IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. JOSEPH ADAM MORA, and RUBEN RANGEL Defendant and Appellant.	**CRIM. No. S079925** **Automatic Appeal** **(Capital Case)** **Los Angeles County** **Superior Court** **No. CR TA037999**

APPELLANT RANGEL'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Los Angeles
HONORABLE VICTORIA M. CHAVEZ

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STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, § 1239.)[1/] The appeal is taken from a judgment which finally disposes of all issues between the parties and is automatically taken to this Honorable Court under Penal Code section 1239, subdivision (b).

STATEMENT OF THE CASE

A. Arrest through Preliminary Examination

On August 24, 1997, Mr. Rangel was arrested. (1CT 103.)[2/] Mr. Rangel was first arraigned on September 11, 1997. (1CT 123-124.) On April 23, 1998, a four-count complaint was filed in the Los Angeles County Municipal Court. (2CT 495-497.)

On May 5, 2008, after a two-day preliminary hearing, appellant was held to answer and an Information was filed charging appellant and Joseph Adam Mora with two counts of first degree murder and two counts of attempted second degree robbery of Andres Encinas and Antonio Urrutia on or about August 24, 1997 (Pen. Code, § 187). The complaint alleged that in the commission of the offenses he used a firearm (a handgun) (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)(1), 1192.7, subd. (c)(8)) and the special

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1 Hereafter, all statutory references are to the Penal Code unless otherwise indicated.

2 Throughout this brief, the following abbreviations are used: "CT" refers to the Clerk's Transcript, "Supp CT" to the Supplemental Clerk's Transcript and "RT" to the Reporter's Transcript of the trial proceedings, each preceded by the appropriate volume number.

allegations that the murders were multiple and committed during the commission of the robberies. (§§ 211, 190.2(a)(3)(17); 2CT 499-504.)

B. Information and Pretrial Motions

A four-count information filed on May 5, 1998, in the Los Angeles County Superior Court charged Mr. Rangel with the following crimes: first degree murder of Andres Encinas and Antonio Urrutia (§ 187, subd. (a); counts one and two) and attempted second degree robbery of Andres Encinas and Antonio Urrutia (§§ 664/211), both offenses alleged to have been committed with a firearm (§§ 1203.06(a)(1); 12022.5, subd. (a)(1)), and both alleged as serious felonies within the meaning of Penal Code section 1192.7, subdivision (c). Two special circumstances were alleged: multiple murder and that the murder was committed in the commission of a robbery (§§ 211, 190.2, subds. (a)(3)(17)). (2CT 501-504.)

Mr. Rangel pleaded not guilty to all counts and denied the allegations. Mr. Rangel remained in custody. (2CT 547-548.)

On July 9, 1998, the prosecution gave notice that if the special circumstances were proved true they would seek the death penalty. (3CT 565.) On that same date, Rangel filed a motion for informal discovery. (3CT 553-564.) On August 10, 1998, Rangel received some discovery from the prosecution. (3CT 567.) On November 23, 1998, the prosecution filed a motion in support of nondisclosure of prosecution witnesses addresses and phone numbers. After a hearing, this motion was granted. (3CT 768-782; 11/23/98

RT A42-A51.) Mid-trial, the defense made repeated motions for mistrial based upon late police reports provided by the prosecution to the defense which included, among other things, several witness statements not previously disclosed. The motions were denied. (4CT 964-968, 999.)

On November 23, 1998, the prosecution filed a statement in aggravation pursuant to § 190.3 asserting that they intended to introduce the following evidence in the penalty phase: (1) On December 4, 1995, Rangel was charged with burglary, vandalism and dissuading a witness, and the case was resolved by Rangel pleading guilty to burglary; (2) on May 23, 1998, Rangel was accused of attempted murder while in the Los Angeles County Jail and put in 10-day segregation; (3) On February 6, 1996, Rangel was accused of "shot-calling" and threats while in the county jail and segregated for six days; and (4) victim impact evidence from six people: three members of Antonio Urrutias' family and three members of Andreas Encinas' family. (3CT 783-784.) Rangel filed a motion in opposition and a hearing was held on December 8, 1998. (3CT 797-822, 866.) The motion was argued and denied on the first day of the penalty phase, February 8, 1999. (4CT 1045.)

The court denied a motion to sever the defendants based on gun shot residue which was found only on Mora and not Rangel. (3CT 880; 2RT 82-91) The gun shot residue evidence was later excluded on Mora's motion based upon late disclosure by the prosecution. (4CT 878, 880.)

C. The Guilt Phase of the Trial

On January 12, 1999, a twelve-person jury and four alternates were sworn. (4CT 893) On that same day, the prosecution commenced the presentation of its case-in-chief and presented 13 witnesses over the next 13 trial days. (4CT 894, 897, 901-902, 916, 964, 971, 975-976, 982, 986, 990, 995-996.) The trial court granted the prosecution's motions to exclude evidence of a bullet from the face of victim Andres Encinas and evidence of the blood alcohol content of both victims. (4CT 990.) At the close of the prosecution's case, the trial court denied Rangel's motion for judgment of acquittal pursuant to § 1118.1. (4CT 996.) The defense called seven witnesses on February 1 and 2, 1999. (4CT 996, 999.) Rangel made a motion for mistrial based on repeated instances of untimely disclosure of material evidence which was argued and denied. (4CT 999; 13RT 1990-1998.) Over defense objection, the prosecution was allowed to re-open their case-in-chief and recalled Detective Branscomb. (4CT 1003.) Both sides gave closing arguments and the court instructed the jury on February 3 and 4, 1999. (4CT 1007.)

The jury began deliberation on February 4, 1999, at 2:55 p.m. (4CT 1007.) On February 5, 1999, after about two-and-a-half hours of deliberation, the jury returned its verdicts. (4CT 1010-1019, 1036-1037A.) It found Mr. Rangel guilty as charged and found true the allegations of the special circumstances and the personal use of a firearm. (*Ibid.*)

D. The Penalty Phase of the Trial

The penalty phase commenced on February 8, 1999. (4CT 1045.) On February 17, 1999, the jury began deliberations on the penalty phase. (4CT 1087.) That same day, the jury requested and was granted read-back of the testimony of three prosecution witnesses. (4CT 1088.) On February 18, 1999, the jury returned its verdict fixing Rangel's punishment at death. (5CT 1221, 1224.)

The trial court granted a defense request to disclose juror information as to jurors no. 3, 11 and 12 only. (45CT 11827.) Rangel's motions for a new trial and for modification of sentence (§§ 1181.6, 190.4, subd. (e)) were filed March 8, 1999 and heard and denied by the court on May 27, 1999. (4CT 11770-11801; 45 CT 11906; 21A RT 3315-3379.)

The court imposed the death sentence on counts one and two (§ 187, subd.,(a)) and remanded Mr. Rangel to the custody of the warden at San Quentin. (45CT 11896A-11913, 11923.) Rangel was also sentenced to twelve years to be served concurrently on counts three and four (§ 664/211). (45CT 11914-11915, 11923.)

This appeal is automatic, arising from a final judgment of death. (Pen. Code, § 1239, subd. (b).)

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STATEMENT OF FACTS

A. Guilt Phase

1. The Prosecution's Case

a. The Deaths of Encinas Encinas and Anthony Urrutia

On August 24, 1997, early in the morning, Paula Beltran and her friends Yesenia and Mayra, left a club. (3 RT 398.) Paula was driving, Mayra was in the front passenger seat, and Yesenia was in the back seat. (7 RT 1307.) They were on their way to meet Paula's boyfriend, Andy Encinas, when Paula's car got a flat tire. (3 RT 398.) Paula paged Encinas, who telephoned her. (3 RT 399.) She told him AAA was coming to fix the tire, but he insisted on coming to meet her. (3 RT 399.) Encinas had left a party in Wilmington, and his friends Anthony Urrutia and Fidel Gregorio were with him; Anthony was sitting in the front passenger seat, and Fidel was sitting in the backseat on the passenger side. (3 RT 399, 4 RT 505, 623.) AAA fixed Paula's tire, and Encinas decided to follow Paula to make sure she arrived home safely. (3 RT 400.)

Yesenia wanted to be taken home first, so Encinas followed Paula to Yesenia's house. (3 RT 401-402. They arrived about 3:00 a.m. (3 RT 429.) Encinas parked his vehicle in front of Paula's car on the street at 1023 South Castlegate. (4 RT 476.) Encinas needed to use the restroom, so Paula, Yesenia, Mayra, and Encinas got out of their cars and went inside Yesenia's house. (3 RT 402.) Everyone then left the house and started to walk back to their cars, with Yesenia stopping about halfway. (3 RT 403.) The

others saw two individuals walking toward their cars from behind. (3 RT 404, 433.) Gregorio had fallen asleep in the backseat of Encinas' vehicle, but woke up and saw Encinas, Paula, and Mayra walking out of Yesenia's driveway. (4 RT 623.) He also saw two individuals on the sidewalk, about three or four feet away. (4 RT 623, 5 RT 660.) Street lights were lit and it was clear enough to see faces. (5 RT 714.) The two individuals passed the other three, about three or four feet from Mayra. (7 RT 1309.)

One individual asked Encinas, "Do you want to go to sleep?" (3 RT 406.) Encinas did not respond, but told Paula to go to her car. (3 RT 406.) Paula told Encinas to go to his. (3 RT 406.) The individual then said, "Why are you quiet, I asked you a question?" (3 RT 406.) Paula and Mayra opened their car doors and Encinas walked to his vehicle. (3 RT 406.) After Paula was in her car and Encinas was getting into his, the same person who had spoken to Encinas walked in front of Paula's car and followed Encinas to the driver's side of his vehicle while the other person went to the passenger side where Urrutia was sitting. (3 RT 407, 438, 491.)

Encinas got in the car and said, "Let's get out of here," in Spanish. (5 RT 699.) The first individual pointed a gun at Encinas, and the other pointed a gun at Urrutia. (3 RT 407.) The person on the driver's side said, "Check yourself, check yourself, give me your wallet." (5 RT 699.) The person on the passenger's side told Urrutia to give him his wallet. (5 RT 699.) The two were each about 6 feet from Encinas and Urrutia, the gun about 12-15 inches from Encinas's head. (4 RT 554, 604.) The gun that the person on

the driver's side had was black, between 8 and 10 inches, and might have been an automatic with a clip (5 RT 638.) Paula described the guns as "square" and thought they were either .45 or 9 mm automatics. (4 RT 509.)

Mayra reclined her seat into a prone position and screamed and cried at Paula to leave. (5 RT 1315.) Paula backed her car up, making a U-turn and left to find a phone to call 911 since she could not find her cell phone. (3 RT 407, 4 RT 554, 8 RT 1318.) She did not hear any shots fired. (4 RT 604.)

Encinas reached for his wallet, but Urrutia did not. (5 RT 699.) It was about 3-4 seconds between the first shot (at Encinas) and the second shot (at Urrutia). (5 RT 710.) It was another three seconds from the second shot to the third and fourth. (5 RT 710.)

b. The Initial Investigation: Witnesses to the Crime.

i. Paula Beltran

The police came to the phone booth from which Paula made the 911 call, and an initial report was made. (8 RT 1318.) Paula described the person who spoke to Encinas as having short hair, and wearing light-colored pants and a dark short-sleeve shirt. (3 RT 410.) The shirt sleeve fell about 3 inches above his wrist, and thinks the shirt had a collar but was not tucked in. (3 RT 462.) Paula described the other person as also having short hair, wearing light-colored pants and no shirt. (3 RT 410.) Paula did not have any trouble identifying them in the lineup, but noted that their body weight had changed between then and the time of trial. (4 RT 581.)

ii. Fidel Gregorio

Fidel had arrived at a party about 7:00 p.m. the night of the incident, and drank 4-5 beers before 11:00 p.m. when he stopped drinking. (5 RT 686.) He left the party with Encinas and Urrutia at 2:45 a.m. (5 RT 686.) He was awake in the vehicle until after Paula's tire was fixed, when he fell asleep on the way to Yesentia's house. (5 RT 690.) He did not wake up until Encinas was already at the house and Encinas had left the car. (5 RT 690.) He saw two individuals on the sidewalk about three or four feet away. (5RT 660.) Fidel's window was rolled up and he did not hear any conversation. (5 RT 699.) He closed his eyes again after looking around, and did not open them until Encinas got back in the car saying, "Let's get the hell out of here," in Spanish. (5 RT 699.)

Fidel described the suspects as two Latin guys, one of whom looked young. (4 RT 639.) The two perpetrators were each about 6 feet from Encinas and Urrutia, the gun about 12-15 inches from Encinas's head. (4 RT 554, 604.) The person on the driver's side had a mustache and was wearing a blue outfit, like dark blue nylon jogging pants, and a blue shirt with a red stripe. (4 RT 639, 5 RT 673, 699.) That person said, "Check yourself, check yourself, give me your wallet." (5RT 699.)

Fidel saw the face of the person on the passenger side and then saw the gun. (5 RT 763.) The person on the passenger's side told Urrutia to give him his wallet. (5RT 699.) Encinas reached for his wallet, but Urrutia did not. (5 RT 699.) It was about 3-4 seconds between the first shot (at Encinas) and the second shot (at Urrutia). (5 RT 710.) It was

another three seconds from the second shot to the third and fourth. (5 RT 710.) The gun that the person on the driver's side had was black, between 8 and 10 inches, and might have been an automatic with a clip (5 RT 638.)

The person on the passenger side was not wearing a shirt, but was wearing baggie pants, Joe Boxer shorts and had a tattoo on his belly. (4 RT 639.) During the line-up, the person who had not been wearing a shirt at the time of the shooting was now wearing a shirt, and Fidel asked that he raise his shirt so he could identify the tattoo he had seen, which he was able to do. (5 RT 651.) The person was also wearing the same Joe Boxer shorts. (5 RT 651.)

iii. Sheila Creswell

Sheila Creswell could not sleep early in the morning of August 24, 1997, because of a loud party across the street. (5 RT 787.) She heard three shots sometime between 3:00 and 4:00 a.m., and getting out of bed and looking out her window, she saw two men that she had previously seen on different occasions (later identified as Rangel and Morw) run into the south door of the house across the street from a burgundy truck. (5 RT 772, 775, 780, 787, 810.) She kept looking out the window and recognized Rangel as being at the party, though she did not recall seeing Mora. (5 RT 787.) She could only describe one of them as Mexican-American with a shaved head. (5 RT 775.) She never saw the full face of either man, only the right sides of their faces for about two seconds. (5 RT 778.)

iv. Ramon Valadez

Ramon Valadez arrived alone at the home of Lourdes Lopez around dusk to exchange a refrigerator. (6 RT 841.) He ended up staying, drinking beer and snorting methamphetamine at the apartment. (6 RT 883.) Ramon testified that two men arrived together a couple of hours after he did, at about 11:00 p.m. (6 RT 844, 877.) A dark Oldsmobile parked in the driveway and Rangel and Mora came inside, but he could not say that both people arrived in the car. (6 RT 844.)

At some point, while Valadez was in the kitchen or living room, he heard a "bunch" of shots and Rangel and Mora came running inside. (6 RT 849, 883.) Valadez originally testified that he was in the kitchen when the two came inside, but later admitted he was in the living room. (6 RT 849, 6 RT 883, 993.). Valadez stated that the two came inside with firearms, Mora with a black machine gun and Rangel with a silver/chrome gun with a bullet stuck in it, which he knew because he heard someone mention it. (6 RT 849, 873, 975.) He does not know which person said it, but he heard, "I'd have shot them more, but the damn bullet got stuck." ((6 RT 975.) Valadez testified that they were "bragging," saying that they "fucking blew their heads off." (6 RT 849.) Rangel was wearing a black shirt and Mora was not wearing one. (6 RT 858.) Rangel took his shirt off and wiped his whole torso and hands with it. (6 RT 858.) At some point around this time, the cars were moved to allow the Oldsmobile into the garage. (6 RT 855, 6 RT 896.) Rangel and Mora left the apartment with the guns through the kitchen door, but did not

have the guns when they returned. (6 RT 975.)

About dawn, the Compton police began shining flashlights in the windows of the apartment and Valadez let them in through the living room door. (6 RT 862.) The police took everyone who was in the apartment outside and interviewed them. (6 RT 862.)

v. Lourdes Lopez

Lourdes testified at trial that Mora was the father of Lourdes Lopez' three-year old daughter. (6RT 1003-1004; 8RT 1261; CT 32.) Lourdes and her daughter were living at the Castlegate house with Jade Gallegos and a roommate named Nancy. (6RT 1003-1004; 7RT 1168; 8RT 1283-1284.) Earlier in the evening on the night of the shooting, Lourdes, her daughter, Jade and three other friends attended a child's birthday party. (6RT 1003; 7RT 1177; 8RT 1261; 1CT 11-14.) At the party they were threatened by several gang members and, as a they were leaving, one of the gang members assaulted Gallegos. (7RT 1176-1177, 1231; 8RT 1261, 1280-1281; 1CT 13-14.)

Lourdes was concerned that these same gang members knew where she and Gallegos lived and would come to their house to continue the confrontation, so she paged Mora to come to her house. Mora arrived with appellant around midnight. (6 RT 1005-1010; 7RT 1177; 1CT 14-16, 32.) Lourdes had left the apartment around 11:00 p.m., but later returned, about midnight. (6 RT 1008, 1075.) When she arrived, she saw appellant sitting in her kitchen with a gun, but cannot describe it because it was in his waistband and she only glanced at it. (6 RT 1075.) At the time, Mora was drinking and getting high.

(6 RT 1075.) Lourdes herself had 2 or 3 one-inch lines of methamphetamine, as well as 4 or 5 twelve-ounce cans of beer. (7 RT 1286.) Lourdes did not see Mora and Rangel leave the house. (6 RT 1008.) She heard two or three gunshots while she was in the bathroom, and saw appellant and Mora standing in the kitchen door. (6 RT 1016.) She did not see anyone run into the apartment with guns. (6 RT 1075.) She did hear cars being moved, after which someone turned the lights and music off. (6 RT 1081, 1087.) Appellant had been wearing a dark-colored, button-down dress shirt, which she noticed had been removed when the police arrived at 5:00 a.m. (6 RT 1105, 1165.)

After the shooting, Lourdes gave a taped statement to the police.[3/] However, at trial she testified that much of what she told police during the tapes was not true but that she felt intimidated by the police to tell them what they wanted to hear because they threatened to call social services and have her daughter taken away. (7RT 1137-1146, 1158-1159 1183, 1219-1220; 8RT 1238-1239, 1291-1293.) The tapes revealed that Lourdes told the police that she saw Mora 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. (1CT 3-7, 18-22.) Lourdes told police she saw Mora with a gun and thought the gang members from the party had come by and that either they had shot at Mora or Mora had shot at them. (1CT 21-24.) Lourdes also told police that Mora ran into the kitchen

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[3] Audio tapes of Lourdes' interviews with police were played for the jury at trial. (8RT 1261; 1CT 1-34; Peo. Exhs. 16 & 17.)

and grabbed her car keys, then told her to go into the bedroom and stay with their daughter because he did not want his daughter to wake up see him go to jail. (1CT 4, 21, 28-31.) Lourdes then told police that Mora moved his car into the garage and parked her car behind it. (1CT 4.)

vi. Mayra Fonseca

After making an initial report at the phone booth, Mayra was taken down to the police station and made a statement. (8 RT 1320.) She was then taken back to Castlegate where potential suspects were shown to her one at a time. (8 RT 1320.) She identified appellant and Mora as the perpetrators. (8 RT 1321.)

When Mayra first saw the two men, they were facing her and she was close enough to see their facial features. (9 RT 1384.) One person had a mustache and was wearing gray pants with no shirt. (9 RT 1384.) The other person had on brown pants, a white shirt, and another shirt on top. (9 RT 1386.) Appellant was the person that ran between Paula's and Encinas's cars with a "chromed" gun, to Encinas's side of the car. (8 RT 1323, 1325, 9 RT 1390.) Mayra did not hear any gunshots. (9 RT 1422.)

vii. John Youngblood

John was watching television in his bedroom early on the morning on August 24, 1997, when two gunshots attracted his attention and he looked out an east-facing window for about 5-10 seconds. (10 RT 1626, 1643.) There were two people standing outside of a Toyota 4-Runner, one facing the passenger door with his back to John, and the other

facing northwest. (10 RT 1626.) He then went to his front door and heard four more gunshots when he was at his front door. (10 RT 1629, 1646, 1648.) John did not have trouble seeing, but did not see anyone fire shots. (10 RT 1629, 1648.) John identified appellant as the person on the driver's side of the vehicle, and who then walked by John's front door, about 15-20 feet from John. (10 RT 1631, 1676.) John went outside to the 4-Runner to calm down a hysterical person outside the vehicle, and then looked inside at two Hispanics who did not seem to be alive. (10 RT 1634.)

c. Initial Investigation: Law Enforcement

i. Officer Raymond Brown and Officer Lepe

At 3:35 a.m. on August 24, 1997, Officer Brown and Officer Lepe responded to a call at 1023 South Castlegate. (9RT 1429.) Upon arrival, they saw a 4-Runner with two subjects sitting in the front seat. (9RT 1429.) The subjects were non-responsive to verbal inquiries by the officers, and upon closer inspection once could see that one person had been shot in the face and the other shot in "chest area, or the head area." (9RT 1429.) He saw bullet casings around the driver's side of the vehicle, and there might have been one or two on the passenger side as well. (9RT 1429, 1478.) Officer Brown saw wallets in the vehicle and looked in them to identify who was in the vehicle. (9RT 1432.)

The officers cordoned off the scene and radioed for paramedics and marked what they could as evidence. (9RT 1433.) The lighting in the area was "very, very bright." (9RT 1433.) Detectives and officers went door-to-door asking if people knew anything

about what had happened. (9RT 1434.) Officers Lepe and Strong gained entry to the house at 1005 South Castlegate and brought potential suspects out. (9RT 1434.) They also went into the garage of the home and saw two weapons on the floorboard of the passenger side of a burgundy Oldsmobile, which weapons were photographed and collected as evidence. (9RT 1436.)

Officer Lepe noted on a booking slip that Jade Gallegos, one of the people detained at Lourdes's residence, was 5'8", wearing a blue shirt and shorts at about 12:45 p.m. on August 24, 1997. (12RT 1945.) He was the officer that searched Gallegos at the time of booking and saw there was a tattoo on his stomach, but he does not remember what it looked like. (12RT 1947.)

ii. Detective Marvin Branscomb

Detective Branscomb was the original investigating officer in this case, and was called to 1023 South Castlegate on August 24, 1997, where he arrived after 5:55 a.m. (10RT 1521, 1556.) Det. Branscomb placed numbers on the evidence already marked and took pictures of the evidence, including casings, a ring, wallets, and bullet holes, finally collecting the evidence which he later booked into Property. (10RT 1523, 1525.) He also went to 1005 South Castlegate and photographed and collected several items of evidence, including a Tec-9 semi-automatic pistol and a 9mm semi-automatic pistol, from the detached garage. (10RT 1539.) The guns were secured in a gun box for transport to the crime lab to be fingerprinted and for ballistics tests. (10RT 1543.) He returned later in

the day to 1005 South Castlegate and recovered a black shirt. (10RT 1552.)

iii. Officer Strong

On August 24, 1997, Officers Strong and Slutske responded to 1023 South Castlegate, where Officers Brown and Lepe were already. (11RT 1756, 1758.) Officer Strong had received a physical description of the perpetrators over the radio while he was en route to the scene. (11RT 1761.) He did door-to-door investigations and went to 1005 South Castlegate, where Lourdes answered the door. (11RT 1760-1762.) Everyone at the residence was taken outside. (11RT 1769.) Lourdes gave consent to search her home, and a search was conducted. (11RT 1770.) No weapons were found in the residence, but a gun case for a 9mm weapon was. (11RT 1770.) Lourdes also gave consent for the garage to be searched, and officers found a handgun and an Intratec 9mm in an Oldsmobile parked in the garage. (11RT 1775.) Lourdes said that Mora owned the car. (11RT 1775.)

Officer Strong had noted Budweiser cans inside the residence at 1005 South Castlegate, as well as a Budweiser can underneath the driver's side of the victim's vehicle, though he did not recover any of the cans from the residence (11RT 1778, 1779.)

iv. Officer Gonzalo Cetina and Officer Timothy Dobbin

Officer Cetina is an officer for the City of Compton and received a call about 3:15 a.m. on August 24, 1997, to respond to two possible gunshot victims in the area of Castlegate. (12RT 1897.) He responded to Alondra and White and made contact with

Paula and Mayra, taking them to the Compton Police Station, where he interviewed Paula. (12RT 1899, 1901, 1903.) His report states that Paula described one perpetrator as a male Latin, approximately 5'8", 165 pounds, approximately 20 years old, with a shaved head, medium complection, no shirt, and gray pants. (12RT 1903.) The second perpetrator was also described as a male Latin, approximately same height and weight, shaved head, medium complexion, light brown clothing. (12RT 1903.) The interview was not tape-recorded. (12RT 1904.) Officer Cetina then took Paula back to South Castlegate to attempt to identify the perpetrators and remained in the vehicle with her while she was viewing the subjects. (12RT 1904.) She positively identified two people, who it was later learned were appellant and Mora. (12RT 1912.)

Officer Dobbin responded with Officer Cetina, and does not recall having a description of the perpetrators before meeting with Paula and Mayra. (13RT 2010.) Dobbin interviewed Paula at the Compton Police Department. (13RT 2012.) Dobbin then transported Mayra back to South Castlegate for the identification. (13RT 2014.) Mayra identified the person later learned to be Mora. (13RT 2017.) She also made another "uncertain" identification, which Officer Dobbin did not include as he wanted only "positive" identifications. (13RT 2026.)

v. Officer Ed'ourd Peters

Officer Peters arrived at the scene about 3:33 a.m. on August 24, 1997, and interviewed Fidel Gregorio about 4:55 a.m., then took him down to a field show-up.

(12RT 1959.) Fidel identified the person later learned to be Mora as the person who shot Urrutia. (12RT 1979.)

d. The Forensic Investigation

Dale Higashi, as a senior criminalist with the Los Angeles County Sheriff's Department, analyzed two firearms connected with this case, an Intratec semi-automatic pistol and an Astra semi-automatic pistol. (12RT 1825, 1827, 1830.) Both guns will eject casings to the right and rear of the shooter. (12RT 1829, 1830.) On the Astra, there was a round of ammunition not properly inserted in the chamber, which caused the gun to jam and the trigger to be deactivated. (12RT 1831.) He examined casings taken into evidence - three were fired from the Astra and one was fired from the Intratec. (12RT 1832.) The bullet that killed Encinas came from the Astra, and the bullet that killed Urrutia came from the Intratec. (12RT 1835.)

e. The Autopsies

Dr. Riley performed an autopsy on Encinas on August 28, 1997. (11RT 1716.) At the autopsy, Dr. Riley observed a gunshot entry wound to the shoulder of the left arm, which went through the skin and soft tissue of that arm, re-entering the body on the left side of the chest. (11RT 1718.) The bullet went through a rib on the left side as well as the left lung, then penetrated the aorta before coming to rest inside the body on the left side of the chest. (11RT 1718.) The bullet was recovered. (11RT 1718.) The bullet could cause death because it went through the left lung, causing bleeding, and caused a

defect in the aorta, so there was an accumulation of blood inside the chest cavity. (11RT 1724.)

Dr. Riley also performed the autopsy on Urrutia on August 28, 1997. (11RT 1724.) Urrutia died as the result of a gunshot wound to the right side of his face at the nostril, the bullet going through his mouth and throat, perforating a large blood vessel on the left side of the neck, which caused him to bleed to death. (11RT 1724, 1727.) The bullet was recovered from the back of the left side of the neck. (11RT 1730.) There was evidence that Urrutia aspirated a considerable amount of blood. (11RT 1730.) There was also a gunshot graze wound on the right forearm near the level of the wrist, which may or may not have come from the same bullet. (11RT 1727.)

The range from which either Encinas or Urrutia was shot could not be determined due to no deposit, soot, or stippling of the wounds.(11RT 1736, 1740.)

2. The Defense Case as to Appellant

a. Michelle Lepisto

Michelle Lepisto, senior criminalist with the Los Angeles County Sheriff's Crime Lab, testified regarding the presence of gunshot residue as to appellant only. (13RT 2039.) According to the samples obtained from appellant, his hands contained no particles of gunshot residue associated with the casings found at the crime scene and therefore no conclusion could be drawn based on the results of the analysis as to whether appellant fired one of the weapons involved in the crime. (13RT 2051.) However, just

because no residue was found does not mean that appellant did not fire the weapon, as gunshot residue particles will dissipate or can otherwise be lost. (13RT 2052.)

b. Officer Slutske

Officer Slutske responded with his training officer, Officer Strong, and conducted door-to-door interviews. (13RT 2075.) He interviewed John Youngblood, who lived at 1019 South Castlegate, and does not recall that Youngblood told him he could identify the perpetrators, otherwise it would have been included in his report. (13RT 2078.)

c. Officer Ronald Thrash

Officer Thrash responded to the scene at 5:55 a.m and was involved in witness interviews. (13RT 2088.) He went back to the station and made contact with appellant after 7:30 a.m., collecting gunshot residue from appellant a few minutes before 9:37 a.m. (13RT 2088, 2101). He does not recall that appellant's hands were bagged to protect them from contamination or wiping them off, and it would have been his duty to remove the bags. (13RT 2104, 2106.)

B. Penalty Phase

1. Summary

The penalty phase consisted of separate aggravation evidence against appellant and Co-Defendant Mora, victim impact testimony from the victims' friends and families, and mitigation evidence as to appellant and Mora.

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2. The Prosecution's Penalty Phase Evidence

a. Aggravation Evidence Relating to Appellant

In 1995, appellant and another individual broke the window of Alejo Esquer Corral's truck when it was parked in front of Corral's house and removed a stereo and speakers. (16RT 2512.) A "13" and a "T-like thing" were spray-painted on the truck's bra. (16RT 2512.) When the owner of the vehicle confronted appellant and the other person, detaining them until the police arrived, appellant threatened him, stating "We know where you live" and that the owner was going to be killed. (16RT 2517, 2519.) Corral was frightened by the threat, and moved before the time he knew appellant would get out of jail. (16RT 2519, 2551.)

Kevin Hilgendorf is a Deputy Sheriff for Los Angeles County, and was working as such when he responded to a radio call concerning a stolen vehicle. (16RT 2554.) When he arrived at the scene, he saw appellant standing on the sidewalk with other people. (16RT 2554.) The truck had a broken window, two of the speakers had been removed and were on the dashboard, and "KCC" was spray-painted on the bra. (16RT 2557.) Deputy Hilgendorf has since learned that "KCC" stands for King City Criminals. (16RT 2583.) He does not recall seeing a "13" or other symbol. (16RT 2559.) A can of spray paint was on the sidewalk and appellant had white spray paint on his hands, the same color of the paint on the bra. (16RT 2559.)

Appellant was arrested for burglary to a motor vehicle, terrorist threats, and

vandalism. (16RT 2566.) Regarding the terrorist threats, Corrall told Deputy Hilgendorf that appellant and the other person had threatened that if the police were called, they would kill him because they knew were he lived. (16RT 2566.) Deputy Hilgendorf said he took the threat seriously because he knew both people were gang members and felt it was a credible threat. (16RT 2569.)

Officer Andrew Zembal is an expert on gang graffiti and gangs, and checked appellant for tattoos. (20RT 3076, 3088.) He testified that appellant has several tattoos, the composition and location of such which signifies a wanton disregard or disrespect for life and indicates that appellant is a hard-core gang member, highly into gang culture. (20RT 3088-3096, 3098.)

b. Aggravation Evidence Relating to Co-Defendant Mora

Paul Juhn was in custody at the Los Angeles County Jail on July 29, 1996, when he was attacked and beaten up by four or five men. (18RT 2675.) His injuries indicated that he was struck once on the left side of his face with a closed fist, and struck about 30 times by hands and feet over the rest of his head and body. (18RT 2727.) That day, he identified one of the attackers in a line-up, which person was later identified as Joseph Mora. (18RT 2680, 2703.) He does not recognize Mora in the courtroom as one of the people who attacked him. (18RT 2689.) Deputy Kresimir Kovac was the officer at the jail who identified Mora by his wristband at the time. (18RT 2719.) He also confirmed that Co-Defendant Mora is the same person by identification of a tattoo on Mora's neck.

(18RT 2726.)

c. Victim Impact Evidence as to Appellant and Co-Defendant Mora

Olivia Perez is Urrutia's sister. (16RT 2591.) Perez explained the significance of several pictures of Urrutia shown to the jury – pictures of Urrutia as a child, with his family, first communion, high school graduation, at work. (16RT 2591-2593.) Perez told the jury that Urrutia had joined the Explorer Scouts with the police department. (16RT 2597.) He then started playing football, which he played with Encinas. (16RT 2597.) Urrutia was involved in a neighborhood committee to clean up the area and help people fix their homes. (16RT 2597.) He also volunteered as an interpreter for St. Mary's, helping Hispanic people who could not understand their doctors. (16RT 2597.)

Perez stated that Urrutia's dream was to become a police officer. (16RT 2598.) He went to Long Beach College after high school, and passed the test for Long Beach City but was not old enough to be hired on at the time. (16RT 2598). He then went to work as a loan representative. (16RT 2598.) He passed the test for the Los Angeles Police Department four months before his death. (16RT 2599.) Long Beach City put up a mural for him when he died. (16RT 2599.)

Javier Soto is Urrutia's nephew, and testified that he and Urrutia grew up as brothers because Urrutia was only two years older than Soto. (17RT 2609.) They grew up about five blocks from each other and went to school and played sports together. Soto was also part of the friendship between Encinas and Urrutia, whose group of friends was

"unbelievable," and everyone looked out for each other. (17RT 2612.) Soto misses Urrutia every day. (17RT 2613.)

Virginia Urrutia, Urrutia's mother, stated that she had been very close to her son, and they would pray together every night and go to church every Sunday. (17RT 2619.) Urrutia was living with her at the time of his death. (17RT 2620.) On the night of his death, she waited up for him. (17RT 2620.) She will miss everything about him. (17RT 2622.)

Luz Gamez, Encinas' sister, explained the photographs shown to the jury as different aspects of Encinas's life, including his baptism, high school graduation, and family. (17RT 2630.) Gamez told the jury that Encinas was loving, well-mannered, and respectful. (17RT 2635.) He played sports in high school, and the whole family would go to watch. (17RT 2635.) Encinas watched Gamez's children on Saturdays so that she could work, and let her son Edgar live with Encinas when Gamez got married. (17RT 2636.)

When Gamez's mother called to tell her that Encinas had been shot, Gamez called her brother and they went to the hospital. (17RT 2639.) By the time they got to the hospital, Encinas was dead. Encinas and his father had been very close, and his father has taken his death hard and is not well. (17RT 2639.) Encinas's father does not know about the trial because they do not know what kind of reaction he would have and his health has deteriorated a lot since Encinas's death. (17RT 2641.) Encinas also wanted to be a

policeman, and had passed the admissions test to the Los Angeles Academy of Police two months before his death.(17RT 2642.)

