmons* (2005) 543 U.S. 551, 568 ["Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force"].) Accordingly, this Court has recognized that it would be improper for a juror to vote for the death penalty based upon a belief that it was a less severe penalty than life without parole. (See *People v. Hernandez*, *supra*, 47 Cal.3d at p. 363 [scrutinizing whether prosecutor's argument that the jurors could find life without possibility of parole was the "ultimate penalty" would have persuaded the jurors that life without parole was similar to death in its severity].)

Appellant's requested instruction was, therefore, a correct statement of the law. It was not argumentative, nor was it duplicative of other instructions given by the trial court, none of which apprised the jury that death is the law's most severe penalty. It was error for the trial court to refuse this instruction. (See *People v. Gurule* (2002) 28 Cal.4th 557, 659 [examining whether rejected penalty phase instructions requested by the defense were incorrect statements of law, argumentative, or duplicative].)

That death is the more severe punishment is not apparent to all jurors. (See, e.g., *People v. Heard* (2003) 31 Cal.4th 946, 964 [recognizing that the view that life imprisonment without the possibility of parole was considered to be a worse punishment death "was not an uncommon response from the jury venire as a whole, and, indeed, from a substantial number of jurors who actually sat on the case"]; see also *People v. Bloom* (1989) 48 Cal.3d 1194, 1223, fn. 7 ["While qualitatively different from the death penalty, the punishment of life without hope of release has been regarded by many as equally severe"]; *Holman v. Page* (7th Cir. 1996) 95 F.3d 481, 487, overruled on another point in *Owens v. United States* (7th

Cir. 2004) 387 F.3d 607 ["Natural life imprisonment is a stern punishment, for some perhaps worse than death"]; *Holland v. Donnelly* (S.D.N.Y. 2002) 216 F.Supp.2d 227, 242 ["Life imprisonment without any hope of parole or other release is a particularly harsh sentence, thought by some to be a fate as bad as, or possibly even worse than, death itself"].) Indeed, even the prosecutor in the present case believed that appellant's jurors could find that life without parole was a more severe penalty than death. (20 RT 3131.)

More critical to the outcome of this case, three of the jurors who sentenced appellant to death believed that life in prison without the possibility of parole was a "worse" penalty than was a death sentence. (43 CT 11266, 11383, 11461.) Another of appellant's jurors believed that "sometimes life in jail is worse" than the death penalty (43 CT 11147), while yet another juror was unable to say which of the two possible punishments was worse.[85] (43 CT 11422.)

Appellant's requested instruction would have corrected these jurors' misunderstanding on this point, and would have clearly instructed the jury that death was in fact the most severe penalty under the law. Absent that requested instruction there is, under the circumstances of this case, more than a "reasonable possibility" (*Chapman v. California* (1967) 386 U.S. 18, 24, citing *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87; *People v. Ochoa* (1998) 19 Cal.4th 353, 479) that appellant's jurors were not in agreement that death was the more severe punishment, and that some of appellant's jurors may have voted for the death penalty in the mistaken belief that this sentence was more lenient than life without possibility of parole. This

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[85] Two of the four alternate jurors in this case also believed that life in prison without the possibility of parole was a more severe penalty than was death. (44 CT 11617, 11707.)

possibility renders appellant's death sentence unreliable and unconstitutional under the Eighth and Fourteenth Amendments.

Stated differently, the trial court's failure to give appellant's requested instruction created a risk that some of appellant's jurors regarded death as a less severe penalty than life without parole and therefore voted for the death penalty because they believed mitigation outweighed aggravation. That risk "is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Lockett v. Ohio* (1978) 438 U.S. 586, 605; see also *Zant v. Stephens* (1983) 462 U.S. 862, 884-885, quoting *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305 [recognizing the "qualitative difference between death and any other permissible form of punishment" and the "'corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case'"].) The death judgment entered in this case must be reversed.

B. The Trial Court Erred by Failing to Instruct That Drug or Alcohol Intoxication Could Not Be Considered Aggravating

The trial court instructed the jurors on Penal Code section 190.3, factor (h), by reading CALJIC No. 8.85, which tells the jurors that in determining which penalty is to be imposed, they should consider: "Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication." (5 CT 1195; 20 RT 3178.) Appellant requested the following clarification:

> Drug and alcohol intoxication, either at the time of the commission of a crime or at some other time, may be considered as a mitigating factor and not as an aggravating

factor.[86]

(4 CT 1062; 20 RT 3113.)

The prosecutor objected to this instruction as misleading. She told the court that drug or alcohol intoxication was a "circumstance surrounding the crime," and therefore could be an aggravating factor under Penal Code section 190.3, factor (a). (RT 3132.) The trial court agreed, saying "to the extent there was evidence of intoxication, it can be argued under the circumstances of the crime," and refused to give appellant's requested instruction. (20 RT 3133.) The trial court also said "there is not any independent evidence relating to [Penal Code section 190.3, factor (h)] and there hasn't been any expert to show the level of intoxication. All we have is alcohol and some drugs." (*Ibid.*)

The trial court and the prosecutor were wrong in their beliefs that intoxication could be considered an aggravating circumstance of the crime

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[86] To the extent that appellant's requested instruction informed the jurors they could consider appellant's intoxication "either at the time of the commission of a crime *or at some other time*" (4 CT 1062, italics added), the italicized portion of the requested instruction was a proper statement under Penal Code section 190.3, factor (k), which allows the jury to consider as mitigation any circumstance which extenuates the gravity of the crime, and any other aspect of the defendant's character offered as a basis for a sentence less than death, regardless of whether they are related to the offense for which he is on trial. (See *People v. Easley* (1983) 34 Cal.3d 858, 878, citing *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; CALJIC No. 8.85.) Moreover, even *assuming* the "or at some other time" portion of appellant's requested instruction could be considered a misstatement of Penal Code section 190.3, factor (h), which deals with intoxication "at the time of the offense," the proper course of action would have been for the trial court to edit out this language, rather than reject the instruction as a whole. (See *People v. Sanchez* (1950) 35 Cal.2d 522, 528 [the trial court could easily have cured any defect in defendant's proposed instruction by striking out the offending language].)

under Penal Code section 190.3, factor (a). (*People v. Ochoa, supra*, 19 Cal.4th at p. 464 [defendant's intoxication at the time of the offense can only be considered in mitigation]; see also *People v. Maury* (2003) 30 Cal.4th 342, 444 [judging whether error occurred by asking if there was a reasonable likelihood that the jurors understood their instructions in a manner that allowed them to view intoxication as an aggravating circumstance of the crime]; *People v. Osband* (1996) 13 Cal.4th 622, 708 [same].)

The trial court also was wrong in its belief that intoxication, whether induced by alcohol or drugs, needs to be established by expert testimony. (*People v. Williams* (1988) 44 Cal.3d 883, 914-915; see also *Carson v. Facilities Company* (1984) 36 Cal.3d 830, 845, citing *People v. Stines* (1969) 2 Cal.App.3d 970, 976-977, for the proposition that lay witness testimony is competent evidence from which the jury can draw the inference of intoxication; *People v. Conley* (1966) 64 Cal.2d 310, 326 ["jury may infer the presence and extent of a defendant's intoxication from evidence of his behavior and the amount of his drinking"];[87] *People v. Barnett* (1976) 54 Cal.App.3d 1046, 1052 ["Jurors as laymen are deemed competent to form opinions on intoxication"].) Here, the prosecution's own witnesses presented sufficient evidence from which the jurors could have drawn the inference that appellant was affected by drugs and alcohol at the time of the crime when they testified that appellant was drinking beer, snorting methamphetamine, and "getting high" prior to the shooting. (6 RT 1011, 7 RT 1077, 1179; see also 6 RT 885, 955-956, 7 RT 1166, 8 RT

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[87] *People v. Conley, supra*, 64 Cal.2d 310, was superseded by statute on other grounds, as recognized in *People v. Saille* (1992) 54 Cal.3d 1103, 1114.

1286-1288.)

