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 REPLY BRIEF

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

Tara K. Hoveland
State Bar No. 167746
1034 Emerald Bay Rd., #235
South Lake Tahoe, CA 96150
(530) 541-2505
Attorney for Appellant
RUBEN RANGEL

DEATH PENALTY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

CONSTITUTIONAL PROVISIONS

STATUTES & RULES OF COURT

JURY INSTRUCTIONS

OTHER AUTHORITIES

INTRODUCTION

Appellant's Opening Brief raised and explained 19 distinct[1] guilt and penalty phase issues which individually and collectively require that appellant's conviction and death sentence be reversed. Respondent has attempted to challenge appellant's analysis as to each of these issues in their Respondent's Brief. In this Reply Brief, appellant will show that respondent has failed to effectively counter the issues raised in the Opening Brief. Appellant has presented the procedural history, the facts of the case and legal issues in the opening brief and will not repeat arguments and analyses here. Rather, by way of reply, appellant addresses specific contentions made by respondent that necessitate an answer in order to fully present the issues to this Court. Appellant does not address every claim raised in the opening brief, nor does he reply to every contention made by respondent with regard to the claims he does discuss. Rather, appellant focuses on the most salient points not already covered in the opening brief. The absence of a reply to any particular argument or allegation made by respondent does not constitute a concession, abandonment, waiver or forfeiture by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined. The arguments in this Reply Brief are numbered to correspond to the argument numbers in Appellant's Opening Brief.

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[1] This number excludes the two issues which argue cumulative error in the guilt and penalty phases (XI, XXII) respectively, and joinder of co-appellant's arguments (XXI).

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.

In his opening brief, appellant asserted that the prosecution's repeated untimely disclosures of material evidence violated appellant's state and federal rights to due process, a fair trial, present a defense, equal protection, a reliable guilt and penalty determination, as well as the right to meaningful confrontation and the right to the effective assistance of counsel and state statutory rights. (U.S. Const. Amends 5th, 6th, 8th & 14th; Cal. Const. Art. I §§ 1, 7, 15, 16, 17, 24.) (RAOB[2] 33-54.)

Respondent concedes there were some violations of the state discovery statute, but that none were *Brady* violations since the evidence was eventually disclosed, thus not "technically" suppressed. Further, respondent contends that each of the errors separately were harmless and thus the trial court's ultimate denial of a mistrial was proper and the remedies given sufficient. However, respondent's attempt to parse out each discovery violation and argue each as harmless, proverbially misses the forest for the trees. (RB[3] 25, 37-38.) A reviewing court ultimately measures the materiality of the belatedly disclosed information collectively. (*Knighton v. Mullin* (10th Cir. 2002) 293 F.3d 1165, 1173, citing *Kyles v. Whitley* (1995) 514 U.S. 419, 436–37 & 436 n. 10, 115 S.Ct. 1555.)

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2 "RAOB" = Rangel's Appellant's Opening Brief.

3 "RB" = Respondent's Brief.

Here, the prosecution's failure to timely disclose[4] critical evidence until the middle of voir dire and until the *second week* of the guilt phase, after multiple prosecution witnesses had testified, was not adequately remedied by the court nor was it harmless. The late disclosure went to the heart of appellant's ability to present a defense and undermined the reliability of the proceedings. (6RT 1020-1028, 7RT 1038-1043, 1045-1048, 1052-1053.) A review of the timing and affect of each untimely disclosed piece of evidence will show the errors to be prejudicial both individually and cumulatively.

A. None of Appellant's Claims as to Violations of Discovery Have Been Forfeited.

Respondent argues that any arguments as to statutory discovery or Brady violations regarding the GSR evidence, the second transcript of the Lopez interview, the two missing diagrams of the scene are forfeited for failure to raise a specific objection. (RB 38, 40, 42.) When, despite inadequate phrasing, the trial court understood the objection, the reviewing court should review the error. (*People v. Smith* (2003) 31 Cal.4th 1207, 1215; *People v. Scott* (1978) 21 Cal.3d 284, 290; see also *People v. Shirley* (1982) 31 Cal.3d 18, 29 [by challenging reliability of scientific technique, defendant preserved Kelly/Frye issue].) Further, the fact that the right to raise an issue on appeal

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[4] Appellant filed his first motion for informal discovery six months before the prosecution began its case-in-chief on January 12, 1999. (3CT 553-564; 1RT A6-A9.)

may have been forfeited, does not preclude a reviewing court from considering an issue and granting relief. (See *People v Smith, supra,* 31 Cal.4th at p.1215; *People v. Johnson* (2004) 119 Cal.App.4th 976, 984.) Moreover, the reviewing court should disregard technical insufficiencies in the form of an objection in a capital case. (*People v. Frank* (1983) 38 Cal.3d 711, 729, n3 (plurality opinion).)

As will be shown below in more detail, because of the pall cast over the entire trial by the repeated discovery violations, there was no question that the trial court understood the objections to be based upon late discovery as to each of the items about which respondent complains.