Sergio Encinas is Encinas's brother, and is nine years older than Encinas. (17RT 2644.) Encinas was a 300-pound teddy bear and a counselor to his friends. (17RT 2644.) He was involved in football and baseball. (17RT 2648.) Sergio was the person who had to identify Encinas's body and tell the family he was dead. (17RT 2648.) It ruined him physically and mentally. (17RT 2648.) He got sick, got ulcers and headaches. (17RT 2651.) He does not think that Encinas's father could control himself in court. (17RT 2651.)

Paula Beltran was Encinas's girlfriend. (17RT 2658.) They knew they were getting married, but were not formally engaged. (17RT 2658.) They wanted a family – children were important to Encinas. (17RT 2658.) Beltran feels a lot of guilt about Encinas's death because he would not have been there if she had not paged him. (17RT 2658.) She has not been able to forgive herself. (17RT 2661.) She has nightmares. (17RT 2662.)

3. The Case for Life

a. Mitigating Evidence as to Appellant

Linda Rangel is appellant's mother. (18RT 2775.) Linda was not married to appellant's father, Ruben, at the time of his birth, but they had known each other since they were in eleventh grade, and had lived together for about four years by the time

appellant was born. (18RT 2775.) Linda and Ruben also had another child, Carmen, who is about three years older than appellant (19RT 2775.) Linda and Ruben moved a lot, usually returning to live at Ruben's parents' home. (18RT 2775-.) Beginning in 1975, Linda started consuming alcohol on the weekends, but was able to take care of appellant. (18RT 2784.) Linda started using heroin in 1980 or 1981, while she and Ruben were still together. (18RT 2786.) Ruben had started using heroin about two years before that, and started using cocaine about five years later. (18RT 2863.) Linda had a sister who used heroin and found out Ruben was also using heroin. (18RT 2786.) She would visit her sisters and use heroin with them, even if she had the children with her. (18RT 2793). Linda and Ruben would use heroin together, locked in the bathroom for hours at a time, while appellant and his sister were in the house. (18RT 2790.) This happened every day at different times for about two years. (19RT 2936.) Carmen and appellant noticed things in the bathroom such as a spoon with a burned bottom and a bottle cap, but did not know what it meant until they were older. (19RT 2934, 2936.) Carmen never saw drugs around the house. (19RT 2940.) When appellant was nine years old, appellant walked in on them once while they were using heroin. (18RT 2790.)

Between Linda and Ruben, they were using about $60 worth of heroin a day, with Linda using about a quarter of what Ruben used. (18RT 2863.) Ruben neglected the needs of his children to buy drugs. (18RT 2875.) Linda and Ruben did not always provide food for the children, and Carmen would have to fix food for her and appellant.

(19RT 2938.) In 1982, Ruben received a settlement of $20,000, of which $15,000 went to drugs. (18RT 2882.) Appellant got a bicycle. (18RT 2882.)

Linda and Ruben separated shortly after 1983 and divorced in 1992. (18RT 2793, 2863.) Carmen was about 10 years old, and appellant was about 8 years old at the time of separation. (19RT 2931.) Carmen went with her mother for a time and appellant stayed with his father. (19RT 2940.) Ruben would hit Linda and call her names in front of the children, usually when he was under the influence of alcohol or drugs. (18RT 2793.) Ruben remembers also hitting appellant on the behind or the head, with his hand or belt. (18RT 2871.)

Linda eventually left both children with Ruben, and alternated staying with her father and her sister. (18RT 2797.) At one point, she was living on the street, prostituting herself to support her heroin habit. (18RT 2797.) She tried to see the children on the weekends and would be under the influence of heroin when she did so. (18RT 2797.) She eventually got into rehab and stopped using heroin in 1988. (18RT 2796, 2797.) Both children started living with her again in 1989. (19RT 2942.) Carmen began seeing changes in appellant's appearance (baggy pants and short hair), but did not believe that he was becoming a gang member. (19RT 2956.) After Carmen moved out of her mother's house, appellant alternately lived with her and his father, and lived with his girlfriend Desiree for a few months. (19RT 2964, 2970.)

The jury was shown photographs of appellant's family, including his two

daughters. (18RT 2800-2806.) Linda started going to Praise Chapel, and appellant went with her 1991-1993. (18RT 2806.) Linda did not visit appellant's various schools when he was a child, and does not remember whether he graduated from high school. (18RT 2806.) Ruben testified that appellant went to Dominquez High School, but did not finish. (19RT 2899.) Linda has been drug-free for 11 years. (18RT 2813.)

Ruben testified that appellant was at Ruben's house the day before the shootings. (18RT 2876.) Appellant had probably about a six pack of beer between 11:00 a.m. and 1:00 p.m., as well as five shots of tequila. (18RT 2876-2880.) It was normal for appellant to drink that much, but Ruben was not aware that appellant had a drug and alcohol problem. (18RT 2880.)

Desiree Leanos, appellant's girlfriend, was also at the barbeque and testified that she saw appellant drinking tequila that day. (19RT 2915.) She knew that appellant also used methamphetamine and marijuana, but did not see him using drugs that day. (19RT 2915.) Carmen and appellant used to smoke marijuana and use methamphetamine together, but Carmen only saw him drinking beer and tequila that day. (19RT 2948, 2951.) There was food at the barbeque, and everyone ate throughout the day. (18RT 2889, 19RT 2926, 2974.)

On the night of the barbeque, appellant fell asleep around 9:00 p.m., and was then paged to go somewhere and left about 11:30 p.m. (19RT 2926.) He did not tell Desiree where he was going, and left with his sister Carmen and her husband so they could drop

him off somewhere. (19RT 2926, 2929.) Carmen and her husband dropped appellant off in Compton, off Alondra. (19RT 2951.) Appellant appeared intoxicated and Carmen could smell alcohol on his breath while he was sitting in the backseat of the car. (19RT 2951.)

Appellant's father, Ruben was a member of CV3, a Compton Street gang. (19RT 2897.) Appellant knew Ruben was in a gang and Ruben has associated with some of his old gang friends while appellant was present. (19RT 2897.) Ruben told appellant not to follow in his footsteps and get involved with gangs. (19RT 2895.) Ruben was once shot at while appellant was with him. (19RT 2902.)

Jose Jimenez has known appellant since about 1989[4/], when appellant attended a home Bible study with Jimenez through Praise Chapel Christian. (18RT 2814, 2819.) Appellant spent three or four years at the church. (18RT 2819.) Appellant being charged with these crimes shocked him as it seemed out of character, and it is hard to believe he committed them based on his dealings with appellant in Bible study. (18RT 2818.) Jimenez never perceived appellant as a gang member, and to his knowledge appellant was not associated with a gang when Jimenez knew him. (18RT 2829, 2832.)

Aurora Rangel and appellant met at Praise Chapel in November 1989. (18RT 2838.) They had a child together in June 1992, married in October 1993, and separated in

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[4] The jury was shown pictures of appellant's wedding, which was held at Jimenez's house. (18RT 2814.)

October 1994. (18RT 2838, 2846.) Appellant and his daughter Vanessa are close, as he continued to see her after he and Aurora separated. (18RT 2846, 2848.) Aurora has not told Vanessa that appellant is in jail, though Vanessa makes comments about seeing her father. (18RT 2850.)

Appellant became Desiree Leanos's boyfriend in February 1995. (19RT 2906.) She met him at Praise Chapel. (19RT 2906.) They have two children together, Celeste and Ruben Junior.[5/] (19RT 2906). Appellant had a new girlfriend, Joanne, but Desiree was still also with appellant. (19RT 2921.)

b. Mitigating Evidence as to Co-Defendant Mora

Cruz Mora knows Joseph Mora as his son, though he has doubts as to whether this is true and has never had a blood test to prove paternity. (19RT 2992.) Mora's mother, Rosita Mendez was a prostitute that had sexual relationships with other members of Cruz's family. (19RT 2992.) Though Cruz married Rosita when Mora was about a month old, it was not a happy marriage, involving verbal and physical abuse, and he left after about four years. (19RT 2995, 2998, 3003.) Mora lived with Rosita's sister Vickie Cockerill for about a year, during which time Rosita did not see him much. (19RT 3007, 3019.) Mora's sister Alicia was born about a year later and Cruz and Rosita got back together shortly after that, but he left again about three years later. (19RT 2998.) During that time, he did not spend a much time at home because he worked a lot of hours. (19RT

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[5] The jury is shown pictures of the children. (19RT 2910-2913.)

2998.) Rosita was going to bars, drinking and using drugs, and the children were left by themselves. (19RT 3007, 3009.) From the time Mora was about 13 years old, he started living with other people, including his aunt Vickie Cockerill and then his cousin Candy Lopez. Mora's mother had not seen him much since then. (19RT 3009, 3022.) After that, Cruz did not have much contact with Mora, only seeing him about once a year, until Mora was 18 or 19 years old and was in the hospital because he had been shot. (19RT 2995, 2997, 3000.) Lourdes and Mora's daughter Abigail lived with Cruz for about two months after that, but he asked Lourdes to leave because Lourdes would not pick up after herself, and Mora left with her. (19RT 2997, 3002.) Cruz has not had much contact with Mora since. (19RT 2997.)

Mora and his daughter Abigail were living with Candy Lopez at the time of his arrest. (19RT 3039.) Abigail was not living with her mother because of Lourdes's home environment. (19RT 3039.)

Mora and his sister were not as close as they could have been, but they were still close and she loves her brother. (19RT 3051.)

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I. THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL IN THE GUILT PHASE AFTER THE PROSECUTION'S REPEATED FAILURES TO COMPLY WITH DISCOVERY RULES AND TO DISCLOSE FAVORABLE MATERIAL EVIDENCE IMPAIRED APPELLANT'S ABILITY TO PRESENT A DEFENSE AND VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

A. Introduction

The prosecution's repeated untimely disclosures of material evidence mid-trial violated appellant's state and federal rights to due process, a fair trial, present a defense, equal protection, a reliable guilt and penalty determination, the right to meaningful confrontation and the right to the effective assistance of counsel. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 1, 7, 15, 16, 17, 24.) The prosecution's failure to timely disclose the evidence below was not adequately remedied by the trial court's choice of sanctions and was not harmless as it hindered appellant's ability to present a cohesive defense and undermined the reliability of the proceedings.

1. The Prosecution's Failure to Timely Disclose The Transcript of Lourdes Lopez' Second Interview With Police, Two Diagrams of the Crime Scene, Four Police Reports, Fourteen Witness Statements, an Arrest Warrant for Jade Gallegos, and an Exculpatory Gun Shot Residue Report, Impaired Appellant's Ability to Present His Defense.

Appellant was charged in Superior Court with murder and attempted robbery with special circumstances on May 5, 1998. The prosecution gave notice on July 9, 1998, of

its intention to seek the death penalty. Informal discovery proceedings began,[6] and over the course of the next six months both sides prepared for trial, during which several pre-trial hearings were held and discovery was exchanged. (3 CT 567-570, 684-687, 748, 751-752, 787-788, 794-795, 823, 866-869, 871-872, 874-883; 1RT A10-A63.)

On Tuesday, January 12, 1999, the jury was sworn and the prosecution began its case in chief. For the next several trial days, the prosecution called and the defense conducted cross-examination of 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). On Tuesday afternoon, January 19, 1999, during the testimony of the prosecution's fifth witness, Lourdes Lopez, appellant's counsel discovered that she had been given only one of the two transcripts of taped interviews conducted by police with Lopez. (6RT 1020-1024.) Appellant was given the court's copy of the missing transcript and as it was late, the court sent the jury home for the day. Outside the presence of the jury, counsel told the court that it appeared she had not received all the discovery from the prosecution. As an example, counsel told the court that a few days prior she inadvertently saw a diagram in Detective Piaz's notebook and as a result was just given two diagrams dated 8-26-97. Counsel expressed her concern that there may be outstanding reports she did not have in the case as well. (6RT 1024-1028.) The

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[6] Appellant filed his motion for informal discovery the day the prosecution filed their notice of intent to seek the death penalty. (3 CT 553-564; 1RT A6-A9.)

prosecutor replied that she had turned over "every single piece of paper [she had]." (6RT 1027.) The court suggested counsel go to Detective Piaz's office that afternoon and go through his notebook to ascertain whether there was any other missing material. (6 RT 1027-1028; 45 CT 11786.)

The next morning, on the fifth day of the guilt phase, appellant reported that after going to the Compton Police Department, she discovered at least four (4) major reports that had not been turned over to the defense, at least one of which was a critical six-page report with witness statements from thirteen (13) different percipient neighborhood witnesses defense counsel had never heard of before. At least two of the statements appeared "to be directly relevant to the credibility of some of the witnesses that had already testified." (7RT 1038; See 4 CT 920-964.) Counsel argued that just a cursory examination of the statements confirmed that had she been privy to the details of the reports earlier, they would have affected her cross-examination of the witnesses who had already testified. Counsel stated that some of the information she found contradicted prosecution witness Ramon Valadez' testimony. (7RT 1039-1040.)

Counsel requested a mistrial since the discovery violation hindered the defense and violated Rangel's rights to due process and a fair trial. (7RT 1038.) Co-counsel for Mora concurred, arguing that it was a direct violation of *Brady* and that at least three of the undisclosed witness statements contradicted the first two prosecution witnesses, Paula Beltran and Fidel Gregorio, thus the information would have affected her cross-

examination as well. (7RT 1040-1041.) The court took ordered a brief recess and took a half hour to review the newly discovered reports. (7RT 1042-1043.) The court concurred 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[7], a statement that a woman's voice was heard outside arguing[8] and a statement by William Florence who claimed he saw a black Hyundai or Honda traveling northbound on Castlegate out of view. (4CT 957; 7RT 1046-1048.) Since the court stated it was not inclined to grant a mistrial, counsel requested in the alternative that the court recess the trial for one week so defense investigators could find and interview the undisclosed witnesses. (7RT 1038, 1045) The court declined to order a mistrial or order a one week continuance, but ordered the case in recess from that morning (Wednesday) until Monday morning with a status conference to be held on Friday.[9] (7 RT 1045-1047, 1052-1053.)

At the status conference on Friday morning, the prosecution turned over yet

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7 These statements were made by John and Barbara Youngblood. (4 CT 952-953.)

8 This statement was made by Fredericka Wilkerson. (4 CT 957)

9 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 as a minimum as to why this has occurred." (7 RT 1048.) However, no post-trial sanctions hearing on the discovery violations was ever held. (02/24/06 RT 10-11.)

another witness statement attributed to Yesenia Jimenez, someone who had been referenced in the evidence previously presented which was "totally contradictory to [an]other report" previously disclosed. (7 RT 1060; see 4 CT 958-959.) The prosecution also turned over a warrant regarding Jade Gallegos and two receipts for the G.S.R.[10/] testing. Co-counsel argued that the nondisclosure of so many reports and witness statements that contradicted the prosecution's case affected appellant Mora's right to a fair trial and again requested the case be dismissed. The court declined stating: "I have suspended the trial to give you an opportunity to communicate with theses 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."[11/] Both counsel responded that they would be requesting a jury instruction and the court responded to have one prepared for when they got to that stage of the trial.[12/] (7 RT 1056-1063 4 CT

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10 "G.S.R." stands for "gun shot residue." The results of the G.S.R. were negative for appellant even though the prosecution had previously told appellant's counsel that they were positive. (13RT 2000.) The G.S.R. results as to Mora were excluded due to the late disclosure. (4CT 878, 880; 13RT 2039.)

11 The court combined the undisclosed reports and marked them as court's exhibit "Y" for the record. (7RT 1056, 1060-1061; 4CT 920-964.)

12 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. (13RT 1998, 2003-2005.) However, when the defense 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 2.28. (5CT 1114, 1169; 13RT 2132; 14RT 2174-2176, 2197-2198; See Argument I.D.3, *supra.*)

994-968.)

The guilt phase proceeded on Monday, January 25, 1999, with the testimony of Lourdes Lopez. (7RT 1064; 4CT 971.) After the court recessed for the day, the prosecution notified the court 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 subpoenas. (7RT 1228-1229.) The prosecution disclosed that it spoke with all the witnesses that day and in its interview of John Youngblood, he had identified Mora as the perpetrator wearing the white shirt and gray pants, whereas in his previous witness statement disclosed to the defense he had not identified anyone. The prosecution also disclosed that one of the other witnesses[13] stated they did "see the back of the car," whereas previously they had stated they did not see anything. (7RT 1229-1230.) The prosecution indicated its intention to call John Youngblood and possibly William Florence. The defense objected to the prosecution calling any of the witnesses based upon the late disclosure; the court found the issue to be premature. (7 RT 1231-1232.)

On Thursday, January 28, 1999, the prosecution sought to call John Youngblood. Appellant again objected to Youngblood being able to testify since he had not been previously disclosed to the defense. The court overruled the objection and allowed

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

Youngblood to testify. (10 RT 1621-1623.) Both defense counsel were forced to have their investigators interview Youngblood that day during court recesses. During the recess just prior to his testimony, Youngblood changed his story when speaking with Mora's investigator and stated that he would be identifying Rangel instead of Mora. Youngblood wrote a six-page statement for the investigator. (10RT 1621-1622.) Appellant requested that the court allow time for Mora's counsel to copy the statement so that both counsel could review it prior to Youngblood's testimony, but the court refused. (10 RT 1622, 1625-1626.) Appellant complained to no avail that it was a denial of a fair trial to be forced to cross-examine a witness without first being able to review the written statement implicating her client. (10RT 1622.)

Mora's counsel was forced to read the statement during the prosecution's direct examination of Youngblood and appellant's counsel was forced to review the statement during her cross-examination of Youngblood. (10RT 1624, 1652-1654.) Appellant complained during cross-examination that she was having trouble focusing her questions because she had just received the statement and it was contradictory to Youngblood's testimony. (10RT 1695.)

Further, both appellants were forced to cross-examine Youngblood without the benefit of any rap sheets on him having been turned over. (10RT 1652.) Appellant requested to have rap sheets run on Youngblood before her cross-examination. The prosecution stated she would stipulate to them instead. Appellant indicated she would

like to ask Youngblood whether he had any felony convictions, but the court refused stating that Youngblood would remain on call and if any felonies turned up, the prosecution could stipulate to them. Appellant again objected arguing that the situation was a denial of appellant rights to have a fair trial, due process of law and equal protection. (See Argument III, *post*; 10 RT 1652-1653; 45 CT 11773, 11786-11787.)

2. The Prosecution's Failure to Timely Disclose the Fingerprint Analysis Report From The Crime Scene Impaired Appellant's Ability to Prepare His Defense.

On February 1, 1999, the prosecution recalled Detective Branscomb as their last witness. (12RT 1866.) On February 2, 1999, after the prosecution rested, it turned over a four-page fingerprint report dated December 3, 1997. Throughout the proceedings, counsel had been told by the prosecution that no fingerprint testing had been done. (13RT 1991.) However, the newly disclosed report reflected that four expended shell casings and a beer can had in fact been tested for fingerprints and none matching the defendants were found.[14/] (13RT 1990-1992.) Defense counsel for both defendants 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.

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

Counsel argued[15] 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. (13RT 1993-1997.)

Moreover, counsel argued that the repeated and continuing discovery violations, including having to scramble to interview thirteen previously undisclosed witnesses mid-trial, had altered and ultimately hampered their ability to present a defense. (13RT 1993-1994, 1998.) The court agreed that a discovery violation had occurred but declined to grant a mistrial[16] and instead heard arguments on whether to exclude the newly disclosed fingerprint analysis report. (13RT 1994-1998.)

Counsel 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

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15 Appellant and co-appellant joined in each other's arguments regarding their request for a mistrial. (13RT 1993-1998.)

16 The court again expressed its intention at the conclusion of trial to set an order to show cause with regard to monetary sanctions from the Compton Police Department for the various discovery violations, stating: "I will add this to my list." (13 RT 1997.) However, as noted previously, no post-trial hearing ever occurred. (02/24/06 RT 10-11.)

when they cross-examined the witnesses the day before.[17] (13 RT 1997-2008, 2109-2113, 2128-2129; 4 CT 999-1002.)

After approximately two and a half hours of deliberations[18], the jury returned verdicts of guilty and true findings on all counts and special allegations. (4 RT 1007, 1036-1037A.)

B. Standard of Review

A trial court's rulings on discovery motions are reviewed under an abuse of discretion standard. (*People v. Ashmus* (1991) 54 Cal.3d 932, 979.) In the exercise of its discretion, a trial court may "consider a wide range of sanctions" in response to the prosecution's violation of a discovery order." (*People v. Ayala* (2000) 23 Cal.4th 225, 299.) Trial court's 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. (c); but see *People v. Ashraf* (2007) 151 Cal.App.4th 1205, 1213.) A trial court's ruling on motions for mistrial are reviewed under an abuse of

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17 At the close of the guilt phase evidence, the court instructed the jury, with among other instructions, a modified version of CALJIC 2.28 regarding the Compton Police Department's failure to timely produce the witness statements and the fingerprint analysis report. (5 CT 1114; See Argument I.D.3, *infra*..)

18 The jury commenced deliberations at 2:55 p.m. on February 4, 1999 and broke for its evening recess at 3:15 p.m. On February 5, 1999, the jury deliberated from 9:05 a.m. until 10:30 a.m. and again from 10:45 a.m. until 11:20 a.m. when it notified the court it had reached its verdicts. (4 CT 1007, 1036-1037A.)

discretion standard. (*People v. Lewis* (2006) 39 Cal.4th 970, 1029; *People v. Ayala*, *supra*, 23 Cal.4th at p. 282-283.) However, a mistrial should be granted when the moving party's chances of receiving a fair trial have been irreparably damaged. (*People v. Ayala*, *supra,* 23 Cal.4th at p. 283-284.)

C. The Prosecution Has Statutory and Constitutional Duties to Timely Disclose Material Evidence to the Defense.

In criminal cases, discovery is available based on the California Constitution, the reciprocal discovery provisions of Penal Code sections 1054 through 1054.10, and as mandated by the Due Process Clause of the United States Constitution. (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, § 30; Pen. Code, § 1054, subd. (e).) This discovery scheme is intended to promote the ascertainment of 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 Cal.4th 122, 131.) These objectives are consistent with the true purpose of a criminal trial; ascertainment of the facts. (*Ibid.*)

1. The Prosecution's Statutory Duty to Disclose

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[19]:

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[19] The prosecution is presumed to have knowledge of all information gathered by the investigating agency. (*In re Brown* (1998) 17 Cal.4th 873, 879.)

(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. (Penal Code § 1054.1)

Here, all of the evidence discussed, *infra*, was found by the trial court to have been untimely disclosed under the applicable discovery statutes. Moreover, each item was "discovered" in Detective Piaz' trial notebook, and thus was "reasonably accessible" to the prosecution; the failure to turn over the items constituted a violation of Penal Code section 1054.1 as well as appellant's state and federal constitutional right to due process and a fair trial. (6RT 1026-1027; 7RT 1037-1038; 13RT 1992.) (*In re Littlefield*, *supra*, 5 Cal.4th 122, 135; *People v. Little* (1997) 59 Cal.App.4th 426, 431-433.)

2. The Prosecution's Constitutional Duty to Disclose

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."[20] (*United States v. Bagley* (1985) 473 U.S. 667, 676;

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[20] The prosecutor's duty to disclose evidence that is favorable to the accused includes the duty to disclose evidence that would impeach the testimony of

Brady v. Maryland (1963) 373 U.S. 83, 87; see Pen. Code § 1054, subd. (e); *People v. Cook* (2006) 39 Cal.4th 566; *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.)

In *Brady v. Maryland*, *supra*, 373 U.S. 83, the U.S. Supreme 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*, *supra*, 373 U.S. 83, the prosecution must disclose material exculpatory evidence whether the defendant makes a "specific request" (*id.* at p. 87), a general request, or none at all. (*United States v. Agurs* (1976) 427 U.S. 97, 107; *In re Brown*, *supra*, 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. 667, 676; *People v. Ochoa* (1998) 19 Cal.4th 353, 473.) "*Brady* information [therefore] includes 'material . . . that bears on the

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material witnesses. (*Id.*; Evid. Code § 780 [jury may consider any matter that has any tendency in reason to prove or disprove a witness's testimony.].)

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, *cert. den.* (1989) 489 U.S. 1032.)

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 879-880; see also, *Kyles v. Whitley* (1995) 514 U.S. 419, 437-438.)

Here, the issue is not that material evidence was *never* disclosed but that its *untimely* disclosure so interfered with the defense's ability to effectively defend its case that it undermined confidence in the verdicts of guilt. 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; *United States v. Coppa* (2d Cir. 2001) 267 F.3d 132, 144 [due process requires that *Brady* material must be disclosed in time for its effective use at trial]; in accord, *Knighton v. Mullin* (10th Cir. 2002) 293 F.3d 1165, 1172-1173 [Brady violated if disclosure is made after it is too late for the defendant to make use of any benefits of the evidence.]; *United States v. Ingraldi* (1st Cir. 1986) 793 F.2d 408, 411-412 ["When the issue is one of delayed disclosure rather than of nondisclosure, however, the test is whether defendant's counsel was prevented by the delay from using the disclosed material effectively in preparing and presenting the defendant's case. Citations omitted.].)

Here, appellant was seriously misled by the prosecution's failure to comply with its discovery obligations and was simply unable mid-trial to make the effective use of the untimely disclosed evidence. (*In re Brown*, *supra*, 17 Cal.4th at p. 887.) Further, the sanctions offered by the trial court were inadequate to cure the harm. Appellant was forced to investigate its case mid-trial, to cross-examine witnesses without the benefit of relevant impeachment evidence and to alter their theory of defense. It is well established that a trial counsel cannot provide meaningful 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 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 should not have been penalized because

information critical to his counsel's rational strategic choices was not available to 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. (*Wardius v. Oregon* (1973) 412 U.S. 470, 474.)

Thus, the delayed disclosure constitutes both statutory and constitutional error. As shown below, the error was also prejudicial and requires that appellant's case be reversed.

D. Appellant is Entitled to a Reversal Since his Ability to Present a Defense and Receive a Fair Trial Was Irreparably Damaged By The Multiple Instances of Untimely Disclosure of Material Evidence Without Adequate Remedy.

Failure of the prosecution to timely disclose the identity and statements of multiple witnesses, diagrams, warrants, reports and fingerprint and gun shot residue results prejudiced appellant since it undermined the presentation of his defense case and ultimately the reliability of the jury's guilt determination. The trial court's denial of appellant's request for a reasonable continuance, repeated requests for a mistrial and exclusion of both John Youngblood's testimony and the fingerprint analysis report were erroneous. The trial court's choice of remedies, a two day recess to find and interview witnesses, an admonishment regarding the fingerprint report and a faulty jury instruction (see Argument I.D.3) 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 (Penal 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. 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 prosecution 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 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.) Reversal is warranted if the collective effect of 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.)

In *United States v. Bagley*, *supra*, 473 U.S. 667, the Supreme Court first explained the meaning of the term "material." In *Kyles v. Whitley*, *supra*, 514 U.S. at p. 434, the 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*, the Supreme Court reemphasized four aspects articulated in *Bagley* critical to proper analysis of *Brady* error. This Court has specifically adopted these criteria as applicable to California cases. (*In re Brown*, *supra*, 17 Cal.4th at pp. 886-888.)

"[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." (*Kyles v. Whitley*, *supra*, 514 U.S. at p. 434; *In re Brown*, *supra*, 17 Cal. 4th at p. 886.)

> "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*, *supra*, 514 U.S. at pp. 434-435; *In re Brown*, *supra*, 17 Cal.4th at pp. 886-887.)

It is not a harmless error test. The materiality test subsumes any harmless-error analysis. (*Kyles*, *supra*, 514 U.S. at pp. 435-536; *In re Brown*, *supra*, 17 Cal.4th at p. 887.) While the tendency and force of undisclosed evidence is evaluated item by item, its cumulative effect for purposes of materiality must be considered collectively, in the context of all the other evidence. (*Kyles*, at pp. 436-437 & n. 10; *Agurs*, *supra*, 427 U.S. at p. 112, fn. omitted [omission "must be evaluated in the context of the entire record"]; *In re Brown*, *supra*, 17 Cal.4th at p. 887.) Moreover,

> "[A]n 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. (*United States v. Bagley, supra*, 473 U.S. at p. 682.)

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." (*Id.* at p. 683.)

Here, the missing transcript, diagrams, witness statements, fingerprint and G.S.R. report went to the heart of the defense. Each of the untimely disclosed items violated the rule that all discovery needed to be turned over to the defense at least thirty days before trial. (Pen. Code § 1054.1.) Appellant reasonably prepared his case and theory of defense

based upon the discovery disclosed pre-trial, e.g., that Lourdes Lopez only made one statement to police, that all the percipient witnesses to the shootings and interviewed by police had been disclosed, that the G.S.R. testing would be positive as to appellant 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,[21] e.g., that Lourdes Lopez made *two* statements to police, that there were thirteen additional neighborhood witnesses[22] who had given statements to police investigators[23], that the G.S.R. testing results as to appellant were actually negative and that the evidence had been tested for fingerprints, but with negative results. The cumulative effect of the above discovery violations resulting in untimely and misleading disclosures was that the defense prepared its case based upon erroneous assumptions as to the state of the evidence only to be blind-

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21 The four major reports, thirteen percipient witness statements and two diagrams were discovered by the defense after a review of Detective Piaz' trial notebook. Detective Piaz was the investigating officer the prosecution designated for trial. (4 RT 473; 6 RT 1025-1028; 7 RT 1037-1038.)

22 Those witnesses were: John Youngblood, Barbara Youngblood, William Roper, Mae Roper, Armand Avila, Shaun Harris, Jose Rosas, Armando Martinez, Fredericka Wilkerson, Alice Whiting, Omar Islas, Joseph Emmitt, and William Florence. (4CT 952-957.)

23 An additional undisclosed witness report was also turned over by the prosecution on Friday, January 15, 1999, detailing a police interview with percipient witness Yesenia Jimenez. Counsel represented that this new report "is totally contradictory to the other report that we previously had." (4CT 958-959; 7RT 1056, 1060.)

sided mid-trial with new and different facts.

Moreover, several of the untimely disclosed items were favorable to appellant and material to the determination of guilt, thus further violating the federal constitution. (*Brady v. Maryland*, *supra*, 373 U.S. at 87.) First, the untimely disclosed reports revealed impeachment material against three prosecution witnesses who had already been called and cross-examined, i.e., Paula Beltran, Fidel Gregorio, and Ramon Valadez. (7RT 1039-1041.) Impeachment, as well as exculpatory, evidence falls within the *Brady* rule. (*United States v. Bagley*, *supra*, 473 U.S. at 676; *People v. Ochoa*, *supra*, 19 Cal.4th at 473.) Second, the untimely disclosed reports revealed potentially exculpatory information from witnesses not previously disclosed to the defense, i.e., Barbara Youngblood, John Youngblood, William Florence and Fredericka Wilkerson. (4CT 952-953, 957; 7RT 1046-1048.)

The only remedies offered by the court for the various discovery violations were: (1) a two day recess of the proceedings, i.e., the rest of the day Wednesday, January 13, 1999, and Thursday, January 14, 1999, so 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 and a jury instruction regarding the Compton Police Department's failure to timely produce evidence. Each of these remedies were not only inadequate, but served to further prejudice the defense case by forcing appellant to: re-investigate the case mid-trial; to

cross-examine witnesses without the benefit of impeachment evidence; to cross-examine witnesses without adequate time to prepare (see Argument I.B1, supra.); to proceed with a defense theory developed throughout 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 I.D.3, supra.)

It is impossible to reconstruct how this trial would have gone had the prosecution timely complied with the discovery and turned over favorable evidence earlier. The prosecutor's failure to provide this material meant that counsel had a materially incorrect understanding of the state of the evidence when developing a theory of defense 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, to present a defense, equal protection, due process, a fair trial, and a reliable guilt and penalty determination. It rendered these proceedings fundamentally unfair, and requires that appellant's conviction be reversed. (*In re Brown*, *supra*, 17 Cal.4th at p. 887; see also *Kyles v. Whitley*, *supra*, 574 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 RESTRICTION OF APPELLANT'S CLOSING ARGUMENT AND REFUSAL TO GIVE APPELLANT'S REQUESTED INSTRUCTION REGARDING THE PROSECUTION'S FAILURE TO FULLY AND TIMELY PROVIDE PRETRIAL DISCOVERY PREJUDICIALLY VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

A. Introduction

The trial court's restriction of appellant's closing argument and refusal to instruct the jury fully regarding the prosecution's repeated discovery violations and instead instructing the jury only with a modified version of CALJIC 2.28 limited to the Compton Police Department's unintentional failure to timely produce witness statements and the fingerprint report, violated appellant's state and federal constitutional rights to due process, a fair trial, to present a defense, to the effective assistance of counsel, and to a reliable guilt and penalty determination. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I §§ 7, 17, 24.)

At a status conference held mid-trial[24/] on Friday, January 22, 1999, appellants' made their second mistrial request based on the prosecution's untimely disclosure of diagrams, warrants and multiple witness statements. The court responded: "I have suspended the trial to give you an opportunity to communicate with theses witnesses and will entertain any other request you have by way of sanctions for these – for this failure to

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[24] This hearing was held during a two-day suspension of the prosecution's case in the guilt phase to give the defense an opportunity to communicate with previously undisclosed prosecution witnesses. (See Argument I., *ante*.)

comply with the discovery requirements that is allowed by law." It denied the motion. Both counsel stated that they would be requesting a jury instruction and the court agreed, telling them to have one prepared for when they got to that stage of the trial. (7 RT 1056-1063; 4 CT 994-968.)

At the close of the prosecution's guilt phase case, appellants Rangel and Mora 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 again declined to grant a mistrial and 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.)

When the defense 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 2.28 regarding the Compton Police Department's failure to timely produce witness statements and the fingerprint report. (5 CT 1114, 1169; 13 RT 2130-2132; 14 RT 2174-2176, 2197-2198.)

B. Standard of Review

A reviewing court independently reviews issues pertaining to jury instructions. (*People v. Waidla* (2000) 22 Cal.4th 690, 733, 737 ["Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that, we believe, is however predominantly legal. As such, it should be examined without

deference"].) The trial court's restriction of defense counsel's closing argument is reviewed for abuse of discretion. (See *People v. Benavides* (2005) 35 Cal.4th 69, 110.)

C. The Trial Court's Instruction Regarding the Compton Police Department's Failure to Timely Produce Evidence Was Misleading, Incomplete And Failed to Provide Adequate Guidance for the Jury.

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.) The defense 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 judges 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(e).)

The giving of CALJIC 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. Bell* (2004) 118 Cal.App.4th 249; *People v. Saucedo* (2004) 121 Cal.App.4th 937; see also *People v. Riggs* (2008) 44 Cal.4th 248.)[25/] Although 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 error and prejudicial for the reasons set forth below.