This Court has held that the failure to specify aggravating and mitigating factors as such does not violate Eighth and Fourteenth Amendment principles because there is no "reasonable likelihood" that a juror would misunderstand which of the statutory factors under Penal Code section 190.3 were "aggravating"' and which "mitigating." (*People v. Benson* (1990) 52 Cal.3d 754, 802, quoting *Boyde v. California* (1990) 494 U.S. 370, 380; see also *People v Coffman* (2004) 34 Cal.4th 1, 123.) This case belies that assumption, as both the trial court and the prosecutor believed intoxication could be considered an aggravating factor under Penal Code section 190.3. (20 RT 3132-3133.) Surely, if the trial court and the prosecutor believed the law, as recited in CALJIC No. 8.85, allowed the jurors to consider intoxication as aggravation warranting the death penalty, there is a "reasonable likelihood" that the lay jurors would believe the same.[88]

Where, as here, it is likely that a juror attached an aggravating label to a factor that actually should militate in favor of a lesser penalty, the Fourteenth Amendment right to due process of law requires that the jury's decision to impose death be set aside. (*Zant v. Stephens* (1983) 462 U.S. 862, 885; *People v. Benson*, *supra*, 52 Cal.3d at p. 801.) The likelihood that the jurors in this case understood that they could attach aggravating consequences to statutory factors that are mitigating only also requires reversal under federal due process principles that prohibit depriving appellant of crucial protections afforded under California law. (*Hicks v.*

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[88] Indeed, the prosecutor argued here that co-appellant Rangel's use of alcohol "just made him more courageous, helped him do this murder that much better." (20 RT 3222.)

Oklahoma (1980) 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300-1301.) This likelihood further renders the resulting verdict unreliable and reversible under the Eighth and Fourteenth Amendments, as well. (See *Furman v. Georgia*, *supra*, 408 U.S. 238; *Godfrey v. Georgia, supra,* 446 U.S. 420, 428, quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 198 ["a State wishing to authorize capital punishment . . . must channel the sentencer's discretion by 'clear and objective standards'"].)

As previously noted, the prosecution's case for death was based almost entirely on the circumstances of the crime. This was not, however, the rare case of a murder so heinous that every juror would conclude that death was the appropriate punishment; instead, reasonable jurors could have found that this was not one of the "extreme cases" that actually warranted society's "most irrevocable of sanctions." (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 182; see also *id.* at p. 184.) Indeed, on the facts of this case, the defense was able to argue that appellant's conduct and reaction to this crime separated him from the "worst of the worst." (21 RT 3275-3277.) A reasonable juror could have determined that the case for life or death was evenly balanced, and that the additional weight of just this one improper factor in aggravation was sufficient to tip the scales of justice in favor of death. This is especially so given that at least four of appellant's jurors appeared predisposed to viewing intoxication as an aggravating factor, as indicated by their beliefs that drug use was the, or one of the, leading causes of crime in general. (43 CT 11135, 11213, 11291, 44 CT 11447.) The People cannot meet their burden under *Chapman v. California*, *supra*, 386 U.S. at pages 23-24, of proving beyond a reasonable doubt that this error was not a contributing factor in at least one juror's decision to impose the death penalty in this case. Appellant's death sentence must be set aside.

C. The Trial Court Erred by Refusing to Instruct the Jurors That Appellant's Background Could Only Be Considered as Mitigating

Appellant requested that the jurors be instructed:

> The permissible aggravating factors are limited to those aggravating factors upon which you have been instructed. Therefore, the evidence which has been presented regarding the defendant's background may only be considered by you as mitigating evidence.

(4 CT 1063; 20 RT 3113.)

Both the prosecutor and the trial court believed that this instruction was a misstatement of the law, and the court refused appellant's instruction because there was no legal authority for it. (20 RT 3134.)

Both the trial court and the prosecutor were wrong. The evidence of appellant's background presented by the defense was admissible "only to extenuate the gravity of the crime; it c[ould] not be used as a factor in aggravation." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1033.) Thus, appellant's instruction was a correct statement of the law.

This Court has declined to specifically rule on the particular instruction requested by appellant, other than to say that it has previously rejected arguments that the trial court must identify for the jurors which sentencing factors are aggravating and which are mitigating. (See *People v. Hinton* (2006) 37 Cal.4th 839, 912; *People v. Martinez* (2004) 31 Cal.4th 673, 701.) In past cases, this Court has found it unnecessary to reach the specific question whether a defendant is entitled to have the jurors instructed that the defendant's background evidence can only be considered as mitigating evidence, based on its belief that even assuming the trial court erred by failing to give the instruction, there was no reasonable possibility that the jury improperly considered such evidence as aggravation. (*People*

v. Hardy (1992) 2 Cal.4th 86, 207; *People v. Martinez*, *supra*, 31 Cal.4th at p. 701.) In a recent case involving a defendant's request for such an instruction, this Court again stated it had rejected arguments that the trial court must identify for the jurors which sentencing factors are aggravating and which are mitigating. (*People v. Hinton*, *supra*, 37 Cal.4th at p. 912.) Then, citing *People v. Ochoa* (2001) 26 Cal.4th 398, 457, this Court simply declared, "In any event, since the court correctly instructed the jury on aggravating and mitigating factors, it was not error to refuse the special instruction." (*People v. Hinton*, *supra*, 37 Cal.4th at p. 912.)

Appellant's case obviously differs from *People v. Ochoa*, *supra*, where the defendant wanted the jurors to consider his *ethnic* background, which, as the Court noted, is not a legitimate factor in aggravation or mitigation. (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 457.) This case differs from the other cases cited above in that, in the absence of appellant's requested instruction, it is very likely that appellant's jury improperly considered the background evidence presented by the defense as aggravation, and just as likely that this error contributed to the jury's death verdict.

Appellant's case for mitigation was based on evidence of his background and life up to the time of the shooting. If, as their statements show, both the trial court and the prosecutor believed it was inaccurate to state that the law allowed this evidence to be considered only as mitigating evidence (20 RT 3133-3134), it is equally likely that the lay jurors would interpret the law the same way. It also is likely that this misunderstanding was fueled by the prosecutor's closing argument, which twisted appellant's mitigating evidence of fathering a daughter and creating a family into an aggravating argument that he spent his time "hanging out having a great old

time" with his buddies. (20 RT 3197.) Likewise, with that portion of the prosecutor's remarks that convoluted appellant's mitigating evidence that he was the innocent victim of a shooting as a teen, suffered severe physical injury, and almost died (19 RT 2997, 3046, 3048), into the pain appellant had "put[] [his] family through" by suffering this experience. (20 RT 3229.)

The likelihood that appellant's jury attached aggravating weight to appellant's mitigating background evidence violated appellant's Eighth and Fourteenth Amendment rights to due process and a reliable penalty verdict based on a proper consideration of relevant sentencing factors (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Zant v. Stephens*, *supra*, 462 U.S. 862, 884-885), and his federal due process guarantee that prohibited his being arbitrarily deprived of crucial protections afforded under California law. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346; *Fetterly v. Paskett, supra,* 997 F.2d at pp. 1300-1301.) In a case like this, where reasonable jurors could have found that the evidence did not overwhelmingly support a death sentence, it is very possible that this error could have, in the mind of at least one juror, tipped what was otherwise a balanced life-death scale in the prosecution's favor. The People cannot show beyond a reasonable doubt that there is no reasonable possibility that this error could have played a contributing role in the jury's decision to impose a death sentence. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Ashmus* (1991) 54 Cal.3d 932, 965.) Appellant's death sentence must be reversed.

D. The Trial Court Erred in Refusing to Give Appellant's Proposed Clarifying Instructions on the Penalty Weighing Process

Appellant requested the following three instructions on the weighing

of mitigating and aggravating factors:

Requested Special Instruction No. 12:

> You are instructed that even if aggravating factors substantially outweigh mitigating factors you may still find life in prison without the possibility of parole to be the appropriate punishment in this case.

(4 CT 1068; 20 RT 3113.)

Requested Special Instruction No. 16:

> Any mitigating factor or circumstance standing alone may be sufficient to support a decision that life in prison without the possibility of parole is the appropriate punishment in this case.

(4 CT 1071; 20 RT 3113.)

Requested Special Instruction No. 20:

> A jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death.

(4 CT 1073; 20 RT 3113.)

The trial court denied these three requested instructions on the ground that the principles illuminated in these instructions were covered by CALJIC No. 8.88, which defines the scope of the jury's sentencing discretion and the nature of its deliberative process.[89] (20 RT 3137-3139.) The court also believed that appellant's special requested instructions Nos. 12 and 16 were argumentative. (20 RT 3137-3138.)