In the time between the crime having been committed in August 1997 and the time trial began in January 1999,[5] Rangel's counsel had been working under the assumption that the GSR report as to Mr. Rangel was positive. This is because, this was the information she received from the prosecutor. (1RT 66; 2RT 82, 84.) Toward the end of voir dire on Thursday, January 7, 1999[6] (long after the statutory deadline of 30 days prior to trial had passed), the prosecution finally turned over the GSR reports to the defense. Much to their surprise, the report reflected negative results as to Rangel, but

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5 The Attorney General mistakenly refers to January 8, 1998, however, it was 1999. The first page of the Reporter's Transcript of this date reflects the wrong year. (1RT 63.)

6 Voir dire began on Tuesday, January 5, 1999, just selection began on January 11, 1999 and opening statements and presentation of evidence trial began on Tuesday, January 12, 1999. (4CT 874, 880, 893.)

positive results as to co-defendant Mora. In respondent's "Relevant Proceedings," section, respondent mischaracterizes the report as "reflecting inconclusive results as to Rangel." (RB 25.) This is not the case. Michelle Lepisto, senior criminalist with the Los Angeles County Sheriff's Crime Lab, testified that *no* particles of gun shot residue were found in the samples obtained from appellant. (13RT 2051.) Respondent argues that because Lepisto later testified that she found lead and tin on appellant's hands, that the GSR tests were actually inculpatory. (RB 40; 13RT 2060-2061. However, respondent fails to point out that the results of the testing on the lead and tin were similarly untimely disclosed to the defense and similarly found to be negative as to the handling or discharging of a firearm. Defense counsel argued she wanted a copy of the testing, but the prosecutor successfully argued that since there was no "written" report as to the findings, there was nothing to disclose. (1RT 65-66, 68-70.)

On Friday, January 8, 1999, as a remedy for the late discovery violation, the trial court chose to exclude the positive GSR results as to Mora. (1RT 67; 4CT 878.) However, this remedy did nothing for appellant Rangel, in fact it made things worse. As Rangel's counsel pointed out in her motion to sever on Monday, January 11, 1999 (one day before the evidentiary portion of the trial was to begin), she would not be able to introduce the fact that there was no GSR on Rangel's hands, but there was GSR on Mora's hands. This could only be done in separate trials or with a dual jury. Being able to do so was significant because counsel would be able to argue that another person,

other than Rangel shot the victims with co-defendant Mora.[7] (2RT 82, 90-91.) In responding to the motion to sever, the prosecutor asked for the GSR results as to Mora to be admitted after all because she turned over the GSR report to the defense the day she obtained it, despite having been mistaken as to its existence before. (2RT 83-86.) The court pointed out to the prosecutor that the Sheriff Department's crime lab is an agency of the People and she still had a duty to have the GSR test performed and results delivered to the defense 30 days before trial – making it clear that the trial court understood that the core issue here was the late discovery.[8] (2RT 85-86.) The trial court's comments show that it understood what is commonly known, that:

> "the prosecution should find out at an early stage in the proceedings what information is in the possession of the investigative agency; the prosecutor is presumed to have knowledge of all information gathered by the investigating agency. (*In re Brown* (1998) 17 Cal.4th 873, 879 [prosecutor's duty to inquire about lab results].) The prosecutor needs this information to prepare effectively for trial and to comply with Penal Code section 1054.1 and any other relevant statutory or constitutional discovery requirements, particularly the obligation to give the defense exculpatory evidence. (See *Kyles v. Whitney* (1995) 514 U.S. 419, 421, 131 L.Ed.2d

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7 Counsel argued in closing argument that Rangel had no motive to commit the killings with Mora, but that Jade Gallegos did and that his physical description matched the witness reports better than Rangel's. (14RT 2288-2291, 2298-2303.) The prosecutor acknowledged that one of her witnesses, Sheila Creswell identified Jade as one of the shooters, but argued to the jury that her identification was unreliable. Contrary to respondent's factual assert, Creswell did not see Mora "every weekend at the house where the party had been taking place that night." (RB 7.) Rather Creswell testified she only saw Mora occasionally. (5RT 802.)

8 The trial court ultimately denied the motion to sever. (2RT 91.)

490, 499, 115 S.Ct. 1555.)"

(Cal. Criminal Law, Procedure and Practice (Cont.Ed.Bar 4th ed. 2012) § 11.4, p. 243; see also *Youngblood v. West Virginia* (2006) 547 U.S. 867 [finding failure to disclose a note from a prosecution witness read by a state trooper, but not given to the defense, was suppression under the meaning of *Brady*].) As such, it is hard to fathom respondent's forfeiture argument as to this particular piece of evidence.

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.) Again, it is clear from the record that the trial court was well aware that Rangel's counsel was objecting to both these pieces of evidence based upon their late disclosure to the defense. In fact, it is so clear from the record that respondent writes in the "Relevant Proceedings" section of his own brief in regard to the disclosure of the two diagrams

that:

> "Counsel for appellant Rangel then raised a discovery issue, stating that the previous week, she saw that Detective Piaz's notebook contained a diagram of the scene of the crime that she did not have, dated August 26, 1997. (6RT 1026.) After requesting a copy of it, counsel, on the same day, received that diagram and another diagram. (6RT 1026-1027.) Counsel for appellant Rangel expressed concern that other materials were not turned over. (6RT 1027.)"