As a result of the prosecution's repeated discovery violations, the defense submitted the following special instruction entitled "Prosecution Misconduct.":

> 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, emphasis added.)

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[25] As a result of these cases, CALJIC 2.28 has since been replaced by CALCRIM 306 entitled "Untimely Disclosure of Evidence" and it instructs: "Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set be 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; *People v. Lawson*, *supra*, 131 Cal.App.4th at pp. 1248-1249.)

The court declined to give the special instruction and instead instructed the jury pursuant to CALJIC 2.28[26], modified as follows:

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

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[26] The unmodified version of CALJIC 2.28 read as follows: "The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial so as to promote the ascertainment of 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. ¶ Disclosure of evidence is 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 [People] [Defendant(s)] [*concealed*] [and] [or] [failed to timely disclose] the following evidence: ¶ [List evidence here] ¶ Although the [People's] [Defendant's] [*concealment*] [and] [or] [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 disclosures are matters for your consideration. However, you should consider whether the untimely disclosed evidence pertains to a fact of importance, something trivial or the subject matter is already established by other credible evidence." (CALJIC 2.28, emphasis added.)

> 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." (CALJIC 2.28 [Failure to Timely Produce Evidence (Pen. Code § 1054.5(b))]; 5 CT 1114; 14 RT 2197-2198)

The trial court's error in refusing to instruct the jury as the defense requested was exacerbated by the trial court's sua sponte deletion of language from the standard CALJIC 2.28 that the evidence was intentionally *concealed*.[27] Moreover, upon the prosecution's request, the court restricted the defense from being able to argue that the untimely disclosure was intentional. (See CALJIC 2.28; 14 RT 2174-2177.)

In *People v. Bell*, *supra*, the Court of Appeal found that the use of CALJIC 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 of Appeal'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

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[27] The trial court also refused to insert defense requested language that a beer can was not turned over until the defense requested it be tested by an expert. The defense obtained a signed order from the court to have an untimely disclosed beer can tested for fingerprints after Detective Branscomb testified that it had never been tested. The next day, the prosecution disclosed a four-page fingerprint analysis report showing that the beer can had in fact been tested for fingerprints previously, but none matching the defendants were found. (13 RT 1990-1992, 1995-1997; See Argument I, *ante*.)

that such an eventuality transpired here." (*People v. Bell*, *supra*, 118 Cal.App.4th at p. 255.) As the court stated, "[I]f here 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, in the absence of any practical impact on the factfinding 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 take 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 held that:

> "It is axiomatic that a trial is a search for the truth. The rationale of the discovery statute is to prevent 'trial by ambush.' The trial court has a variety of remedies available to penalize those who fail to comply with its rulings and the requirements of the statute. 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."[citations omitted.] (*Id.* at p. 752.)

Here, as counsel argued, the untimely disclosures were "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." (5 CT 1169) The instruction given was faulty because it failed to articulate how the untimely disclosed evidence affected the defense's ability to effectively present its 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*, and Argument III, *post.*) Thus, the instruction left the jury with no way to evaluate the weight and significance of the delayed disclosure 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" as the responsible party for the delayed disclosure, nor did it list all of the plethora of late disclosures. (See Argument I, *ante.*) The prosecution is presumed to have knowledge of all information gathered by the investigating agency. (*In re Brown*, *supra*, 17 Cal.4th 873, 879; see also, *Kyles v. Whitley*, *supra*, 514 U.S. 419, 437-438.) *Each* untimely disclosed item was "reasonably accessible" to the prosecution and turned over in violation of Penal Code section 1054.1. (*In re Littlefield*, *supra*, 5 Cal.4th 122, 135; *People v. Little*, *supra*, 59 Cal.App.4th 426, 431-433; See Argument I, *ante.*) Because of this omission, the prosecution was able to distance itself from the many discovery violations. In closing argument, the prosecution argued when discussing the murders: "This is serious stuff. ¶ And the fact that the Compton Police Department botched it up, do not take that out on the victims' family. Do not say..." – at which point a defense objection was sustained.

(15 RT 2414.) However, immediately thereafter, the prosecutor argued without objection:

> "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.)

Moreover, the instruction not only failed to point out that it was the *People* who failed to timely produce the evidence, but also that the evidence was *concealed* by the Compton Police Department in that they withheld it. This seemingly was undisputed and born 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 reliability of the jury's decisions. Indeed, in *People v. Riggs*, *supra*, 44 Cal.4th at p. 308, this Court found that the salient inquiry for the jury is not necessarily how the offended party was actually adversely affected, but rather, the implications to be drawn against the offending party, i.e., the party "did not have much confidence in the ability of its own evidence to withstand full adversarial testing;" "[w]hether or not the [offended party] was actually impaired by the attempt to conceal the evidence would not change the circumstance that [the offending party] tried to inhibit the [offended party's] efforts;" and that "the fact of a discovery violation might properly be viewed by the jury as evidence of the [offending party's] consciousness of the lack of credibility of the evidence that has been presented on [its] behalf." (*Ibid.*)

The court erred in refusing the defense requested instruction and instead giving the modified 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 government's repeated discovery violations.

D. The Trial Court's Ruling Prohibiting Appellant From Arguing To The Jury That The Discovery Violations Were Intentional Was Error and Violated Appellant's Constitutional Rights.

It is undisputed that there was evidence to support the inference that the Compton Police Department intentionally withheld evidence from the defense. As such, appellant had the right to make that argument to the jury.[28/] (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 795-796; *People v. Thornton* (2007) 41 Cal.4th 391, 454; *People v. Coffman* (2004) 34 Cal.4th 1, 103 [party need not conclusively establish suppression of the evidence, there need only be some evidence in the record to support the inference; see also *People v. Steel* (2002) 27 Cal.4th 1230, 1244; *People v. Welch* (1999) 20 Cal.4th 701, 752-753.)

Closing argument is a critical stage of the proceedings. (See *Herring v. New York* (1975) 422 U.S. 853, 858-859, 863.) A defendant's right to counsel is denied where the

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[28] Indeed the violations were so egregious that the trial court expressed its intention to issue an order to show cause and hold a post-trial hearing for monetary sanctions. (7RT 1048; 13RT 1997.)

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

Here, appellant's defense, like Mora's was one of mistaken identity. An important aspect of his defense was that the prosecution and the Compton Police Department had repeatedly withheld evidence and manipulated witnesses in order to convict appellant. (See e.g., 6RT 1024-1028; 7RT 1037-1040, 1056-1063; 10RT 1622, 1652; 13RT 1990-1998; 14RT 2281-2286, 2289-2294, 2297-2302, 2305.) Indeed, there was more than sufficient evidence from which the jury could find that the Compton Police Department's many blatant discovery violations constituted an intentional concealment of evidence on the part of the prosecution. Had appellant's jury been permitted to make that determination, it would have viewed the prosecution evidence very differently. (See e.g., *Kyles v. Whitley*, *supra*, 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]".) Therefore, appellant had the right to argue that the discovery violations were deliberate and intentional, not, merely

technical violation of timely discovery obligations, as the jury was instructed by the court.

E. The Erroneous Instruction And Restriction of Closing Argument Constitutes Reversible Error Since The Errors Were Not Harmless.

The trial court's instructional error is reversible here since it cannot be shown that the failure to instruct the jury with an instruction which would have given them the tools to assess the prejudice to appellant's case during the guilt phase was harmless beyond a reasonable doubt. (*People v. Flood* (1998) 18 Cal.4th 470, 499; *People v. Molina* (2000) 82 Cal.App.4th 1329, 1334; *Chapman v. California*, *supra*, 386 U.S. at 24.) An erroneous instruction requires reversal when it appears that the error was likely to have misled 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].)

Further, the trial court's erroneous ruling forbidding appellant from arguing that the Compton Police Department's many discovery violations were intentional, seriously undercut appellant's counsel's ability to effectively defend 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 regardless of his guilt or innocence. Appellant's sole defense was innocence. 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 525; *People v. Galloway* (1979) 100 Cal.App.3d 551, 561; *Luna v. Cambria* (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.)

Here, the repeated untimely disclosures of evidence to the defense were unknown to the jury until they were instructed with the modified version of CALJIC 2.28. The circumstances surrounding those untimely disclosures were never revealed to the jury by way of instruction or argument. For examples, the jury was not privy to the following facts: (1) that the defense was unaware of impeachment evidence during the cross-examination of the prosecution's first four witnesses; (2) that the defense was forced to investigate the case and interview witnesses mid-trial instead of being able to focus on the evidence being presented; (3) that there were thirteen witnesses to the crime that had not been disclosed or interviewed by the defense prior to trial; (4) 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. (7 RT 1231); (5) that the defense was forced to cross-examine at least one

witness without having had the opportunity to even read the witness' last minute statement identifying appellant; (6) that the defense had been repeatedly and affirmatively told that no fingerprint testing had been done, despite the fact that it had been; or (7) that the "delay in disclosure" was actually *an intentional concealment of evidence* and the only reason it was ever disclosed was because the defense discovered it of their own accord – first by "snooping" into Detective Piaz's trial notebook, then by looking through the notebook at the direction of the court on the fifth day of the guilt phase after the jury had been sent home. In sum, the jury was never privy to the facts that legitimately reflected upon the credibility of the prosecution witnesses and the reliability of the prosecution evidence, all of which made the trial not "a search for the truth," but rather a trial by ambush.

Limiting appellant's argument to omit that any of the discovery violations might have been intentional and instructing the jury with the modified CALJIC 2.28 was inadequate and trivialized the jury's assessment of the discovery violations in this case, leaving the jury with the false impression that they could give weight and significance to the "delayed disclosure" without giving them any guidance with which to do so. Further, the errors resulted in a denial of appellant's right to present a defense, a fair trial and to effective assistance of counsel at a critical stage of the proceedings.

The entire judgment should be reversed because it cannot be shown that these errors, either alone or in combination, were harmless beyond a reasonable doubt.

(*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

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III. THE TRIAL COURT ERRED IN FORCING APPELLANT TO CONDUCT CROSS-EXAMINATION WITHOUT SUFFICIENT TIME TO REVIEW A NEWLY ACQUIRED SIX- PAGE STATEMENT FROM AN UNTIMELY DISCLOSED WITNESS VIOLATING HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

A. Introduction

The trial court's refusal to grant a brief recess to allow appellant to review a newly acquired six-page handwritten statement of an untimely disclosed prosecution witness prior to examination of the witness, violated appellant's state and federal rights to due process, a fair trial, present a defense, equal protection, a reliable guilt and penalty determination, the right to meaningful confrontation and the right to the effective assistance of counsel. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I §§ 7, 15, 17, 24.) Post-trial, appellant filed a motion for new trial asserting among other things, that the circumstances surrounding the late disclosure and cross-examination of John Youngblood affected appellant's state and federal constitutional rights to confrontation and the effective assistance of counsel under the Sixth Amendment. The motion was denied. (45 CT 11770-11801, 11906; 21A RT 3343-3344, 3349-3352.)

On Monday, January 25, 1999, the prosecution disclosed that four of the untimely-disclosed witnesses had been subpoenaed and were present in court and that one of them had made statements to the prosecutor that were different from those which were in the untimely disclosed police reports. John Youngblood told the prosecutor he could identify Mora, when he had previously told police he could not identify anyone. Youngblood also

told the prosecutor he saw the back of the car that had driven away when previously he had told police he had not seen anything. (7RT 1228-1230.) Appellant objected to each of the witnesses being called due to the late disclosure. (7RT 1232.)

On Thursday, January 28, 1999, the prosecution sought to call John Youngblood. (10RT 1621.) Appellant's defense investigator interviewed Youngblood during a court recess and Youngblood confirmed that he could identify only one of the suspects – co-defendant Mora. However, when Mora's investigator interviewed Youngblood outside the courtroom just prior to his testimony, Youngblood indicated he would be identifying Rangel instead. This information came as a complete surprise to appellant. Mora's investigator obtained a six-page handwritten statement from Youngblood, which appellant was precluded from seeing prior to Youngblood's testimony. Counsel requested the court allow time for Mora's counsel to copy the statement so that both counsel could review it prior to Youngblood's testimony. The court refused, stating that counsel had an opportunity to have its investigator interview the witness[29/] and because it did not want to inconvenience the witness. Counsel argued, to no avail, that had the prosecution timely disclosed Youngblood, appellant would not be in this situation. (10RT 1622-1625.) Mora's counsel was forced to read the statement during Youngblood's

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[29] Mora's counsel had previously complained that when her investigator went out to interview the Youngbloods, they told him that the police had already been out there and told them not to talk to defense investigators because they did not have to talk to them. (7RT 1231.)

direct examination and appellant's counsel was forced to review it just prior to and during her cross-examination. (10RT 1624, 1653, 1695.) Both appellants were forced to cross-examine Youngblood without the benefit of any rap sheets on him having been turned over.[30] (10RT 1652-1653.) Appellant continually objected, arguing that the situation was a denial of Rangel's constitutional rights. (10RT 1621-1626, 1651-1654; 45 CT 11773, 11786-11787.) Youngblood identified appellant Rangel as the person on the driver's side of the victim's vehicle before the shots were fired. (10RT 1631, 1676.) Appellant complained during cross-examination that she was having trouble focusing her questions because she had just received the statement and much of it was contradictory to Youngblood's testimony. (10RT 1695.)

B. Standard of Review

The Sixth Amendment, and thus the constitutional minimum that must be allowed a criminal defendant before a trial court's discretion to limit cross-examination adheres, includes the ability to develop and present a defense. (*United States v. Muhammad* (7th Cir. 1991) 928 F.2d 1461, 1467.) Once the constitutional threshold has been met, the trial court "retain[s] wide latitude to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant."

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30 At the close of the prosecution's case, the prosecutor told the court that she had run the rap sheet and found a 1975 misdemeanor conviction for carrying a concealed weapon. (12 RT 1893-1894.)

(*Delaware v. Van Arsdall* (1986) 475 U.S. 673.) Thus, where as here, the issue is not a matter of the court's discretion in properly limiting cross-examination, but instead the impairment of the right to confront witnesses, the Confrontation Clause is violated. (*Davis v. Alaska* (1974) 415 U.S. 308; *People v. Dyer* (1988) 45 Cal.3d 26, 48-49; see also *People v. Rodriguez* (1986) 42 Cal.3d 730, 750-751, fn. 2.) Although the harmless error standard of prejudice usually applies to other Confrontation Clause errors, if the right to effective cross-examination is completely abridged, constitutional error exists without the need to show actual prejudice. (*Davis v. Alaska*, *supra*, 415 U.S. at pp. 315-316; *Olden v. Kentucky* (1988) 488 U.S. 227, 232; *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Review of a trial court's order denying a motion for new trial is *de novo* where the case implicates a defendant's federal constitutional rights to due process and concerns the fundamental fairness of the trial. (*People v. Ault* (2004) 33 Cal.4th 1250, 1262.) Here, the trial court erred both in refusing to allow appellant a brief recess to review Youngblood's six-page statement prior to cross-examination and later in denying the motion for new trial.

C. Appellant Has the Constitutional Right to Effective Confrontation and Effective Assistance of Counsel.

It is axiomatic that a criminal defendant has a fundamental right to confront the witnesses against him. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§

7, 15, 24; Pen. Code, § 686.) It is equally well settled that the right of cross-examination is the primary interest secured by the confrontation guarantee and an essential safeguard of a fair trial. (*People v. Brock* (1985) 38 Cal.3d 180, 188; *Pointer v. Texas* (1965) 380 U.S. 400, 405-407; *Douglas v. Alabama* (1965) 380 U.S. 415, 418-420.) "Cross-examination has been described as 'the "greatest legal engine ever invented for discovery of the truth."'" (*People v. Brock*, *supra*, 38 Cal.3d at p. 197, quoting *California v. Green* (1970) 399 U.S. 149, 158.)

The object of the confrontation clause is to "ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." (*Maryland v. Craig* (1990) 497 U.S. 836, 845.) The right to confrontation, which is secured for defendants in state as well as federal criminal proceedings, "means more than being allowed to confront the witness physically." (*Delaware v. Van Arsdall*, *supra*, 475 U.S. 673.) It instead means that a defendant has the right to *effective* cross-examination. (*Davis v. Alaska*, *supra*, 415 U.S. at p. 318, emphasis added.)

D. Appellant's Case Must Be Reversed Since Appellant's Ability to Effectively Cross-Examine Youngblood Was Impaired by the Trial Court's Refusal to Allow Counsel Sufficient Time to Prepare.

Ordinarily, restrictions imposed on cross-examination violate the Confrontation Clause if they limit relevant testimony and prejudice the defendant. (*United States v. Shabani* (9th Cir. 1995) 48 F.3d 401, 403.) However, prejudice is measured in terms of

the particular witness, not in terms of the outcome of the trial or whether the error would have affected the jury's verdict. (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 680.) Here, however, as in *Davis v. Alaska*, *supra*, 415 U.S. 308, appellant was denied the right of effective cross-examination which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." (*Brookhart v. Janis* (1966) 384 U.S. 1, 3, quoted in *Smith v. Illinois* (1968) 390 U.S. 129, 131.)

The trial court's actions in forcing defense counsel to conduct cross-examination on a witness whose statement had materially changed with no time for preparation or investigation, prevented him from fully probing the witness' credibility. John Youngblood had not initially identified anyone in his statement to police the night of the crimes. After his statement was untimely disclosed and the defense interviewed Youngblood, he changed his story to include an identification of co-defendant Mora. It was in the courthouse hallway just prior to his testimony that he changed his story again and stated his intent to identify appellant Rangel instead. Given this surprise and the public policy against trial by ambush, the trial court had a duty to allow counsel a reasonable time to review the new statement and prepare for cross-examination. Instead, the trial court was myopic in its insistence to continue the testimony without a recess.

As a consequence, appellant was unable to subject the prosecution's case to "'the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings,'" thereby violation not only his right to confrontation and to present a defense but also to

due process and a fair trial. (*United States v. Vargas* (9th Cir. 1991) 933 F.2d 701, 709 (9th Cir. 1991), *quoting Maryland v. Craig*, *supra*, 497 U.S. at p. 846.) Appellant's case should be reversed since the refusal to grant a brief recess or continuance unfairly affected appellant's ability to present a defense, specifically affected his ability to effective confrontation of Mr. Youngblood and violated appellant's rights to a fair guilt and penalty determination. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 1, 7, 15, 17, 24.)

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IV. APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED IN ALLOWING THE ADMISSION OF INADMISSIBLE HEARSAY AND IRRELEVANT AND PREJUDICIAL GANG EVIDENCE THROUGH THE IMPROPER IMPEACHMENT OF LOURDES LOPEZ IN VIOLATION OF STATE AND FEDERAL LAW.

A. Introduction

Reversal is required because the trial court admitted inadmissible, irrelevant and prejudicial evidence in violation of Evidence Code sections 210, 352 and 1200 as well as in violation of defendant's state and federal constitutional rights to a fair trial, an impartial jury, confrontation of adverse witnesses, due process of law, and a reliable guilt and penalty determination.[31] (U.S. Const Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15, 16, 17, 24; Evid. Code, §§ 352, 1200.)

Appellant and co-defendant Mora were each charged with two counts of murder and two counts of attempted robbery. The crimes were not alleged to have been gang-related. During voir dire, the court asked the prosecutor whether there was "any gang evidence that [she would] elicit in this case?" The prosecutor responded: "Not that I know of." (2 RT 266.) Based on the prosecutor's representations, the gang section of the jury questionnaire was deleted and attorneys for both appellant and Mora did not voir dire the potential jurors on their views towards gangs and gang members. However, at least

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31 The erroneous admission of the gang-related evidence described below, 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, *post.*)

one seated juror still opined that it would make a difference to her with respect to whether one would get the death penalty whether either of the defendants were gang members. (2 RT 266; 8 RT 1246-1248.)

Just prior to opening statements, an Evidence Code section 402 hearing was held regarding the exclusion of any reference to gangs. The court ordered the gang evidence excluded and the prosecutor agreed that she would avoid eliciting any information regarding gangs by admonishing her witnesses. (2 RT 358-359.)

Throughout the trial, the court reminded counsel to avoid any reference to gangs through argument or testimony.(3 RT 409 [during Paula Beltran's direct examination][32]; 6 RT 1006-1008 [during Lourdes Lopez direct examination]; 10 RT 1624-1625 [during John Youngblood's direct examination].)

During direct examination of Lopez, the prosecution initially used the transcripts of her two interviews with police to impeach Lopez with her prior inconsistent statements being careful to redact any reference to gangs. Lopez admitted making the inconsistent statements but explained that she made them because of police coercion and intimidation. Lopez testified that police were mean to her, turned the tape on and off until she said

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[32] During the testimony of the prosecution's first witness, Paula Beltran, the prosecutor elicited that Beltran told the 911 operator that the two men whom she saw approach her boyfriend's vehicle "looked like gang members." The trial court sustained a defense objection and struck the response. (3 RT 409.)

what they wanted her to say, threatened to take her child away and threatened her with perjury. (7 RT 1138-1139, 1141-1146; 8 RT 1238-1239; 8 RT 1269-1270; 1289-1295.)

The prosecution and defense not only conducted an extensive examination of Lopez regarding these claims[33], but also examined and elicited denials from Detective Branscomb regarding the claims.[34] (6 RT 1003-1021; 7 RT 1064-1222; 8 RT 1235-1299; 10 RT 1549-1552, 1606-1619.) However, the prosecutor was additionally allowed to play the tapes for the jury[35] ostensibly so Lopez could listen and point out where the tapes had been stopped and started. (8 RT 1240, 1242; 12 RT 1847-1848.)

The defense first objected on foundational grounds because Lopez had already testified she did not know at what points the tape had been stopped and started and as a lay witness had no expertise on determining whether the tape had indeed been turned on and off just by listening to them. Mora's counsel argued and Rangel's counsel joined that

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[33] Appellant objected that the prosecutor's questioning of Lopez was improper. At the sidebar conference, the prosecutor defended herself by arguing that Lopez was lying. Defense counsel noted that the prosecutor was talking loud enough for the jury to hear and the court told the prosecutor to "keep it down." (7RT 1133-1136.)

[34] Where the statements by which the witness is sought to be impeached were the result of improper police pressures, "the police certainly should have an opportunity to refute such a charge." (*People v. Underwood* (1964) 61 Cal.2d 113, 125, disapproving *People v. Perez* (1961) 189 Cal.App.2d 526, 534-537.)

[35] The jury was also given transcripts of the tapes to follow along with while they were being played, but those were not admitted into evidence for the jury's use during deliberations.

the analysis of the tapes having been turned on and off was a scientific-type of procedure that would have required the tapes to be sent to a lab for a scientific evaluation followed by proper expert opinion testimony. (8 RT 1241-1243.)

Defense counsel again objected and argued that much of the information on the unredacted tapes was not only inadmissible hearsay, but was irrelevant and prejudicial. Further, 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 it was not a gang case and that the evidence was being admitted for a limited purpose, 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.) This purported "limited purpose" of the evidence was never explained to the jury, however. Instead, the court gave a vague and over-inclusive admonishment and jury instruction failing to cure the error. (See Argument V. E, *post*; 8 RT 1256-1258.)

In sum, the trial court erred in allowing the prosecution to improperly impeach Lourdes Lopez by playing her unredacted tape-recorded statements to police for the jury. The playing of the tapes contained inadmissible hearsay, improper character evidence, resulted in prejudicial and previously excluded gang evidence being heard by the jury and

was cumulative to impeachment evidence previously presented.[36/] As argued below, none of these errors were cured by an effective admonition or jury instruction. (8 RT 1240-1258.)

B. Standard of Review

This Court reviews any ruling by a trial court on the admissibility of evidence for an abuse of discretion. (*People v. Waidla*, *supra*, 22 Cal.4th at p. 724.) This standard is applicable both to a trial court's determination of the relevance of evidence as well as its determination under Evidence Code section 352 of whether the evidence's probative value is substantially outweighed by its prejudicial effect. (See, e.g., *People v. DeJesus* (1995) 38 Cal.App.4th 1, 32-33.)

> "The issue of the relevance of evidence is left to the sound discretion of the trial court, and the exercise of that discretion will not be reversed absent a showing of abuse. [Citations.] That discretion is only abused where there is a clear showing the trial court exceeded the bounds of reason, all of the circumstances being considered. [Citations.]" (*Ibid.; People v. Cudjo* (1993) 6 Cal.4th 585, 609.)

The abuse of discretion standard applies equally when the issue is the admission of gang evidence. (*People v. Champion* (1995) 9 Cal.4th 879, 922; *People v. Sandoval* (1992) 4 Cal.4th 155, 175.)

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[36] The tapes contained inferences that the crimes were gang-related; that both Rangel and Mora were gang members; that Mora had a propensity for violence; and that Mora had recently been in jail.

The improper admission of hearsay evidence is reviewed de novo where it is purely a question of law. (*People v. Duarte* (2000) 24 Cal.4th 603, 618.)

C. The Trial Court Erred When It Allowed the Jury To Hear Two Tape Recorded Statements Which Contained Inadmissible Hearsay as well as Irrelevant and Prejudicial Gang Evidence.

The trial court erred in allowing the prosecution to "impeach" Lourdes Lopez by playing her unredacted tape-recorded statements to police for the jury. As shown below, the playing of the tapes was wholly unnecessary and irrelevant to the material issue i.e., whether appellant and Mora were guilty of the crimes alleged. The playing of the tapes resulted in prejudicial and otherwise inadmissible evidence being heard by the jury. (8 RT 1240-1258.)

The prosecution argued and the trial court erroneously held that the defense had "opened the door" to the unredacted tapes being admitted, including all the hearsay, bad character evidence and gang references, by cross-examining Lopez regarding the allegations of police coercion. (8 RT 1242-1244, 1247-1248, 1252-1253, 1256.) Pursuant to Evidence Code section 780, subdivision (i), a trial court may admit otherwise inadmissible evidence[37] for impeachment purposes to prove or disprove the existence or

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[37] Appellant maintains this evidence was otherwise inadmissible, *inter alia*, because it required an expert testimony for its purported admissible purpose, i.e., to show where the tapes were turned on and off. (Evid. Code § 801 [Expert testimony is admissible where it relates to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact].)

nonexistence of a fact about which a witness has testified or opened the door. However, this evidence is still subject to Evidence Code sections 210 and 352 exclusion if found to be irrelevant or more prejudicial than probative. Such should have been the case here.

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, the Court requires 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 infer the defendant has a criminal disposition and is therefore guilty of the offense charged'[citations omitted.] ..."

(*People v. Gurule* (2002) 28 Cal.4th 557, 653; *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 gang evidence presented in the tapes 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.

Further, the gang evidence was more prejudicial than probative of any material facts. Evidence Code section 352 states 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.) Evidence Code section 352, however, is designed to prevent the admission of evidence having little evidentiary impact, but evoking an emotional bias. (*Ibid.*)

Many courts have recognized that evidence of a criminal defendant's gang membership or affiliation can create a risk 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. But "[c]ases have repeatedly held that it is proper to introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent. [Citations.]" (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1518, and cases cited therein.)

Here, the jury was improperly allowed to hear that: Lourdes Lopez (Mora's "baby-momma") was at a party earlier in the evening where "North County Locos" gang members were harassing her and her "Tiny Locos" gang-member friends, Jose, Jade, Kiki and Dreamer as they left in Lopez' car with her baby daughter; the police thought one of her gang-member friends in the car was appellant Rangel; a gang member who shot "Dreamer" saw her with him and she was afraid he would come back to the house and

"shoot it up or something"; she called Mora (aka "Joker") when she got home to come over in case the other gang-members came back; Mora showed up with appellant (aka "Stranger") and they went outside; when Lopez heard the shots, she assumed the other gang-members came by; those same gang-member friends that were in her car were also at her house during the shootings; Mora frequently got into fights; and he Mora recently gotten out of jail. (1 CT 7-9, 13-21, 30-32.)

None of the above information had a tendency to prove any disputed facts as to whether appellant was guilty of the crimes as charged. The only admissible purpose for which the tapes were admitted was as evidence of whether Lopez' statements to police had been coerced. Instead, the tapes injected prejudice into the case by informing the jury that appellant and Mora were gang members and that the crimes were gang-related. Thus, the trial court abused its discretion when it overruled appellant's objection and allowed the jurors to hear the unredacted gang-related information in the tapes. (*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."].)

D. The Admission of the Evidence Was Prejudicial and Was Not Cured By The Court's Vague and Inadequate Admonishment Regarding the "Limited" Use of the Evidence Nor Its Giving of CALJIC 2.09.

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 the gang evidence served no legitimate purpose, and where, as described below, the prejudicial effect of the gang evidence was such that it could only have influenced the jurors' decision by inflaming them to a degree that infected the guilt phase as well as the penalty 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 towards 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, 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.)

In terms of prejudice, it matters not whether this error is assessed as one of state or federal law, for test is the "same in substance and effect." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 961 & fn. 6; *People v. Ashmus*, *supra*, 54 Cal.3d at p. 965.) As described below, the State cannot show that it is beyond reasonable possibility that this violation of state and federal law could have contributed to the jury's decision to find appellant guilty in this case. (*Chapman v. California*, *supra*, 386 U.S. 18; *People v. Brown* (1988) 46 Cal.3d 432, 446-448.)

As recognized by this Court, evidence of a defendant's gang affiliation can have a highly inflammatory and prejudicial impact on jurors and can create a risk 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 153, 193.) 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; *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1497; *People v. Perez* (1981) 114 Cal.App.3d 470, 479.)

Moreover, no adequate admonishment or instruction was given to limit the purpose for which the jury could consider the evidence. Rather, the admonishment that was given, allowed the jury to consider the information on the tape for *any* purpose which clarified Lopez' testimony. The court in explaining that the prosecutor was about the play the taped statements that they were to be given transcripts with which to follow along, first explained to the jury 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 – excuse me for pointing at you – 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.*"

(Emphasis added. 8 RT 1248, 1256-1258.) 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 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; CALJIC 2.09.)

However, the jury was not instructed with CALJIC 2.09 until just prior to deliberations after seven more days of testimony by seven other witnesses. The jury could not possibly have been able to glean from the admonishment nor instruction which evidence, *if any*, was being admitted for a limited purpose.

Further, 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.) What is worse here, is that neither the admonishment nor the instruction even mentioned that the court was referring to the gang evidence.

The trial court's erroneous admission of the tapes made it appear that the instant crimes were gang-related and allowed the jurors to view appellant and Mora as violent gang members that commit murders and exact revenge. The State 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 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; *People v. Ashmus*, *supra*, 54 Cal.3d at p. 965). Thus appellant's conviction must be

reversed.

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V. THE TRIAL COURT'S REFUSAL TO DISMISS JUROR NO.7 AFTER SHE HAD OBTAINED EXTRANEOUS AND OTHERWISE INADMISSABLE INFORMATION REGARDING A PLEA OFFER OF 25 YEARS TO LIFE WITHOUT MAKING AN ADEQUATE INQUIRY VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

A. Introduction

The trial court erred in refusing appellant's request to remove a juror who had received outside information that appellant had been offered a plea of twenty-five years to life violating appellant's rights to an impartial jury, a fair trial, due process and a reliable guilt determination. (U. S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 24.)

On the second day of trial[38], Juror No. 7 brought to the court's attention that two days beforehand she was approached by one of the defendant's mothers in the cafeteria. During the lunch break, the woman sat across from Juror No. 7 and offered her a cookie, which Juror No. 7 refused. The woman said that she had to be there from 10:00 a.m. to 4:00 p.m. every day for her son who was facing murder charges and that he had been offered a plea of 25 years to life[39] but that she would lose him anyway since he was facing the death penalty. The woman went on to complain that she was looking for work

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38 Wednesday, January 13, 1999.

39 In reality, there was not a formal offer of 25 years to life, however the prosecution had discussed with the defense the possibility of a potential package deal for the defendants to plea to "LWOP" as opposed to proceeding to trial. (4 RT 530, 532.)

but couldn't continue to do so until this whole ordeal was over with. (4 RT 523-528.)

The court questioned Juror No. 7 about whether this interaction would affect her deliberations in either the guilt or penalty phases of the trial. Juror No. 7 responded that it would not. (4 RT 526-528.) The court did not ask whether Juror No. 7 had shared this information with any of the other jurors nor did it admonish her not to do so during the course of the trial or deliberations.

Counsel for Rangel asked the juror why she had not brought the event to the court's attention during voir dire since she had the interaction prior to being specifically voir dired by the court and the attorneys. Juror No. 7 responded "I didn't know she was here for this case." (4 RT 527-528.)

The prosecution asked Juror No. 7 whether she "would be able to disregard the entire conversation," to which the juror responded in the affirmative. (4 RT 527-528) Juror No. 7 was excused from the court room while the court and attorneys discussed the situation.

Counsel for Rangel asked the court to excuse the juror from the case since her knowledge of a plea offer necessarily would conjure up the question of whether the defendants were considering the offer because they were in fact guilty. (4 Rt 528-529.)

> "I have a problem with this juror remaining because it indicates to me if she thinks an offer was made, that the defendants may have been considering that offer, which perhaps could point up that they are saying "Well, maybe I did this and I better take this deal." (4 RT 529.)

Counsel for Mora stated that "Your Honor, I believe the juror said she could be fair and impartial" and asked the court to instruct people in the audience not to make statements regarding the case. The court did so and also instructed counsel to tell family members not to have any contact with anyone. (4 RT 529-533.).

The court declined appellant's request to excuse the juror and failed to sua sponte further question or admonish the juror or jury.

B. Standard of Review

The ultimate determination of juror misconduct is for the trial court and the decision to dismiss the juror lies within the trial court's discretion. (*People v. Osband* (1996) 13 Cal.4th 622, 675-676; Pen. Code, § 1089.) A juror's misconduct creates a rebuttable presumption of prejudice, and reversal is required where there is a substantial likelihood one or more jurors were improperly influenced by bias. (*In re Hitchings* (1993) 6 Cal.4th 97, 118-119.) The trial court's decision whether to discharge a juror is reviewed for abuse of discretion and will be upheld only where supported by substantial evidence; to warrant discharge, the juror's bias or other disability must appear in the record as a demonstrable reality. (*People v. Holloway* (2004) 33 Cal.4th 96, 125; *People v. Marshall* (1996) 13 Cal.4th 799, 843; *People v. Lucas* (1995) 12 Cal.4th 415, 489.)

The heightened standard of "demonstrable reality"more fully reflects the reviewing court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury than the former substantial evidence test. (*People v. Barnwell*

(2007) 41 Cal.4th 1038, 1051-1053.) The demonstrable reality test entails a more comprehensive and less deferential review that the substantial evidence test. The reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court relied. In other words, it requires a showing that the trial court relied on evidence that supported its conclusion that bias was not established. (*Ibid.*)

C. Juror Knowledge Of A Plea Offer Of Twenty-Five Years to Life Without An Adequate Inquiry From The Trial Court Or Removal of the Juror Violated Appellant's Constitutional Rights to A Fair and Impartial Jury.