In *People v. Brown* (1985) 40 Cal.3d 512, reversed on other grounds in *California v. Brown* (1987) 479 U.S. 538, this Court recognized that under California law, a death sentence is never mandatory – not even when the aggravating circumstances outweigh the mitigating circumstances. (See

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[89] CALJIC No. 8.88 was given to appellant's jury. (4 CT 1211; 21 RT 3294-3296.)

id. at p. 540 ["The jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that it is not the appropriate penalty"].) In *People v. Bolin* (1998) 18 Cal.4th 297, 344, this Court quoted *People v. Duncan* (1991) 53 Cal.3d 955, 979, for the proposition that "[t]he jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death." And, in *People v. Anderson* (2001) 25 Cal.4th 543, 600, and *People v. Sanders* (1995) 11 Cal.4th 475, 557, this Court noted with approval an instruction informing the jurors that a single mitigating factor may be sufficient to support a decision that life in prison without the possibility of parole is the appropriate punishment. Thus, appellant's requested instructions were correct statements of the law.

Nevertheless, this Court has rejected the need for instructions such as those requested by appellant here on the ground that CALJIC No. 8.88 adequately guides the jury's selection of the appropriate punishment by informing jurors that "[t]o return a judgment of death, each of you must be persuaded that the aggravating [evidence is] so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (*People v. Ray* (1996) 13 Cal.4th 313, 355-356, quoting *People v. Johnson* (1993) 6 Cal.4th 1, 52.) Given this language, this Court has held that "[n]o reasonable juror would assume he or she was required to impose death despite insubstantial aggravating circumstances, merely because no mitigating circumstances were found to exist." (*Ibid.;* see also *People v. Anderson*, *supra*, 25 Cal.4th at p. 600, fn. 20; *People v. Snow* (2003) 30 Cal.4th 43, 124.)

The proper question, however, is not whether a juror would assume that death had to be imposed even if there were insubstantial aggravating

circumstances, but whether a juror would feel free to return a verdict of life imprisonment without parole in the face of substantial aggravating circumstances and little or no mitigating circumstances. That is what is implicit in appellant's requested instructions, and what a juror has a right to do. This concept is not properly conveyed by CALJIC No. 8.88, which implies that death is the *only* appropriate sentence if the aggravating evidence is "so substantial in comparison with the mitigating circumstances . . . ."[90]

Without the aid of appellant's special requested instructions, the jurors were not able to fully engage in the type of individualized consideration required in a capital case. (See *Zant v. Stephens*, *supra*, 462 U.S. at p. 879; see also *Furman v. Georgia, supra,* 408 U.S. 238; *Godfrey v. Georgia*, *supra*, 446 U.S. 420, 428.) Thus, the failure to give appellant's requested instructions violated his right to a fair and reliable penalty determination under the Eighth and Fourteenth Amendments.

E. The Trial Court Prejudicially Erred in Failing to Limit the Jury's Consideration of the Victim Impact Evidence in this Case and to Admonish the Jury Not to Base Its Decision on Emotion

Appellant requested the following instruction to guide the jury's consideration of the victim impact evidence in this case:

> Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be

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[90] Because appellant's requested instructions clarified the sentencing concepts set forth more generally and less clearly in CALJIC 8.88, they were not, as the trial court believed, argumentative. (See *People v. Fauber* (1992) 2 Cal.4th 792, 865-866 [defining an argumentative instruction as one that "merely highlight[s] certain aspects of the evidence without further illuminating the legal standards at issue"].)

> considered by you to divert your attention from your proper role of deciding whether the defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy.

(5 CT 1215-1216; 20 RT 3121-3122.) The prosecutor objected to this instruction on the ground that "It's totally discounting every victim impact witness the People put on, and therefore it should not be stated that way." (20 RT 3122.) Appellant responded by noting that his requested instruction was based on the principles discussed by this Court in *People v. Edwards* (1991) 54 Cal.3d 787. (20 RT 3122.) The trial court was "concerned" that "a lot of this is covered" by the last paragraph of CALJIC No. 8.84.1.[91] The court said that it would not give appellant's requested instruction. It agreed, however, to add the following language to the last paragraph of CALJIC No. 8.84.1:

> "You must face your obligation soberly and rationally and . . . not [*sic*] a purely subjective response to emotional evidence."

(20 RT 3123.) When it came time to instruct appellant's jury, the court gave the following instruction:

> You must face this obligation soberly and rationally and may not reach any decision as an irrational response to emotional

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[91] The last paragraph of CALJIC No. 8.84.1 reads as follows:

> You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously and reach a just verdict.

evidence or argument.

(20 RT 3176.)

The trial court prejudicially erred in failing to instruct appellant's jury concerning the proper use of victim impact evidence.

It is well settled that in criminal cases, even in the absence of a request, the trial court is responsible for ensuring that the jury is correctly instructed on all the general principles of law which are openly and closely connected with the evidence presented and necessary for the jury's proper understanding of the case. (See *People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1022 [penalty phase instructions].) In the present case, an appropriate limiting instruction was necessary for the jury's proper understanding of the case, and appellant's requested instruction should have been given.

"Because of the importance of the jury's decision in the sentencing phase of a death penalty trial, it is imperative that the jury be guided by proper legal principles in reaching its decision." (*Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842.) "Allowing victim impact evidence to be placed before the jury without proper limiting instructions has the clear capacity to taint the jury's decision on whether to impose death." (*State v. Hightower* (N.J. 1996) 680 A.2d 649, 661.) "Therefore, a trial court should specifically instruct the jury on how to use victim impact evidence." (*State v. Koskovich* (N.J. 2001) 776 A.2d 144, 181.)

The highest courts of Oklahoma, New Jersey, Tennessee and Georgia have held that whenever victim impact evidence is introduced the trial court must instruct the jury on its appropriate use, and admonish the jury against its misuse. (*Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d

806, 829; *State v. Koskovich*, *supra*, 776 A.2d at p. 181;[92] *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 892; *Turner v. State*, *supra*, 486 S.E.2d 839, 842.) The Supreme Court of Pennsylvania has recommended delivery of a cautionary instruction. (*Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 159.)

Although the language of the required cautionary instruction varies in each state, depending on the role victim impact evidence plays in that state's statutory scheme, common features of those instructions include an explanation of how the evidence can properly be considered, and an admonition not to base a decision on emotion or the consideration of improper factors. An appropriate instruction would read as follows:

> Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. Finally, a victim-impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must draw no inference whatsoever by a witness's silence in that

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[92] In *State v. Koskovich*, *supra*, the New Jersey Supreme Court held:

> We are mindful of the possibility that some jurors will assume that a victim-impact witness prefers the death penalty when otherwise silent on that question. To guard against that possibility, trial courts should instruct the jury that a victim-impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must draw no inference whatsoever by a witness's silence in that regard.

(776 A.2d at p. 177.)

regard.

(See *Commonwealth v. Means*, *supra*, 773 A.2d at p. 159; see also *State v. Koskovich*, *supra*, 776 A.2d at p. 177.)[93]

In *People v. Zamudio* (2008) 43 Cal.4th 327, 368-370, this Court addressed a similar proposed limiting instruction, and held that the trial court properly refused that instruction because it was covered by the language of CALJIC No. 8.84.1. (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 368.) However, CALJIC No. 8.84.1, which was also given in appellant's case (5 CT 1193; 20 RT 3176), does not cover any of the points made by the instruction proposed here. For example, it does not tell the jury why victim impact evidence was introduced, and does not caution the jury against an irrational decision.

CALJIC No. 8.84.1 does contain the admonition: "You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings," but the terms "bias" and "prejudice" evoke images of racial or religious discrimination, not the intense anger or sorrow that victim impact evidence is likely to produce. The jurors would not recognize those entirely natural emotions as being covered by the reference to bias and prejudice. Nor would they understand that the admonition against being swayed by "public opinion or public feeling" also prohibited them from being influenced by the private opinions of the victims' relatives.