(RB 26-27.) As such, respondent's forfeiture argument should fail.

B. The Late Disclosure Was Prejudicial Under Any Standard Since It Violated Both *Brady v. Maryland* and the California Statutory Discovery Laws.[9]

Respondent contends that "recent authority from this Court holds that so long as exculpatory evidence within the meaning of *Brady* was disclosed during trial, no suppression occurred, and thus, no *Brady* error can be established." Respondent relies *People v. Verdugo* (2010) 50 Cal.4th 263, 283 and *People v. Morrison* (2004) 34 Cal.4th 698, 715.) (RB 36.) To the extent either of those cases stand for the above proposition, those holdings are contrary to clearly established federal law. (See *United States v. Williams* (9th Cir. 2008) 547 F.3d 1187, 1202 [No dispute that [tape recording] satisfied the [suppression] element [of Brady] because the defense did not receive it until very late

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[9] Due process under the United States Constitution trumps the California discovery statute. (See Pen. Code, sec. 1054, subd. (e) [no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States].) As such, the prosecution's statutory discovery violations are contained within appellant's discussion of the constitutional duty imposed upon the prosecution by *Brady* and its progeny.

in the trial.]; *Knighton v. Mullin, supra* 293 F.3d at p. 1173, n2 [recognizing prosecution's failure to disclose exculpatory material until the beginning of trial, while the defense was cross-examining the State's third witness implicated *Brady*]; *United States v. Miller* (9th Cir. 1976) 529 F.2d 1128 [recognizing prosecution's failure to disclose exculpatory material until toward the end of the defense case implicated *Brady*].)

Under *Brady*, "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." (*Brady v. Maryland* (1963) 373 U.S. 83, 87.) Contrary to respondent's argument, *Brady* does indeed apply to untimely disclosure of evidence, rather than solely nondisclosed evidence. Generally, evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. (*See Kyles v. Whitley, supra*, 514 U.S. at 434.)

Where evidence is disclosed during trial, the inquiry on review is "whether the lateness of the disclosure so prejudiced appellant's preparation or presentation of his defense that he was prevented from receiving a constitutionally guaranteed fair trial. (*United States v. Hibler* (9th Cir. 1972) 463 F.2d 455, 459.) The materiality question presented here, then, is instead whether there is a reasonable probability that the outcome of either trial stage would have been different had the State disclosed this information

earlier. (*Knighton v. Mullin, supra*, 293 F.3d at pp. 1172-73.)

Indeed, cases involving claims of untimely *Brady* disclosure typically involve disclosures that occurred during the trial or hearing in which the *Brady* material would have been useful. (*United States v. Gamez-Orduno* (9th Cir. 2000) 235 F.3d 453, 461 [disclosure during suppression hearing]; *United States v. Osorio* (1st Cir. 1991) 929 F.2d 753, 757 [disclosure halfway through trial].) In such cases, the error rests upon whether the evidence was disclosed at a time when disclosure would be of value to the accused. (*United States v. Gamez-Orduno, supra*, 235 F.3d at p.461.) The First Circuit put it thusly: When dealing with cases of delayed disclosure, "the critical inquiry is ... whether the tardiness prevented defense counsel from employing the material to good effect." In this connection, "a court's principal concern must be whether learning the information altered the subsequent defense strategy, and whether, given a timeous disclosure, a more effective strategy would likely have resulted." (*United States v. Osorio, supra*, 929 F.2d at p. 757, quoting *United States v. Devin* (1st Cir. 1990) 918 F.2d 280, 290.) This is because the *Brady* rule is rooted in a defendant's right to due process and a fair trial. Thus, delayed disclosure of exculpatory material 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 [whether untimely disclosure of exculpatory evidence consisting of police reports of witness interviews deprived defendant of a fair trial under *Brady*]; *In re United States v. Coppa*

(2nd 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, supra,* 293 F.3d at pp. 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.].)

Thus, the delayed disclosure constitutes both statutory and constitutional error. Moreover, 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. Here, by the time the materials were eventually disclosed, their usefulness was greatly diminished. Four prosecution witnesses had already testified both on direct and cross-examination during the first week of the guilt phase.[10/] During the testimony of the prosecution's fifth guilt phase witness, Lourdes Lopez, on January 19, 1999, appellant discovered she had only been given one of the two transcripts of Lopez' interviews with police. Appellant was given the court's copy of the twenty-four page second transcript and the jury recessed for the

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[10] The prosecution began its case-in-chief on Tuesday January 12, 1999.