The court's failure to conduct and adequate inquiry or to remove Juror No. 7 from the jury was an abuse of discretion and resulted in a violation of appellant's Fifth Amendment right to Due Process and a fair trial, his Sixth Amendment right to trial by an impartial jury (*Irvin v. Dowd* (1961) 366 U.S. 717, 722; *Turner v. Louisiana* (1965) 379 U.S. 466, 471-472); his Fourteenth Amendment right to an impartial penalty jury (*Morgan v. Illinois*, *supra*, 504 U.S. 719, 729-730; *People v. Williams*, *supra*, 16 Cal.4th 635, 666-667); and his Eighth Amendment guarantee of a reliable capital and penalty determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.)

The Sixth Amendment guarantees a criminal defendant the right to an impartial jury. "In essence the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. The failure to accord the accused a fair hearing violates even the minimal standards of due process." (*Irvin v. Dowd*, *supra*, 366 U.S. at p.

722.) The constitutional right to an impartial jury imposes a duty on each individual juror to maintain his or her impartiality throughout the case (*In re Hamilton* (1999) 20 Cal.4th 273, 293; *People v. Nesler* (1997) 16 Cal.4th 561, 578; *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 973 (en banc)), and the loss of impartiality at any time during the case requires dismissal of the juror in question. (*People v. Keenan* (1988) 46 Cal.3d 478, 532-533; *People v. Nesler, supra*, 16 Cal.4th at 581-582; *People v. Farris* (1977) 66 Cal.App.3d 376, 386.) A juror's misconduct, even when inadvertent, gives rise to a presumption of prejudice. (*People v. Nesler, supra*, 16 Cal.4th at p. 579.) This lack of impartiality is denominated misconduct, whether or not moral blame to the juror attaches; but in either event, the juror is not, or is no longer, competent to judge the case. (*In re Hamilton, supra*, 20 Cal.4th at 294-295.)

Specifically, the United States Supreme Court has clearly stated that private communications between an outside party and a juror raise Sixth Amendment concerns. (See *Parker v. Gladden* (1966) 385 U.S. 363, 364 (per curiam).) "Private talk, tending to reach the jury by outside influence" is constitutionally suspect because it is not subject to "full judicial protection of the defendant's right to confrontation, of cross-examination, and of counsel." (*Id.*) Conversations between jurors and "anyone else on any subject connected with the trial" are forbidden. (*People v. Jones* (1999) 17 Cal.4th 279, 310, emphasis added.) Juror misconduct occurs when a juror obtains information about a party or the case that was not part of the received evidence at trial. (*People v. Nesler, supra*, 16

Cal.4th at p. 578.) Juror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that the defendant was prejudiced thereby and may establish juror bias. (*People v. Marshall* (1990) 50 Cal.3d 907, 949-951; *In re Carpenter* (1995) 9 Cal.4th 634, 650-655.)

> "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.... [¶] In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." (*Turner v. Louisiana*, *supra*, 379 U.S. 466, 472-473, citations and fn. omitted.)

As the United States Supreme Court has explained: "Due process means a jury capable and willing to decide the case solely on the evidence before it . ..." (*Smith v. Phillips* (1982) 455 U.S. 209, 217, quoted in *Carpenter*, *supra*, 9 Cal.4th at p. 648; accord, *Dyer v. Calderon* (9th Cir. 1997) 113 F.3d 927, 935; *Hughes v. Borg* (9th Cir. 1990) 898 F.2d 695, 700.)

When juror misconduct involves the receipt of information about a party or the case from extraneous sources, the verdict will be set aside if there appears a substantial likelihood of juror bias either because the material is inherently prejudicial or because it was likely to result in "actual bias." (*Carpenter*, *supra*, 9 Cal.4th at p. 653.)

The extraneous information that appellants were offered a plea of twenty-five years to life, judged objectively, is inherently prejudicial and substantially likely to have

influenced Juror No. 7, as well as any other jurors with whom she may have shared the information during deliberations. (See *Carpenter*, *supra*, 9 Cal.4th at p. 653.) Moreover, even if this court does not find that the "insider" information Juror No. 7 thought she was privy to was not "inherently prejudicial," it is clear from her comments on her jury questionnaire and during voir dire that this is exactly the type of information that would lead to actual bias on her behalf. During voir dire, the court specifically asked Juror No. 7[40] whether there was "anything you want to bring to my attention," and she answered "No." In response to defense questioning she acknowledged that she wrote in her jury questionnaire that:

> "A person who has no regard for another person's life shouldn't use taxpayers' money in prison" and that "once you have been convicted and found guilty beyond a reasonable doubt, sentence (sic) to death, and I think it should be carried out" because "[too] much time is wasted on the criminals." (2 RT 196-197.)

Neither this juror, nor anyone else on the jury should have been privy to any offers to plead guilty as they are inadmissible at trial. (See, Evid. Code § 1153[41]; Pen. Code §

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40 (AKA prospective juror #3982 or #18, but mistakenly identified on pages 193-194 as #8480)

41 "Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is inadmissible in any action or in any proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals." (Evid. Code § 1153.)

1192.4.[42]) Here, Juror No. 7 was nonetheless privy to this information because of juror tampering. A nonjuror's "tampering contact or communication with a sitting juror, usually raises a rebuttable 'presumption' of prejudice. [Citations.]" (*In re Hamilton*, *supra*, 20 Cal.4th 273, 295.) Here, "tampering contact" occurred through the improper out-of-court conversation between Juror No. 7 and one of the defendants' mothers. In that conversation, the mother told Juror No. 7 that one of the defendants "had been offered a plea of 25 to life, – but in either case, she was going to lose out because murder charges – well, charges had been set up and they wanted to give him the death penalty." (4RT 524.)

The underlying problem with such exposure of jurors to claims of plea negotiations is that it suggests a defendant who has made a conscious decision to "roll the dice" with a trial, and who therefore might "deserve" to be sentenced to death in the event he is found guilty. Such an implication may well suggest to a juror that "the responsibility for determining the appropriateness of the defendant's death rests elsewhere" – namely, with the defendant's own decision to go to trial, and that the juror consequently need not exercise any great concern over imposing a sentence that the on which the defendant "gambled" and lost. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320, 329.) This is particularly true where, as here, the juror admitted feeling that "too

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[42] "The plea so withdrawn may not be received in evidence in any criminal, civil, or special action or proceeding of any nature, including before agencies, commissions, boards, or tribunals." (Pen. Code § 1192.4.)

much time is wasted on the criminals." (2 RT 196-197.)

In *Caldwell*, the United States Supreme Court reversed a death sentence imposed after the prosecutor made the argument to the jury that its decision to vote for capital punishment would not really be the "final" one because such a decision is "automatically reviewable by the Supreme Court." (*Id.* at pp. 325-326.) This argument, the Court said, encouraged the jury to "shift its sense of responsibility" for making the death decision onto a reviewing court in the future. (*Id.* at p. 330.) Moreover, it did so in a way that would shift a serious decision onto the shoulders of an institutional actor that was less capable of making a fair determination because it had less access to "intangibles a jury might consider in its sentencing determination." (*Ibid.*)

Here, an analogous error occurred because of the risk that the jury would shift its sense of responsibility *backward* onto the defendant for what it may have inaccurately perceived to be a choice of defense strategy. Essentially, this error would have encouraged the jury to punish appellant with death for choosing to "waste" state resources by going to trial rather than for taking a deal, and it would have done so on the basis of purported pretrial discussions that were no concern of the jury. Just as "the fact that review is mandated is irrelevant to the thought processes required to find that an accused should be denied mercy and sentenced to die," so it should be equally irrelevant to the jury that the defendant has gone to trial rather than taking a plea. (See *id.* at p. 331.) Because of the conversation between one of the defendant's mothers and Juror No. 7,

however, those irrelevant considerations were pushed to the forefront of that juror's mind. The information was "of a type that would leave an inerasable impression." (*People v. Lambright* (1964) 61 Cal.2d 482, 486 [Judgment reversed where innocent[43] juror misconduct made it reasonably probable that juror knowledge of inadmissible evidence, i.e., that defendant had previously threatened the victim, affected the result.].) It was extraneous information which, as a matter of law she could not consider, but as a matter of fact, she could not forget. (See *Jackson v. Denno* (1964) 378 U.S. 368, 388-389 [discussing juror knowledge of co-defendant confession implicating defendant].)

When this conversation between the woman and Juror No. 7 was disclosed, appellant's trial counsel argued that Juror No. 7 could not fairly continue to serve on the jury because of the possibility that, correctly or not, "she thinks an offer has been made" and that the defendants were "saying [to themselves] that 'well, maybe I did this and I better take this deal.' " (4RT 529.) The conversation, in other words, raised the specter that factually guilty individuals were weighing the odds of going to trial versus taking a deal.

The court declined to remove Juror No. 7 and failed to further question or

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[43] In *People v. Lambright*, the jurors were improperly told by the court that they could read newspaper articles about the trial during the trial as long as it did not affect their deliberations. The inadmissible information regarding defendant previously threatening the victim was discussed in a newspaper article written during the trial. (*People v. Lambright, supra*, 16 Cal.2d at pp. 486-487.)

admonish her or the rest of the jury panel. (4RT 531.) The trial court conducted an inadequate voir dire of Juror No. 7 in order to determine whether or not she could discharge her duties as a juror. When a question arises justifying inquiry into the juror's qualification, the trial court has an obligation to investigate the matter sufficiently to determine whether or not good cause exists to replace that juror. (*People v. Keenan*, *supra,* 46 Cal.3d 478, 532; *People v. Burgener* (1986) 41 Cal.3d 505, 519-520; *People v. Hightower* (2000) 77 Cal.App.4th 1123, 1142.) Specifically, if the court has reason to believe that a juror is or has become biased for or against a party, then that must be adequately investigated, and because of the constitutional values involved, the failure to conduct an adequate investigation will itself be constitutional error. (*Dyer v. Calderon*, *supra*, 151 F.3d 970, 974-975; see also *Smith v. Phillips*, *supra*, 455 U.S. 209, 217 ["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."].) The court not only has a duty conduct whatever inquiry reasonably necessary to determine the alleged facts, but due process requires "a trial judge be ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." (*Smith v. Phillips, supra,* 455 U.S. at p, 217.) The failure to conduct an adequate investigation will itself be constitutional error. (*Dyer v. Calderon*, *supra*, 151 F.3d 970, 974-975; *see also People v. Keenan*, *supra*, 46 Cal.3d 478, 532.)

Here, the trial court failed in discharging its constitutional obligations. The trial court failed to adequately assess the effect of Juror No. 7's conversation with the woman not only on Juror No. 7 but potentially on any other jurors as well. The court did not ask whether Juror No. 7 had shared this information with any of the other jurors nor did it admonish her not to do so during the course of the trial or deliberations. The likelihood that this death-qualified juror who communicated such specific views about the cost of incarceration being "wasted on criminals," sharing the plea offer information with other jurors either prior to or during deliberations is an issue with which the trial court should have been concerned.

D. Appellant's Case Must Be Reversed.

Appellant was denied his right to an impartial jury, a fair trial, due process and a reliable guilt determination when the court failed to make an adequate inquiry into the misconduct and failed to remove Juror No. 7 on defense request after it had learned that Juror No. 7 had obtained extraneous and otherwise inadmissable information regarding a purported rejected plea offer of twenty-five years to life.

Juror misconduct occurs when a juror obtains information about a party or the case that was not part of the received evidence at trial. (*People v. Nesler*, *supra*, 16 Cal.4th 561, 578.) Once misconduct is found, the court then considers whether the misconduct was prejudicial. The applicable standard in California has been set forth by this Court:

"[W]hen misconduct involves the receipt of information from extraneous

> sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias. Such bias can appear in two different ways.[citation omitted.] ¶ 'First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror.' [citation omitted] 'Under this standard, a finding of 'inherently' likely bias is required when, but only when, the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment. Application of this 'inherent prejudice' test obviously depends upon a review of the trial record to determine the prejudicial effect of the extraneous information.'[citation omitted.] ¶ Second, 'even if the extraneous information was not so prejudicial, in and of itself, as to cause 'inherent' bias under the first test,' the nature of the misconduct and the 'totality of the circumstances surrounding the misconduct must still be examined to determine objectively whether a substantial likelihood of actual bias nonetheless arose.' [citation omitted.] 'Under this second, or 'circumstantial,' test, the trial record is not a dispositive consideration, but neither is it irrelevant. All pertinent portions of the entire record, including the trial record, must be considered. 'The presumption of prejudice may be rebutted, inter alia, by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual' bias.'" (*People v. Danks* (2004) 32 Cal.4th 269, 302-303, citing *In re Carpenter*, *supra*, 9 Cal.4th 634, 653-654.)

"The judgment must be set aside if the court finds prejudice under either test. Whether prejudice arose from juror misconduct ... is a mixed question of law and fact subject to an appellate court's independent determination.(*Id.* at 303.)

Moreover, a defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16; *Irvin v. Dowd*, *supra*, 366 U.S. 717, 722; *In re Hitchings*, *supra*, 6 Cal.4th 97, 110.) A defendant is "entitled to be tried by 12, not 11, impartial and unprejudiced jurors.

'Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced.' [Citations.]" (*People v. Nesler*, *supra,* 16 Cal.4th at p.578)

Since it is reasonably probable on the facts of this case that Juror No. 7's knowledge of this information either affected her deliberations or others she may have told, appellant's conviction must be reversed.

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VI. THE EVIDENCE WAS INSUFFICIENT TO CONVICT APPELLANT OF ATTEMPTED ROBBERY, FELONY MURDER BASED UPON ATTEMPTED ROBBERY AND TO SUPPORT A TRUE FINDING ON THE ROBBERY SPECIAL CIRCUMSTANCES.

A. Introduction

The Information charged appellant in counts one and two with first degree murder (Pen. Code § 187, subd., (a)) and in counts three and four with attempted second degree robbery (Pen. Code § 664/211). It was further alleged that the murders with which appellant was charged in counts one and two were committed with the special circumstances as they occurred while appellant was engaged in the commission of the crime of robbery. (Pen. Code § 190.2, subd., (a)(17).) (2 CT 501-504.)

Appellant's jurors were instructed they could convict appellant of attempted second degree robbery if appellant committed a direct but ineffectual act to take another person's property from the person or from his immediate presence, by the use of force or fear and against the will of the person, and the act was done with the specific intent to commit the crime of robbery. (CALJIC No. 6.00/9.40; 5 CT 1148-1150; 14 RT 2224-2226.)

The jurors were further instructed that they could convict appellant of first degree felony murder if appellant killed the victim during the attempted commission of robbery if the perpetrator had the specific intent to commit robbery. (CALJIC No. 8.21; 5CT 1136; 14RT 2210.) However, the jurors were not instructed that a felony murder finding

required an independent felonious purpose for the attempted robbery.[44/]

The jurors were also instructed that they could find true the special circumstance that the murder was committed during the commission of the crime of attempted robbery if appellant committed the murder in order to carry out or advance the commission of the robbery, but not if the attempted robbery was merely incidental to the commission of the murder. (CALJIC No. 8.81.17; 5CT 1147.)

The prosecution proceeded on a theory that the murders were in the first degree as they were either committed with malice aforethought (Pen. Code § 187, subd.(a)) or committed during the attempted commission of a robbery (Pen. Code § 189). The prosecution argued that appellant's display of a gun and his statement "Give me your wallet" constituted a direct but ineffectual act to take the victim's property by the use of force or fear with the specific intent to commit the crime of robbery. The prosecution theorized that the fact that no property was actually taken from the victims, showed only that they abandoned the robbery before completing it. (14RT 2234-2240.)

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[44] Appellant requested the court instruct the jury with defense special instruction #1 which stated: "To prove the felony murder of first degree murder, the prosecution must prove beyond a reasonable doubt that the attempted robbery was done for the independent purpose of committing the felony rather than for the purpose of committing the homicide. ¶ If the defendant's primary purpose was to kill or if he committed the attempted robbery to facilitate or conceal the homicide, the there was no independent felonious purpose. If from all the evidence you have a reasonable doubt that the defendant committed the attempted robbery for such independent felonious purpose, you must find the defendant not guilty on the felony murder theory." (4CT 1043.)

The jurors convicted appellant of two counts of attempted robbery, two counts of first degree murder and found the robbery special circumstances true. (4 CT 1010-1014, 1043; 15 RT 2464-2465.) After which, when arguing for death verdicts in the penalty phase, the prosecution argued the directly inconsistent theory that appellant and co-defendant Mora's "mission" or "goal" "from the get go" was to murder or "execute" the victims "for fun," but decided in the middle "let's get their wallets while we're at it." However, neither defendant took either victim's wallet or any other personal belongings. (20RT 3198-3201.)

On either theory the evidence was insufficient to support a finding that an attempted robbery took place. There was no evidence appellant or the co-defendant intended to take anything from the victims, nor that they killed the victims with the independent felonious purpose of robbing them. Accordingly, the record at trial does not contain facts necessary to find the essential elements of attempted robbery, felony murder based on robbery or the robbery special circumstance in violation of appellant's rights to due process and a fair trial. (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, §§ 7, 15; *Jackson v. Virginia* (1979) 443 U.S. 307.)

Further, as argued below, permitting appellant's felony murder convictions and robbery special circumstances findings 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., 8th & 14th Amends.; Cal. Const., art. I, §§ 1, 7, 15, 17; *Beck v. Alabama, supra*, 447 U.S. 625, 637-638; *People v. Marshall* (1997) 15 Cal.4th 1, 34-35.)

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 required for a constitutionally valid conviction. (*In re Winship* (1970) 397 U.S. 358.) 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 reasonable doubt." (*People v. Holt* (1997) 15 Cal.4th 619, 667.) The United State Supreme Court 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.)

"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." *(Id.* at pp. 318-319.) This Court, however, does not limit its review to the evidence favorable to the respondent. (*People v. Miranda* (1987) 44 Cal.3d 57, 78.) A reviewing court has a two-fold task: "First, we must resolve the issue in light of the whole record. . . Second, we must judge whether the

evidence of each of the essential elements is substantial." (*People v. Brown* (1989) 216 Cal.App.3d 596, 600, quoting *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*, *supra*, 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* (1980) 26 Cal.3d 557, 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.) In *People v. Morris*, *supra*, this Court stated:

> We may *speculate* about any number of scenarios that may have occurred on the morning in question [when the victim was murdered with no eyewitnesses present]. A reasonable inference, however, 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [Para.]. ... A finding of fact must be an inference drawn from evidence rather than ... a mere speculation as to probabilities without evidence.' [Citations.]

(*Id.* at p. 21; emphasis and ellipses in original.)

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. Ochoa* (2001) 26 Cal.4th 398, 453-454; *People v. Cain* (1995) 10 Cal.4th 1, 38 quoting *People v. Roland* (1992) 4 Cal.4th 238, 271.)

C. The Evidence Was Insufficient to Convict Appellant of Attempted Robbery, Felony Murder or Find True the Robbery Special Circumstances, Thus Those Convictions and Findings Must Be Reversed.

As described in the following arguments, the trial 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. And, because the charged robbery-murder special circumstance could only be found true if the murders were committed while appellant was engaged in the attempted commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)(A)), the true findings on this special circumstance also must be reversed.

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., 5th & 14th Amends.; *Jackson v. Virginia*, *supra*, 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 Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, and article I, sections 7, 15, and 17 of the California Constitution.

1. The Evidence Was Insufficient to Support the Attempted Robbery Convictions.

Appellant's constitutional rights were violated since the evidence presented was insufficient to convict appellant of attempted robbery. Robbery is defined as "the taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code § 211.) To obtain a proper attempted robbery conviction, the prosecutor had to prove beyond a reasonable doubt that appellant had the specific intent to permanently deprive, or to aid Mora in permanently depriving, Encinas and Urruita 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 prosecutor's evidence of an attempted robbery came from Fidel Gregorio's testimony that appellant told Encinas "Check yourself, check yourself, give me your wallet" and that Mora similarly told Urrutia to give Mora his wallet. (4 RT 634, 636-637, 699, 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 well, 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] evidence remains substantial in the light of other facts." (*Ibid.*) That certainly is the case here, where the "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 Mora intended to actually take the victims' wallets or belongings. Where the most tenable inference that can be drawn from the whole record is that the demands for money were used as a pretext for some other objective, the evidence is insufficient to establish an intent to steal. (*People v. Thompson* (1980) 27 Cal.3d 303, 323-324 [no intent to steal found where defendant with intent to kill demanded money but failed to take it.)

Here, the witness testimony showed that appellant and Mora approached Encinas and Urrutia on the sidewalk late at night while the two men and their girlfriends were walking to their cars. Appellant said to Encinas: "Do you want to go to sleep?" Encinas

did not respond. Appellant then said: " Why are you quiet, I asked you a question." As Encinas continued to his car, appellant followed him to the driver's side while Mora followed Urrutia to the passenger side. (3RT 406- 407, 438, 491.)

Appellant then displayed his gun and told Encinas, "Check yourself. Check yourself. Give me your wallet." (4 RT 632-633.) Mora then told Urrutia, "Give me your wallet." (4 RT 636-637, 5 RT 701.) However, immediately after appellant's statement, and before Encinas could even reach for his wallet, appellant shot Encinas in the chest. (4 RT 635-636.) Mora then shot Urruita within "seconds" of his statement without giving Urrutia any opportunity whatsoever to hand over his wallet. (5 RT 702; 4 RT 637.) Appellant immediately fired two more shots, then he and Mora ran away, leaving Encinas and Urrutia in the vehicle with their wallets. (4 RT 638-639, 9 RT 1432, 1452-1453.) Appellant and Mora ran across the street into Lourdes Lopez' house and started bragging that they "fucking blew their heads off" and appellant allegedly stated: "I'd have shot them more, but the damn bullet got stuck." (6RT 849, 975.)

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.)

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 the testimony presented 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 appellant or Mora acted with the specific intent to permanently deprive Encinas and Urrutia of their wallets or other belongings. Rather, the most tenable inference that can be drawn from the whole record is that the demands for the wallets were used as a pretext for some other objective. Since even the prosecution agrees that the perpetrators had at least a coequal – if not preeminent – intent to kill from the beginning of this incident, it would seem that the demands for the wallets were simply a ruse to obtain the victims' cooperation until they could be maneuvered into a vulnerable position so that the shootings could easily be carried out. (*People v. Thompson, supra*, 27 Cal.3d at p. 323.) Therefore, appellant's attempted robbery convictions must be reversed.

2. The Evidence was Insufficient to Support a Felony Murder Conviction Based on Robbery or a True Finding on the Robbery Special Circumstance Allegation.

First degree felony murder based upon robbery may only be found true if the murder was committed during the commission of the robbery. The perpetrator must have had the specific intent *and* independent felonious purpose to commit the robbery or to aid and abet its commission before or during the fatal assault. (*People v. Lewis*, *supra*, 25

Cal.4th 610, 642; *People v. Burton* (1971) 6 Cal.3d 375, 384–388.) In other words, felony-murder may not be found true where the purpose of the criminal act is to kill or assault. (*People v. Garrison* (1989) 47 Cal.3d 746, 778.) The purpose of the felony-murder doctrine is to deter negligent, accidental, and reckless killings during the commission of a felony, and this purpose can only be realized when the defendant has the intent to commit the underlying felony. For example, the felony-murder doctrine does not apply in a situation where a defendant commits a robbery in the perpetration of a murder. In such a situation, the murder is not considered to occur within the course of the robbery because the defendant's intent is not to steal but to kill and the robbery is merely incidental to the murder. (*People v. Sears*, *supra*, 2 Cal.3d 180, 188; *People v. Wilson* (1969) 1 Cal.3d 431, 444; *People v. McLead* (1990) 225 Cal.App.3d 906, 915.)

Similarly, "[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).) "[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* (1980) 27 Cal.3d 1, 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*, *supra*, 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 contended that the evidence showed appellant's and Mora's primary goal was to murder, not rob, Encinas and Urrutia. (20 RT 3199-3200.) Paradoxically, the prosecutor's guilt phase argument was that appellant and Mora decided that if they killed Encinas and Urrutia, they then could just reach into the 4-Runner, grab the wallets, and thereby prevent Encinas and Urrutia from calling 911 and

identifying them.[45/] (15 RT 2431.)

Once again, however, the prosecutor's argument was speculation and conjecture, and entirely unsupported by the facts and circumstances surrounding the crime. There was testimony that appellant said to Encinas on the street, "Do you want to go to sleep?" Neither appellant nor Mora gave either victim time to hand over their wallets before shooting them, nor did either one "reach in and get it." Appellant was heard bragging about the killings immediately thereafter, and no mention of robbery was made. The crimes depicted by the evidence and embraced by the prosecution in the penalty phase were murders, not robberies. As this Court noted in *People v. Thompson*:

> "the jurors who tried this case undoubtedly were sorely tested when they realized they would have to return a "not true" finding as to all the special circumstance allegations if they determined appellant was primarily a killer instead of a thief. But constitutional protections, including the requirement of proof beyond a reasonable doubt, are not limited to those defendants who are morally blameless. [Citation] No matter how blameworthy in other respects, this appellant is entitled to the same dispassionate review of the sufficiency of the evidence as to the special circumstances findings as a civil litigant is allowed upon appeal from an adverse judgment for money. Indeed, in a case such as this, where moral equities weigh so heavily against an individual, an appellate court has a special duty to apply its objectivity." (*People v. Thompson, supra*, 27 Cal.3d at 325.)

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[45] 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 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.)

A rational trier of fact could not have concluded beyond a reasonable doubt that appellant and Mora killed Encinas and Urrutia during the course of a robbery or killed them in order to advance the independent, felonious purpose of committing a robbery. Because the evidence was woefully insufficient to show that Encinas and Urrutia were killed in order to advance the independent felonious purpose of robbery, the felony murder convictions and the robbery-murder special-circumstance findings must be reversed. (*Ibid.*)

3. Arguendo, If the Evidence Presented Is Deemed Sufficient for a Finding of Attempted Robbery or Felony Murder Based upon Robbery in a Non-capital Case, It Is Still Not Sufficient to Sustain a Death Verdict.

The evidence presented in this trial 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 the attempted robbery convictions and a sentence of imprisonment (which it is not), the evidence of attempted robbery 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 murder conviction and robbery 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., 8th & 14th Amends.; Cal. Const., art. I, §§ 1, 7, 15, 17; *Beck v. Alabama*, *supra*, 447 U.S. 625, 637-638; *People v. Marshall*, *supra*, 15 Cal.4th 1, 34-35.)

D. The Attempted Robbery and First Degree Murder Convictions Must be Reversed and the Death Verdict Must Be Set Aside Since There Was Insufficient Evidence Presented to Support the Convictions and Robbery Special Circumstance Findings.

Appellant has shown that even when the evidence is viewed in a light most favorable to the judgment, the facts supporting the prosecution's theories were insufficient to support the verdicts and true findings. On any of the alternative theories relied upon by the prosecution (14RT 2235-2240, 15RT 2431, 20RT 3198-3200), the evidence was factually insufficient to support the convictions for attempted robbery and felony murder based upon robbery as well as to support the jury's finding that the robbery-murder special circumstance was true.

Appellant could be convicted of attempted robbery and first degree felony murder only if he intended to actually take Encinas' and Urrutia's wallets, thereby satisfying the specific intent to permanently deprive element of 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."].) Moreover, even if there was sufficient evidence of specific intent for robbery, that is not enough for felony murder or the

robbery murder special circumstances. Both statutes require that the jury find that the murder was committed during the commission of the attempted robbery, *not* vice versa as the evidence, at most, showed in this case. (Pen. Code §§ 189, 190.2(a)(17(A); *People v. Green*, *supra*, 27 Cal.3d 1, 59; *People v. Sears, supra*, 2 Cal.3d at p. 188.)

1. The Attempted Robbery Convictions Must be Reversed and Cannot be Retried.

Since the evidence was insufficient as a matter of law to support the attempted robbery convictions, the convictions must be reversed and further proceedings are barred by the double jeopardy clause. (U.S. Const., 5th Amend.; Cal. Const., art. I, §§ 15, 24; *People v. Hill* (1998) 17 Cal.4th 800, 848; *People v. Pierce* (1979) 24 Cal.3d 199, 209-210; *Burks v. United States* (1978) 437 U.S. 1.)

2. The Murder Convictions Must Be Reversed.

Since there was insufficient evidence to support one of the prosecution's two theories of first degree murder, i.e., felony murder,[46] the murder convictions must be reversed. In *People v. Green*, *supra*, 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

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

guilt rested, the conviction 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*, *supra*, 4 Cal.4th 1116, the 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 Court in *Guiton* 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 the 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 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. 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 should be reversed. (*People v. Green*, *supra*, 27 Cal.3d at p. 70; see also *In re Winship*, *supra*, 397 U.S. 358, 364 [conviction based on insufficient evidence violates defendant's constitutional right to due process of law]; *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'"]; 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 Antonio Urrutia based on an aiding and abetting theory. (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 Urrutia's murder, they had to find appellant's intent was to aid Mora in robbing Urrutia.[47] (5CT 1128, 1137.) Thus, the jury's verdict against appellant on Count 2 was necessarily based on a felony murder theory, as the jurors were expressly told they could only find appellant guilty of aiding and abetting Urrutia'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 jurors' erroneous verdicts finding appellant guilty on the attempted robbery charges, and finding the robbery special circumstance allegation true, must be viewed as an additional indication that they 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*

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[47] 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. (5CT 1128.)

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 instruction on malice aforethought, deliberation, and premeditation, there is nothing in the record that would similarly indicate that the jury found any such facts.

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

3. The Robbery Special Circumstance Findings Must Be Reversed and the Death Verdict Must Be Set Aside.

As argued above, there was insufficient evidence presented to sustain the true findings on the robbery special circumstances, therefore they must be reversed. (*People v. Thompson, supra,* 27 Cal.3d at 325.) Further, because it cannot be shown that the jurors could have returned a death verdict absent the attempted robbery, felony murder and robbery special circumstances, the death verdict must also be reversed. (*Brown v. Sanders* (2006) 546 U.S. 212.)

Appellant was charged with two special circumstance allegations making him eligible for the death penalty: (1) multiple murder; and (2) robbery felony murder. As noted above, appellant was alleged to have aided and abetted Urrutia's murder under a felony murder theory that appellant's intent was to aid Mora in robbing Urrutia. (5CT 1128, 1137.) However, as argued in Argument, VI, *post*, 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 Antonio Urrutia, or on the erroneous premise that appellant, with reckless indifference to human life, intended to aid Mora in robbing Urrutia. Thus, the multiple murder special circumstance must also be reversed and the death penalty set aside.

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VII. THE JURY'S TRUE FINDING ON THE MULTIPLE MURDER SPECIAL CIRCUMSTANCE MUST BE REVERSED SINCE SUBSTANTIAL EVIDENCE WAS NOT PRESENTED TO SUPPORT IT AND BECAUSE THE JURY MOST LIKELY RELIED UPON AN INVALID THEORY IN FINDING THE CIRCUMSTANCE TRUE.

A. Introduction

Appellant argued in his Motion to Modify the Verdict of Death that the evidence presented at trial was insufficient to support the multiple murder special circumstance. The trial court erred in denying the motion and imposing a sentence of death for the reasons set forth below. (45 CT 11796-11797; 21 RT 3340-3343.)

As argued in Argument V, *ante*, the jury's two attempted 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 Urrutia 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 Urrutia. (Pen. Code, § 190.2, subd. (c);[48] *People v. Anderson* (1987) 43 Cal.3d 1104, 1149-1150 ["intent to kill

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[48] 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

is not an element of the multiple-murder special circumstance; but when the defendant is an aider and abetter rather than the actual killer, intent must be proved."]; People v. *Williams*, *supra*, 16 Cal.4th 635.) 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 Antonio Urrutia, or on the erroneous premise that appellant, with reckless indifference to human life, intended to aid Mora in robbing Urrutia.

The insufficiency of the evidence violated appellant's rights to due process, a fair trial, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and sections 1, 7, 12, 15, 16 and 17 of article I of the California Constitution. Thus, the multiple murder special circumstance and death judgment 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 required for a constitutionally valid conviction. (*In re Winship*, *supra*, 397 U.S. 358.) On appeal,

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if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4.

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 reasonable doubt." (*People v. Holt*, *supra*, 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, supra*, 443 U.S. at pp. 318-319.) A reviewing court has a two-fold task: "First, we must resolve the issue in light of the whole record. . . Second, we must judge whether the evidence of each of the essential elements is substantial." (*People v. Brown*, *supra*, 216 Cal.App.3d 596, 600 quoting *People v. Barnes*, *supra*, 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*, *supra*, 46 Cal.3d 1, 21, overruled on other grounds in *In re Sassounian*, *supra*, 9 Cal.4th 535, 543.)

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, supra,* 10 Cal.4th at p. 38, quoting *People v. Roland*, *supra*, 4 Cal.4th 238, 271.)

C. The Multiple Murder Special Circumstance Must Be Reversed Since There Was Insufficient Evidence Presented That Rangel Intended to Kill Urrutia and Because the Jury Was Instructed It Could Find The Circumstance True Without Finding an Intent to Kill.

In *People v. Williams, supra*, 16 Cal.4th at 687, 689, 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. (*Ibid.*) 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 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*, *supra*, 386 U.S. 18, 24), the Court reversed the special circumstance finding and the death sentence. (*Id.* at p. 690.)

Here, while the jurors were generally instructed on the intent to kill requirement for a true finding on the special circumstances alleged, they *also* were allowed the option

of convicting appellant of the multiple murder circumstance by finding that, "with reckless indifference to human life and as a major participant," he intended to aid Mora in attempting to rob Urrutia.[49/] Moreover, the specific instruction regarding the multiple murder special circumstance did not contain *any* reference to an intent to kill requirement. That instruction simply instructed the jury that if it found that defendant had been

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[49] The jury was instructed that: If you find [a] defendant in this case guilty of murder of the first degree, you must then determine if [one or more of] the following special circumstance[s]: [are] true or not true: (1) multiple murders, (2) murder during an attempted robbery. ¶ The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true. ¶ [[Unless an intent to kill is an element of a special circumstance, if] you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true.] ¶ [If you find that a defendant was not the actual killer of a human being, [or if you are unable to decide whether a defendant was the actual killer or [an aider and abettor] you cannot find the special circumstance to be true [as to that defendant] unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill [aided,] [abetted,] [counseled,] [commanded,] [induced,] [solicited,] [requested,] [or] [assisted] in the commission of the murder in the first degree][.][, or with reckless indifference to human life and as a major participant, [aided,] [abetted,] [counseled,] [commanded,] [induced,] [solicited,] [requested,] [or] [assisted] in the commission of the crime of attempted robbery which resulted in the death of a human being. ¶ [A defendant acts with reckless indifference to human life when that defendant knows or is aware that [his] acts involve a grave risk of death to an innocent human being.] ¶ [You must decide separately the existence or nonexistence of each special circumstance alleged in this case [as to as to each of the defendants]. If you cannot agree as to all of the special circumstances, but can agree as to one [or more of them], you must make your finding as to the one [or more] upon which you do agree.] ¶ In order to find a special circumstance alleged in this case to be true or untrue, you must agree unanimously. ¶ You will state your special finding as to whether this special circumstance is or is not true on the form that will be supplied. (CALJIC 8.80.1 (1997 Revision)[Post June 5, 1990 Special Circumstances – Introductory (Pen. Code § 190.2)]; 5RT 1144-1145; 14 RT 2219-2222).

convicted in this case of more than one offense of murder in the first or second degree, it could find the multiple-murder special-circumstance allegation to be true.[50/] This was error since intent to kill is required for the multiple murder special circumstance in aider and abettor situations and because the reckless indifference exception to the intent to kill requirement applies *only* to the felony murder special circumstance. (Pen. Code, § 190.2, subd. (d).)[51/] (See *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298, overruled on other grounds in *Collins v. Youngblood* (1990) 497 U.S. 37, 42-52; see also *People v. Anderson, supra*, 43 Cal.3d at pp. 1149-1150.)