People v. Zamudio, *supra*, also held that to the extent that a limiting

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[93] The first four sentences of this instruction come from the instruction suggested by the Supreme Court of Pennsylvania in *Commonwealth v. Means*, *supra*, 773 A.2d at page 159. The last sentence is based on the decision of the New Jersey Supreme Court in *State v. Koskovich*, *supra*, 776 A.2d at page 177.

instruction like the one requested by appellant indicates that the jurors' emotions may play no part in their decision to opt for the death penalty, such an instruction is misleading, because jurors "'may properly consider in aggravation, as a circumstance of the crime, the impact of a capital defendant's crimes on the victim's family, and in so doing [they] *may exercise sympathy for the defendant's murder victims and . . . their bereaved family members*. [Citation.]'" (*People v. Zamudio*, *supra*, 43 Cal.4th at pp. 368-369, quoting from *People v. Pollock* (2004) 32 Cal.4th 1153, 1195, italics in original.) Nevertheless, in every capital case "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*People v. Haskett* (1982) 30 Cal.3d 841, 864; see also *Gardner v. Florida* (1977) 430 U.S. 349, 358 (plurality opinion) ["any decision to impose the death sentence" must "be, and appear to be, based on reason rather than caprice or emotion"].) Appellant's requested instruction would have conveyed that message to the jury; none of the instructions given at the trial did. Consequently, there was nothing to stop raw emotion and other improper considerations from tainting the jury's decision. The trial court's failure to deliver an appropriate limiting instruction violated appellant's right to a decision by a rational and properly-instructed jury, his due process right to a fair trial, and his right to a fair and reliable capital penalty determination. (U.S. Const., Amends. 6, 8 & 14; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

The violations of appellant's federal constitutional rights require reversal unless the prosecution can show that they were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The violations of appellant's state rights require reversal if there is any reasonable possibility that they affected the penalty verdict. (See *People v.*

Brown (1988) 46 Cal.3d 432, 447-448.) In view of the extensive victim impact evidence admitted in this case, the trial court's refusal to give appellant's requested instruction cannot be considered harmless under the federal Constitution, and therefore reversal of the death judgment is required.

F. The Denial of Appellant's Requested Instructions Deprived Him of a Fair and Reliable Penalty Determination

Each of the requested instructions described above should have been given, and the failure to give any one of these instructions constitutes reversible error. However, even if the denial of each instruction individually would not be considered to be reversible error, the cumulative effect of the trial court's failure to give all of the requested instructions denied appellant a fair penalty determination under the state and federal Constitutions.

Each of the requested instructions was designed to address considerations that the jurors could bring to bear in making their penalty determination. None of the instructions was an incorrect statement of the law or improper in its manner of presentation. All of the principles embraced by the instructions have been endorsed by this Court. In short, all of these instructions presented to the jurors information that is an accepted part of death penalty jurisprudence in this state, and that was necessary to ensure appellant's Eighth and Fourteenth Amendment rights to a fair and reliable penalty determination. The trial court's failure to give these instructions denied appellant those rights, and requires that his death sentence be reversed.

XVII

APPELLANT'S CONVICTION OF CAPITAL MURDER MUST BE REVERSED BECAUSE CALIFORNIA'S MULTIPLE MURDER SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONAL

The multiple murder special circumstance must be overturned because it violates the Eighth and Fourteenth Amendments by encompassing an overly-broad class of persons with vastly different levels of culpability.

"To pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" (*People v. Ledesma* (2006) 39 Cal.4th 641, 725, quoting *Zant v. Stephens* (1983) 462 U.S. 862, 877; see also *Lewis v. Jeffers* (1990) 497 U.S. 764, 774; *People v. Moon* (2005) 37 Cal.4th 1, 44, quoting *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of Stewart, J.) ["To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not'"].)

Thus, in order to meet the demands of the Eighth Amendment, a special circumstance that makes a defendant eligible for the death sentence under California law must "provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not." (*People v. Green* (1980) 27 Cal.3d 1, 61; see also *Zant v. Stephens*, *supra*, 462 U.S. at p. 879 [factors that make a defendant eligible for the death penalty must "differentiate [his] case in an objective, evenhanded, and substantively rational way from the many . . . murder cases

in which the death penalty may not be imposed"].)[94] Stated differently, a special circumstance that makes a defendant eligible for the death penalty must be one that "permit[s] the sentencer to make a principled distinction between those who deserve the death penalty and those who do not." (*Lewis v. Jeffers*, *supra*, 497 U.S. at p. 776; see also *Arave v. Creech* (1993) 507 U.S. 463, 474.)

California's multiple murder special circumstance, which applies in cases where the defendant has been convicted of one or more offenses of murder in the first or second degree (Pen. Code, § 190.2, subd. (a)(3)), does not achieve the constitutional goal of distinguishing in any meaningful or principled way the few cases in which the death penalty may be imposed from the many cases in which it may not. In order to achieve this goal, a valid special circumstance must define a sub-class of persons of comparable culpability. "When juries are presented with a broad class, composed of persons of many different levels of culpability, and are allowed to decide who among them deserves death, the possibility of aberrational decisions as to life or death is too great." (*United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1445.) The multiple murder special circumstance in California fails to foreclose this prospect.

The narrowing factor for the multiple murder special circumstance is not the defendant's mental state, but the act which was committed. Because death eligibility is based entirely upon the fact that more than one murder in the first degree has been committed, this special circumstance encompasses a broad class of individual defendants who possess wildly disparate levels

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[94] *People v. Green*, *supra*, 27 Cal.3d 1, was overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3, and *People v. Martinez* (1999) 20 Cal.4th 225, 239.

of culpability. Thus, for instance, California's multiple murder special circumstance applies equally to a defendant who, motivated by racial hatred, deliberately kills several minority children in separate incidents, as well as to a defendant who, in the course of a robbery, accidentally kills one woman and her nine-week-old fetus, which the defendant did not know the woman was carrying. (See, e.g., *People v. Davis* (1994) 7 Cal.4th 797, 810 [person responsible for death of eight-week-old fetus may be convicted of murder]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1149-1150 [intent to kill not required for the actual killer under the multiple murder special circumstance].) Under California's statutory scheme, one jury could sentence the accidental killer to death, while another could spare the life of the defendant who deliberately killed his victims based on their race. "The prospect of such 'wanton and freakish' death sentencing is intolerable under *Furman* and the cases following it." (*United States v. Cheely*, *supra*, 36 F.3d at p. 1444.)

In *People v. Coddington* (2000) 23 Cal.4th 529, 656, this Court rejected a constitutional challenge to the multiple murder special circumstance by stating that "the United States Supreme Court recognized multiple murder as a narrowing factor in *Lowenfield v. Phelps* (1988) 484 U.S. 231, 246." The question presented in *Lowenfield*, however, was whether an aggravating circumstance at the penalty-selection stage of a capital trial may duplicate an element of the capital crime that, under Louisiana law, was the equivalent of a special circumstance creating death eligibility (namely, murder with intent to kill or inflict great bodily harm on more than one person). The United States Supreme Court held that such duplication was constitutionally permissible because the jury's guilt verdict, which effectively amounted to a special circumstance finding that the

defendant had killed more than one person with the intent to kill or inflict great bodily harm, accomplished the narrowing required by the Eighth Amendment. The fact that the sentencing jury was additionally required to find the existence of an aggravating circumstance before imposing a death sentence was not part of the constitutionally-required narrowing process, and therefore the fact that the aggravating circumstance duplicated an element of the crime that essentially amounted to an eligibility factor did not make the defendant's death sentence unconstitutional. (*Lowenfield v. Phelps*, *supra*, 484 U.S. at p. 246.) The high court did not decide the question of whether Louisiana's equivalent to the multiple murder special circumstance adequately narrowed the class of persons eligible for the death penalty, as that issue was neither raised by the defendant nor discussed by the Court.

Moreover, even assuming that the high court's opinion in *Lowenfield* could be read to hold that Louisiana's statutory equivalent of the multiple murder special circumstance was a proper narrowing factor, the Louisiana statute differs from the California special circumstance by making eligible for the death penalty a distinct sub-class of persons of comparable culpability – specifically, those murderers who act with the "specific intent to kill or to inflict great bodily harm upon more than one person." (*Lowenfield v. Phelps*, *supra*, 484 U.S. at p. 242, citing La. Rev. Stat. Ann., § 14:30(A), subd. (3).). As described in the above example of the racially-motivated killer of several children and the accidental killer of a woman and her unknown fetus, the California multiple murder special circumstance encompasses an overly-broad class that is composed of persons of immensely different levels of culpability, and allows the jurors to decide who among this vast class deserves death, thereby creating the possibility of

aberrational life-or-death decisions. Thus, regardless of whether the Louisiana statute in *Lowenfield* sufficiently narrowed the class of murderers eligible for the death penalty by reasonably justifying the imposition of a more severe sentence on those who commit certain types of multiple murders, the California multiple murder special does not.