day. (6RT 1020-1024.) Earlier that day, the prosecution gave her two previously undisclosed diagrams of the crime scene because defense counsel noticed one of them in Detective Piaz's trial notebook the week before and had requested a copy. (6RT 1024-1028.) On Wednesday, January 20, 1999, *the fifth full day* of the guilt phase, appellant reported that she discovered four additional police reports in Detective Piaz's trial notebook that had not been disclosed. The first was a six-page report detailing thirteen (13) witness statements, at least two of which were relevant to the credibility of prosecution witnesses that had *already* testified. (7RT 1038-1041.) The court declined to grant a mistrial and instead recessed until a status conference on Friday, January 22, 1999, at which time, the prosecution turned over a fourteenth witness statement (Yesenia Jimenez), a warrant for Jade Gallegos and two receipts for the G.S.R. testing, one of which showing the results for appellant Rangel were negative, despite the prosecution having told the defense previously that they were positive. (7RT 1045-1047, 1052-1053, 1056-1063; 13 RT 2000; 4CT 958-959.)

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, despite having previously been told 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.[11] (13RT 1990-1992.) Defense counsel for both defendants again 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. Counsel argued that the disclosure of the report after all the prosecution witnesses had testified undermined a large portion of the defense and that had they had it earlier they could have proceeded differently. (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[12] and instead heard arguments on whether to exclude the newly disclosed fingerprint analysis report. (13RT 1994-1998.)

The cumulative effect of the multitude of *Brady* and statutory discovery violations irreparably impaired appellant's ability to present a defense. The prejudicial effect of the

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11 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.)

12 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.)

above 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-sided mid-trial with new and different facts. Appellant was not only misled by the prosecution's failure to comply with its discovery obligations, but was simply unable mid-trial to make the effective use of the untimely disclosed evidence. (*See In re Brown*, *supra*, 17 Cal. 4th at p. 887.) By way of her motion to sever immediately after the court ordered Mora's GSR results inadmissible based upon late disclosure, appellant argued that she wanted to present a third-party culpability defense now that she knew that the GSR results were positive as to Mora and negative as to Rangel, but that she was precluded from doing so because of the court's ruling. (2RT 82, 90-91.) As to the 13 witness statements produced after four prosecution witnesses had testified, counsel argued that had she had the reports sooner, she would have handled her cross-examination of those witnesses differently because at least two of the witness statements appeared to be"directly relevant to the credibility" of Paula Beltran and Fidel Gregorio both of whom had already testified, and at least one report directly contradicted the testimony of prosecution witness Ramon Valadez. (7RT 1038-1041.) After having reviewed the new witness statements, the court concurred that it was "more than a little concerned" about the statements and that they required follow-up. (7RT 1046-1048.)

Appellant was forced to investigate its case mid-trial [defense counsel was given a recess during the first week of trial from Wednesday until Monday to find and

interview the 13 witnesses previously undisclosed by the prosecution, and forced to interview John Youngblood during trial on Thursday, January 28, 1999[13]]; to cross-examine witnesses without the benefit of relevant impeachment evidence [Defense counsel was forced to conduct cross-examination John Youngblood without the benefit of his rap sheet] and to alter their theory of defense [Rangel's counsel had to change her theory of defense when she found out during voir dire that the GSR report as to Rangel was negative, not positive]. What is particularly egregious is that in Youngblood's untimely disclosed statement to police immediately after the crime, he failed to identify either Rangel or Mora. In his interview with the prosecution on Monday January 25, 1999, the defense was told he identified co-defendant Mora as one of the shooters. On Thursday, January 28, 1999, during his interview with Mora's investigator, Youngblood changed his statement again and this time identified appellant Rangel. Then, Rangel's counsel was not given a brief recess to even copy the statement so she could review it before her cross-examination of Youngblood. (7RT 1229-1230; 10RT 1621-1622.)

It is unfathomable that these discovery violations and related "remedies" could not have affected the investigation, preparation and presentation of the defense and ultimately appellant's due process right to a fair trial.

Finally, the trial court's choice of remedies, a mid-trial recess to find and interview witnesses, an admonishment regarding the fingerprint report and a faulty jury

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[13] (See 10RT 1621-1626.)

instruction provided little, if any, relief from the damage done to appellant's fundamental due process right to receive a fair trial. Reversal is warranted, where as here, 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.) Appellant prepared his case and theory of defense based upon the reasonable but erroneous belief that all mandated discovery materials had been timely disclosed pre-trial, e.g., that Lourdes Lopez only made one statement to police [when actually there were two], that all the percipient witnesses to the shootings and interviewed by police had been disclosed [when actually there were at least 13 witness statements that had not been disclosed], that the G.S.R. testing would be positive as to appellant [when actually it was negative] and that no fingerprinting had ever been done [when actually it had been done, but no prints matched Rangel]. 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. "'Fairness' cannot be stretched to the point of calling this a fair trial." (See *Kyles v. Whitley*, *supra*, 514 U.S. at p. 454.)

These violations 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* (1985) 473 U.S. 667, 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.

Appellant asserts that 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. Amends 5TH, 6TH, 8TH & 14th; Cal. Const. Art. I §§ 7, 17, 24.) (RAOB 55-69.)