As in *Williams*, with respect to the murder of Urrutia, appellant's jurors were instructed on aider and abettor liability under the "natural and probable consequences"

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[50] The jury was instructed: "To find the special circumstance, referred to in these instructions as multiple murder convictions, is true, it must be proved: ¶ [A] defendant has in this case been convicted of at least one crime of murder of the first degree and one or more crimes of murder of the first or second degree. 8.81.3 [Special Circumstances - Multiple Murder Convictions (Pen. Code § 1902.(a)(1))]; 5 CT 1146; 14 RT 2222).

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

> 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.

doctrine, which did *not* require that appellant act with the intent to kill Urrutia.[52/] Further, the jury was instructed they could find appellant guilty as an aider and abettor to first degree felony-murder *in the absence* of an intent to kill.[53/] Thus, the jury's verdict finding appellant guilty of murdering Urrutia appears to have necessarily been based on a felony

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[52] The jury was instructed: "One who aids ans abets [another] in the commission of a crime [or crimes] is not only guilty of [those crimes], but is also guilty of any other crime committed by a principle which is a natural and probable consequence of the crime[s] originally aided and abetted. ¶ In order to find defendant guilty of the crime[s] of Murder, [as charged in Count[s] 1 & 2], you must be satisfied beyond a reasonable doubt that: ¶ 1. The [crimes] of attempted robbery [were] committed; ¶ 2. That the defendant aided and abetted [those] crime[s]; ¶ 3. That a co-principal in that crime committed the crime[s][of Murder; and ¶ 4. The crime[s] of Murder [were] a natural and probable consequence of the commission of the crime[s] of attempted robbery. ¶ [You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted, so long as you are satisfied beyond a reasonable doubt and unanimously agree that the defendant aided and abetted the commission of an identified and defined target crime and that the crime of Murder was a natural and probable consequence of the commission of that target crime.] (CALJIC 3.02 (1997 Revision)[Principals – Liability for Natural and Probable Consequences]; 5 CT 1128; 14 RT 2207-2208.)

[53] The jury was instructed: "If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of attempted robbery, all persons, who either directly and actively commit the act constituting that crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental. ¶ [In order to be guilty of murder, as an aider and abettor to a felony murder, the accused and the killer must have been jointly engaged in the commission of the attempted robbery at the time the fatal [wound was inflicted].] [However, an aider and abettor may still be jointly responsible for the commission of the underlying attempted robbery based upon other principals of law which will be given to you.]" (CALJIC 8.27 (1998 Revision)[First Degree Felony Murder – Aider and Abettor (Pen. Code § 189)]; CT 1137; 14 RT 2214-2215.)

murder theory -- as opposed to an intent to kill theory -- as the jurors were expressly instructed that they could find appellant guilty of aiding and abetting Urrutia's murder only if they found that appellant was aiding and abetting an attempted robbery. (5 CT 1128, 1137.).

Here, the prosecution introduced some evidence intended to suggest that appellant had entertained an intent to kill Encinas [asking him "Do you want to go to sleep?"], however, it failed to present sufficient evidence that appellant intended to kill Urrutia.[54/] The prosecution summarized its aiding and abetting theory by arguing that appellant and Mora were equally guilty of each crime and each special circumstance simply because they participated together in the crimes. (14 RT 2272-2273.) Alternatively, the prosecution argued the jury could find first degree murder without an intent to kill through the felony murder doctrine.

> "[t]hey had specific intent to commit the robbery and somebody was killed in the process of the robbery going down. ¶ This is felony murder, and this too equals first degree murder. ¶ For this you don't have to have willful, deliberate and premeditated. You don't even have to have intent to kill. In can be unintentional or accidental. When you commit a dangerous act such as robbery and someone gets killed, that is first degree murder." (14 RT 2236.)

In regard to the multiple murder special circumstance, the prosecution's theory was

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[54] Although Rangel's defense was misidentification, defense counsel also argued that Rangel did not know anyone except for Mora when he arrived on the scene and had no motive to commit the crimes. (14 RT 2289.)

simple, and like the multiple murder instruction given to the jury (CALJIC 8.81.3), omitted any mention of the intent to kill requirement:

> "Now, the defendants are also charged with the allegations of special circumstances... ¶it's just an allegation and there are two of them in this case. ¶ And the first one is multiple murder convictions. That means for the People to prove that special circumstance of multiple murder convictions, (sic) defendant to be guilty of, you have to find one count of first degree murder. ¶ Meaning, in your verdicts you must find that at least one count of first degree murder occurred. So, say you said Andy Encinas, that was first degree murder for sure, that qualifies here. ¶ Then one count of first degree or second degree murder. ¶ So if you found first degree as to – as to Andy and Anthony, done. If you found first degree as to one and second degree as to the other, done. It is proven to you. That's all that means, with special circumstance as to multiple murder convictions – convictions in this case." (14 RT 2238-2239.)

This argument specifically gave the jury permission to find the multiple murder circumstance true if they found appellant guilty of murder under *any* theory.

In light of the prosecutions arguments and the instructions given as a whole there is no way to determine that the jury found the multiple murder special circumstance true based upon proof beyond a reasonable doubt that appellant intended to kill Urrutia. Rather, the jury could have just as easily found the multiple murder circumstance true finding merely that appellant specifically intended to commit the robbery in which a death resulted "intentional[ly], unintentional[ly] or accidental[ly]" or acted with reckless indifference to human life, intended to aid Mora in robbing Urrutia as instructed with

CALJIC 8.21[55], 8.81.3 and the modified CALJIC 8.80.1. (5 CT 1136, 1144-1146.)

Where, as here, there is evidence from which the jury 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 before the multiple murder circumstance could be found true. (S*ee People v. Williams, supra*, 16 Cal.4th at p. 689.) In *People v. Garrison*, *supra*, 47 Cal.3d 746, this Court found that:

> "[W]hen the defendant is an aider and abettor rather than the actual killer, intent to kill must be proved before the trier of fact can find the [multiple murder] special circumstance to be true [citations omitted]. Where, as here, there was evidence from which a jury could have based its verdict on an accomplice theory, the court erred in failing to instruct that the jury must find that defendant intended to aid another in the killing of a human being.

(*Id.* at 789; see also *People v. Jones* (2003) 30 Cal.4th 1084, 1118 ["[W]hen the defendant is an aider and abettor rather than the actual killer, intent must be proved."]). However, 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 Urrutia, this Court cannot know whether the jury actually based its true

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[55] The jury was instructed that: "The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs [during the commission or attempted commission of the crime] of robbery is murder of the first degree when the perpetrator had the specific intent to commit that crime. ¶ The specific intent to commit robbery and the commission or attempted commission of such crime must be proven beyond a reasonable doubt." (CALJIC 8.21 [First Degree Felony-Murder (Pen. Code § 189)]; 5 CT 1136.)

finding of multiple murder on this theory or on the invalid theories of felony murder or reckless indifference to human life.

D. Because It Cannot Be Determined If The Jury Based Its True Finding on The Multiple Murder Circumstance on an Intent to Kill Theory Rather than a Reckless Indifference Theory, the Multiple Murder Special Circumstance Must be Set Aside.

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 on the record to conclude that jury actually based its verdict on a legally correct theory. (*People v. Guiton*, *supra*, 4 Cal.4th 1116, 1129.)

> "Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to the 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.]"

(*Id.* at 1125, quoting *Griffin v. United States*, *supra*, 502 U.S. 46, 59.) Further, in *People v. Perez* (2005) 35 Cal.4th 1219, this Court enunciated the assessment of prejudice in cases in which the jury was presented with a legally inadequate theory.

> "When one of the theories presented to a jury is legally inadequate, such as a theory which " 'fails to come within the statutory definition of the crime'" (*People v. Guiton, supra,* 4 Cal.4th at p. 1128, quoting *Griffin v. United States* (1991) 502 U.S. 46, 59, 112 S.Ct. 466, 116 L.Ed.2d 371), the jury cannot reasonably be expected to divine its legal inadequacy. The jury may render a verdict on the basis of the legally invalid theory without realizing that, as a matter of law, its factual findings are insufficient to constitute the charged crime. In such circumstances, *reversal generally is required unless "it is possible to determine from other portions of the verdict that the jury*

necessarily found the defendant guilty on a proper theory. [Citation omitted.]" (*Id.* at 1233 [emphasis added].)

On this record, this Court cannot determine beyond a reasonable doubt whether appellant's jurors based their multiple murder finding on an intent to kill, or on their erroneous belief that "reckless indifference" rather than "intent to kill" was sufficient for a true finding on the multiple murder special circumstance. For these reasons and because there was insufficient evidence of Rangel's intent to aid Mora in killing Urrutia, the multiple murder special circumstance finding and the judgment of death must be reversed.

Finally, 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., 5th, 8th & 14th Amends.; Cal.

Const., art. I, §§ 1, 7, 15, 17; *Beck v. Alabama*, *supra*, 447 U.S. 625, 637-638; *People v. Marshall*, *supra*, 15 Cal.4th 1, 34-35.)

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VIII. THE TRIAL COURT ERRED IN INSTRUCTING THE 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 VIOLATING HIS CONSTITUTIONAL RIGHTS.

A. Introduction

Appellant's state and federal constitutional rights to notice, due process and a fair and reliable guilt phase were violated when the trial court instructed the jury that it could convict him of the uncharged crime of first degree murder. (U.S. Const., 5th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 17.) The information charged appellant with second degree murder requiring malice. (Pen. Code, § 187). However, appellant's jurors were instructed they 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. (Pen. Code, § 189; CALJIC No. 8.27; 5 CT 1137; 14 RT 2214-2215.) The jurors convicted appellant of two counts of first degree murder. (4 CT 1010-1011, 15 RT 2463-2464.)

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 ("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.

B. 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.

As discussed below, the instructions on first degree murder were erroneous, and the resulting first degree murder convictions murder 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/]

Penal Code section 187, the statute appellant was charged with violating, describes second degree murder, which the 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.]"

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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.

(*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/]

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

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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, kidnaping, train wrecking, or any act punishable under Section 286, 288, 288a, 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.

to murder would not support a conviction of assault with a deadly weapon].)

Nevertheless, the 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. Morgan* (2007) 42 Cal.4th 593; *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 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

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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.

> 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, [it] [has] 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 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, "We 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 California 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 p. 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* (1999) 20 Cal.4th 546, 608-609, discussing the differing elements of those crimes; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1344, holding that second degree murder is a 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" (*id.* at p. 194, fn. 14).

Furthermore, regardless of how this Court construes the various statutes defining

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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.)

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] In *Cunningham c. California* (2007) 549 U.S. 270, the United States Supreme Court applied this standard to California's Determinate Sentencing Law and found that, because the DSL's circumstances in aggravation were factual in nature, they must be pled and found true by a jury beyond a reasonable doubt. (*Id.* at 293.) *Apprendi* and *Cunningham* compel the conclusion that the premeditation and felony-murder allegations of section 189 constitute elements of the offense that must be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt.

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

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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.]"

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 *United States v. Allen* (8th Cir. 2004) 357 F.3d 745, 758 [vacating death sentence because failure to allege aggravating factor in indictment was not harmless error]; see also *State v. Fortin* (N.J. 2004) 843 A.2d 974, 1035-1036 [holding prospectively that in capital cases aggravating factors must be submitted to the grand jury and returned in the indictment].)

Permitting the jury to convict appellant of an uncharged crime violated his right to due process of law. (U.S. Const., 5th & 14th Amends.; Cal. 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., 5th, 6th, 8th & 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, overruled on other grounds by *People v. Flood*, *supra*, 18 Cal.4th 470, 484, 490 & fn. 12.) 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*, *supra*, 447 U.S. 625, 638.)

C. Appellant's Convictions for First-Degree Murder Must Be Reversed.

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.) Thus, appellant's convictions for first degree murder must be reversed.

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IX. 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.

A. Introduction

The failure to require the jury to agree unanimously as to whether appellant 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., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17.)

Here, 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 Nos. 8.21 & 8.27; 5 CT 1136-1137; 14 RT 2214-2215.) The trial court did not, however, instruct the jury that it had to agree unanimously on which type of first degree murder appellant committed.

B. The Jury Must Be Unanimous On the Theory of First-Degree Murder Under Which They Convicted Appellant.

Appellant acknowledges that the 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*, *supra*, 30 Cal.4th 705, 712-713; *People v. Kipp* (2001) 26 Cal.4th 1100, 1132; *People v. Carpenter*, *supra*, 15 Cal.4th 312, 394-395.) This conclusion is erroneous and should be reconsidered, particularly in light of recent decisions of the United States Supreme Court.

The 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, supra*, 34 Cal.3d 441, the Court acknowledged first that "[i]n 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.) It then 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.)[62/]

In subsequent cases, the 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

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[62] "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.)

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, the Court explained that the language from footnote 23 of *People v. Dillon*, *supra*, 34 Cal.3d 441, quoted above, "meant that the elements of the two types of murder are not the same." Similarly, the 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, supra,* 60 Cal.2d at pp. 502-503 (dis. opn. of Schauer, J.)), and also to determine 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 these 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 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.);[63] see also *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111 (lead opn. of Scalia, J.)).

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[63] "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.).)

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 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*, *supra*, 20 Cal.4th 546, 608-609.)

Therefore, it is incongruous to say, as the 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*, at p. 394, first italics added.) 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 also is 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*, *supra*, 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 also is 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*, *supra*, 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), 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, the Court has recognized that it was the intent of the Legislature to make premeditation an element of first degree murder:

> 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.]

(*People v. Stegner* (1976) 16 Cal.3d 539, 545, quoting *People v. Thomas*, *supra*, 25 Cal.2d at p. 900.)[64/]

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 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 (Pen. Code, § 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

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[64] Specific intent to commit the underlying felony, the mens rea element of first degree felony murder, is not specifically mentioned in Penal Code 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, Penal Code 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.)

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. (Pen. Code, §§ 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 [Pen. Code,] §§ 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.

C. Appellant's Convictions of First-Degree Murder Must Be Reversed.

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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X. THE TRIAL COURT ERRED WHEN IT REFUSED APPELLANT'S PINPOINT INSTRUCTION STATING THAT CONVICTING APPELLANT UNDER THE FELONY MURDER THEORY REQUIRED THAT APPELLANT COMMITTED THE ATTEMPTED ROBBERY FOR A PURPOSE WHOLLY INDEPENDENT OF THE MURDER, VIOLATING APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

A. Introduction

The trial court's refusal to instruct the jury on a necessary finding for felony murder violated appellant's rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, his analogous rights under the California Constitution, and his rights under state law, including, but not limited to, his rights to due process of law, present a defense, a fair trial, trial by jury, and to a reliable guilt and penalty verdict. (U.S. Const., 5th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 17, 24.) The trial court erred in refusing appellant's pinpoint instruction on its alternate theory of defense to felony murder because it was a correct statement of law and would have charged the jury with how to relate the evidence of felony murder to the prosecution's burden of proving felony murder beyond a reasonable doubt.

At the end of the guilt phase, appellant requested the court supplement the standard first degree felony murder instruction (CALJIC 8.21) with language from *People v. Sears*[65] as reflected in Special Instruction No. 1.[66] (4 CT 1043.) The court declined to

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[65] *People v. Sears*, *supra*, 2 Cal.3d 180, 187-188 ["The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit.' [Citation omitted] Where a person

do so, finding that "the essence" of the additional language was included in CALJIC 8.21 itself.[67] The court further found that the standard instruction on aider and abettor liability under felony murder (CALJIC 8.27[68]) "covers the issue" and that there was not any need

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enters a building with an intent to assault his victim with a deadly weapon, he is not deterred by the felony-murder rule. That doctrine can serve its purpose only when applied to a felony independent of the homicide."].)

[66] Special Instruction No. 1 read as follows: "To prove the felony murder of first degree murder, the prosecution must prove beyond a reasonable doubt that the attempted robbery was done for the independent purpose of committing the felony rather than for the purpose of committing the homicide. ¶ If the defendant's primary purpose was to kill or if he committed the attempted robbery to facilitate or conceal the homicide, then there was no independent felonious purpose. If from all the evidence you have a reasonable doubt that the defendant committed the attempted robbery for such independent felonious purpose, you must find the defendant not guilt on the felony murder theory." (4 CT 1043)

[67] CALJIC 8.21 as given here provided: "The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs [during the commission or attempted commission of the crime] of robbery is murder of the first degree when the perpetrator had the specific intent to commit that crime. ¶ The specific intent to commit robbery and the commission or attempted commission of such crime must be proved beyond a reasonable doubt." (CT 1136.)

[68] CALJIC 8.27 as given here provided: "If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of attempted robbery, all persons, who either directly and actively commit the act constituting that crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental. ¶ [In order to be guilty of murder, as an aider and abettor to a felony murder, the accused and the killer must have been jointly engaged in the commission of the attempted robbery at the time the fatal [wound was inflicted].] [However, an aider and abettor may still be jointly responsible for the commission of the underlying attempted robbery based upon other principles of law which will be given to you.] (CT 1137)

to add the additional language as requested. (14 RT 2172-2173.) This was error since neither the standard felony murder instruction (CALJIC 8.21) nor the felony murder aider and abettor liability instruction (CALJIC 8.27) "covered the issue" raised by defense counsel.

B. Standard of Review

The applicable standard of review for instructional error has been set out in *People v. Martin* (2000) 78 Cal.App.4th 1107, 1111-1112:

> "A trial court must instruct the jury 'on the law applicable to each particular case.' [Citations.] '[E]ven 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.' [Citation.] Therefore, a claim that a court failed to properly instruct on the applicable principles of law is reviewed de novo. [Citations.] In conducting this review, we first ascertain the relevant law and then 'determine the meaning of the instructions in this regard.' [Citation.] ¶ The proper test for judging the adequacy of instructions is to decide whether the trial court 'fully and fairly instructed on the applicable law....' [Citation.] ' "In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole ... [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]" ' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]"

C. Appellant Was Entitled to Have CALJIC 8.21 Modified Since The Prosecution Was Required To Have Proved Beyond A Reasonable Doubt that Appellant Had an Independent Felonious Purpose to Commit the Attempted Robbery In Order For The Jury to Convict Appellant Under The Felony Murder Theory.

A trial court must instruct the jury, even without a request, on all general principles

of law that are " 'closely and openly connected to the facts and that are necessary for the jury's understanding of the case. [Citation.] In addition, a defendant has a right to an instruction that pinpoints the theory of the defense....'" (*People v. Roldan* (2005) 35 Cal.4th 646, 715.) Further, "[a] defendant is entitled to an instruction relating particular facts to any legal issue." (*People v. Sears, supra,* 2 Cal.3d at p.190.) A pinpoint instruction relates particular facts to a legal issue in the case. (*People v. Saille*, *supra*, 54 Cal.3d 1103, 1119.) Upon request, a trial court must give instructions that pinpoint the theory of the defense, if the proposed instruction is supported by the evidence and neither highlights specific evidence nor is argumentative. (*People v. Earp* (1999) 20 Cal.4th 826, 886.) What is pinpointed is not specific evidence as such, but the theory that supports a defense. It is the specific evidence on which the theory focuses that is related to reasonable doubt. (*People v. Adrian* (1982) 135 Cal.App.3d 335, 338.)

It has long been held that the first degree felony-murder rule is applicable to a homicide resulting from the perpetration or attempted perpetration of any of the felonies enumerated in Penal Code § 189, undertaken for felonious purpose *independent* of the homicide. (*People v. Burton, supra,* 6 Cal.3d at pp. 384–388, emphasis added.) The rationale for this rule is that commission of the felony must be the defendant's primary purpose in order to rationally further the legislative objective of deterring killings which occur as a result of or during the commission of one of the enumerated felonies. Based on these principles, the defendant should not be held liable for felonies under Penal Code

section 189 if the primary intent was to kill. In other words, the prosecution must prove beyond a reasonable doubt that the defendant had an independent felonious purpose to commit one of the felonies enumerated in Penal Code section 189.[69]

The trial court has a duty to ensure the jurors were adequately informed on the law governing all elements of the case to the extent necessary to enable them to perform their function. (*People v. Miller* (1999) 69 Cal.App.4th 190, 207; *People v. Reynolds* (1988) 205 Cal.App.3d 776, 779.) Further, the trial court must give instructions on particular defenses and their relevance to the charged offense if the defendant is relying on such a defense or there is substantial evidence supportive of the defense and it is not inconsistent with the defendant's theory of the case. (*People v. Sedeno* (1974) 10 Cal.3d 703, 716, overruled on other grounds in 19 Cal.4th 142, 165; *People v. Barton* (1995) 12 Cal.4th 186, 195.) Where, as here, the additional language requested focuses upon a theory which seeks to negate an element of the offense, then the instruction is a proper instruction which assists the jury. (See *People v. Howard* (1988) 44 Cal.3d 375, 442; *People v. Wright* (1988) 45 Cal.3d 1126, 1136-37; *People v. Rincon-Pineda*, *supra*, 14 Cal.3d 864, 885.)

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[69] This is also true in order to find a felony murder special circumstance true for purposes of death eligibility. (See *People v. Green*, *supra*, 27 Cal.3d 1, 61-62 [applying the rule to felony murder special circumstance findings]; see also *Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, 1476 [independent felonious purpose serves narrowing finding necessary for capital eligibility].)

The jury should have had the benefit of the "independent felonious purpose" language which explained that the attempted robbery had to have been the goal of the incident, not just a ruse to accomplish the murder or simply an afterthought.[70] Here, although one defense theory was misidentification, it was also that appellant had no motive to commit the charged crimes (14 RT 2289) and that the prosecution had the burden to prove beyond a reasonable doubt each and every element of those crimes. Defense counsel argued at guilt phase closing argument:

> But let me just tell you the important part. The People have the burden of proof, and that burden is beyond a reasonable doubt, as her honor has told you. That proof must be beyond a reasonable doubt for the elements of the criminal activity...." (14 RT 2305)

The defense therefore was testing the prosecution's case, not only as to identification, but as to all elements of the crimes as presented through the prosecution's evidence.

The prosecution not only presented evidence that appellant was one of the shooters, but also presented competing theories of liability regarding whether appellant sought to kill the victim and used the attempted robbery as a ruse to more easily do so, or

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[70] Appellant concedes that the jury was instructed in CALJIC 8.27 as to the felony murder special circumstance that the special circumstance "is not established if the attempted robbery was merely incidental to the commission of murder." (5 CT 1147.) However, appellant maintains that the jury's true finding of that special circumstance after having been so instructed does not defeat his claim here since the jury was charged with deciding the substantive crimes before determining whether the special circumstances existed. Thus, it is possible that the error in omitting the "independent felonious purpose" language from the substantive felony murder instruction tainted the jury's later finding on the felony murder special circumstance.

if appellant sought to rob the victim but for whatever reason shot him instead. There was evidence that showed that appellant walked up to Encinas and said, "Do you want to go to sleep?". When Encinas did not answer, appellant stated: "Why are you quiet, I asked you a question?" As soon as Encinas got into his vehicle, appellant approached the driver's door, pointed a gun at Encinas and stated: "Check yourself, check yourself, give me your wallet," but before Encinas could retrieve his wallet, appellant shot and killed him and then left without taking anything from Encinas or from the vehicle. (3RT 406-407; 5 RT 699, 710.) Based on this evidence, the jury was left with the very relevant question of whether appellant ever really sought to rob Encinas at all.

Interestingly, the prosecutor, who argued at the guilt phase that it was "undisputed" that the murder occurred during the course of a robbery, later argued the opposite at the penalty phase – that appellant's intent from the get-go was to murder.

> "He was going to willful, deliberate and premeditated execute these two men, it was just a matter of when." The prosecutor further argued at penalty phase that appellant shot because "that was his mission to start with" and the crime occurred as follows: "So they walk over to each side of the car and, hey, why not for fun, let's get their wallets too, because their goal, we know, was to murder by 'Do you want to go to sleep?' But let's get their wallets while we're at it." (14 RT 2240; 20 RT 3199-3200.)

In light of the evidence present at trial, the "independent felonious purpose" requirement for felony murder was crucial for the jury to determine. It was error for the court to give CALJIC 8.21 in this case without the requested additional language. The instructional omission prevented the jurors from understanding the concept of felony

murder and instead allowed them to effectively ignore the requirement that the murder must have happened in the course of an attempted robbery, not that the attempted robbery happened in the course of a murder. (See *People v. Mendoza* (2000) 24 Cal.4th 130, 182 [regarding finding required for felony murder special circumstance].) The jury was entitled to be adequately informed on the law regarding felony murder. As such, it should have been given to enable the jury to perform their function of delivering a fair and reliable determination of guilt.

D. The Refusal To Give the Defense Requested Special Instruction No. 1 Requires Reversal Since The Error Cannot Be Deemed Harmless Beyond a Reasonable Doubt.

The trial court erred and violated appellant's state and federal constitutional rights when it refused to properly instruct the jury on felony murder. This error requires reversal since it cannot be said that the omission did not affect the verdict of guilt and thus cannot be found to be harmless beyond a reasonable doubt. (See *People v. Harris* (2008) 43 Cal.4th 1269, 1300.)

Here, the evidence suggested that the perpetrators shot the victims while they sat in their cars and while they were preoccupied by a ruse to get their wallets. Nothing was taken. Even the prosecutor's theory changed to reflect that attempted robbery was not the perpetrator's intent..

> "... because their goal, we know, was to murder by 'Do you want to go to sleep?' But let's get their wallets while we're at it." (20 RT 3200.)

Under these circumstances it was absolutely imperative that the jurors be properly instructed on the correct principles of felony murder. Without an instruction requiring that appellant had an independent purpose in committing the attempted robbery, *in addition to* specific intent, the jury did not have an understanding that if the attempted robbery was indeed a ruse, as the prosecution argued at penalty phase, there could be no felony murder conviction, even if appellant decided to try and get Encinas wallet "while [they were] at it." Therefore, there is a reasonable probability that had the pinpoint instruction been given and counsel ben able to argue its applicability to felony murder, the jury would have found appellant not guilty of felony murder. Moreover, the instructional error caused a fundamentally unfair guilt phase trial.

Finally, under both the due process clause and the Eighth Amendment, a state, if it elects to utilize capital punishment, must do so in an evenhanded fashion, on the basis of consistently applied standards. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112 [noting the requirement that capital punishment is "imposed fairly, and with reasonable consistency, or not at all"].) To routinely expect juries to convict on felony murder only when there is proof beyond a reasonable doubt of an independent felonious purpose for the underlying felony, yet not assign error when the instruction stating such is refused, is inconsistent and violative of due process, the Eighth Amendment, and deprives appellant of his right to present a defense.

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

A. Introduction

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, a fair trial, and trial by jury. (U.S. Const., 5th, 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.) 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.

B. Standard of Review

The standard of review for instructional error is whether the instructions as a whole were reasonably likely to mislead the jury. (*People v. Cornwell* (2005) 37 Cal.4th 50, 89; *People v. Cole* (2004) 33 Cal.4th 1158, 1212; *People v. Catlin* (2001) 26 Cal.4th 81, 151.) The federal Constitution's Fifth Amendment right to due process and Sixth Amendment right to jury trial, made applicable to the states through the Fourteenth

Amendment, require the prosecution to prove to a jury beyond a reasonable doubt every element of a *crime*. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; see *Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 277-278.) Because both individually and as a whole the instructions violated the federal Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Id.* at p. 279.)

C. The Defective CALJIC Instructions Given in The Guilt Phase Undermined the Requirement of Proof Beyond a Reasonable Doubt.

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*, *supra*, 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*, *supra*, 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*, *supra*, 511 U.S. 1, 6.)

1. 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.) 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., 5th & 14th Amends.; 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*, *supra*, 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 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*, *supra*, 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*, *supra*, 471 U.S. 307, 314-318; *Sandstrom v. Montana*, *supra*, 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.

2. The Instructions Pursuant to CALJIC Nos. 2.21.1, 2.21.2, 2.22, 2.27, and 8.20 Undermined the Requirement of Proof Beyond a Reasonable Doubt.

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 and a fair trial (U.S. Const., 5th & 14th Amends.; 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).

3. 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 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. Appellant's Conviction Must Be Reversed Since The Instructions Undermined the Requirement of Proof Beyond a Reasonable Doubt Constituting Structural Error.

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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XII. REVERSAL OF APPELLANT'S CONVICTIONS IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT COLLECTIVELY UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE GUILT PHASE AND THE RELIABILITY OF THE VERDICTS OF GUILT.

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, supra*, 17 Cal.4th 800, 844-848 [reversing entire judgment in capital case due to cumulative error]; 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 the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying *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*, *supra*, 508 U.S. 275, 278-282; *Chapman v. California, supra*, 386 U.S. at p. 24.) These errors, viewed separately or in any combination, deprived appellant of his state and federal constitutional rights to a fair trial, due process, to present a defense, trial by jury and a reliable determination of guilt. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17, 24; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Caldwell v. Mississippi*, *supra*, 472 U.S. 320, 330-331; *Beck v. Alabama*, *supra*, 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, appellant's convictions must be reversed. (*Donnelly v. DeChristoforo, supra,* 416 U.S. at 643; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].) Accordingly, theses errors considered cumulatively establish a violation of appellant's right to a fair trial, and the convictions and special circumstances findings must be reversed.

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XIII. THE TRIAL COURT ERRONEOUSLY ALLOWED THE PROSECUTOR TO ELICIT IRRELEVANT AND PREJUDICIAL GANG EVIDENCE DURING THE PENALTY PHASE IN VIOLATION OF APPELLANT'S STATE A FEDERAL CONSTITUTIONAL RIGHTS.

A. Introduction

The improper admission of the gang evidence violated appellant's state and federal constitutional rights to due process, a fair trial and a reliable guilt and penalty phase determination. (U.S. Const., 5th, 8th & 14th Amends.; Cal. Const., art I, §§ 7, 15, 17, 24.)

The crimes in this case were not alleged to be gang related, and during jury selection the prosecutor informed the court and defense attorneys that she would not present any gang evidence during trial. (2 RT 266, 3 RT 358.) The prosecutor said there were indications that both appellant and Mora were gang members, but that she would admonish her witnesses not to mention this. (3 RT 358.) Based on the prosecutor's representations, the attorneys for both appellant and Mora did not voir dire the potential jurors on their views towards gangs and gang members. (See 8 RT 1246-1249.)

Later, after the guilt trial, the court and attorneys discussed the evidence that would be presented at the penalty trial. (16 RT 2475-2495.) The prosecutor said that included in the aggravating evidence she would present against appellant was his conviction for an automobile burglary. (16 RT 2478-2479.) The prosecutor said she intended to present evidence that during the burglary, appellant 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 she would present evidence that KCC stands for "King City Criminals," which is a street gang, and that this added to the victim's fear by informing the victim that appellant was a gang member. (16 RT 2483.) Over appellant's objection, the court ruled this evidence was admissible. (*Ibid.*)

In the prosecutor's penalty case against appellant, a sheriff's deputy Kevin Hilgendorf testified that during the automobile burglary, appellant spray-painted the letters "KCC" on the front of the vehicle, and that appellant and his accomplice in the crime 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.) Hildgendorf 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 appellant and his accomplice were gang members. (16 RT 2569-2570, 2582-2583.) The prosecutor elicited testimony about this incident from the owner of the vehicle who, prompted by the prosecutor, told the jurors that he expressed concerns to the prosecutor that appellant's "friends" would be in the courtroom during his testimony. (16 RT 2527.) The owner of the vehicle further testified that as a result of the incident, he moved to a new home. (16 RT 2550.)

Jose Jimenez, who became acquainted with appellant through a Bible study group,

testified on behalf of appellant. He testified that appellant attended church and bible study with his mother and sister between 1989 and 1992.[71] During his testimony, Jimenez, in response to an inquiry by defense counsel regarding how he felt when he heard that appellant was charged with murder, answered, "It seemed to me it was out of his character. The character that I knew Ruben to be. It didn't seem that that would fit his character." (18 RT (18 RT 2815-2819.) During cross-examination, Jimenez clarified that it was out of character "from the person I knew Ruben (sic) during this time frame..." (18 RT 2821.) However, at a sidebar conference, the prosecutor claimed that Jimenez's response "opened the door" for her to inquire about appellant's gang affiliation[72], and asked the court to allow her to inquire whether gang membership would be consistent with the character that Jimenez claimed to know. (18 RT 2823.) Defense counsel objected, but the court overruled the objection, stating, "[T]he subject came in, not necessarily in response to a question as you phrased it. But the door is open, and I think the people are entitled to inquire. (18 RT 2823-2827.)

Defense counsel then introduced the issue that there had yet to be any evidence

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71 The crimes occurred in August 1997.

72 The prosecutor was again admonished to "lower your voice" during the sidebar when arguing: "Your honor, I think by the word "character" coming out, "it would be out of character," I could also ask him about his gang affiliation, if he was aware that he was in a gang, and if he was in a gang, would that change his opinion of his character. I have – at lunchtime I ran the Gang-Cal search, and I have...." (18 RT 2822.)

offered with respect to gang membership, and so a hypothetical would be inappropriate. (18 RT 2828.) The court replied that it would merely be an inquiry into the witness's knowledge, and that based on the prosecution's representations, there existed a good faith belief that there is gang membership claimed by appellant such that inquiry regarding the witness's knowledge about that behavior or affiliation was justified. (18 RT 2828.) The court took the matter even further and stated that the prosecution would be entitled to bring in the information during rebuttal. (18 RT 2828.)

Over repeated objections by defense counsel, the prosecution was allowed to inquire of Jimenez regarding his knowledge of appellant's gang affiliation and activities. (18 RT 2829-2832, 2837.)

Prosecutor: Mr. Jimenez, are you aware of the defendant's character as it relates to gang membership?

Ms. Trotter: Objection. That's vague.

The Court: Overruled.

The Witness: Can you elaborate on the question a little more?

Prosecutor: Are you aware that Ruben Rangel is in a gang?

Ms. Trotter: Objection, That assumes facts not in evidence.

The Court: Overruled.

The Witness: I – I never perceived Ruben as a gang member.

Prosecutor: Would your opinion of Mr. Rangel change if you knew he claimed a gang.

Ms. Trotter: Objection. That assumes facts not in evidence.

The Court: Overruled.