In *People v. Sapp* (2004) 31 Cal.4th 240, 287, this Court again upheld the constitutionality of the multiple murder special circumstance, this time stating that the special circumstance "narrow[s] the class of death-eligible first degree murderers to those who have killed and killed again." However, this classification permits death eligibility for an overly-broad class of defendants whose crimes are of vastly disparate levels of culpability, without providing any rational basis for distinguishing between those defendants who possess levels of culpability that make them deserving of the death penalty and those who do not.

In short, California's multiple murder special circumstance fails to differentiate in an objective and rational manner those murderers who deserve to be considered for the death penalty and those who do not, and thereby creates the type of "wanton and freakish" death sentencing found intolerable in *Furman v. Georgia*, *supra*, 408 U.S. 238, and the cases following it. This Court should reexamine its prior holdings to the contrary, declare this special circumstance unconstitutional, and reverse appellant's conviction of capital murder.

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XVIII

THE TRIAL COURT'S FAILURE TO CONDUCT AN EVIDENTIARY HEARING ON APPELLANT'S ALLEGATIONS OF JUROR MISCONDUCT REQUIRES THAT APPELLANT'S DEATH JUDGMENT BE VACATED AND THE CASE REMANDED FOR A HEARING TO RESOLVE DOUBTS ABOUT THE JURORS' IMPARTIALITY

The trial court received information from appellant's counsel that prejudicial juror misconduct had occurred during the jury's penalty phase deliberations. This information imposed a duty on the trial court to hold a hearing to resolve the matter. The trial court committed error by failing to conduct any type of inquiry into the allegations of juror misconduct. As argued below, the trial court's failure to take any steps to resolve this issue, which, paradoxically, the trial court believed was "an issue of significance and concern" that "should be explored fully" (21 RT 3310), violated appellant's Sixth and Fourteenth Amendment rights to due process and a fair trial by an impartial jury, and his Eighth and Fourteenth Amendment rights to a reliable determination that the state should be allowed to execute him. The death judgment must be set aside, and appellant's case remanded to the superior court for a hearing on the allegations of juror misconduct raised by the defense.

A. Factual Background

After the jury returned its death verdict against appellant, appellant's trial counsel filed a written request for access to the jurors' names and addresses in order to investigate juror misconduct during the jury's penalty phase deliberations. (45 CT 11759-11769; see Code Civ. Proc., § 237.) Appellant's trial counsel informed the court that they had spoken to some of the jurors and learned that at least two jurors had based their decision to sentence appellant to death on evidence that had not been presented at trial,

and that one of these jurors had refused to consider or deliberate on the mitigating evidence that had been presented on appellant's behalf. (45 CT 11761, 11768.) The motion informed the trial court that one of the jurors had told appellant's counsel that, based on his military training and experience, he had determined that appellant had "executed" Anthony Urrutia because Urrutia was shot in the head. (45 CT 11761.) This juror told appellant's counsel that he shared his training and experience and the conclusion he deduced therefrom with his fellow jurors, and that this was the only information he considered in deciding that appellant should be sentenced to death. (*Ibid.*) Another juror told appellant's counsel that she voted for death based in part on the other juror's conclusion that appellant committed an execution. This juror said that the jury's deliberations as to Rangel were brief due to his overall reprehensible conduct, and even though he did not commit an execution, the jury determined death was the appropriate punishment for him. (*Ibid.*) With respect to appellant, this juror said she had been convinced by other jurors that appellant had paged Rangel before the shootings, a fact which was not part of the prosecution's evidence at trial, and that appellant had planned the execution and intended solely to execute, and not to rob, Urrutia, factual findings which contradicted the jury's robbery-murder guilt verdicts and special circumstance findings. (*Ibid.*) Appellant's counsel stated that, in light of the jurors' statements, they needed to investigate whether there was juror misconduct in this case. (45 CT 11763, 11766.) However, without access to the jurors' contact information, appellant's trial counsel had no way to conduct this investigation and supply the requisite declarations from these jurors, and possibly other jurors, that could establish juror misconduct. (*Ibid.*)

According to the declaration submitted by one of appellant's trial attorneys, Joan Whiteside-Green, which was attached to appellant's request for court-ordered disclosure of the jurors' addresses and/or phone numbers, following the penalty verdict, appellant interviewed some of the jurors. Juror No. 2 told them that based on his military training and experience, he knew that shooting someone in the head meant the shooter planned to execute the victim, and that he therefore was able to determine that appellant's conduct in shooting Urrutia in the head amounted to an "execution." (45 CT 11768.) Juror No. 2 said that once he determined this was an execution killing, he automatically concluded appellant also must be executed, without considering any of the other evidence presented in the penalty trial. (*Ibid.*) A second juror, Juror No. 7, said that she changed her penalty decision to a vote for death based on discussions during jury deliberations that appellant had committed an execution-style killing. (*Ibid.*) Whiteside-Green said that there appeared to be juror misconduct in this case, the extent of which could not be determined until the defense had the opportunity to speak further with the jurors. (*Ibid.*) She said that the defense had no names or contact information for the jurors, and requested access to that information under Code of Civil Procedure section 237 so that they could investigate and, if appropriate, present evidence of juror misconduct in a motion for a new trial. (45 CT 11768-11769.)

The trial court believed the information received from appellant's counsel raised "an issue of significance and concern" that "should be explored fully" before taking any further action in this case. (21 RT 3310.) The trial court set a hearing for the release of the jurors' contact information, and said the court clerk would mail notice of that hearing to the jurors. (21 RT 3309-3314; 45 CT 11819-11820; 11823-11825.) The

court apologized to spectators who had come to court expecting to see appellant sentenced, and said that it was postponing the sentencing hearing because "in all cases, but in particularly cases in which the penalties are as severe as this, I want to be extra careful that every legitimate issue that needs to be resolved be thoroughly heard and resolved prior to sentencing." (21 RT 3313.)

At the hearing concerning appellant's request for the release of juror information, the court said that the court clerk had heard back by phone call or in writing from Jurors Nos. 4, 5, 6, 7, 8, 9, and 10, and that these jurors did not want their contact information disclosed. (21 RT 3318.) The court said that Jurors Nos. 1 and 2 were in court, along with Jurors Nos. 6, 8, and 9, and that Jurors Nos. 1 and 2 had also informed the clerk that they did not want their contact information released. (*Ibid.*) The court ruled that because these jurors did not want their contact information released, it was denying appellant's request for access to that information. (21 RT 3319.) The court told those jurors who were in court that appellant's counsel might attempt to communicate with them after the hearing, and it was their decision as to whether they wished to talk to them. (21 RT 3319.) The court said that Jurors Nos. 3, 11, and 12 had not contacted the court, and it therefore would release their names and contact information to appellant's counsel. (21 RT 3319; 45 CT 11826, 11828.)

Appellant's counsel subsequently filed a motion for a new penalty trial, based on the juror misconduct that Jurors Nos. 2 and 7 had initially described to appellant's counsel, and on information obtained from one of the jurors whose name and contact information had been released, which indicated that the jury had used Rangel's penalty phase mitigating evidence as a basis for sentencing appellant to death. (45 CT 11829-11839.) In that

motion, appellant's counsel argued that the facts these jurors relayed to them created a presumption of prejudicial juror misconduct. (*Ibid.*) Appellant's counsel also argued that, to the extent further investigation was needed to support a misconduct claim, they had no way of conducting that investigation absent access to the jurors, and that the absence of any means to further investigate this matter deprived appellant of his constitutional guarantees to due process, equal protection, and a fair trial.[95] (*Ibid.*)

Appellant's motion again informed the court that after the verdict, one juror told the defense that he had shared his "execution" opinion, which he was able to form based on his military training and experience, with the other jurors, and that this was the only information he considered in determining that appellant should also be executed. (45 CT 11831.) Another juror said that she changed her verdict from life to death because she was convinced by other jurors that appellant had paged Rangel, and that appellant's intent was not to rob the victims, but solely to execute them. (*Ibid.*)

The declarations of appellant's counsel were attached to the motion for a new trial. (45 CT 11838-11839.) The declarations again informed the trial court that Juror No. 2 told them that his military training and experience informed him that a head shot meant the shooter intended to execute the victim, and that he shared this training and experience with the other jurors. (*Ibid.*) This juror stated that, upon determining this was an "execution," he decided that appellant must also be executed, and he did not consider any of the other sentencing factors. (45 CT 11838.) Whiteside-

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[95] Appellant's motion to modify the penalty verdict to life without parole was based in part on the same arguments. (45 CT 11841-11848.)