Respondent contends preliminarily that appellant has forfeited all or part of his claim because he did not specifically join in Mora's requested special instruction and did not specifically object to the instruction given. (RB 55-56.) Respondent contends that the special instruction was properly refused, the given instruction was not error and the restriction of closing argument was proper. (RB 56-62.) Respondent finally contends that any error was harmless. (RB 63.) Appellant disagrees.

First, it is hard to fathom respondent's contention that appellant Rangel has forfeited any portion of this claim. At the status conference on the various discovery violations on Friday January 22, 1999, after having her motion for mistrial denied, the

court invited counsel to request other sanctions. Appellant Mora's counsel told the court "I will be requesting a jury instruction as well." Appellant Rangel's counsel stated: " I will be asking for that, too." (7RT 1062.) On Tuesday February 2, 1999, both counsel again requested a mistrial, this time because of the untimely disclosed fingerprint evidence presented after the prosecution rested its case. The court again indicated it would give a formal instruction toward the end of the guilt phase covering the additional violations that had come to light. Counsel for Rangel specifically asked the court to instruct the jury that the defense was misled by the prosecution. Counsel for Mora indicated that based on the continuing violations, the defense would be asking for a particularly strenuous instruction. (13RT 1998-2005.) There could have been no doubt on behalf of the court or the prosecution that the requested instruction was on behalf of both defendants. Further, the trial court's ruling rejecting the defense requested special instruction and modifying CALJIC No. 2.28 to "specifically [leave] out 'intentional'...," necessarily affected defense counsel's subsequent closing argument. (14RT 2175.) This is so because the request for specific language in an instruction in "part and parcel" of being able to argue that language to the jury. Because it is obvious from the record that both the trial court and the prosecutor were aware of the nature of the defense request and the impact of the court's ruling, appellant did not forfeit his claim that his closing

argument was thusly restricted.[14/]

Respondent next contends that appellants were not entitled to any instruction at all because the recess they were granted mid-trial was a sufficient remedy for the discovery violations. Respondent ignores both the continuing discovery violations which occurred during and after the recess, e.g., a contradictory report of Yesenia Jimenez, a warrant for Jade Gallegos and the two GSR reports all turned over on Friday January 22, 1999; and the fingerprint analysis report turned over on February 1, 1999. (7RT 1056-1063) as well as the trial court's repeated acknowledgment that not only was an instruction warranted on the discovery violations, but a hearing for additional sanctions was warranted as well. (7RT 1048; 13RT 1997-1998, 2003-2005; .) Furthermore, as explained in Argument I, *ante*, respondent is incorrect that the mid-trial recess was a sufficient remedy even for the violations that preceded it. (RB p. 52; RAOB pp. 51-54.) Here, the instruction was required based upon all the discovery violations.

Respondent is similarly incorrect in contending that the requested special instruction was merely repetitive of the modified instruction given by the court. Important aspects of the special instruction were missing from the modified instruction,

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[14] Appellant reasserts that when, despite inadequate phrasing, the trial court understood the objection, the reviewing court should review the error. (*People v. Smith, supra,* 31 Cal.4th at p. 1215; *People v. Scott, supra,* 21 Cal.3d at p. 290.) Moreover, the reviewing court should disregard technical insufficiencies in the form of an objection in a capital case. (*People v. Frank, supra,* 38 Cal.3d at p. 729, n3 (plurality opinion).)

e.g., the prosecution's role in the discovery violations, the effect on the defense's ability to present its case because it was forced to continue investigation during trial, the broad scope of the untimely disclosed evidence and the fact that the evidence was intentionally concealed by the Compton Police. Finally, respondent is incorrect that the related restriction of defense closing argument which would have put the discovery violations in the relevant context for the jury's evaluation of both the prosecution and defense case was proper.

Here, the modified CALJIC 2.28 was faulty because it did not provide explicit guidance to the jury regarding why and how the discovery violation would be relevant to its deliberations. (*People v. Bell* (2004) 118 Cal.App.4th 249, 255.) The jury never heard the truth, which was that 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 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. 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, but instead only two. Moreover, the defense was unable to argue these very things to the jury. Thus, the prosecution was able to distance itself from the discovery violations and downplay their importance, giving the jury a materially warped view of what actually occurred during trial.

In sum, contrary to respondent's contentions, 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. The failure to give an effective curative instruction which could have been used by the defense and argued to the jury in favor of acquittal was prejudicial and requires reversal of appellant's case.

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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.

Appellant asserts that the trial court erred in failing to grant a brief recess to allow counsel adequate time to review a newly obtained six-page witness statement from John Youngblood and prepare for cross-examination. (RAOB 70-76.)