The Witness: Yes.

Prosecutor: So if you were to find out that he was in a gang, would you then question if you really knew the true Ruben Rangel?

The Witness: No.

Prosecutor: Well, you just said that your opinion would be different if you knew he claimed a gang.

Ms. Trotter: Objection to the form of the question – its argumentative.

The Court: Sustained – rephrase.

...

Prosecutor: Would you be surprised to learn that Ruben Rangel was in a gang.

Ms. Trotter: Objection. Assumes facts not in evidence.

The Court. Overruled.

The Witness: No, I wouldn't.

Prosecutor: Did he tell you he was in a gang.

The Witness: No, he did not.

Prosecutor: But you said he wasn't a character to do certain things. And with that in mind, you knew he was in a gang; is that what you are telling us?

The Witness: No.

Ms. Trotter: Objection. That misstates the testimony.

The Court: Overruled.

The Witness: We, as a church – we, as a church, we work on the heart, and today I can speak of the heart of Ruben. And that's what I refer to as the "character".

Prosecutor: Okay. When you speak of Ruben's heart, would you picture it inside a gang member?

The Witness: Not at the time I knew Ruben, No.

Prosecutor: So if I told you he was a gang member, would that surprise you?

Ms. Trotter: Objection. That's vague as to time.

The Court: Overruled.

The Witness: I would not have thought he would be in a gang. To my knowledge, when I knew Ruben, to my knowledge he was not associated with any gang.

Prosecutor: To your knowledge?

The Witness: To my knowledge.

Prosecutor: Would your opinion of him, what you stated earlier, change if you knew he was in a gang?

The Witness: No.

Prosecutor: Your opinion would remain the same?
The Witness: Yes.

(18 RT 2829-2832.) On re-cross, the prosecutor asked Jimenez if his opinion of appellant's character would change if he knew that appellant had spray painted "KCC" on a car[73] and whether that would surprise him. Jimenez stated that "it would be surprising." The prosecutor then asked Jimenez "He never showed that side of himself to you?" and Jimenez responded: "No." (18 RT 2837.)

The prosecution later called police officer Andrew Zembal to further rebut appellant'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 the "King City Criminals." (20 RT 3078-3079.) Zembal told the jurors that the "King City Criminals" started as a tagging crew involved in graffiti. (20 RT 3079.) According to Zembal, 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 whose members carry guns and commit serious offenses, including murder. (20 RT 3079-3081.)

Zembal testified that law enforcement agencies are able to determine whether an

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[73] Defense counsel objected that the question was "beyond the scope of redirect. The trial court overruled the objection. (18 RT 2837.)

individual is a gang member by the way they dress, their tattoos, and who they associate with. (20 RT 3083, 3085.) Zembal also testified that gang members have monikers or "gang name[s]," such as appellant'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.[74] (20 RT 3094.)

Zembal further testified that he had examined appellant's tattoos (20 RT 3089; see 20 RT 3074), and he described those tattoos to the jury, which included tattoos that identified appellant as a member of the "King City Criminals." (20 RT 3090-3094.) Zembal said he could tell from appellant's shaved head and tattoos that appellant 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.)

Defense counsel requested a limiting instruction be given stating that gang membership is not a crime and cannot be considered as aggravation. (20 RT 3140-3141, 3145.) The court refused the limiting instruction stating that although the evidence was admitted only to refute evidence of appellant's good character, the jury would not be so instructed. (20 RT 3148-3149.)

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

B. Standard of Review

This Court reviews any ruling by a trial court on the admissibility of evidence for an abuse of discretion. (*People v. Waidla, supra,* 22 Cal.4th at p. 724.) This standard is applicable both to a trial court's determination of the relevance of evidence as well as its determination under Evidence Code section 352 of whether the evidence's probative value is substantially outweighed by its prejudicial effect. (See, e.g., *People v. DeJesus*, *supra*, 38 Cal.App.4th 1, 32-33.)

> "The issue of the relevance of evidence is left to the sound discretion of the trial court, and the exercise of that discretion will not be reversed absent a showing of abuse. [Citations.] That discretion is only abused where there is a clear showing the trial court exceeded the bounds of reason, all of the circumstances being considered. [Citations.]" (*Ibid.; People v. Cudjo*, *supra*, 6 Cal.4th 585, 609.)

The abuse of discretion standard applies equally when the issue is the admission of gang evidence. (*People v. Champion*, *supra*, 9 Cal.4th 879, 922; *People v. Sandoval*, *supra*, 4 Cal.4th 155, 175.)

Moreover, where as here, "[w]hen evidence has been erroneously received at the penalty phase, this court should reverse the death sentence if it is 'the sort of evidence that is likely to have a significant impact on the jury's evaluation of whether defendant should live or die.'[Citation.]" (*People v. Danielson* (1992) 3 Cal.4th 691, 738.)

C. The Death Judgment Must Be Reversed Because The Defense Detrimentally Relied on the Court and Prosecution' Representations That No Such Evidence Would Be Admitted In Omitting The Subject of Gangs From The Jury Questionnaire and Voir Dire.

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 towards gangs and gang members (see 8 RT 1246-1249), this error violated appellant's right under the Sixth and Fourteenth Amendments to a reliable verdict by an impartial jury. (*Morgan v. Illinois*, *supra*, 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 exercise peremptory challenges (*id.* at pp. 729-730), this error further violated appellant's Sixth Amendment guarantee to the effective assistance of counsel.

During voir dire, the court asked the prosecutor whether there was "any gang evidence that you will elicit in this case?" The prosecutor responded: "Not that I know of." (2 RT 266.) Based on the prosecutor's representations, the gang section of the jury questionnaire was deleted and attorneys for both appellant and Mora did not voir dire the

potential jurors on their views towards gangs and gang members. (2 RT 266; 8 RT 1246-1249.) Here, counsel argued previously during the guilt phase 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.)

D. The Death Judgment Must Be Reversed, Because in Violation of State and Federal Law, the Trial Court Erroneously Allowed the Prosecutor to Elicit Irrelevant and Prejudicial Gang Evidence During the Penalty Phase.

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, the Court requires 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, supra*, 28 Cal.4th 557, 653, internal citations and quotation marks omitted; see also *People v. Cox, supra*, 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. Indeed, as recognized by the United States Supreme Court, evidence of defendant's mere membership in a gang, which essentially is what Zembal's testimony established, is irrelevant in a capital sentencing proceeding where, as here, it fails to prove an aggravating circumstance or rebut mitigating evidence. (*Dawson v. Delaware* (1992) 503 U.S. 159, 166-168.)

Moreover, even if appellant's spray painting "KCC" could be deemed a circumstance of the vehicle burglary (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 except for the spray painting, and there was no evidence that the instant charged crimes were gang-related. Because this gang evidence was at most only superficially related to the jurors' penalty determination, the trial court abused its discretion when it overruled appellant's objection and allowed the jurors 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*, *supra*, 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."].)

Moreover, the trial court erred in finding that appellant had "opened the door" to additional gang evidence. Pursuant to Evidence Code section 780, subdivision (I), a trial court may admit otherwise inadmissible evidence for impeachment purposes to prove or disprove the existence or nonexistence of a fact about which a witness has testified or opened the door. However, this evidence is still subject to Evidence Code sections 210 and 352 exclusion if found to be irrelevant or more prejudicial than probative. Such should have been the case here.

The improper admission of the gang evidence in the penalty phase violated appellant state and federal 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*, *supra*, 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 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.) Evidence of appellant's gang membership nevertheless was wrongly

injected into jurors 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*, *supra*, 486 U.S. at pp. 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 "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].)

As recognized by the Court, evidence of a defendant's gang affiliation has an inflammatory and prejudicial effect on jurors. (*People v. Kennedy*, *supra*, 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*, *supra*, 149 Cal.App.4th 214, 57 Cal.Rptr.3d 92, 99; *People v. Maestas*, *supra*, 20 Cal.App.4th 1482, 1497; *People v. Perez*, *supra*, 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*, *supra*, 24 Cal.4th 130, 192), and in doing so, 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.) In the Court's words, 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 Hilgendorf's testimony 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 appellant and his accomplice were gang members[75] and the only piece of evidence that the prosecutor introduced against appellant in the penalty trial was made even more aggravating by the fact 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,

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[75] Appellant additionally objected to the admission of the latter evidence on hearsay grounds. (16 RT 2569-2570, 2582-2583)

588.) This erroneous impression also increased the specter that appellant would associate with prison gangs and be involved in future gang violence in prison, and would thus pose the risk of future dangerousness if allowed to live his life in prison.

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

The evidence the prosecutor elicited from Officer Zembel's testimony could only have left the jurors with the impression that appellant, with his shaved head, tattoos, and moniker, was a "gang member of a hard-core nature," with a "wanton disregard or disrespect for life itself" (20 RT 3094-3096), and that appellant belonged to the "King City Criminals," a 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 the police. (16 RT 2567, 2569-2570.)

Moreover, despite appellant's request, no limiting instruction was given in the penalty phases to direct the jury as to how to consider the gang evidence. (20 RT 3140-3141, 3147-3149; 5 CT 1171-1212 (instructions given), 1220 (gang instruction refused).) However, even had the trial court explicitly instructed the jury however, it is unlikely the jurors could have followed any instruction limiting its consideration of the evidence. 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*, *supra*, 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.) 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 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.)

E. Appellant's Death Sentence Must be Reversed.

In terms of prejudice, it matters not whether this capital case penalty trial error is assessed as one of state or federal law, for test is the "same in substance and effect." (*People v. Gonzalez, supra,* 38 Cal.4th at p. 961 & fn. 6; *People v. Ashmus, supra,* 54 Cal.3d at p. 965.) As described below, the State cannot show that it is beyond a reasonable possibility that this violation of state and federal law could have contributed to the jury's decision to impose the death penalty in this case. (*Chapman v. California, supra,* 386 U.S. 18; *People v. Brown*, *supra*, 46 Cal.3d 432, 446-448.)

This was not a case in which there were numerous aggravating factors that appellant would have had to overcome in order to receive a life sentence. To the contrary, the sole aggravating facts other than the circumstances of the crime itself was the single incident of vehicle burglary and the victim impact evidence. Moreover, appellant presented mitigation evidence not only through the testimony of Jose Jimenez discussed above, but also through the testimony of both his parents, his sister, his ex-wife, and his girlfriend. Appellant's mother and sister testified that he had been abused and that his parents were heroin addicts and incapable of properly taking care of him. (18 RT 2775-2797; 19 RT 2942-2970.) Appellant's mother did not even know whether appellant finished high school. (18 RT 2806.) Appellant's father testified that he himself was in a gang but told appellant not to get involved with them. Appellant's father was once shot

while appellant was with him. (19 RT 2895-2897, 2902.) Appellant's father also testified that appellant did not finish high school and that appellant was at his house the day before the shootings and drank a six-pack of beer and had five tequila shots, but that he always drank that much. (19 RT 2876-2880, 2899.) Appellant's sister and girlfriend testified to his drug use and that he was intoxicated that night of the shootings after having drank all day at a family barbeque. (19 RT 2915, 2626, 2929, 2948, 2951.) The jury was also shown pictures of appellant's family, including his children. (18 RT 2800-2806.)

In light of the conflicting aggravating and mitigating evidence presented at the penalty phase, the State 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), particularly in light of one seated juror having already admitted her bias against gang members in voir dire.[76/]

The gang testimony made it appear that the instant crimes were gang-related and therefore more serious because appellant was a hard-core violent gang member with a

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[76] The prejudice in the penalty phase from the admission of the irrelevant and highly prejudicial gang evidence is exacerbated by the trial court's earlier erroneous ruling in the guilt phase allowing the prosecutor to play for the jury tape-recorded statements Lourdes Lopez made to police containing improper inferences that the charged crimes were gang-related and appellant and Mora were gang members. (See Argument IV, *ante*.)

"wanton disregard or disrespect for life itself," and that he and his gang carry guns, commit violent offense, including murder, and terrorize and threaten to kill their victims. (16 RT 2567, 2569-2570; 20 RT 3094-3096, 3078-3080.) This irrelevant and unduly prejudicial evidence was indeed, "the skunk in the jury box" and therefore, appellant's death sentence must be reversed.

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XIV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING APPELLANT'S ADDITIONAL PROPOSED PENALTY PHASE INSTRUCTIONS.

A. Introduction

The trial court refused a number of specially tailored instructions which appellant requested and which would have addressed various aspects of the jurors' penalty determination.[77] As described 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 would live or die, and that pinpointed the crux of his case for life. (See *People v. Saille*, *supra*, 54 Cal.3d 1103, 1119, citing *People v. Rincon-Pineda*, *supra*, 14 Cal.3d 864, 885, *People v. Sears*, *supra*, 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

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[77] The special instructions discussed below were submitted by appellant. (4 CT 1057-1074, 20 RT 3127-3144.) After noting that she had similar instructions on Mora's behalf but believed the trial court only needed one set of the special instructions, Mora's trial counsel joined in appellant's request for these instructions, and in all objections made by appellant's attorney to the trial court's refusal to give these instructions. (20 RT 3113, 3160-3161.)

effectively, and justly, they must be accurately instructed in the law."]. The trial court's refusal to give these requested instructions deprived appellant of these rights and, more importantly, of his rights to a fair and reliable penalty determination, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the applicable sections of the California Constitution. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 17, 24.)

B. Standard of Review

An appellate court applies the abuse of discretion standard of review to any decision by a trial court to instruct, or not to instruct, in its exercise of its supervision over a deliberating jury. (*People v. Waidla*, *supra,* 22 Cal.4th at pp. 745-746.) Further, penalty phase error, even state law error which does not violate the federal constitution, requires reversal where "there is a reasonable ... possibility the jury would have rendered a different verdict had the error not occurred." (*People v. Hamilton* (2009) 45 Cal.4th 863, 917.)

C. 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 qualitative 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 federal 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*, *supra*, 47 Cal.3d 315, 362, citing *Caldwell v. Mississippi*, *supra*, 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, which did not apprise 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*, *supra*, 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, here, as noted above, even the prosecutor 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 a fifth juror was unable to say which of the two possible punishments were worse.[78] (43 CT 11422.)

Appellant's requested instruction would have corrected these jurors' misunderstanding on this point, and would have clearly instructed the jurors that death was 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, supra,* 386 U.S. at p. 24, citing *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87; *People v. Ochoa, supra,* 19 Cal.4th at p. 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

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[78] 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.)

lenient than life without possibility of parole. This 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 creates 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*, *supra*, 438 U.S. 586, 605; see also *Zant v. Stephens* (1983) 462 U.S. 862, 884-885, quoting *Woodson v. North Carolina* (1976) 428 U.S. 280, 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.

D. 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, subdivision (h), by reading CALJIC No. 8.85, which tells the jurors that in deciding whether appellant would live or die, they should consider: "[w]hether 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.[79]

(4 CT 1062; 20 RT 3113.)

The prosecutor objected this instruction was misleading, and 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, subdivision (a). (20 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

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[79] 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, subdivision (k), which allows the jurors 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. 586, 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, subdivision (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].)

independent evidence relating to [Penal Code section 190.3, subdivision (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 under Penal Code section 190.3, subdivision (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*, *supra*, 13 Cal.4th 622, 708 [same].)

The trial court also was wrong in its belief that intoxication, be it 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[80] ["jury may infer the presence and extent of a defendant's intoxication from evidence of his behavior and the amount of

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[80] *People v. Conley* was superseded by statute on other grounds, as recognized in *People v. Saille*, *supra*, 54 Cal.3d 1103, 1114.

his drinking"]; *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 testimony was given that "everyone" was "drinking" and "getting high" and that alcohol and meth were present. (6 RT 1010-1011, 7 RT 1075-1076, 1146, 1179; see also 6 RT 884, 7 RT 1166.) The prosecutor even argued that alcohol allowed appellant "to do this murder that much better." (20 RT 3222.)

The 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 circumstances 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; see also *People v. Coffman*, *supra*, 34 Cal.4th 1, 123.) This case belies that assumption, as both the trial court and the state's prosecutor believed intoxication could be considered an aggravating factor under Penal Code section 190.3. (20 RT 3132-3133.) Surely, if the 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 jurors would believe the same.

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*, *supra*, 462 U.S. 862, 885; *People v. Benson, supra,* 52 Cal.3d at p. 801.) The likelihood that the jurors in this case understood 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. Oklahoma, supra,* 447 U.S. 343, 346; *Fetterly v. Puckett* (9th Cir. 1993) 997 F.2d 1295, 1300-1301.) This likelihood further renders the resulting verdict unreliable and reversible under the Eighth Amendment, as well. (See *Furman v. Georgia* (1972) 408 U.S. 238; *Godfrey v. Georgia* (1980) 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 noted already, the state's case for death was based almost entirely on the circumstance of the crime, presented under Penal Code section 190.3, subdivision (a). This was not, however, the rare case of a murder so heinous that any juror would have to conclude that death was the appropriate punishment, and reasonable jurors could have found this was not one of the "extreme cases" that actually warranted societies "most irrevocable of sanctions[.]" (*Gregg v. Georgia, supra,*, 428 U.S. at p. 182; see also *id.* at

p. 184.) A reasonable juror could have determined that the scale of justice was balanced, and that the additional weight of just this one improper factor in aggravation was sufficient to tip that scale in favor of death. This is especially so, given at least four of appellant's jurors were predisposed to viewing intoxication as an aggravating factor, as indicated by their beliefs that drug use was one of the leading causes of crime.. (43 CT 11135, 11213, 11291, 44 CT 11447.) The state cannot meet its burden under *Chapman v. California, supra,* 386 U.S. at pp. 23-24 of proving beyond a reasonable doubt that this error could not have been a contributing factor in at least one juror's decision to impose the death penalty in this case. Appellant's death sentence must be overturned.

E. 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.)

The prosecutor and court both believed this instruction misstated the law, and the court refused appellant's instruction, saying there was no legal authority for it. (20 RT 3134.)

Again, the trial court and 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.) Appellant's instruction therefore as a correct statement of the law.

The Court has declined to specifically rule on the particular instruction requested by appellant, other than to say it has previously rejected arguments that the trial court must identify for the jurors which sentencing factors are aggravating and which are mitigating. (*People v. Hinton* (2006) 37 Cal.4th 839, 912; *People v. Martinez* (2004) 31 Cal.4th 673, 701.) In past cases, the Court's has found it unnecessary to reach the specific question of whether a defendant is entitled to have the jurors instructed that the background evidence he has been presented 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 the defendants' backgrounds 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, the Court again stated it had rejected arguments that the 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, supra*, 26 Cal.4th 398, 457, the 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,* 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 more than possible that appellant's jury improperly considered the background evidence presented by the defense as aggravation, and more than possible that this error contributed to appellant's conviction.

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 only as mitigation (20 RT 3133-3134), it is more than likely that the jurors would interpret the law, as instructed by the court, the same. It also is likely that this misunderstanding was fueled by the prosecutor's summation, which twisted appellant's mitigating evidence of fathering children into an aggravating argument that he "created" a family, then "hun[g] out having a great old time [with his] buddies[.]" (20 RT 3197.) Likewise with that portion of the prosecutor's remarks that turned appellant's mitigating evidence that he was the subject of childhood neglect by his heroin-addicted parents into a disclaimer that this does not turn one into "a cold-blooded killer." (20 RT 3228.)

The likelihood that appellant's jurors 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, supra*, 486 U.S. 578, 584-585, quoting *Zant v. Stephens, supra,* 462 U.S. 862, 884-885; see also *Furman v. Georgia, supra,* 408 U.S. 238; *Godfrey v. Georgia, supra,* 446 U.S. 420, 428, quoting *Gregg v. Georgia, supra,* 428 U.S. 153, 198), and his federal due process guarantee that prohibited his being arbitrarily deprived of a crucial protections afforded under California law. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346; *Fetterly v. Puckett, supra,* 997 F.2d at pp. 1300-1301.) In a case like this, where reasonable jurors could have found the evidence did not overwhelmingly support a death sentence, it is more than possible that this error could have, in the mind of a least one juror, tipped what was otherwise a balanced life-death scale in the prosecution's favor. The State 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, supra,* 54 Cal.3d at p. 965.) The death sentence must be reversed.

F. The Trial Court Erred in Refusing to Give Appellant's Proposed Clarifying Instructions on the Penalty Weighing Process.

Appellant requested 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 appellant's request on the ground that the principles illuminated in these requested instructions were covered by CALJIC No. 8.88.[81/] (5 CT

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[81] The trial court instructed appellant's jurors on CALJIC No. 8.88 which stated: "It is now your duty to determine which of the two penalties, death or imprisonment in the state prison for life without possibility of parole, shall be imposed on [each] defendant. ¶ After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. ¶ An aggravating factor is any fact, condition or event attending the commission of a crime which increases its severity or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty. ¶ The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each

1211-1212; 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*, *supra*, 479 U.S. 538, the Court recognized that under California law, a death sentence is never mandatory - not even when the aggravating circumstances outweigh the mitigating circumstances. (See *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, the 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*

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side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. ¶ [In this case you must decide separately the question of the penalty as to each of the defendants. If you cannot agree upon the penalty to be inflicted on [both] defendants, but do agree on the penalty as to one of them, you must render a verdict as to the one on which you do agree.] ¶ You shall now retire to deliberate on the penalty. The foreperson previously selected may preside over your deliberations or you may choose a new foreperson. In order to make a determination as to the penalty, all twelve jurors must agree. ¶ Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom. (5 CT 1211-1212; 21 RT 3294-3296.)

(2001) 25 Cal.4th 543, 600 and *People v. Sanders* (1995) 11 Cal.4th 475, 557, the 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, the Court has rejected the need for instructions such as those requested by appellant 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, the 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 . . . ."[82/]

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 appellant's right to a fair and reliable penalty determination under the Fifth, Eighth, and Fourteenth Amendments.

G. Appellant's Death Sentence Must be Vacated.

The denial of all of the above-requested instructions combined to deny appellant 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 instructions denied appellant a fair penalty determination.

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[82] 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 is one that "merely highlight[s] certain aspects of the evidence without further illuminating the legal standards at issue."].)

Each of the requested instructions was designed to address considerations that the jurors could bring to bear in making the determination between life and death. 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 constitutional 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 overturned.

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XV. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTS FOR A CONTINUANCE TO ALLOW APPELLANT TO SECURE A NECESSARY SURREBUTTAL WITNESS, REVISE HER CLOSING ARGUMENT IN LIGHT OF THE COURT'S REJECTION OF DEFENSE REQUESTED INSTRUCTIONS, AND ALLOW DEFENSE COUNSEL UNTIL THE NEXT MORNING TO START HER PENALTY PHASE CLOSING ARGUMENT.

A. Introduction

The trial court's denial of a continuance to secure a necessary surrebuttal witness, and of an overnight recess between the prosecution and defense closing argument deprived counsel of a reasonable opportunity to present a defense and to prepare closing argument for the penalty phase, violating his constitutional rights to due process, a fair trial, to present a defense, equal protection, to a reliable penalty phase and to the effective assistance of counsel. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 17, 24.)

On February 16, 1999, the prosecution presented its penalty phase rebuttal case, consisting of a single witness, Compton School District Police Officer and self-described "world renowned expert on gang graffiti and gangs," Andrew Zembel. (20 RT 3078, 3081-3082) Zembel was not on the prosecution's penalty phase "witness list" which was not a list at all but instead the witnesses originally reflected on the jury questionnaire. (15 RT 2471; 16 RT 2475; See e.g., 43 CT 11158.) Prior to beginning the penalty phase defense counsel expressed her concern that the prosecutor might present witnesses other than those listed on the questionnaire, but all the prosecutor would state was that she had

no other witnesses "at this time." The trial court assured defense counsel that if the prosecutor attempted to present any other witnesses, there would be a hearing first. (16 RT 2482-2485.) A hearing was conducted prior to Zembel's testimony in which the court denied appellant's request to know the name of the witness or be given additional documents[83] upon which the witness planned to rely. (20 RT 3068-3076; See Argument XIII, *ante*.) The following exchange took place after the prosecutor expressed her intention to present a rebuttal witness:

Ms. Trotter: I would like to know who that witness is, your honor.

The Court: I appreciate that you do but they are not required to tell you.

Ms. Trotter: Your honor, I respectfully disagree with the court. I have no way of lining up other witnesses unless I have those underlying documents on which this perspective witness bases his testimony.

The Court: I appreciate the difficulty, but that isn't going to happen.

The thrust of Zembel's testimony was to introduce gang evidence to rebut defense testimony by Jose Trinidad "Trino" Jimenez that he knew appellant through home bible study from 1989 through 1992 and based upon what he knew of appellant, it seemed "out

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[83] The prosecutor had previously turned over a four-page document to counsel regarding appellant's gang membership that she intended to use as rebuttal to Jimenez testimony regarding appellant's character. Counsel objected to the evidence being admitted at all and unsuccessfully requested that if it were admitted that she be given the underlying documents which supported it, e.g., field ID cards, police reports, etc. so she could adequately cross-examine the witness. (20 RT 3066-3067; See Argument XIII, *ante*.)

of character" for appellant to commit the crimes of which he was convicted.[84] (18 RT 2815-2819, 2822-2828; 20 RT 3074.) Counsel for appellant objected to the rebuttal testimony. (18 RT 2828-2829; 20 RT 3072-3076.) Zembel was allowed, over defense objection, to examine tattoos on appellant's body and testify as to the significance of each, and to use a multiple hearsay document not generated by Zembel to give his opinion as to the extent and nature of appellant's involvement in gang activity. (20 RT 3077-3107.)

After, Zembel's testimony concluded, appellant requested a continuance to present appellant's father, who had previously testified on the nature of appellant's gang activities as a surrebuttal witness.[85] The court stated that if counsel could get appellant's father into court by 1:30 p.m. (it was then 11:00 a.m.) with a sufficient offer of proof, it would *consider* allowing the witness, but was "not making any promises." (20 RT 3108-3110.) Counsel, who was involved in jury instruction discussions with the court and the other attorneys during that time (20 RT 3110-3161), was unable to procure the witness on such

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84 Over defense objection, (See Argument XIII, *ante*) the prosecution was allowed to cross-examine Jimenez on whether he was "aware that Ruben Rangel was in a gang" and elicited whether his opinion of Rangel's character would change if he knew that Rangel claimed a gang or if he knew that appellant spray-painted "KCC" on the side of a car and threatened to kill a witness for calling the police. (18 RT 2821-2837.)

85 The defense argued that appellant's father: "had previously testified, as a witness on the nature of gang activity of [appellant] and that [t]his prospective witness had previously testified about his own gang membership over a number of years and we contend is knowledgeable in the are of gangs and membership." (45 CT 11774.)

short notice and thus no surrebuttal was presented. At 1:30 p.m., after discussing proposed jury instructions the following colloquy occurred:

Ms. Trotter: Also, your honor, there is another issue that I was unable to contact the person that I was considering calling in surrebuttal, and I'm asking your honor for a recess until tomorrow so I can have that opportunity.

The Court: If you haven't been able to even contact them I'm not inclined to do it based on the testimony that was offered in rebuttal.

Ms. Trotter: I would be able to contact him during the evening, your honor.

The Court: I'm going to deny your request.

Ms. Trotter: Your honor, I think that would be denial of a fair trial, equal protection, due process rights under the federal constitution.

The Court: All right. ¶ Now I have been a (sic) handed from the People a special jury instruction entitled...." (20 RT 3149-3150.)

After completing discussing jury instructions, the prosecution began its closing argument at approximately 2:25 p.m. and completed it at approximately 3:40 p.m.,[86] affording the prosecution approximately one hour and fifteen minutes for its initial closing argument (20 RT 3191-3236.) A fifteen minute recess was taken until 3:55 p.m., during which time counsel for appellant objected to being forced to do her closing argument when it was essentially 4:00 p.m..[87] Counsel pointed out that it was the end of

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86 There was a 15 minute recess taken during the prosecution's closing argument. (20 RT 3214-3216.)

87 Counsel requested that her closing be deferred to the following day: "first to allow time for reorganizing notes, in light of the facts that mush of Counsel's argument had been based on the special instructions proposed; many of these requested specials were rejected, that same day, by the Court. Secondly, Counsel believed that the jurors would be inattentive because her argument would extend beyond the normal time the Court recessed for the

the day, the jurors were tired[88/] and wanted to go home, thus making her do her closing argument under those circumstances would cause her to rush. The court noted her objection but stated that the court was in session until 4:30 and if she wanted to continue past that, she could. Counsel expressed her concern that if she did so, the jurors might be distracted and not be listening. The court declined to put the closing argument over until the next morning. (20 RT 3237.) Appellant's closing argument commenced at 3:55 p.m.. (20 RT 3238.) Mid-argument, during a bench conference regarding an objected-to quote counsel wanted to use in her argument, the following exchange took place:

The Court: .... If we have to interrupt one more time, that's the end of your argument."
Ms. Trotter: It's probably the end anyway because I don't have enough time.

When counsel sought to resume argument, one of the juror's indicated they had to use the restroom and a short recess was taken, after which, counsel completed her argument at 4:50 p.m.. (20 RT 3258-3259.)

B. Standard of Review

The trial court's denial of a motion for continuance is reviewed for abuse of discretion. (*People v. Roybal* (1998) 19 Cal.4th 481; *People v. Jones*, *supra*, 17 Cal.4th 279; *People v. Mickey* (1991) 54 Cal.3d 612, 660.) Although, the trial court has broad

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day." (45 CT 11775.)

88 Indeed, the court acknowledged that prosecution's closing argument was quite emotional and the juror's were distracted by the victim's family and friends crying in the audience. (20 RT 3214-3216.)

discretion to determine whether good cause exists to grant a continuance of trial, that discretion, of course, must be exercised in conformity with applicable law. (Pen. Code § 1050, subd. (e); *People v. Frye* (1998) 18 Cal.4th 894, 1012; *People v. Mickey, supra,* 54 Cal.3d at p. 660.) The trial judge must consider "not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion." (*People v. Zapien* (1993) 4 Cal.4th 929, 972.)

Further, such discretion may not be exercised in a manner as to deprive the defendant of a reasonable opportunity to prepare his defense. (*Jennings v. Superior Court* (1967) 66 Cal.2d 867; *People v. Murphy* (1963) 59 Cal.2d 818.) Moreover, "[W]hen a denial of a continuance impairs the fundamental rights of an accused, the trial court abuses its discretion." (*People v. Fontana* (1982) 139 Cal.App.3d 326, 333; see also *United States v. Bogard* (9th Cir. 1988) 846 F.2d 563, 566 ["The concept of fairness, implicit in the right to due process, may dictate that an accused be granted a continuance in order to prepare an adequate defense. Denial of a continuance warrants reversal, however, only when the court has abused its discretion."].)

C. The Trial Court Abused its Discretion in Refusing to Grant An Overnight Continuance for the Defense to Secure a Necessary Surrebuttal Witness And To Prepare for Closing Argument.

The absence of a material witness for the defense, under appropriate conditions,

has long been recognized as a ground for continuance. (*Jennings v. Superior Court, supra*, 66 Cal.2d at 876.) Because the defense was denied the opportunity to present a material witness who could have rebutted the prosecutions' "gang expert" on a critical issue in the penalty phases – whether appellant was a hardened gang member[89] deserving of death – the trial court's insistence on expeditiousness in the face of a justifiable request for a continuance was prejudicial error and denied appellant effective assistance of counsel, the right to present a defense, due process, a fair trial and a reliable penalty phase determination. death verdict. (*Morris v. Slappy* (1983) 461 U.S. 1, 11-12; *Ungar v. Sarafite* (1964) 376 U.S. 575; *Webb v. Texas* (1972) 409 U.S. 95, 98; *see People v. Snow, supra*, 30 Cal.4th 43, 70; U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 17, 24, 29.)

A reasonable continuance to secure this surrebuttal witness was necessary for appellant to effectively rebut the prosecution's irrelevant and prejudicial gang testimony. (See Argument XIII, *ante*.) A brief delay of proceedings for counsel to secure and prepare a surrebuttal witness would not have compromised the integrity of the proceedings or prejudiced the prosecution. However, despite this reasonable request, the court was determined that the penalty phase would proceed immediately into instructions

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[89] Zembel testified: "My opinion is that he is a gang member of a hard-core nature. Based on the tattoos from the shoulders up they signify someone that has a wanton disregard or disrespect for life itself, it shows a very ... a extreme hopelessness. (20 RT 3095.)

and argument even though it was at the expense of appellant's ability to fully prepare his case for life.

Further, the trial court's denial of an overnight recess between the prosecution and defense closing argument deprived counsel of a reasonable opportunity to prepare closing argument for the penalty phase, violating his constitutional rights to due process, to present a defense, to equal protection of the law, to a reliable penalty phase and to the effective assistance of counsel. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 17, 24.) A reasonable continuance was necessary for counsel to prepare her closing which had previously been based on a number of proposed defense instructions which were denied earlier that day and to structure a rebuttal to the prosecution's argument. (45 CT 11775; 20 RT 3113, 3118-3121, 3127-3144, 3160-3161). A delay of the proceedings for what would have amounted to less than an hour of court time[90] for counsel to reorganize her notes in light of the refused instructions and prepare to rebut the prosecution's argument for death would not have compromised the integrity of the proceedings or prejudiced the State in any way.

In response to such improper judicial actions, courts have criticized "a trial judge who seemed above all to be determined not to disturb [the court's] trial schedule." (*United States v. Nguyen* (9th Cir. 2001) 262 F.3d 998, 1003; see also *Lee v. Kemma*

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[90] The court was only to be in session until 4:30, but insisted on defense counsel starting her closing argument at 3:55 p.m. rather than recessing until the next morning.

(2002) 534 U.S. 362 [holding that a trial court's failure to grant a continuance in order for the defense to locate a scheduled alibi witness fell "within the small category of cases in which asserted state grounds are inadequate to block adjudication of a federal claim."].)

Under both the state and federal constitutions, a criminal defendant has the right to the effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I § 15, 24.) The right to counsel includes the right to adequately present a defense, including the right to prepare witnesses and argument. (See *People v. Maddox* (1967) 67 Cal.2d 647, 652.) This is particularly true in the penalty phase of a capital case, where the defendant has a right to counsel who adequately prepares witnesses and effectively presents their testimony. (*Belmonte v. Ayers* (9th Cir. 2008) 529 F.3d 834, 861-862.) By denying the brief continuance to either secure the surrebuttal witness or to adequately prepare for closing argument, the trial court deprived appellant of the effective assistance of counsel since counsel was prevented from fully advancing his case for life. (*Geders v. United States* (1976) 425 U.S. 80; *Morris v. Slappy, supra*, 461 U.S. at 11-12; see *Greenberger v. Superior Court* (1990) 219 Cal.App.3d 487, 505; see also *United States v. Gallo* (6th Cir. 1985) 763 F.2d 1504, 1523-1524.)