Green's declaration informed the court that Juror No. 7 told appellant's defense team that she voted for death based on jury-room discussions that appellant, unlike Rangel, committed an execution. (*Ibid.*) The declaration of appellant's other trial attorney, Thomas McLarnon, informed the trial court that when he spoke with jurors after the penalty verdict, he learned that the jury was divided eight to four in favor of the death penalty, and that Juror No. 2 had used his military training and experience regarding executions to sway the four hold-out jurors. (45 CT 11839.) McLarnon also stated that he had talked to one of the three jurors, whose contact information had been released to the defense, and that this juror had told him that, in sentencing appellant to death, the jurors considered the fact that the murders would not have occurred had appellant not paged Rangel that evening. (45 CT 11839.) As McLarnon noted in his declaration, the juror's statement indicated that appellant's jury had used mitigating evidence presented by co-defendant Rangel as a basis for determining whether appellant should live or die.[96] (*Ibid.*)

The trial court denied appellant's motion for a new trial. (21 RT 3353; 45 CT 11916.) The court said that it believed that appellant's counsel's declarations were inadmissible hearsay, but that it had nevertheless considered them and found them insufficient to establish actual misconduct by the jurors. (21 RT 3352-3353.) The court said that, while it understood that appellant's counsel were unable to further investigate juror

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[96] The prosecution did not present any evidence that appellant paged Rangel prior to the murders. The only evidence that Rangel had been paged was presented by Rangel in his case-in-mitigation, when Rangel's father testified that on the night of the murder, Rangel was drunk and attempting to get some sleep when "someone beeped him on the beeper." (18 RT 2883.)

misconduct because the jurors would not talk to them, there was no requirement under the law that the jurors talk to anyone, including the court. (21 RT 3353.) The court said that because appellant's counsel could not provide enough information to establish actual juror misconduct, it had to assume there had been none. (*Ibid.*)

B. The Trial Court Had a Duty to Inquire into the Allegations of Juror Misconduct

Whether the declarations of appellant's counsel were admissible as proof of *actual* juror misconduct, and regardless of whether counsel's representations to the trial court were themselves sufficient to establish such misconduct, the information provided by counsel was more than sufficient to alert the court to the *strong possibility* of prejudicial juror misconduct. Once the trial court became aware of this information, it had a duty to make its own inquiry into the allegations of juror misconduct.

"Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." (*Smith v. Phillips* (1982) 455 U.S. 209, 217.) In line with this principle, this Court has held that "[w]hen a trial court is aware of *possible* juror misconduct, the court must make whatever inquiry is reasonably necessary to resolve the matter." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1255, quoting *People v. Hedgecock* (1990) 51 Cal.3d 395, 417, internal quotation marks omitted, italics in original].) As stated in *People v. Engelman* (2002) 28 Cal.4th 436, 442, a trial court "does have a duty to conduct reasonable inquiry into allegations of juror misconduct."

The Ninth Circuit Court of Appeals has held the same: "A court confronted with a colorable claim of juror bias must undertake an

investigation [that is] reasonably calculated to resolve the doubts raised about the juror's impartiality." (*Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 974-975, citing *Remmer v. United States* (1956) 350 U.S. 377, 379; *Remmer v. United States* (1954) 347 U.S. 227, 230.) As the *Dyer* court explained:

> Given the extremely delicate situation when a juror is suspected of prejudice or misconduct, the trial judge must assume the "primary obligation . . . to fashion a responsible procedure for ascertaining whether misconduct actually occurred and if so, whether it was prejudicial." . . . Where juror misconduct or bias is credibly alleged, the trial judge cannot wait for defense counsel to spoon feed him every bit of information which would make out a case of juror bias; rather, the judge has an independent responsibility to satisfy himself that the allegation of bias is unfounded.

(*Dyer v. Calderon, supra*, 151 F.3d at p. 978.)

While courts have "considerable discretion" in determining how to conduct the mandated inquiry into possible juror misconduct (*People v. Prieto* (2003) 30 Cal.4th 226, 274), the trial court here appears to have been unaware that it even had a duty to conduct a reasonable inquiry into appellant's counsel's allegations of juror misconduct. Indeed, it appears the trial court was unaware that it even had the authority to do so.

The trial court believed that appellant's counsel's allegations raised "an issue of significance and concern" that needed to be "explored fully" prior to it making any further decisions in this case. (21 RT 3310.) According to the court, the information relayed by appellant's counsel raised an "issue that needs to be resolved[,] be thoroughly heard and resolved prior to sentencing." (21 RT 3313.) Nevertheless, the court mistakenly believed that once the trial jurors indicated that they did not want to talk to or be contacted by appellant's counsel, there was no further

means of inquiring into the possibility of juror misconduct. As stated and believed by the trial court, the jurors were not required to talk to "the court or anyone else, for that matter. It is entirely a private issue." (21 RT 3353.) In light of the trial court's mistaken view that it was precluded from conducting a further inquiry into the possibility of juror misconduct, the trial court cannot be deemed to have exercised any discretion whatsoever on this matter. (See *People v. Massie* (1967) 66 Cal.2d 899, 917-918 see also *In re Carmaleta B.* (1978) 21 Cal.3d 482, 496 ["where fundamental rights are affected by the exercise of discretion of the trial court . . . such discretion can only truly be exercised if there is no misconception by the trial court as to the legal bases for its action"]; *People v. Davis* (1984) 161 Cal.App.3d 796, 802 [court abused its discretion where it was "misguided as to the appropriate legal standard to guide the exercise of this discretion"].)

Moreover, even had the trial court recognized its duty, *a fact which is not supported by the record*, and even if the court's failure to make any inquiry whatsoever to resolve appellant's counsel's allegations of juror misconduct could somehow be considered an exercise of discretion on the matter, it plainly abused that discretion. Again, courts have "considerable discretion" in determining how to comply with their duty to conduct an inquiry into possible juror misconduct. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 274.) However, where a party comes forward with evidence that raises a "strong possibility that prejudicial misconduct has occurred" and that reveals the existence of a factual issue that needs to be resolved, the trial court is "required" to hold an evidentiary hearing on the matter. (*People v. Schmeck* (2005) 37 Cal.4th 240, 295; see *People v. Avila* (2006) 38 Cal.4th 491, 604; *People v. Brown* (2003) 31 Cal.4th 518, 581-582; *People v.*

Hedgecock, *supra*, 51 Cal.3d at p. 415, 419.) At that evidentiary hearing, the trial court and, if the court permits, the attorneys may question the jurors on the allegations of misconduct. (*People v. Hedgecock*, *supra*, 51 Cal.3d at pp. 418-419; see *People v. Avila*, *supra*, 38 Cal.4th at p. 604 [court may permit the parties to call jurors to testify at the evidentiary hearing].)

This Court has stated that, "*Normally*, hearsay is not sufficient to trigger the court's duty to make further inquiries into a claim of juror misconduct." (*People v. Avila*, *supra*, 38 Cal.4th 491, 605, quoting *People v. Hayes*, *supra*, 21 Cal.4th at p. 1256, italics added.) The present case, however, is not the norm. The factual allegations made in appellant's counsel's motions and accompanying declarations, as statements of responsible officers of the court, could properly be relied upon by the trial court in determining whether there existed a strong possibility of prejudicial juror misconduct.