Respondent contends that since the written statement was given to co-defendant Mora's investigator rather than the prosecutor, the changed statement "was through no fault of the trial court or the prosecution" and that "the prosecution did nothing to cause this surprise." (RB 65.) Further respondent contends that since "the defense knew about Youngblood since January 20, 1999;" had the opportunity to interview him prior to his testimony; and was allowed to read the six-page statement in open court just prior to cross-examination[15], appellant was indeed given enough time to prepare. Moreover, respondent contends the trial court had no duty to "grant any extensive recess in the middle of the proceedings." Respondent finally contends that appellant cannot show prejudice either in a showing of having been able to do a more thorough cross-examination or in a showing that it would have made a difference in the verdict. (RB 64-

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[15] Respondent asserts "It was only thereafter, when appellant Rangel's counsel announced she was ready to proceed, that cross-examination began. (RB 64.) However, rather than announcing "ready," counsel instead told the court "I'm going to try to start." (10RT 1653.)

65.) Appellant disagrees.

Respondent conveniently omits a number of salient facts, all of which reveal that the prosecution entirely caused this surprise and the trial court was indeed at fault for not giving appellant even the modicum of due process to which he was entitled. First, January 20, 1999 was mid-trial, i.e., the *fifth* day of the guilt phase. Youngblood's initial statement was among a litany of other witness statements taken by police not turned over to the defense until the middle of the guilt phase. (See RAOB, 33-54, *Argument I.*) In fact, in discussing the late disclosure of the reports with counsel, the trial court commented that it was "more than a little concerned," about the late disclosure of Youngblood's statement because the statement reflected that he was a percipient witness. (4CT 952-953; 7RT 1046-1048.)

On Monday, January 25, 1999,Youngblood and three other witnesses from the untimely disclosed police reports above 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. In his previous witness statement (which was not disclosed to the defense until January 20, 1999), he had not identified anyone. Further, Youngblood stated he did "see the back of the car" that had driven away, whereas previously he had stated he did not see anything. The prosecution indicated its intention to call Youngblood in its case in chief. The defense objected to the prosecution calling

any of the witnesses based upon the late disclosure; the court found the issue to be premature and withheld a ruling. (7 RT 1231-1232.)

On Thursday, January 28, 1999, the prosecution called John Youngblood over defense objection. (10 RT 1621-1623.) Both defense counsel then 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 yet again when speaking with Mora's investigator. This time he stated that he would be identifying Rangel instead of Mora. Youngblood wrote a six-page statement for the defense investigator during the recess. (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.[16] (10 RT 1622, 1625-1626) . Rather than extend the recess a few more minutes for copying and/or review of the written statement, the court forced Mora's counsel to read the statement during the prosecution's direct examination during which, Youngblood identified Rangel as the person on the driver's side of the victim's vehicle before the shots were fired. (10RT 1631, 1676.) Because Rangel's counsel was then forced to review the newly- written statement during her cross-examination, she had trouble focusing her questions because the statement she

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[16] Appellant's counsel specifically argued that it was a denial of a fair trial to be forced to cross-examine Youngblood without first being able to review the written statement implicating her client. (10RT 1622.)

had just received was contradictory to Youngblood's testimony.[17] (10RT 1624, 1652-1654, 1695.)[18]

Therefore, contrary to respondent's contentions, appellant was not seeking an "extensive recess in the middle of the proceedings," for which the court had no obligation to provide. (RB 64.) Rather, counsel merely sought a brief recess prior to Youngblood's testimony in order to obtain and review a copy of the statement in order to effectively prepare for the cross-examination of Youngblood, an eyewitness identifying her client as the killer. The court's refusal to do so was plainly unreasonable because, as counsel argued below, had the prosecution timely disclosed Youngblood, appellants could have interviewed him much earlier than the day of his testimony and would not have been caught surprised and unprepared. (10RT 1622-1625.)

The right to effective 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, 85 S.Ct. 1065, 13 L.Ed.2d 923; *Douglas v. Alabama* (1965) 380 U.S. 415, 418-420, 85 S.Ct. 1074, 13

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17 The court asked counsel to approach the bench toward the end of her cross-examination and told her that it did not think her notes were accurate and that her questions should be "a little more focused." Counsel responded "I'm having problems focusing because I just got the statement.... Because the statement is contradictory to his testimony." (10RT 1695.)

18 Both appellants also cross-examined Youngblood (over their objections) without the prosecution having searched his record for rap sheets and without being allowed to ask if he had any felony convictions. (10 RT 1652-1653; 45 CT 11773, 11786-11787.)

L.Ed.2d 934, 937-938.) 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, 110 S.Ct. 3157, 111 L.Ed.2d 666.) The right to confrontation "means more than being allowed to confront the witness physically." (*Delaware v. VanArsdall* (1986) 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674.) 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.) Here, appellant's ability to rigorously test the reliability of Youngblood's trial testimony identifying appellant as one of the killers was severely and unnecessarily restricted by the trial court.

In terms of prejudice, respondent once again ignores salient facts. 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. VanArsdall, supra*, 475 U.S. at 680, 106 S.Ct. at 1435-1436.) 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, 86 S.Ct. 1245, 1246, 16 L.Ed.2d 314. *Smith v. Illinois* (1968) 390 U.S. 129, 131, 88 S.Ct. 748, 750, 19 L.Ed.2d 956 (1968)." (*Id.*)

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. 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 result, appellant was unable to subject the prosecution's case to "'the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings,'" thereby violating 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 his ability to present a defense, specifically affected his ability to effective confrontation of Youngblood and violated appellant's rights to a fair guilt and penalty determination. (U.S. Const., Amends. 5th, 6th, 8th & 14th; Cal. Const. Art. I, §§ 1, 7, 15, 17, 24.)