The trial judge "failed to adequately balance [appellant's] Sixth Amendment rights against any inconvenience and delay from granting the continuance." (*United States v. Nguyen, supra,* 262 F.3d at p. 1004.) The denial therefore also violated his Sixth and Fourteenth Amendment rights to present a defense. (*United States v. Pope* (9th Cir. 1988)

841 F.2d 954, 958 [denial of continuance clearly prejudicial in that it deprived defendant of testimony that could have helped him]; *Bennet v. Scroggy* (6th Cir. 1986) 793 F.2d 772, 777 [same].) Moreover, the error violated appellant's right to a fair and reliable determination of penalty under the Eighth and Fourteenth Amendments to the Constitution of the United States because the court's ruling directly impacted the nature and quantity of the evidence available for the jury to consider. (U.S. Const., 8th & 14th Amends.; Pen. Code, § 190.3; CALJIC 8.85.)

The request for a continuance to secure a critical surrebuttal witness was particularly reasonable under the circumstances since appellant was essentially sandbagged by the gang testimony. (See Argument XIII, *ante*). Further, the request to recess at 4:00 p.m. instead of 4:30 p.m. so the defense could prepare her penalty phase closing argument in light of the refused instructions and rebut the prosecution's argument for death was also reasonable under the circumstances

The court abused its discretion since there was no compelling reasons not to grant the additional time in either circumstance.

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. [citation omitted.] Contrariwise, *a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality*. [citation omitted.]. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to

the trial judge at the time the request is denied.

(*Ungar v. Sarafite*, *supra*, 376 U.S. 575, 589.)

"In determining whether a denial was so arbitrary as to deny due process, the appellate court looks to the circumstances of each case and to the reasons presented for the request. [citations.] One factor to consider is whether a continuance would be useful. [citation.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 1011, citing *People v. Frye, supra,* 18 Cal.4th at p. 1012-1013.) Further, the court should consider "'not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by the granting of the motion.'" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037, citing *People v. Zapien*, *supra*, 4 Cal.4th 929, 972; see also *United States v. Flynt*, *supra*, 756 F.2d 1352, 1359, amended on other grounds, 764 F.2d 675 (9th Cir. 1985).)

Specifically, where a defendant alleges the absence of a witness as grounds for his continuance, if the defendant can show that he has been diligent in securing the witness, or that a specific witness exists who would present material evidence, the court's ruling denying a continuance can support a claim of federal constitutional error. (See *Id.* at p. 591; *People v. Jenkins, supra*, 22 Cal.4th at p.1140; *People v. Howard, supra*, 1 Cal.4th at p. 1172.) Moreover, a defendant has the right to place before the sentencer any relevant evidence in mitigation, including any aspect of his character. (*People v. Carpenter*, *supra*,

15 Cal.4th 312; *People v. Jackson* (1996) 13 Cal.4th 1164.) The jury must be allowed to consider as mitigating any aspect of a defendant's background, character or record that the defendant proffers as a basis for a sentence less than death. (*Mills v. Maryland*, *supra*, 486 U.S. 367, 373; *Eddings v. Oklahoma*, *supra*, 455 U.S. 104, 121; *People v. Ochoa*, *supra*, 19 Cal.4th 353; *People v. Gordon* (1990) 50 Cal.3d 1223.) Any barrier, whether instructional, evidentiary, or statutory that precludes a juror from considering relevant mitigating factors is constitutional error. (See *Skipper v. South Carolina* (1986) 476 U.S. 1, 4.)

Here the request for a continuance to present a necessary surrebuttal witness was based on the need to rebut the prosecution's prejudicial gang evidence and to present relevant evidence in appellant's case for life. Substantial justice was defeated by the denial of a sufficient continuance to obtain that evidence. The trial court instead forced appellant to face the jury's determination of life or death without the aid of a witness whose testimony could have aided in the presentation of a compelling case for life. Prejudice is readily apparent since the court's refusal to grant the additional time to defense counsel made it impossible to meaningfully represent appellant and rendered the proceedings unreliable and fundamentally unfair.

Further, prejudice is readily apparent from the refusal to allow counsel adequate time to revise her closing argument. Counsel expressed concern that she needed more time for her closing argument and demonstrated that a recess would have been useful both

for appellant's sake and for the sake of the jury in being able to fully focus on the argument for life. (See *People v. Beeler* (1995) 9 Cal.4th 953, 1003-1004.) The prosecutor did not claim that the continuance would inconvenience any of her witnesses, nor was there any evidence that it would have been an undue burden to the jurors or the court. (Pen. Code, § 1050, subd. (g).) The request was reasonable under the circumstances and there was no burden to the court in continuing the matter. Further, allowing the additional time would have served the ends of justice since the Eighth Amendment mandates a heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." (*Caldwell v. Mississippi*, *supra*, 472 U.S. 320.)

In the face of the denial of the overnight recess, appellant had only 15 minutes to reorganize her argument in light of the refused instructions and prepare her rebuttal to the prosecution's arguments for death. Counsel's argument lasted only about 40 minutes, still taking the court past its 4:30 p.m. routine adjournment time and stunting the effort to present a case for life. Here, substantial justice was defeated by the denial of the continuance by the trial court who instead allowed appellant to face a determination of life or death without the aid of fully prepared defense counsel who very well could have presented a compelling case for life had she been granted an overnight recess to organize her argument. The court's refusal to grant any breathing room to defense counsel made it impossible to meaningfully represent appellant, and rendered the proceedings unreliable,

and fundamentally unfair.

The consequences of the unreasonable denial of the continuance by the trial court was a deprivation of appellant's state and federal rights to counsel, reasonable access to the courts, to present a defense, effective assistance of counsel, a fair penalty determination, due process of law, a fair trial and equal protection of the laws. (U. S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 17, 24.)

The errors are reversible per se, or alternatively is reversible since respondent cannot show it to have been harmless beyond a reasonable doubt. (*Perry v. Leek* (1989) 488 U.S. 272, 279; *Chapman v. California*, *supra*, 386 U.S. 18, 24, 17 L.Ed.2d 705, 87 S.Ct. 824.) Moreover, even under the standard articulated in *People v. Watson*, *supra*, 46 Cal.2d 818, the error is reversible because it is reasonably probable that had defense counsel been able to present a knowledgeable surrebuttal witness regarding appellant's gang membership and been able to make a more detailed and coherent case for life in light of the instructions actually given by the court, the penalty phase result could have been more favorable. For the foregoing reasons, appellant respectfully requests that this Court reverse his death sentence.

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XVI. THE "CIRCUMSTANCES OF THE CRIME" LANGUAGE IN PENAL CODE SECTION 190.3, SUBDIVISION (A) IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD AS APPLIED RESULTING IN THE TRIAL COURT ERRING IN ADMITTING THE EVIDENCE WITHOUT LIMITATION, OR EXCLUSION OF WITNESSES, AND WITHOUT AN APPROPRIATE JURY INSTRUCTION.

A. Introduction

The presentation of such irrelevant and emotionally charged "victim impact evidence[91]" in this case violated appellant's state and federal constitutional guarantees to a fair trial, cross-examination and confrontation of adverse witnesses, due process of law, a fair trial, the right to affirmatively present evidence in one's defense, right to effective assistance of counsel, and right to a reliable verdict and sentence (Cal. Const., art. I, §§ 7, 15, 17, 24; U.S. Const., 5th, 6th, 8th & 14th Amends.; Pen. Code, § 190.3; Evid. Code, §§ 210, 352.)[92]

On November 23, 1998, the prosecutor filed a "statement in aggravation"

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91 As used herein, "victim impact evidence" refers to victim impact evidence as described in *Payne v. Tennessee* (1991) 501 U.S. 808, 827, and *People v. Edwards* (1991) 54 Cal.3d 787, 835-836, or as otherwise encompassed under Penal Code section 190.3.

92 Appellant acknowledges that the weight of California law on this subject is against him. (See e.g., *People v. Cruz* (2008) 44 Cal.4th 636; *People v. Salcido* (2008) 44 Cal.4th 93, 151; *People v. Kelly* (2007) 42 Cal.4th 763, 793; *People v. Lewis*, *supra*, 39 Cal.4th 970, 1056-1057; *People v. Boyette* (2002) 29 Cal.4th 381, 444; However, appellant asserts that the testimonial and photographic evidence presented in this case goes beyond "the nature and circumstances of the crime" as intended by Penal Code section 190.3, subdivision (a) and as limited by the United States Supreme Court in *Payne v. Tennessee*, *supra*.

announcing its intent to introduce aggravating evidence that included victim impact evidence. The statement listed six victim impact witnesses: Antonio Urrutia's mother, sister and nephew and Andreas Encinas' mother, sister and brother. (CT 783-784.) On February 8, 1999, the trial court overruled an objection by counsel that victim impact witnesses, particularly family members, should be excluded from the courtroom during each other's testimony to avoid emotions from running too high.[93] (16 RT 2494-2495.)

On February 9, 1999, the prosecution presented the testimony of the Andreas Encinas' sister Luz Gamez, his brother Sergio Encinas and his fiancee Paula Beltran. (17 RT 2632-2662.) The prosecution preceded its presentation against appellant by presenting victim-impact testimony and photographs through Urrutia's sister Olivia Perez[94], his nephew Jabbar Soto and his mother Virginia Urrutia. (16 RT 2591-2607; 17 RT 2610-2623.)

The siblings testified about their relationship with their brother from the time he was a child through going to the hospital the morning after the shooting and learning of his death. They also talked about how the death affected their parents and Luz Gamez'

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93 The court seemed to realize its mistake later when it noted that the victim impact evidence had turned into "something like a wake" for the victims families and it had "to stop somewhere." (17 RT 2663-2664.)

94 The prosecution was allowed to recall Perez over defense objection after the testimony of Encinas' victim impact witnesses to tell a story about her brother working at the IHOP and dressing up as a pancake. (17 RT 2663-2667.)

children. Their testimony was aided by two photo boards containing eleven photos[95] showing: Encinas' baptism (53-A); a photo from second grade (53-B); a photo of Encinas with his father (53-C); Encinas playing football at St. Anthony's (53-D); a high school graduation photo (53-E); a Christmas dinner family photo (53-F); Gamez' son's graduation photo from St. Anthony with Encinas and Paula Beltran (54-A); a photo of Gamez' son with Encinas (54-B), two family photos from Gamez' wedding with their mother, brother Sergio, Luz' kids, Encinas and Paula Beltran (54-C, E); and a photo of how Encinas looked when he was killed. (54-D) (17 RT 2633-2635; Exs. 53, 54.)[96]

Paula Beltran testified through tears[97] that she was Encinas' girlfriend and they planned to get married and start a family together. Beltran blamed herself for the death because she called him to help her. She remembers him all the time and has nightmares. (17 RT 2659-2662.)

The presentation of such evidence in this case was error. Moreover, the failure of the trial court to exclude the witnesses during each other's testimony and to give a sufficient pinpoint instruction regarding how the evidence should be considered was

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95 The photo boards were marked and admitted into evidence as People's Exhibits 53 and 54. (17 RT 2633, 2769.)

96 While there were no objections made during the testimony, an objection by counsel would have only served to alienate the jury and was tactically impossible.

97 Beltran's testimony had to be halted several times due to her breaking down on the stand.

error.

B. Standard of Review

Whether a statute is unconstitutionally vague and overbroad is a pure question of law. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887-888.) Pure questions of law are subject to the appellate court's independent or *de novo* review. (*People v. Cromer* (2001) 24 Cal.4th 889, 894 n.1.) Further, a reviewing court also independently reviews issues pertaining to jury instructions. (*People v. Waidla*, 22 Cal.4th 690, at pp. 733, 737 ["Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that, we believe, is however predominantly legal. As such, it should be examined without deference"].)

C. The "Circumstances of the Crime" Language in Penal Code Section 190.3, Subdivision (a) is Unconstitutionally Vague and Overbroad.

The "circumstances of the crime" language in Penal Code section 190.3, subdivision (a) is unconstitutionally vague and its application in appellant's case was unconstitutionally overbroad, thereby violating appellant's constitutional rights.[98/] Due

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98 Appellant recognizes that section 190.3, subdivision (a) has survived similar challenges. (*Tuilaepa v. California*, *supra*, 512 U.S. 967, 987-988; *People v. Kraft* (2000) 23 Cal.4th 978, 1078.) Neither of these opinions, however, discussed the issue of whether the factor regarding the circumstances of the crime (§ 190.3, subd. (a)) is unconstitutionally vague or overbroad in the wake of *Edwards*, and subsequent decisions by this Court allowing consideration of evidence and argument of victim impact matters under the guise of circumstances of the crime. Appellant challenges the use of victim impact evidence as an aggravating circumstance as

process requires that criminal statutes be reasonably definite. (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.)

In analyzing whether a statute is sufficiently definite to pass constitutional muster, the reviewing courts look not only at the language of the statute but also to legislative history and California decisions construing the statute. (*People v. Bamba* (1997) 58 Cal.App.4th 1113, 1120.) Here, prior to 1991, evidence of a murder's impact on a victim and the victim's family and friends was not admissible in the penalty phase of a capital trial. (*Booth v. Maryland* (1987) 482 U.S. 496, 501-502; *People v. Ochoa*, *supra*, 19 Cal.4th 353, 455, fn. 9.)

In 1991, the U.S. Supreme Court partially overruled its previous decision in *Booth v. Maryland*, *supra*, 482 U.S. 49, and held that the Eighth Amendment does not preclude a state from allowing victim impact evidence and statements that demonstrate a specific harm cause by the defendant's crimes because it is relevant to a jury's assessment of a defendant's moral culpability. (*Payne v. Tennessee*, *supra*, 501 U.S. 808, 819.) This Court has read "evidence of specific harm" to include the impact on the family of the victim caused by the defendant's acts as a "circumstance of the crime" under Penal Code section 190.3, subdivision (a). (*People v. Salcido*, *supra*, 44 Cal.4th 93, 151.)

However, the only type of victim impact evidence addressed in *Payne* was

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unconstitutionally vague and overbroad, and fails to support a reliable penalty determination, under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

evidence describing the impact of the capital crimes on a family member who was personally present during, and immediately affected by, the capital murders.[99/] Moreover, the Court recognized that victim impact statements or evidence may potentially render the sentencing proceeding fundamentally unfair. (*Id.*, 501 U.S. at p. 825; *Id.* at p. 831 (O'Connor, J., concurring); *Id.* at p. 836 (Souter, J., concurring).) The Court indicated that it would violate the federal constitutional guarantee to due process of law to introduce victim impact evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair...." (*Ibid.*.)

Payne left undisturbed *Booth*'s prohibition against the victim's family offering its opinion about the crime, the defendant, and the appropriate punishment. (*Id.*, 501 U.S. at p. 830 n.2.) Further, *Payne* left undisturbed the rule "that the term 'circumstances of the crime' did not include personal characteristics of the victim that were unknown to the defendant at the time of the crime." (*People v. Fierro* (1991) 1 Cal.4th 173, 260, 264 (conc. & dis. opn. of Kennard, J.); *South Carolina v. Gathers* (1989) 490 U.S. 805, 811-812, overruled on other grounds in *Payne v. Tennessee, supra*, 501 U.S. at p. 863.)

In *People v. Edwards, supra*, 54 Cal.3d at pp. 835-836, this Court, for the first time, allowed consideration of evidence and argument regarding victim impact matters under section 190.3, subdivision (a), as "circumstances of the crime." *Edwards*, however,

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99 This Court has declined to limit victim impact evidence to family members who were present during the crime. (*People v. Brown* (2004) 33 Cal.4th 382, 398.)

merely addressed photographs of the victims which were taken near the time of the crimes, in order to establish how the victims appeared to defendant when he committed the crimes against them. (54 Cal.3d at p. 828.) *Edwards* recognized that there are limits on the extent and content of victim impact evidence and held that irrelevant or inflammatory rhetoric that diverts the jury's attention from their proper focus, inviting irrational, purely subjective responses, should be curtailed. (*People v. Edwards, supra,* 54 Cal.3d at p. 833; See also *People v. Robinson* (2005) 37 Cal.4th 592, 644 [discussing the limits of victim impact evidence].) Indeed, in *Edwards*, *supra*, 54 Cal.3d 787, 835-836, this Court warned: "We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne* [citation omitted]."

The testimony and photographs presented in this case went beyond the recitation reviewed and contemplated in *Payne*, a recitation that was limited to a short response that the victim's son, who was present during the crime, missed his mother and cried for his sister. (*Payne v. Tennessee, supra*, 501 U.S. at pp. 814-815.) By contrast, the testimony from Encinas' older adult siblings was purely an emotional retrospective of Encinas' life, while the testimony of his girlfriend was an emotional view into what his future could have been like and the devastation felt by losing him.

Gamez showed family photos of Encinas at all stages of his life including his baptism, a second grade photo, football photos, graduation photos and wedding photos

from Gamez' wedding. The prosecution elicited how Encinas was as a child. Gamez testified that Encinas "was a very loving child, well-mannered and very respectful. He was a normal, happy child." who grew into a man that "had his whole life ahead of him, a person that would help whoever needed it." Gamez testified that Encinas was very close to his mother and father as well as Gamez' son Edgar. The day of the murder, the family went to a wedding but Encinas had to work. Encinas' mother stayed up all night waiting for him to come home. The next morning the family went to the hospital because they had heard Encinas had been shot, but he died in surgery and they never got to see him alive again. Encinas mother and father's health has declined considerably since Encinas' death. The family could not tell Encinas' father the trial was going on because he could not handle it. Encinas wanted to be a policeman and had passed his admission test into the LAPD two months before he was killed. Encinas was also taking criminology classes at the Long Beach College. The prosecution asked Gamez to share a memory of Encinas and herself. Gamez told a story about how her brother used to call her "fatty" in Spanish. The prosecution asked Gamez what she would miss most about Encinas and she said "everything." When asked if there was anything else she would like to tell the jury about her brother Gamez stated: "That we don't understand and we don't know why certain people took his life, took my brother's life." (17 RT 2633-2643.)

Encinas' brother Sergio testified that he and Encinas used to sleep together as children, play games and have competitions. Encinas grew into a 300-pound loveable

"teddy bear" that everyone liked and had excellent friends. Encinas' Dad was very proud of him for passing the LAPD Academy test. Sergio will miss Encinas' smiling face the most. Sergio shared a memory of riding Encinas home on his bike from school when Encinas was in first grade and that Encinas got his foot stuck in the spokes. Sergio talked about the Catholic grade school they went to and the sports Encinas played in. Then he talked about going to the hospital the day Encinas died and having to identify the body before knowing that his brother had died. An officer took him to the morgue and pulled out a tray, opened a bag and it was his brother. Sergio then had to tell Encinas family that he was dead. Sergio confirmed that his parents were very sick and that they could not tell Encinas father that the trial was going on for fear of how it would affect him. Encinas' death had also severely affected Sergio physically and emotionally, Sergio responded that the pain "will never go away." (17 RT 2645-2654.)

Encinas' girlfriend Paula Beltran testified that although they were not formally engaged, they had given each other smiley face rings to symbolize their common dreams of getting married and having a family. Encinas wanted a boy first and wanted to name him Andres. Encinas also dreamed of becoming a policeman. Beltran blames herself for his death and cannot stop thinking of them together doing different things. She falls asleep hoping to dream of him so she can see him again, but awakes with nightmares instead. (17 RT 2659-2662.)

Although this Court has largely sanctioned this type of testimony (see *People v.*

Lewis, *supra*, 39 Cal.4th 970, 1056-1057; *People v. Robinson*, *supra*, 37 Cal.4th 592, 650-652), many other jurisdictions[100/] have recognized that much of it is outside the scope intended by *Payne*. It bears repeating that the United States Supreme Court in *Payne* cautioned that the admission of victim impact evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair . . . " violates the federal constitutional guarantee to due process of law. (*Payne v. Tennessee*, *supra*, 501 U.S. 808, 825 [111 S.Ct. 2597, 2608, 115 L.Ed.2d 720].)

In *People v. Hope*, *supra*, 702 N.E.2d 1282, the Illinois Supreme Court interpreted the provisions of The Illinois Rights of Crime Victims and Witnesses Act to limit victim impact testimony to "a single representative who may be the spouse, parent, child or sibling of a person killed as a result of a violent crime." (See also *New Jersey v. Muhammad*, *supra*, 678 A.2d 164, 180.) In addition to the constitutional limits on victim impact evidence and the limitations required by Evidence Code section 352, it must be noted that Penal Code section 1191.1 provides in pertinent part that "the next of kin of the victim if the victim has died" may appear and testify "at the sentencing proceeding . . . ." While the statute was clearly enacted, inter alia, to assist victims in obtaining restitution,

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100 (See e.g., *People v. Hope* (Ill. 1998) 702 N.E.2d 1282; *New Jersey v. Muhammad* (1996) 145 N.J. 23, 54 [678 A.2d 164, 180]; *State v. Hill* (S.C. 1998) 501 S.E.2d 122, 128; *Conover v. State* (Okla.Crim.App. 1997) 933 P.2d 904, 921; *Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 829-830; *Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330, 337; *United States v. McVeigh* (10th Cir. 1999) 153 F.3d 1166, 1221 & fn. 47.)

and not merely to assist the court in assessing the proper punishment, the statutory limitation on the type of witness–that is, to "the next of kin of the victim"–applies to the penalty phase of a capital trial because, after all, the penalty phase is a "sentencing proceeding" and the statute does not exclude capital trials from its reach. (Cf. *State v. Hill*, *supra*, 501 S.E.2d 122, 128, which concluded that the South Carolina statute authorizing victim impact statements at sentencing did not limit the scope of victim impact evidence in capital cases because the statute expressly "exclud[ed] any crime for which a sentence of death is sought . . . .") Further, the statute's description of a single victim impact witness, "or up to two of the victim's parents or guardians if the victim is a minor," limits the prosecution to one victim impact witness at penalty phase, just as the Illinois Supreme Court interpreted the similar provisions of the Illinois statute in *People v. Hope*, *supra*, 702 N.E.2d 1282.

Additionally, "[c]omments about the victim as a baby, his growing up and his parents' hopes for his future in no way provide insight into the contemporaneous and prospective circumstances surrounding his death; . . . [but] address only the emotional impact of the victim's death . . . [and increases] the risk a defendant will be deprived of Due Process." (*Conover v. State*, *supra*, 933 P.2d 904, 921.) In *Cargle v. State*, *supra*, 909 P.2d 806, 829-830, the Oklahoma court also held it was error to admit testimony "portraying [the decedent] as a cute child at age four . . . ;" and "that he dressed up as Santa Claus, saved the county thousands of dollars by a personal fundraising effort, was a

talented athlete and artist, and was thoughtful and considerate to his family . . . ."

Moreover, in this case, the overbroad construction of the statute, resulted in admission of a plethora of photographs that were irrelevant, unduly prejudicial, cumulative and which contributed to rendering the penalty phase fundamentally unfair. Although a photograph of a murder victim while alive is "generally admissible" in the penalty phase (*People v. Carpenter*, *supra*, 15 Cal.4th 312, 400-401), this is only so because it is relevant as a "circumstance of the crime" because it portrays the victim as seen by the defendant before the murder. (*People v. Lucero* (2000) 23 Cal.4th 692, 714-715, citing *People v. Cox*, *supra*, 53 Cal.3d 618, 688.) It is improper to admit pre-mortem photographs of the victim which do not depict the victim as he or she appeared at the time of the murder, for example, as a child, during another era in the victim's life, or dressed in particular uniforms or other special attire that were not related to the circumstances of the murder. (*Salazar v. State*, *supra*, 90 S.W.3d 330, 337, holding that it was improper to exhibit childhood photographs of the victim since the defendant killed the victim when he was an adult, not a child, and the childhood photographs were extremely prejudicial, presenting a strong "danger of unconsciously misleading the jury . . .") It has also been found improper to admit wedding photos. (*United States v. McVeigh*, *supra*, 153 F.3d 1166, 1221 and fn. 47.) Thus, here, only exhibit 54-D which depicted Encinas as he looked prior to his death was properly admitted as relevant to "circumstances of the crime."

Finally, as pointed out by the Texas high court: "the punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial." (*Salazar v. State*, *supra,* 90 S.W.3d at pp. 335-336.) Here, the trial court noted when the prosecution sought to recall Olivia Perez briefly for "memory" evidence regarding Urrutia dressing up as a giant pancake once as part of his employment at IHOP:

> It's not the issue of time. That's not the problem. What concerns me, as long as the families of both victims are sitting here and they're having something like a wake, I think, again, it's thinking about the losses that they suffered. And they're going to be experiences that come to mind, and they are going to remember. And there is a lot of benefit to them in talking about it. My concern is, it has to stop somewhere." (17 RT 2663-2664.)

Despite its concerns, the trial court allowed this final victim impact evidence over defense objection. (*Ibid.*) The overbroad application of the statute in this case resulting in the admission of a myriad of improper victim impact evidence crossed the line established by due process, and rendered the penalty phase of appellant's trial unconstitutional and fundamentally unfair.

Imposing capital punishment in such a way is arbitrary, and violates the Eighth Amendment. Moreover, because all murders have victims, and virtually all such victims have families or other loved ones, a victim impact aggravating factor does not "aggravate" a homicide, as required under the Eighth Amendment. (See *Arave v. Creech* (1993) 507 U.S. 463, 474 ("If the sentencer fairly could conclude that an aggravating

circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm").) The instruction defining victim impact as an aggravating factor does just that.

The validation of the death penalty in this country is premised on [T]he consensus expressed by the Court in *Furman* . . . 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."(*Zant v. Stephens*, *supra*, 462 U.S. 875, 103 S.Ct. 2733, 2741] quoting *Gregg*, 428 U.S. at 189 (opn. of Stewart, Powell and Stevens, JJ.).) As such, in determining whether a defendant is "eligible" for the imposition of death, "an aggravating circumstance 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." (*Zant*, 103 S.Ct. at p. 2742.) Where an aggravating circumstance fails to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,'" then its use violates the Eighth Amendment. (*Godfrey v. Georgia*, *supra*, 446 U.S. 420, 428 [100 S.Ct. 1759, 1764-1765].) Thus, in *Godfrey*, the court found unconstitutionally vague and standardless Georgia's use as an aggravating factor that a murder was "outrageously or wantonly vile, horrible or inhuman"; it did so on the premise that "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and

capricious infliction of the death sentence" because "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" (*Godfrey*, 100 S.Ct. at p. 1765.)

Although victim impact evidence is constitutionally relevant as an *explanation*, it is not a permissible aggravating factor on its own. It suffers from every vice condemned in *Godfrey*. This court should reconsider whether this aggravating factor adequately channeled the sentencer's discretion by narrowing the class of persons eligible for the death penalty, and find that the use of such evidence for this purpose in appellant's case violates the federal Constitution.

D. The Trial Court Erred in Its Refusal of Defense Special Instruction No. 14, and the Modified Version of Caljic 8.84.1 Given by the Trial Court to Satisfy the Instructional Deficiency Failed to Sufficiently Instruct the Jury Regarding the Proper Use of "Victim Impact Evidence."

The trial court breached its instructional obligation by failing to instruct the jury on the proper use of victim-impact evidence.[101/] Emotional victim impact evidence which is likely to provoke arbitrary or capricious action violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 17, and 24 of the California Constitution. (See, *Gregg v. Georgia*, *supra*, 428 U.S. 153, 189: "where discretion is afforded a sentencing body on a matter so grave as the determination of

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101 This Court has previously rejected the argument that a trial court must instruct the jury not to be influenced by emotion resulting from victim impact evidence. (*People v. Carey* (2007) 41 Cal.4th 109, 134.)

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"; *Gardner v. Florida* (1977) 430 U.S. 349, 358: "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion"; see, also, *Godfrey v. Georgia*, *supra*, 446 U.S. 420, 428).

Here, two of Encinas siblings, and his girlfriend testified for the prosecution as victim-impact witnesses. This followed the emotional and extensive testimony of Urrutia's sister, nephew and mother. Taken together, their testimony inevitably had a strong emotional effect on the jury. During penalty-phase closing argument, the prosecution recounted the victim impact evidence stating:

> [Paula Beltran] will never forget it. She feels horrible, guilty. She is going to carry that guilt for the rest of her life. The blame rests solely on the defendants. ¶ Anthony was Virginia Urrutia's only son. She will never have grandkids from him, her only natural child. Andy's sister and brother cannot tell their dad this trial is going on. He couldn't take the pain and he wouldn't be able to control himself. Sergio had to identify him with no warning. Luz has a son that grew up with Andy, she couldn't tell him either because they were best of friends and this is too tortuous. Javier Soto said they were like brothers, and Anthony always made him laugh. All of that goes under Factor A. Paula was going to have a future and children with Andy. That's all gone. Think of her misery day in and day out. (20 RT 3205-3207.)

Shortly thereafter the court had to take a recess because Paula Beltran and Virginia Urrutia had been audibly crying and the jurors kept looking at them. (20 RT 3214-3215.) Shortly after the recess, the prosecution commented on appellant's inability to hold his

children except "through the glass" since he was incarcerated. She stated:

> Well, you know what? That's all well and good. But you know what? Where is Sergio going to look through glass to see his relative? Where is Luz going to see her brother? Where is Paula going to see her future fiancé and her future husband? ¶ Virginia, she can't look through the glass and say "Hi" and communicate with Anthony. They only can look through dirt and ground at the cemetery and get no correspondence, no feedback, no nothing. Just empty void, looking at dirt at a cemetery. ¶ So the fact that poor defendant Rangel can only see his kids through glass, if they could only be so lucky. I'm sure they, too, if they were here would choose to see their family for the rest of their life through glass than underneath six feet in the ground....
>
> .... And remember their families and what was taken away. ¶ And you know, you have pictures of the defendant's families. And that's all well and good. But you know what? Nobody in these families caused the tragedy. Nobody. The people that caused these tragedies are these two defendants. They are to blame and they need to be punished. And the only punishment that is warranted in this case is death. (20 RT 3233, 3235.)

The jury was not sufficiently instructed on how to deal with those emotions in the determination of life or death. The trial court is responsible for ensuring that the jury is correctly instructed on the law. (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1022.) "In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085.) The court must instruct *sua sponte* on those principles which are openly and closely connected with the evidence presented and are necessary for the jury's proper understanding of the case. (*People v. Breverman*, *supra*, 19 Cal.4th 142, 154.) "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.)

Here, appellant requested Special Instruction No. 14 as follows:

> Evidence has been introduced for the purpose of showing specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be 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 irrational, purely subjective response to emotional evidence and argument. (4 CT 1070, citing *People v. Edwards* (1991) 54 Cal.3d 787.)

The trial court indicated its intent to refuse the instruction stating that it was covered by CALJIC 8.88, that it was alright to argue, but "it's not instruction in the law."[102/] Defense counsel responded that "this is specific case law that's taken directly from *People v. Edwards*." The court refused the instruction. (20 RT 3137-3138; 5 CT 1070.) Co-

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[102] CALJIC 8.88 "Penalty Trial – Concluding Instruction" was given *sua sponte* and did not mention victim impact evidence, however told the jury that in "the weighing of aggravating and mitigating circumstances.... You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. " (5 CT 1211; See also Argument II.C.2, *supra*.)

defendant Mora requested identical[103] language be added to CALJIC 8.85 (5 CT 1215-1216; 19 RT 3057, 20 RT 3112-3114, 3121-3122.) The prosecution objected to Mora's requested instruction stating: "that's inaccurate. It's victim impact. It's totally discounting every victim impact witness the People put on, and therefore it should not be stated that way." Defense counsel responded that all of the principles in her proposed instruction were taken from *People v. Edwards, supra*, 54 Cal.3d 787. (20 RT 3121-3126.) The prosecution also noted that victim impact evidence should be entitled to more weight than other aggravating factors. The trial court responded: "If they, the jury, determine that the emotional impact on the victims' surviving family outweighs everything else, and that alone justifies a decision to impose death as the penalty, that is certainly appropriate." (20 RT 3125-3126.)

The court held that the last paragraph of CALJIC 8.84.1 covered the same concerns and instructed the jury with a modified version of CALJIC 8.84.1 "Duty of Jury – Penalty Proceeding" as follows:

> You will now be instructed as to all of the law that applies to the penalty phase of this trial. ¶ You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial. ¶ You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings. Both the

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[103] The language was identical to that above and added one sentence: "On the other hand, evidence and argument on emotional through relevant subjects may provide legitimate reasons to sway the jury to show mercy." (5 CT 1216.)

> 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. *You must face this obligation soberly and rationally and may not reach any decision as an irrational response to emotional evidence or argument.* (Modification in italics; *Id.*; 5 CT 1193.)

This single line non-specific "add-on" was woefully inadequate to cover the very real concerns raised by the admission of victim impact evidence. The modified version of CALJIC 8.84.1 does not explain why victim impact evidence was introduced. It does not warn jurors not to consider what they may perceive to be opinions of the victim-impact witnesses – a clearly improper factor (*Payne v. Tennessee, supra*, 501 U.S. at p. 830 fn. 2; *People v. Pollock, supra*, 32 Cal.4th 1153, 1180; *People v. Smith* (2003) 30 Cal.4th 581, 622.) Nor does it admonish them not to employ the improper factor of vengeance in their penalty determination. (See e.g., *Drayden v. White* (9th Cir. 2000) 232 F.3d 704, 712-713.)

Given the emotional testimony of the victims' families and Encinas' girlfriend, it is an understatement to say that there was a very real danger that emotion would overcome the juror's reason preventing them from making a rational penalty phase decision, unless the trial court gave them guidance on how the victim-impact evidence should be used. An appropriate limiting instruction was necessary for the jury's proper understanding of the case, and therefore it should have been given either on request of the parties or on the court's own motion. (See generally *People v. Koontz, supra*, 27 Cal.4th at p. 1085; *People v. Breverman, supra*, 19 Cal.4th at p. 154; *People v. Murtishaw, supra*, 48 Cal.3d at p.

1022.) The 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., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17.)

E. The Admission of the Victim-Impact Evidence in This Case Was Prejudicial and Requires Reversal.

The violations of appellant's federal constitutional rights require reversal unless the state can show that they were harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 381 U.S. 18, 24.) The violations of appellant's state rights require reversal if there is any reasonable possibility that the errors affected the penalty verdict. (*People v. Brown*, *supra*, 46 Cal.3d 432, 447-448.) In view of the emotional nature of the victim-impact evidence presented in this case and the prosecutor's repeated and effective use of that evidence during her closing argument, the trial court's error in admitting the evidence without excluding the testifying witnesses and doing so without proper instruction, cannot be considered harmless, and therefore reversal of the death judgment is required.

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XVII. THE TRIAL COURT'S FAILURE TO CONDUCT AN EVIDENTIARY HEARING ON THE DEFENSE ALLEGATIONS OF JUROR MISCONDUCT REQUIRES THAT THE DEATH JUDGMENT MUST BE REVERSED AND THE CASE REMANDED FOR A HEARING TO RESOLVE DOUBTS ABOUT THE JURORS' IMPARTIALITY.