The United States Supreme Court has long recognized that, as an officer of the court, an attorney's representations to the trial judge on matters before the court are to be afforded considerable credence. (See *Holloway v. Arkansas* (1978) 435 U.S. 475, 485-486, internal quotation marks omitted ["attorneys are officers of the court, and when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath"].) This Court has implicitly adopted this same reasoning in the context of whether a trial court needs to hold an evidentiary hearing into potential jury misconduct. In *People v. Brown*, *supra*, 31 Cal.4th 518, the prosecutor and defense attorneys spoke with the jurors after the penalty verdict in a capital case, and the jurors stated that they were afraid of retaliation from the defendant's gang as a result of their verdict. (*Id.* at p. 581.) The attorneys relayed the content of their discussions with

the jurors to the trial court in declarations, and based on those declarations, the defense moved for a new trial grounded on juror misconduct. (*Ibid.*) On appeal, this Court was asked to determine whether the trial court erred in failing to hold an evidentiary hearing on the matter. (*Ibid.*) This Court decided this issue by reviewing the attorneys' statements relaying what the jurors had told them in order to determine whether this evidence raised a strong possibility that prejudicial misconduct had occurred, without any indication whatsoever that the attorneys' declarations were insufficient for this purpose.[97] (*Id.* at p. 582; see also *People v. Ayala* (2000) 23 Cal.4th 225, 253 [in determining whether extra security measures were required, witness testimony was not necessary; "the trial court was entitled to rely on and act on the prosecutor's representations, as an officer of the court, that bringing the case to trial posed certain risks"]; *People v. Laudermilk* (1967) 67 Cal.2d 272, 286 [statements of a responsible officer of the court are tantamount to sworn testimony]; *People v. Wolozon* (1982) 138 Cal.App.3d 456, 460, fn. 4 [same].)

Unlike *Brown*, however, where the information relayed by the attorneys to the trial court established that the jurors' concerns of retaliation did not affect their deliberations, and therefore failed to show possible prejudice and a disputed material fact (*People v. Brown*, *supra*, 31 Cal.4th at p. 582), the information relayed by appellant's counsel to the trial court plainly warranted an evidentiary hearing on the issue of juror misconduct.

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[97] In *People v. Medina* (1995) 11 Cal.4th 694, 731, this Court applied similar reasoning in the context of a shackling claim, holding that the trial court could base its shackling determination on the prosecutor's representations, made as an officer of the court, that there was evidentiary support for restraining the defendant.

Appellant's counsel's motions and declarations alerted the trial court to the fact that one juror claimed to have reached his penalty decision by considering only that appellant shot Urrutia in the head, and by refusing to consider any of the other evidence in the penalty trial (45 CT 11761, 11768, 11831, 11838, 11839), notwithstanding the fact that this juror was instructed to consider and take into account *all* of the trial evidence (5 CT 1194-1195; 1211-1212; 20 RT 3176-3179, 21 RT 3294-3296), and had previously declared during jury selection that he would so. (43 RT 11186, 11191). This was a clear indication of possible juror misconduct. (See *In re Hamilton* (1999) 20 Cal.4th 273, 305 ["A sitting juror commits misconduct by violating her oath, or by failing to follow the instructions and admonitions given by the trial court"]; *People v. Williams* (2001) 25 Cal.4th 441, 449, citing *People v. Daniels* (1991) 52 Cal.3d 815, 865 [misconduct where juror violates trial court's instructions]; *People v. Majors* (1998) 18 Cal.4th 385, 417, citing *In re Hitchings* (1993) 6 Cal.4th 97, 111 [juror who conceals facts or gives false answers during selection process commits misconduct]; see also *Eddings* v. *Oklahoma* (1982) 455 U.S. 104, 114-115 [penalty phase jurors "may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration"].)

Appellant's counsel's motions and declarations further alerted the trial court that this juror claimed to have special military training and experience that allowed him to conclude that the manner in which appellant shot Urrutia established an "execution," and that this juror's special training and experience was discussed in the jury room to convince hold-out jurors that, unlike Rangel – who had not shot Encinas in the head – appellant had committed an execution killing, and to convince jurors that, contrary to the

jury's guilt verdicts, appellant intended solely to execute and not to rob Urrutia. (45 CT 11761, 11768, 11831, 11838, 11839; see *In re Malone* (1996) 12 Cal.4th 935, 963 ["injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct"]; *In re Stankewitz* (1985) 40 Cal.3d 391, 397, 399-400 [juror committed prejudicial misconduct when he "advised the other jurors that he had been a police officer for over 20 years; that as a police officer he knew the law; that the law provides a robbery takes place as soon as a person forcibly takes personal property from another person, whether or not he intends to keep it; and that as soon as petitioner took the wallets at gunpoint in this case he committed robbery, whether or not he intended to keep them"]; see also *Jeffries v. Wood* (9th Cir. 1997) 114 F.3d 1484, 1490, overruled on other grounds by *Lindh v. Murphy* (1997) 521 U.S. 320 ["When a juror communicates objective extrinsic facts regarding . . . the alleged crimes to other jurors, the juror becomes an unsworn witness within the meaning of the Confrontation Clause"].)

The trial court also was alerted that, in sentencing appellant to death, the jurors considered the facts that appellant had planned the killings, and that those killings would not have occurred had appellant not paged Rangel that evening (45 CT 11761, 11831, 11839), even though neither the evidence presented at the guilt phase nor the prosecution's evidence in aggravation established those facts. (See *People v. Nesler* (1997) 16 Cal.4th 561, 581, citing *Smith v. Phillips*, *supra*, 455 U.S. at p. 217; *In re Carpenter* (1995) 9 Cal.4th 634, 648, 656 ["An impartial juror is someone 'capable and willing to decide the case solely on the evidence presented at trial"]; *Patton v. Yount* (1984) 467 U.S. 1025, 1037, fn. 12 [noting "[t]he constitutional standard that a juror is impartial only if he can . . . render a

verdict based on the evidence presented in court"].)

The information presented by appellant's counsel to the trial court demonstrated a "strong possibility" that prejudicial misconduct had occurred, and required the trial court to hold a hearing to determine whether such juror misconduct had in fact occurred and prejudiced appellant's right to a fair and reliable penalty verdict. The trial court knew that appellant's counsel were unable to further investigate the alleged misconduct themselves because the jurors would not talk to them. (21 RT 3351, 3353.) The court should have recognized that an evidentiary hearing, at which it could compel the jurors to confirm or deny the information initially relayed to appellant's counsel, was the only means available to determine the truth or falsity of this information. Even if the information before the trial court was not in itself sufficient to establish *actual* juror misconduct, it was more than sufficient to trigger the court's duty to conduct an evidentiary hearing on the issue.

The trial court's failure to conduct a hearing into appellant's counsel's allegations of juror misconduct implicated appellant's rights under the Sixth and Fourteenth Amendments to due process and a fundamentally fair trial by an unbiased jury. (See *Irvin v. Dowd* (1961) 366 U.S. 717, 722 [Sixth Amendment "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors"]; *In re Hitchings*, *supra*, 6 Cal.4th at p. 110, quoting *People v. Galloway* (1927) 202 Cal. 81, 92 ["The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution"]; *Dyer v. Calderon*, *supra*, 151 F.3d at p. 973 [bias or prejudice of even a single juror violates the right to a fair trial].) In the absence of such a hearing, the death verdict rendered in this case cannot meet the

constitutionally recognized requirement of heightened reliability in the determination that death is the appropriate penalty in a capital case. (U.S. Const., 8th & 14th Amends.; see *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Herrera v. Collins* (1993) 506 U.S. 390, 405; *Mills v. Maryland* (1988) 486 U.S. 367, 376-377; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 340; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) The judgment of death entered against appellant must be vacated, and the case remanded to the trial court for a hearing on appellant's allegations of juror misconduct.

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XIX

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

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently-phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (I) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's opinion in *Schmeck*, appellant briefly presents the following challenges to California's capital sentencing scheme in order to urge reconsideration and to preserve these claims for federal review. Should this Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this mandate requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the

pool of murderers eligible for the death penalty. At the time of the offenses charged against appellant, Penal Code section 190.2 contained 19 special circumstances.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application of Section 190.3(a) Violated Appellant's Constitutional Rights

Penal Code section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See 5 CT 1194; 20 RT 3177 [CALJIC No. 8.85].) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide, facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not

required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that this Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Appellant urges this Court to reconsider this holding.