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.

Appellant asserts that reversal is required because the trial court admitted inadmissible, irrelevant and prejudicial gang evidence through the taped statements of Lourdes Lopez[19] 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.[20] (U.S. Const Amends. 5th, 6th, 8th, &14th; Cal. Const. Art. I, §§ 7,15, 16, 17, 24; Evid. Code §§ 352, 1200.)(RAOB 77-90.)

Respondent contends that the entire tape was relevant and more probative than prejudicial because it was important impeachment evidence against Lourdes Lopez, a percipient witness. Respondent also contends that even if certain portions of the tape were erroneously admitted, any error was harmless because of the overwhelming evidence of guilt. Respondent fails to address the lack of an effective jury instruction to cure any error and as such concedes none was given. (RB 70-73.)

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19 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.

20 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.*)

First, the playing of the unredacted tapes was largely irrelevant to the credibility of Lourdes Lopez whose allegations of police coercion went far beyond whether the police stopped recording during the interviews on the two tapes played for the jury. The two taped interviews played for the jury occurred around Noon and 2:00 p.m. and only lasted about 7 minutes and 30 minutes respectively. Lopez had been with the police since 3:00 a.m. and had alleged (in addition to the fact that the tape recorder had been turned off and on), that the threats occurred before and between the taped interviews and that she had been interviewed the first time at 8:00 a.m. for 45 minutes to an hour. (7RT 1140-4, 1158, 1179, 1180-83, 1269-1271, 1289-1295; 1CT 1-10, 11-134.) Thus, if as respondent asserts, impeaching the credibility of Lopez was truly the prosecution's goal, it could have done so much more effectively through its questioning of Lopez and it's questioning of Detectives Branscomb and Swanson refuting the coercion. The lesser issue of the starting and stopping of the tape recording could have much more effectively been probed by an audio expert and much less prejudicially probed by allowing Lopez to listen to the tapes outside the presence of the jury.

Second, the otherwise inadmissible gang evidence contained in the tapes was completely irrelevant to Lopez credibility and could have easily been redacted under any scenario, but was not. 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.[21] 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. Thus, not only was the evidence irrelevant, it was not probative of any material fact and should have been excluded under both Evidence Code section 210 and 352.

The improper admission of the gang evidence violated appellant's federal and state constitutional rights since the gang evidence served no legitimate purpose, and served only to inflame the jury against appellant. Further, appellant detrimentally relied

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[21] The jury was improperly allowed to hear that Lopez was at a party earlier in the evening where "North County Locos" gang members were harassing her and her gang-member friends, one of which may have been appellant Rangel and that Lopez was afraid a rival gang member would come back to her house and "shoot it up or something" later that night. (1CT 7-9, 13-21, 30-32.)

in voir dire and in presenting its case in both the guilt and penalty phases on the prosecution's representation and the court's pretrial rulings that no gang evidence would be admitted at trial. (2Rt 266; 3RT 358; 8RT 1246-1249

Finally, in terms of prejudice, the State cannot show that it is beyond reasonable possibility that this violation of state and federal law could have contributed to at least one juror's decision to find appellant guilty and subsequently sentence him to death. (*Chapman v. California* (1967) 386 U.S. 18; *People v. Ashmus* (1991) 54 Cal.3d 932, 965; *People v. Brown* (1988) 46 Cal.3d 432, 446-448.) This is so, both because no adequate admonishment or instruction was given to limit the purpose for which the jury could consider the evidence, and because at least one juror admitted his bias against gang members during voir dire. Here, 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 as a violent gang member that commits murders and exacts revenge. Because this view is necessarily contrary to the presumption of innocence and a case for life over death, the admission of the evidence creating it was prejudicial and appellant's conviction and death sentence 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.

Appellant asserts that the trial court's refusal to dismiss Juror No. 7 after failing to adequately inquire into whether she shared the extraneous information regarding a plea offer with other jurors or admonish her not to do so was error violating appellant's rights to an impartial jury, a fair trial, due process and a reliable guilt determination. (U. S. Const Amends. 5th, 6th, 8th & 14th; Cal. Const. Art. I §§ 7, 15, 24.) Appellant argues that the juror's knowledge of a plea offer of twenty-five years to life was likely to negatively influence the juror's decisions on guilt and penalty, particularly since she had expressed on her juror questionnaire that a death judgment should be imposed swiftly on those convicted so as not to waste too much time and taxpayer money on criminals and because she had not reported the misconduct during voir dire despite having had the opportunity to do so. (2RT 196-197; RAOB 91-104.)