A. Introduction

The trial court possessed information from defense attorneys demonstrating a strong possibility that prejudicial juror misconduct had occurred during the jurors' penalty phase deliberations. This information imposed a duty on the trial court to hold a hearing to resolve the matter. The trial court violated this duty, and failed to conduct any type of inquiry at all into the allegations of juror misconduct. 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"), violated appellant's Fifth, 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. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 15, 24, 29.) The death judgment must be set aside, and appellant's case must be remanded to the superior court for a hearing on the allegations of juror misconduct raised by the defense.

After the death verdict, Mora's trial attorneys filed a written motion requesting a new trial and access to the jurors' names and contact information in order to investigate apparent misconduct during the jury's penalty deliberations. Appellant's attorney joined

in motion. (45 CT 11759-11769, 11821; 21 RT 3310; see Code Civ. Proc., § 237.) Counsel informed the court that the defense attorneys spoke with some of the jurors after the penalty verdict and learned that at least two jurors based their decisions to impose the death penalty on evidence that had not been presented at the penalty trial, and that one of these jurors had refused to consider or deliberate on the mitigation evidence presented by the defense. (45 CT 11761, 11768.) The defense motion relayed to the trial court that juror No. 2 told the defense attorneys that based on his military training and experience, he knew that a shot to the head meant the shooter intended to commit an "execution," and was therefore able to determine that Mora had "executed" Anthony Urrutia. (45 CT 11761.) This juror told the defense attorneys that he shared his training and experience and the conclusion he deduced therefrom with the other jurors, and that this was the *only* information he considered in determining Mora should be sentenced to death. (*Ibid.*)

Juror No. 7 told the defense attorneys that she changed her verdict based in part on Juror No. 2's conclusion that Mora committed an execution. (*Ibid.*) This juror said that 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 his appropriate punishment. (*Ibid.*) This juror said she was convinced by other jurors that Mora had paged Rangel before the shootings,[104/] and that Mora had planned the execution and

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[104] Neither the guilt phase evidence, nor the prosecution's penalty phase evidence in aggravation, showed Mora paged Rangel prior to the murders. The only evidence that Rangel had been paged was presented by Rangel in

intended solely to execute, and not to rob, Urrutia - which contradicted the jury's guilt verdicts.[105] (*Ibid.*)

The defense stated that in light of the jurors' statements, they needed to investigate whether there was in fact juror misconduct in this case. (45 CT 11763, 11766.) However, without further access to the jurors, the defense had no way to conduct this investigation and supply the requisite declarations from these, and possibly other jurors, that could establish misconduct. (*Ibid.*)

According to a declaration drafted by Mora's counsel and attached to the request, the first juror (Juror No. 2) told the defense attorneys that based on his military training and experience, he knew that shooting someone in the head meant the shooter planned to execute the victim. (45 CT 11768.) The juror said he therefore was able to determine that Mora's conduct in shooting Urrutia in the head amounted to an "execution." (*Ibid.*) Juror no. 2 said that once he determined this was an execution, he automatically concluded Mora also must be executed, without considering any of the other evidence presented in

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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.)

105 The prosecution argued during penalty phase closing argument, contrary to its theory during the guilt phase, that Mora and Rangel's sole goal that night was to kill, that they had a plan to kill from the beginning and that they just asked for the victims wallets for fun. The prosecution also argued, without objection, that Rangel specifically intended to execute the victims, it was just a matter of when. (20 RT 3198-3203)

the penalty trial. (*Ibid.*) It is safe to say that Juror No. 2 harbored similar feelings for Rangel.

The second juror (Juror No. 7) said she changed her penalty decision to a vote for death based on jury room discussions that Mora committed an execution. (*Ibid.*) Counsel declared 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.*) Counsel said that under court order, the defense had no names and contact information for the jurors, and requested access to that information under Code of Civil Procedure section 237 so the defense could investigate and, if appropriate, present evidence of juror misconduct in a motion for new trial. (45 CT 11768-11769.)

The trial court believed the information received from the defense 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 appellants be 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 on the release of juror information, the court said the court clerk had heard back by phone call or in writing from jurors no. 4, 5, 6, 7, 8, 9, and 10, and that these seven 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 these two jurors also informed the clerk that they did not want their information released. (*Ibid.*) The court ruled that because these jurors did not want their contact information released, it was denying the defense request for access to this information. (21 RT 3319.) The court told those jurors who were in court that the defense might attempt to communicate with them after the hearing, and it was their decision as to whether they wished to talk to the defense. (21 RT 3319.) The court said that jurors nos. 3, 11, and 12 had not contacted the court and it therefore would release these jurors' names and contact information to the defense. (21 RT 3319; 45 CT 11826, 11828.)

Appellant subsequently filed a motion for a new penalty trial, based on the jury misconduct that some jurors had initially described to counsel, and on information obtained from one of the jurors whose name and contact information had been released, which indicated the jurors had used appellant's penalty phase mitigating evidence as a basis for a sentence of death. (45 CT 11829-11839.) The defense argued that the facts these jurors relayed to the defense attorneys created a presumption of prejudicial juror misconduct. (*Ibid.*) The defense 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 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.[106/] (*Ibid.*)

The defense motion again informed the court that after the verdict, one juror told the defense attorneys that he 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 Mora should also be executed. (45 CT 11831, 11838-11839.) Another juror said she changed her verdict from life to death because she was convinced by other jurors that Mora had paged Rangel, and that Mora's intent was not to rob the victims, but solely to execute them. (*Ibid.*) Co-counsel in his declaration also informed the trial court that he had talked to one of the three jurors whose contact information was released to the defense attorneys, and that this juror told counsel that the jurors considered the fact that "these murders would never have occurred if Mora had not paged or called Rangel that evening." (45 CT 11839.) As co-counsel noted, the juror's statement indicated that the jurors used mitigating evidence presented by Rangel's defense as a basis for determining the death verdicts. (*Ibid.*)

The trial court denied the motion for a new trial. (21 RT 3353; 45 CT 11916.) In doing so, the court said it believed counsels' declarations were inadmissible hearsay, but

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106 The defense motion to modify the penalty verdict to life without parole was based in part on the same arguments. (45 CT 11841-11848.)

that it had nevertheless considered the declarations and found them insufficient to establish actual misconduct by the jurors. (21 RT 3352-3353.) The court said it understood the defense was unable to further investigate misconduct because the jurors would not talk to them, but said there was no requirement under the law that the jurors talk to anyone, including the court. (21 RT 3353.) The court said that because the defense could not provide enough information to establish actual juror misconduct, it had to assume there had been none. (*Ibid.*)

B. Standard of Review

In reviewing a trial court's ruling on a motion for new trial, the reviewing court applies the abuse of discretion standard. (*People v. Staten* (2000) 24 Cal.4th 434, 466.) Jury misconduct may constitute grounds for a new trial. (Pen. Code § 1181, subd., (2); *People v. Garcia* (2001) 89 Cal.App.4th 1321, 1338.)

> " 'In ruling on a request for a new trial based on jury misconduct, the trial court must undertake a three-step inquiry. [Citation.] First, it must determine whether the affidavits supporting the motion are admissible. (Evid.Code, § 1150.) If the evidence is admissible, the trial court must determine whether the facts establish misconduct. [Citation.] Lastly, assuming misconduct, the trial court must determine whether the misconduct was prejudicial. [Citations.] A trial court has broad discretion in ruling on each of these issues, and its rulings will not be disturbed absent a clear abuse of discretion. [Citations.]' [Citation.]"

(*People v. Garcia, supra,* 89 Cal.App.4th at page 1338; see also *People v. Duran* (1996) 50 Cal.App.4th 103, 112-113.) Misconduct requires reversal on appeal where it can be shown the jury's impartiality was adversely affected, the burden of proof was lightened,

or a defense was removed. (*People v. Harper* (1986) 186 Cal.App.3d 1420; *People v. Martinez* (1978) 82 Cal.App.3d 1, 22.) Further, the verdict must be set aside if there is a substantial likelihood that the misconduct influences at least one juror. (*In re Hamilton*, *supra*, 20 Cal.4th 273, 293; *In re Carpenter*, *supra*, 9 Cal.4th 634, 653.)

When there are issues of fact concerning juror misconduct, the trial court may, in its discretion, conduct an evidentiary hearing to resolve disputed facts. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 415,419; *People v. Williams*, *supra*, 16 Cal.4th 635, 686.) The court, in its discretion my call jurors to testify at the hearing but examination of jurors should not invade the mental processes of the jurors. (*Hedgecock, supra,* at p. 418.) In determining whether misconduct occurred, the reviewing court accepts the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. (*People v. Garcia, supra,* at p. 1338.) The decision not to conduct an evidentiary hearing is reviewed for an abuse of discretion. (*People v. Hedgecock*, *supra*, 51 Cal.3d at p. 414-415.)

C. The Trial Court Erred in Failing to Hold an Evidentiary Hearing on the Allegations of Jury Misconduct During Penalty Phase Deliberations.

Whether or not the defense attorneys' declarations were admissible as proof of *actual* juror misconduct, and regardless of whether the defense attorneys representations to the trial court were themselves sufficient to establish such misconduct, this information was more than sufficient to alert the court to the strong possibility of prejudicial juror

misconduct. Once it became aware of this information, the trial court had a duty to make its own inquiry into the allegations of juror misconduct. "[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, supra,* 51 Cal.3d at p. 417, internal quotation marks omitted].) 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, supra*, 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 that 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 the defense allegations of juror misconduct. Indeed, it appears the trial court was unaware that it had the authority to do so.

The trial court believed that the defense allegations raised "an issue of significance and concern" that needed to "explored full" prior to it making any further decisions in this case. (21 RT 3310.) According to the court, the information relayed by the defense attorneys 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 jurors indicated they did not want to talk to or be contacted by the defense, 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 court's mistaken view that it was precluded from conducting a further inquiry into the possibility of juror misconduct, the 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 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

discretion"].)

Moreover, even had the trial court recognized its duty, *which is not supported by the record*, and even if the court's failure to make any inquiry whatsoever to resolve the defense allegations of juror misconduct could somehow be considered an exercise of discretion on the matter, it plainly abused that discretion. 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 the defense 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 chooses to allow, 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,

emphasis added.) This case, however, is not the norm. The information in the defense motions and declarations came from the trial attorneys, whose representations of fact, made as officer 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 ["[A]ttorneys 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."].) Without expressly stating so, the Court has implicitly adopted this 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 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, the Court was asked to determine whether the trial court erred in failing to hold an evidentiary hearing on the matter. (*Ibid.*) The 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.[107/] (*Id.* at p. 582.)

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 presented here plainly warranted an evidentiary hearing. The defense attorneys' motions and declarations alerted the court that one juror claimed to have reached his penalty decision by considering only that one execution deserves another, 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; see; *In re Hamilton, supra*, 20 Cal.4th at p. 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)

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107 In *People v. Medina* (1995) 11 Cal.4th 694, 731, the Court applied similar reasoning in the context of a shackling claim, holding 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.

52 Cal.3d 815, 865 [misconduct where juror violates the court's instructions]; *People v. Majors* (1998) 18 Cal.4th 385, 417, citing *In re Hitchings*, *supra*, 6 Cal.4th 97, 111 [juror who conceals facts or gives false answers during selection process commits misconduct].)

The attorneys motions and declarations further alerted the trial court that this juror claimed to have military training and experience that allowed him to conclude that the manner in which Mora shot Urrutia established an "execution," and that this special training and experience was discussed in the jury room to convince hold-out jurors that someone who commits an execution should be executed himself, and to convince jurors that contrary to the jury's guilt verdicts, Mora's goal was 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."]; 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 court also was alerted that the jurors considered the facts that the killings were planned, and that those killings would not have occurred had Mora not paged Rangel that evening (45 CT 11761, 11831, 11839), even though neither the evidence presented at the guilt phase of trial, nor the prosecution's evidence in aggravation, established those facts.

(See *People v. Nesler*, *supra*, 16 Cal.4th 561, 581, citing *Smith v. Phillips, supra*, 455 U.S. at p. 217, *In re Carpenter*, *supra*, 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[.]"].) All of this information conveyed to the trial court a "strong possibility" that prejudicial misconduct has occurred, and it presented to the court the disputed question of whether such misconduct had in fact occurred and affected the jurors' deliberations on whether appellants would live or die. The trial court knew that the defense attorneys were unable to further investigate the alleged misconduct themselves because the jurors would not talk to them (21 RT 3353), and it should have recognized that an evidentiary hearing at which it could compel the jurors to confirm or deny the information initially relayed to the defense attorneys 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.

D. Appellant Was Prejudiced By the Lack of an Evidentiary Hearing on the Juror Misconduct Claims and The Penalty Phase Must Be Reversed.

The trial court's failure to conduct a hearing into the defense allegations of juror

misconduct implicates appellant's rights under the Fifth, Sixth and Fourteenth Amendments to due process and a fundamentally fair trial by an unbiased jury. (See *Irvin v. Dowd*, *supra*, 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 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, supra,* 486 U.S. at pp. 376-377; *Caldwell v. Mississippi, supra,* 472 U.S. at p. 340; *Zant v. Stephens, supra,* 462 U.S. at pp. 884-885; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.)

Every person accused of criminal conduct has a federal and state constitutional right to a trial by a fair and impartial jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16; *Duncan v. Louisiana* (1968) 391 U.S. 145, 149; *People v. Collins* (2001) 26 Cal.4th 297, 304.) The Sixth Amendment guarantees a criminal defendant the right to an impartial jury. "In essence the right to jury trial guarantees to the criminally accused a fair

trial by a panel of impartial, indifferent jurors. The failure to accord the accused a fair hearing violates even the minimal standards of due process." (*Irvin v. Dowd, supra,* 366 U.S. at p. 722.) The constitutional right to an impartial jury imposes a duty on each individual juror to maintain his or her impartiality throughout the case. (*In re Hamilton, supra,* 20 Cal.4th at p. 293; *People v. Nesler, supra,* 16 Cal.4th at p. 578; *Dyer v. Calderon, supra*, 151 F.3d 970, 973.) Specifically, the Sixth Amendment's guarantee of a trial by jury requires that the jury base its verdict on the evidence presented at trial. (*Turner v. Louisiana, supra*, 379 U.S. 466, 472-73.)

A jury's exposure to extrinsic evidence deprives a defendant of the rights to confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment. (*Lawson v. Borg* (9th Cir. 1995) 60 F.3d 608, 612. "Evidence not presented at trial, acquired through out-of-court experiments or otherwise, is deemed 'extrinsic.' " (*Raley v. Ylst* (9th Cir. 2006) 444 F.3d 1085, 1094.) Further, "[d]ue 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, supra*, 455 U.S. 209, 217.)

Thus, the judgment of death must be vacated, and the case must be remanded to the superior court for a hearing on the allegations of juror misconduct raised by the defense.

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XVIII. THE TRIAL COURT'S REFUSAL TO GIVE APPELLANTS' REQUESTED MODIFICATION OF CALJIC 8.85 REQUIRES REVERSAL OF THE DEATH SENTENCE BECAUSE, IN VIOLATION OF EIGHTH AND FOURTEENTH AMENDMENT PRINCIPLES, THERE IS A REASONABLE 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 STATE'S AGGRAVATING EVIDENCE.

A. Introduction

The trial court erred in refusing to allow language to assure the jury's correct understanding of how to assess circumstances of the crime as aggravation. As a result, 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 rendered the trial fundamentally unfair in violation of appellant's constitutional rights to a fair and reliable penalty trial and death verdict. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 17, 24.) The jurors were instructed with CALJIC 8.85 that in determining whether appellant would spend his life in prison or be executed, 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 3177; Pen. Code § 190.3, subd. (a); CALJIC No. 8.85.) Appellant requested that the jurors be further instructed, "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, 20 RT 3118-3119, 3121.)[108] Defense counsel argued that the jury could only use the circumstance of the offense once and that if not instructed, they would be free to use it multiple times. The trial court disagreed stating, "I don't' think there is any limit on how many times they use it." The prosecution argued, "I agree with the court's reading. It's -- there is no bar in double counting in this area." The trial court erroneously held that 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. The court denied appellant's requested instruction on the ground that it misstated the law. (20 RT 3119-3120.)

B. The Death Sentence Must Be Reversed Because, in Violation of Eighth and Fourteenth Amendment Principles, There is a Reasonable 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 State's Aggravating Evidence.

As described below, the trial court erred by refusing to give the jurors appellant's requested clarifying instruction. As further described below, 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

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[108] This special instruction was submitted by co-defendant Mora. (5 CT 1214, 20 RT 3118-3119.) However, appellant's trial counsel joined in Mora's request for this instruction and argued in support of said instruction. (20 RT 3121.)

over-weighing the same facts as both circumstances of the crime and as special circumstances. The likelihood that the 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.

"*Furman* [*v. Georgia*, *supra*, 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*, *supra*, 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. (Pen. Code § 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[.]" (Pen. Code § 190.3, subd. (a).)

As recognized by the 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,

emphasis added.)[109] As also recognized by 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, the 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 the Court's holdings in *Young* and *Melton*, the trial court plainly erred when it failed to admonish the jurors, as appellant requested, "not double count any 'circumstances of the offense' which [were] also 'special circumstances.'" (5 CT 1214, 20 RT 3177.)

The 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*

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

(2004) 34 Cal.4th 743, 790; see also *People v. Morris, supra,* 53 Cal.3d at pp. 224-225.) This position rests upon the Court's assumption that absent such 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*, *supra*, 54 Cal.3d 932, 997.)[110/]

Appellant's case demonstrates both the fault with the Court's assumption, and a "substantial likelihood" that appellant's jurors understood their instructions to allow 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 explained to the jury in the form of 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 one in [their] sentencing determination" was an inaccurate statement of the law. (20 RT 3118-3119.) According to the 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

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110 This Court disapproved *People v. Ashmus* on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.

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 the jurors to consider and double count the same facts as both circumstances of the crime and special circumstances, it is unreasonable to assume the jurors would have understood the instruction as allowing only "single 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].) 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*, *supra*, 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"].)

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

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*, *supra*, 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*, *supra*, 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*, *supra*, 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*, *supra*, 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'"].) And, 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, subd. (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, supra*, 447 U.S. 343, 346; see also *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]; *Clemons v. Mississippi* (1990) 494 U.S. 738, 746 ["Capital sentencing proceedings must of course satisfy the dictates of the Due Process Clause[.]".)

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 arrest regarding an incident of burglary to a motor vehicle, the prosecution's case for death was based entirely on evidence of the circumstances of the charged crime, presented under Penal Code section 190.3, subdivision (a). The trial court's failure to clarify that the jurors 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. This was particularly serious here, where a single prior crime for auto burglary was presented and appellant presented mitigation evidence through the testimony of several witnesses

regarding his background, family and character.

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*, *supra*, 386 U.S. 18, 24.) Even if assessed as state law error, the error is reversible where there is a reasonable possibility the jury would have rendered a different verdict had the error not occurred. (*People v. Hamilton*, *supra*, 45 Cal.4th 863, 917.) That is the case here, thus appellant's death sentence must be reversed.

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XIX. 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[111] 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 multiple murder.'" (*People v. Ledesma* (2006) 39 Cal.4th 641, 725, quoting *Zant v. Stephens*, *supra*, 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*, *supra*, 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*, *supra*, 27 Cal.3d 1, 61;[112] 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,

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111 Appellant that this Court has previously upheld the constitutionality of the multiple murder special circumstance under different circumstances. (*People v. Sapp* (2004) 31 Cal.4th 240, 287; *People v. Coddington* (2000) 23 Cal.4th 529, 656.)

112 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.)

evenhanded, and substantively rational way from the many ... murder cases in which the death penalty may not be imposed"].) 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*, *supra*, 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 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 decided 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 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; *People v. Anderson*, *supra*, 43 Cal.3d 1104, 1149-1150.) Under California's statutory scheme, one jury could sentence the accidental killer to death, while another jury could spare the life of the defendant who deliberately killed hi 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 sum, 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 its progeny. This Court should reexamine its previous holdings t the contrary, and declare this special circumstance unconstitutional, and reverse appellant's conviction of capital murder.

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XX. 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, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6.)[113/] See also *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks

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[113] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (548 U.S. at p. 178.)

on arbitrariness that it would not pass constitutional muster without such review).

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime - even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) - to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute - but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the

death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (548 U.S. at p. 178.)

A. Appellant's Death Penalty Is Invalid Because Penal Code Section 190.2 Is Impermissibly Broad.

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. (Citations omitted.)" (*People v. Edelbacher*, *supra*, 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo, supra,* 6 Cal.4th at p. 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained nineteen (19) special circumstances[114/] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon, supra*, 34 Cal.3d 441.) Section 190.2's reach has been

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114 The number of special circumstances has continued to grow and is now thirty-three (33).

extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law. [115/] (See Section E. of this Argument, *post*).

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115 In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia, supra,* 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is

B. The Overly Broad Application of Penal Code Section 190.3, Subdivision (a) Allows Arbitrary And Capricious Imposition Of Death In Violation Of The Fifth, Sixth, Eighth And Fourteenth Amendments To The United States Constitution.

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[116/] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[117/] or having had a "hatred of religion,"[118/] or threatened witnesses

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unconstitutional.

116 (*People v. Dyer*, *supra*, 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88.)

117 *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, cert. den., 494 U.S. 1038 (1990).

118 *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, cert. den., 112 S. Ct. 3040 (1992).

after his arrest,[119] or disposed of the victim's body in a manner that precluded its recovery.[120] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson*, *supra*, 37 Cal.4th 592, 644-652, 656-657.) Relevant "victims" include "the victim's friends, coworkers, and the community" (*People v. Ervine* (2009) 47 Cal.4th 745, 858), the harm they describe may properly "encompass[] the spectrum of human responses" (*ibid.*), and such evidence may dominate the penalty proceedings (*People v. Dykes* (2009) 46 Cal.4th 731, 782-783).

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California, supra,* 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

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. (*Tuilaepa, supra*, 512 U.S. at pp.

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119 *People v. Hardy, supra*, 2 Cal.4th 86, 204, cert. den., 113 S. Ct. 498.

120 *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, cert. den. 496 U.S. 931 (1990).

986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (Ibid.) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts - or facts that are inevitable variations of every homicide - into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia*, *supra*, 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C. California's Death Penalty Statute Contains No Safeguards To Avoid Arbitrary And Capricious Sentencing And Deprives Defendants Of The Right To A Jury Determination Of Each Factual Prerequisite To A Sentence of Death; It Therefore Violates The Sixth, Eighth, And Fourteenth Amendments To The United States Constitution.

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to

argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make - whether or not to condemn a fellow human to death.

1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they

needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona*, *supra*, 536 U.S. 584 [*Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [*Blakely*]; and *Cunningham v. California* (2007) 549 U.S. 270 [*Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at 593.) The court acknowledged that in a prior case

reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.* at p. 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." *(Blakely v. Washington, supra*, 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (Ibid.) The supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 313.)

In reaching this holding, the supreme court stated that the governing rule since *Apprendi* is that other than a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any

additional findings." (*Id.* at 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*United States v. Booker, supra*, 543 U.S. at 244.)

In *Cunningham*, the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. (*Cunningham v. California, supra*, 549 U.S. at 274.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and Ring have no application to the penalty phase of a capital trial. (549 U.S. at 282.)

a. In the Wake of *Apprendi, Ring, Blakely,* and *Cunningham,* Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

California law as interpreted by this Court does not require that a reasonable doubt

standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance - and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[121/] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury "[a]n aggravating factor is any fact, condition or event attending the commission of a crime which increases its severity or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88; 5 CT 1211-1212; 21 RT 3294-3296.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury.

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[121] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also - and most important - to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown, supra,* 46 Cal.3d at p. 448.)

And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[122/] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[123/]

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow*, *supra*, 30 Cal.4th 43, 126, fn. 32; *People v. Prieto, supra*, 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that

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[122] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though Ring expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that Ring requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at p. 460)

[123] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown*, *supra*, 40 Cal.3d 512, 541.)

notwithstanding *Apprendi*, *Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in Cunningham.[124/] In Cunningham the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (549 U.S. at pp. 276-279.) That was the end of the matter: Black's interpretation of the DSL "violates Apprendi's bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." (*Cunningham, supra*, 549 U.S. at pp. 290-291.)

Cunningham then examined this Court's extensive development of why an

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[124] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at 1253; *Cunningham, supra*, 549 U.S. at p. 289.)

interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.*, p. 293.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi*'s "bright-line rule" was designed to exclude. See *Blakely,* 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line").

(*Cunningham, supra*, 549 U.S. at pp. 291.) In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson*, *supra*, 25 Cal.4th 543, 589.) After Ring, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new

constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, supra, 30 Cal.4th at p. 263.)

This holding is simply wrong. As section 190, subd. (a)[125] indicates, the maximum penalty for any first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but Cunningham recognized that the middle rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts - whether related to the offense or the offender - beyond the elements of the charged offense." (*Cunningham, supra*, 549 U.S. at p. 279.)

Arizona advanced precisely the same argument in Ring. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks *Apprendi's* instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the

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[125] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

> required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, 536 U.S. at 604.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." *(Ring, supra*, 536 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88.) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt." (*Ring*, 536 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the way in which the offender carried out that

crime." (*Id.*, 542 U.S. at p. 328; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

b. Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors - a prerequisite to imposition of the death sentence - is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring* (Ariz. 2003) 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo. 2003) 64 P.3d 256; *Johnson v. State*,

supra, 59 P.3d 450.[126/])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California*, *supra*, 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[127/] As the high court stated in *Ring, supra*, 536 U.S. at p. 609:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain,

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126 See also Stevenson, The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in Ring as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

127 In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* (1982) 455 U.S. 745, 755 rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citations.]" (*Monge v. California, supra*, 524 U.S. at p. 732 (emphasis added), quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441, and *Addington v. Texas* (1979) 441 U.S. 418, 423-424.)

undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of Ring to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

a. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clauses of the Fifth and Fourteenth Amendments. (*In re Winship*, *supra*, 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the

requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship, supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas*, *supra*, 441 U.S. 418, 423; *Santosky v. Kramer, supra*, 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship, supra* (adjudication of juvenile delinquency); *People v. Feagley*, *supra*, 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Ca1.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Ca1.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky, supra*, the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at p. 755.)

The penalty proceedings, like the child neglect proceedings dealt with in Santosky, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky, supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship, supra*, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson, supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of

being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citations.]" (*Monge v. California, supra*, 524 U.S. at p. 732 (emphasis added), quoting *Bullington v. Missouri*, 451 U.S. 430, 441 (1981), and *Addington v. Texas*, 441 U.S. 418, 423-424 (1979).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

3. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown, supra*, 479 U.S. at p. 543; *Gregg v. Georgia, supra*, 428 U.S. at p. 195.) Especially given that California juries have

total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank, supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber, supra*, 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.)[128/] The same analysis applies to the far

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[128] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must

graver decision to put someone to death.

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra*; Section D, post), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias, supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne, supra*, 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-Furman state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under

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consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury.

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra*, 548 U.S. at pp. 177-178 [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review - a procedural

safeguard this Court has eschewed. In *Pulley v. Harris*, *supra*, 465 U.S. 37, 51 (emphasis added), the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris,* 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can not be charged with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia, supra*. (See Section 1 of this Argument, *ante*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section 3, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary

and capricious sentencing (see Section 2, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh, supra*, 548 U.S. at pp. 177-178), this absence renders that scheme unconstitutional.

Section 190.3 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., inter-case proportionality review. (See *People v. Fierro, supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall, supra*, 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

5. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi, supra*, 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d

945.) Here, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by appellant, i.e., and devoted a portion of its closing argument to arguing these alleged offenses.

The U.S. Supreme Court's recent decisions in *U. S. v. Booker, supra, Blakely v. Washington, supra, Ring v. Arizona, supra,* and *Apprendi v. New Jersey, supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

6. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland, supra*, 486 U.S. 367; *Lockett v. Ohio, supra*, 438 U.S. 586.)

7. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

As a matter of state law, each of the factors introduced by a prefatory "whether or not" - 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. Edelbacher, supra,* 47 Cal.3d at p. 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina, supra*, 428 U.S. 280, 304; *Zant v. Stephens, supra,* (1983) 462 U.S. at p. 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an affirmative answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft, supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro, supra*, 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors." (*People v. Arias* (1996) 13 Cal.4th 92, 188.)

(*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 32 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (Ibid.) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter, supra*, 15 Cal.4th 312, 423-424.)[129/]

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[129] See also *People v. Cruz, supra*, 44 Cal.4th 636, 681-682 [noting appellant's claim that "a portion of one juror's notes, made part of the augmented clerk's transcript on appeal, reflects that the juror did 'aggravate [ ] his sentence upon the basis of what were, as a matter of state law, mitigating factors, and did so believing that the State-as represented by the trial court [through the giving of CALJIC No. 8.85]-had identified them as potentially aggravating factors supporting a sentence of death'"; no ruling on merits of claim because the notes "cannot serve to impeach the jury's verdict"].

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest - the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) - and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. 343; *Fetterly v. Paskett*, *supra*, 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].

It is likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State - as represented by the trial court - had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC 8.85 pattern instruction. Different defendants, appearing

before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings, supra*, 455 U.S. at p. 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D. The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants Which Are Afforded to Non-capital Defendants.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California, supra*, 524 U.S. at pp. 731-732.) Despite this directive 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. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude

of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra; Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[130] as in *Snow*,[131] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias, supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections

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130 "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto, supra*, 30 Cal.4th at p. 275; emphasis added.)

131 "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*Snow, supra,* 30 Cal.4th at p. 126, fn. 3; emphasis added.)

than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge makes a sentencing choice in a non-capital case, the court must give "a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." (Cal. Rules of Ct,, rule 4.42(e).) This Court has conceded that, from 2004 (when *Blakely* was decided) until Jan. 1, 2008, when the DSL scheme was made discretionary), the Sixth Amendment -- pursuant to *Cunningham* -- required that, in non-capital cases, findings of aggravating circumstances supporting imposition of the upper term be made beyond a reasonable doubt by a unanimous jury. See *In re Gomez* (2009) 45 Cal.4th 650. That buttresses the equal protection claim for capital cases tried in the same time frame. Moreover, both *Blakely* and *Ring* applied *Apprendi* to statutes in existence before *Apprendi* was decided (2000).

In a capital sentencing context, by contrast, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. These

discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[132/] (*Bush v. Gore* (2000) 531 U.S. 98.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland, supra*, 486 U.S. at p. 374; *Myers v. Ylst, supra*, 897 F.2d 417, 421; *Ring v. Arizona, supra.*)

E. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and Violates the Eighth and Fourteenth Amendments; Imposition of the Death Penalty Now Violates the Eighth and Fourteenth Amendments to the United States Constitution.

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom*: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" - as opposed to its use as

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132 Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring, supra*, 536 U.S. at p. 609.)

regular punishment - is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 (plur. opn. of Stevens, J.).) Indeed, as of January 1, 2010, the only countries in the world that have not abolished the death penalty in law or fact are in Asia and Africa - with the exception of the United States. (Amnesty International, "Death Sentences and Executions, 2009 - "Appendix I: Abolitionist and Retentionist Countries as of 31 December 2009" (publ. March 1, 2010) (found at www.amnesty.org).

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. 268, 315 (dis. opn. of Field, J.); *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. 367, 409.)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world

community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21, citing the Brief for The European Union as Amicus Curiae in McCarver v. North Carolina, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming arguendo capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes - as opposed to extraordinary punishment for extraordinary crimes - is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia, supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot, supra*, 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112.)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[133/] Categories of criminals that warrant such a

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133 See Kozinski and Gallagher, Death: The Ultimate Run-On Sentence, 46 Case W. Res. L.Rev. 1, 30 (1995).

comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*) Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the U.S. Constitution. Appellant's death sentence must be reversed.

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XXI. APPELLANT JOINS IN THE ARGUMENTS SUBMITTED BY CO-APPELLANT JOSEPH MORA.

Pursuant to California Rules of Court, rule 8.200, subdivision (a)(5), appellant joins in the arguments submitted by co-appellant Joseph Mora to the extent those arguments benefit appellant in his automatic appeal.

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XXII. REVERSAL OF APPELLANT'S DEATH SENTENCE IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT COLLECTIVELY UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE ENTIRE TRIAL AND THE RELIABILITY OF THE JUDGMENT OF DEATH.

As argued in Argument XII, *ante*, the cumulative effect of the guilt phases errors in this case requires reversal of appellant's convictions. 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. (*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]; see also *People v. Brown, supra*, 46 Cal.3d at 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] accord *Arizona v. Fulminante* (1991) 499 U.S. 279, 301-302 [erroneous introduction of evidence at guilt phases had prejudicial effect on sentencing phase of capital murder trial].)

Here, there is at least a reasonable possibility that the guilt and penalty phase errors in combination had a prejudicial effect upon the jury's consideration of whether or not to return a judgment of death. Reversal of the death sentence is therefore mandated since the People cannot show that the collective errors at the guilt and penalty phases had no

effect on the penalty verdict. (See *Hitchcok v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina, supra,* 476 U.S. at p. 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 death sentence.

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CONCLUSION

For all the foregoing reasons, appellant's conviction must be reversed and the judgment of death must be set aside.

DATED: July 26, 2010

Respectfully submitted,

Tara K. Hoveland
Attorney for Appellant

CERTIFICATE OF COUNSEL

(CAL. RULES OF COURT, RULE 8.630, subd., (b)(2))

I am the attorney assigned to represent appellant, Ruben Rangel, in this automatic appeal. I conducted a word count of this Appellant's Opening Brief using WordPerfect X3 software. On the basis of that computer-generated word count, I certify that this brief including footnotes, and excluding tables and certificates is 88,180 words in length, which is less than the maximum 102,000 words allowed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 26, 2010

Tara K. Hoveland

CERTIFICATE OF SERVICE

I, the undersigned, certify: That I am a citizen of the United States, over the age of eighteen years, and not a party to the within cause; I am employed in El Dorado County, State of California; my business address is 1034 Emerald Bay Rd., #235, South Lake Tahoe, California 96150.

On this date, I caused to be served on the interested parties hereto, a copy of **APPELLANT'S OPENING BRIEF ON AUTOMATIC APPEAL** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at South Lake Tahoe, California, address as set forth below:

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I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge, and that this Certificate has been executed on July 26, 2010 at South Lake Tahoe, California 96150.

Tara K. Hoveland

SUPREME COURT COPY

SUPPLEMENTAL CERTIFICATE OF SERVICE

I, the undersigned, certify: That I am a citizen of the United States, over the age of eighteen years, and not a party to the within cause; I am employed in El Dorado County, State of California; my business address is 1034 Emerald Bay Rd., #235, South Lake Tahoe, California 96150.

On this date, I caused to be served on the interested parties hereto, a copy of **APPELLANT RANGEL'S OPENING BRIEF ON AUTOMATIC APPEAL (S079925)** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at South Lake Tahoe, California, address as set forth below:

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SUPREME COURT
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AUG - 4 2010

Frederick K. Ohlrich Clerk

Deputy

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge, and that this Certificate has been executed on July 29, 2010 at South Lake Tahoe, California 96150.

Tara K. Hoveland