C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof

1. Appellant's Death Sentence Is Unconstitutional Because It Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable-doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4

Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors before determining whether or not to impose a death sentence, except as to proof of prior criminal acts. (5 CT 1203 [CALJIC No. 8.87 (1989 rev.)].)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Ring v. Arizona* (2002) 536 U.S. 584, 604, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, and *Cunningham v. California* (2007) 549 U.S. 270, 127 S.Ct. 856, 871, now require that any fact used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make factual findings: (1) that aggravating factors were present; and (2) that the aggravating factors were so substantial as to make death an appropriate punishment. (5 CT 1211-1212 [CALJIC No. 8.88 (1989 rev.)].) Because these additional findings were required before the jury could impose the death sentence, *Apprendi*, *Ring*, *Blakely*, and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The trial court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on another ground in *People v. Breverman* (1998) 19 Cal.4th 142, 163, fn. 10; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33

Cal.4th 536, 595). This Court has rejected the argument that *Apprendi*, *Ring*, and *Blakely* impose a reasonable-doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges this Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Appellant also submits that the Due Process Clause and the Eighth Amendment require that the sentencer in a capital case be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected the argument that the Due Process Clause and the Eighth Amendment require that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair*, *supra*, 36 Cal.4th 686, 753.) Appellant requests that this Court reconsider its rejection of this argument.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the state had the burden of persuasion regarding the existence of any factor in

aggravation and the appropriateness of the death penalty, and that it was presumed that life without the possibility of parole was the appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here, fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutionally-minimal standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges this Court to reconsider its decisions in *Lenart* and *Arias*.

Even assuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the reasonable possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance that the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that

warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) This Court reaffirmed this holding after the decision in *Ring v. Arizona, supra.* (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and that application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the Equal Protection Clause of the federal Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the Equal Protection Clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the

requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the Equal Protection Clause of the federal Constitution, and by its irrationality violate both the Due Process Clause and Cruel and Unusual Punishment Clause of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks this Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (5 CT 1203 [CALJIC No. 8.87].) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson, supra*, 25 Cal.4th 543, 584-585.) Here, the prosecutor argued that appellant's "act of beating up Paul [Juhn] in jail" constituted aggravating evidence the jury was to consider. (20 RT 3234.)

The United States Supreme Court's recent decisions in *Cunningham v. California*, *supra*, 549 U.S. 270, *Blakely v. Washington*, *supra*, 542 U.S.

296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim in *People v. Ward* (2005) 36 Cal.4th 186, 221-222, but asks this Court to reconsider its decision in *Ward*.

4. The Instructions Caused the Penalty Determination to Turn on An Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (5 CT 1211-1212.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that holding.

5. The Instructions Failed to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather, it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

This Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

6. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Penal Code section 190.3 directs the jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that

is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the non-reciprocity involved in explaining how a death verdict may be warranted, but failing to explain when a verdict of life without the possibility of parole is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 292-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374;

Lockett v. Ohio (1978) 438 U.S. 586, 604; *Woodson v. North Carolina, supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that the jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that appellant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

8. The Penalty Jury Should Have Been Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th & 14th Amends.), and his right to the equal protection of the laws (U.S. Const., 14th Amend.).

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to ensure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing to Require That the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these arguments. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges this Court to reconsider its decisions on the necessity of written findings.

E. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see 5 CT 1194-1195 [CALJIC No. 8.85]; Pen. Code, § 190.3, factors (d) and (g)) acted as barriers to the consideration of mitigation in violation of the Sixth, Eighth, and Fourteenth Amendments. (See *Mills v. Maryland, supra*, 486 U.S. 367, 384; *Lockett v. Ohio, supra*, 438 U.S. 586, 604.) Appellant is aware that this Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

A number of the sentencing factors set forth in CALJIC No. 8.85

were inapplicable to appellant's case, including factors (e) [victim a participant in or consented to homicide] and (f) [offense committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation of his conduct]. The trial court failed to omit those factors from the jury instructions, likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of appellant's constitutional rights. Appellant asks this Court to reconsider its decision in *People v. Cook, supra*, 39 Cal.4th 566, 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely As Potential Mitigators

In accordance with customary state-court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. This Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). Appellant's jury, though, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black*

(1992) 503 U.S. 222, 230-236.) As such, appellant asks this Court to reconsider its holding that the trial court need not instruct the jury that certain sentencing factors are relevant only as mitigators.

F. The Prohibition Against Intercase Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., intercase proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct intercase proportionality review violates the Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges this Court to reconsider its failure to require intercase proportionality review in capital cases.

G. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes, in violation of the Equal Protection Clause of the Fourteenth Amendment. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence,

and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.42, (b) & (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that this Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks this Court to reconsider them.

H. California's Use of the Death Penalty As a Regular Form of Punishment Falls Short of International Norms

This Court has repeatedly rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, and "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook, supra*, 39 Cal.4th 566, 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges this Court to reconsider its previous decisions.

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APPELLANT JOINS IN THE ARGUMENTS SUBMITTED BY CO-APPELLANT RUBEN RANGEL

Pursuant to California Rules of Court, rule 8.200, subdivision (a)(5), appellant joins in the arguments submitted by co-appellant Ruben Rangel to the extent that those arguments benefit appellant in his automatic appeal.

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XXI

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT COLLECTIVELY UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

As previously argued herein concerning the three related errors regarding the prosecution's failure to fully and timely provide pretrial discovery to appellant's trial counsel (see Argument IV, *ante*), even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 298 ["The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair"]; *People v. Hill* (1998) 17 Cal.4th 800, 844-848 [reversing entire judgment in capital case due to cumulative error]; *People v. Criscione* (1981) 125 Cal.App.3d 275, 293 [cumulative prejudice from repeated acts of prosecutorial misconduct required reversal of sanity verdict]; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"]; see also *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [addressing claim that cumulative errors so infected "the trial with unfairness as to make the resulting conviction a denial of due process"].) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude

combined with other errors].)

In appellant's case, each of the guilt phase errors, standing alone, was sufficient to undermine the prosecution's case and the reliability of the jury's ultimate verdict, and none can properly be found harmless beyond a reasonable doubt. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-282; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) These errors, viewed separately or in combination, deprived appellant of his state and federal constitutional rights to a fair trial, due process and a reliable determination of guilt. (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 330-331; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

Because the cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7, 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643), appellant's convictions must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital-murder conviction for cumulative error].) Accordingly, these errors considered cumulatively establish violation of appellant's right to a fair trial, and the convictions and special circumstance findings must be reversed.

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of

appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing penalty phase].) In this context, this Court has expressly recognized that evidence that may not affect the guilt determination can have a prejudicial impact on the penalty trial:

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal. But in determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence, the misconduct and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in the absence of error.

(People v. Hamilton (1963) 60 Cal.2d 105, 136-137, overruled on another ground in *People v. Morse* (1964) 60 Cal.2d 631, 637, fn. 2, and disapproved of on another ground in *People v. Daniels* (1991) 52 Cal.3d 815, 866; see also *People v. Brown*, *supra*, 46 Cal.3d at p. 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase]; accord, *Arizona v. Fulminante* (1991) 499 U.S. 279, 301-302 [erroneous introduction of evidence at guilt phase had prejudicial effect on sentencing phase of capital murder trial]; *United States v. McCullough*

(10th Cir. 1996) 76 F.3d 1087, 1101-1102 [erroneously admitted confession harmless in guilt phase but prejudicial in penalty phase].)

In the present case, there is at least a reasonable possibility that the guilt and penalty phase errors in this case, singly and in combination, had a prejudicial effect upon the jury's consideration of the evidence presented at the penalty phase, as well as the jury's ultimate decision to return a death sentence. Reversal of the death judgment is therefore mandated here because it cannot be shown by the People that the penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341; *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Brown*, *supra*, 46 Cal.3d at p. 466.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions, special circumstance findings, and death sentence.

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CONCLUSION

For the reasons stated above, the entire judgment must be reversed.

DATED: December 10, 2009

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

PETER R. SILTEN
Supervising Deputy State Public Defender

Attorneys for Appellant Mora

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(b)(2))

I, Peter Silten, am the Deputy State Public Defender assigned to represent appellant Mora in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is approximately 77865 words in length.

PETER R. SILTEN

Attorney for Appellant Mora

DECLARATION OF SERVICE

Re: *People v. Mora and Rangel* No. S079925

I, Glenice Fuller, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; that I served a true copy of the attached:

APPELLANT MORA'S OPENING BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Office of the Attorney General
Attn: John Yang
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Joseph Adam Mora
(Appellant)

Addie Lovelace
Death Penalty Appeals Clerk
Criminal Courts Building
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Each said envelope was then, on December 10, 2009, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Signed on December 10, 2009, at San Francisco, California.

Glenice Fuller
DECLARANT