Respondent contends that the portion of the claim arguing that the misconduct may have affected the penalty verdict was forfeited for lack of specific objection; that the court properly refused to dismiss the juror because her inability to perform a juror's functions was not shown by "good cause," vis a vis the "heightened standard" of a "demonstrable reality"; the court properly exercised its discretion in not further questioning or admonishing the juror; and that Juror No. 7 was presumed to have

followed the instructions and admonitions of the court. (RB 70-79.) Appellant disagrees.

First, no portion of appellant's claim is waived. The court specifically queried Juror No. 7 as to whether the interaction would affect her deliberations in either the guilt *or* the penalty phase. (4RT 526-528.) Defense counsel's request immediately thereafter to have the juror excused because she was concerned that if the juror thought an offer of 25 years to life was made and being considered by appellant that she might also think appellant was doing so because "maybe I did this and I better take this deal," put the court on notice that the issue was whether the juror could still be fair and impartial at either phase of the proceeding.[22/] (4RT 529.)

Second, neither of the cases cited by respondent in its discussion of a trial court's ability to excuse jurors under Penal code section 1089 without a presumption of bias is analogous to the instant case. (RB 76.) *People v. Holt* (1997) 15 Cal.4th 619, 659 involved a seated juror who brought to the court's attention that his son had recently been charged with a crime and *People v. Holloway* (2004) 33 Cal.4th 96, 125-125, involved a seated juror who was having dreams of faceless victims and wanted to see pictures of the victims before their death. Neither case involved a juror who was

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[22] To the extent this Court finds any portion of this argument forfeited, appellant asserts that trial counsel was ineffective for failing to specifically argue to the court that based upon this juror's answers on her juror questionnaire it was apparent counsel that she would likely punish appellant by seeking the death penalty because he spent state resources (i.e., tax payer money) to go to trial when he instead could have taken a plea.

exposed to outside information specific to the case. As such, respondent ignores that under Penal Code section 1089, the court may discharge a juror where, as here, the juror is inadvertently exposed to outside information about the case, which gives rise to a presumption of prejudice. (*People v. Nesler* (1997) 16 Cal.4th 561, 579; see *Caliendo v. Warden of Cal. Men's Colony* (9th Cir. 2004) 365 F.3d 691, 696.) Instead respondent argues that the information about the twenty-five year to life plea offer was not inherently prejudicial because the "information would just as likely infer innocence because the defendants had rejected a favorable plea." (RB 77.) However, the devil is in the details. Juror No. 7 told the court that the mother told her that "she was sure she was going to lose him because he had been offered a plea of twenty-five 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.) First, a plea offer of twenty-five years to life is hardly one which a juror would believe is offered to people likely to be innocent of a crime. Second, it is fairly obvious from this communication that even the mother did not think her son was innocent and expressed that to the juror. Thus, the likelihood of respondent's scenario that the juror "would just as likely infer innocence" is slim. Thus, a substantial likelihood of juror bias is apparent both because the material is inherently prejudicial and because it was likely to result in "actual bias." (*People v. Carpenter* (1997) 9 Cal.4th 634, 653.)

Next, respondent argues that "[t]he presumption of prejudice may be dispelled by

an admonition to disregard the improper information," but does not point out that the court failed to specifically admonish the juror to do just that. (RB 78.) Respondent argues instead that the court's initial admonition to the entire jury to only consider evidence presented at trial along with the two questions to Juror No. 7 about whether the information regarding the plea offer would affect her guilt or penalty phase verdicts was sufficient to rebut the presumption of prejudice. (RB 78.) However, Juror No. 7's response alone that the conversation regarding the 25-year to life plea offer would not affect her deliberations was not sufficient by itself to rebut that presumption of prejudice without further inquiry into whether she had shared that information with other jurors as well as a specific admonition not to do so.

Finally, respondent's contention that the trial court had no sua sponte duty to ask the juror if she discussed the prohibited extraneous information with other jurors is equally unpersuasive. (RB 79.) 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* (1988) 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*

(9th Cir. 1998) 155 F.3d 970, 974-975; see also *Smith v. Phillips* (1982) 455 U.S. 209, 217; *see also People v. Keenan, supra,* 46 Cal.3d at p.532.) 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,* (1982) 455 U.S. 209, 217.) 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 juror who communicated such specific views about the cost of incarceration being "wasted on criminals," sharing the plea offer information with other jurors is indeed an issue with which the trial court should have inquired sua sponte.

Moreover, even if there is no evidence that this juror shared the information with the other jurors because the court failed to so inquire, the presumption of prejudice that this juror herself was biased was never successfully rebutted. Because a defendant is entitled to be tried by 12, not 11, impartial and unprejudiced jurors, appellant's conviction cannot stand if even only Juror No. 7 was improperly influenced and his case must be reversed. (*People v. Nesler, supra,* 16 Cal.4th at p. 578)

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.

Appellant asserts that the evidence presented at trial was insufficient to prove that appellant committed attempted robbery or that the victims were killed during the commission of an attempted robbery since there was not substantial evidence presented that appellant had the specific intent to rob the victims or to aid Mora in robbing the victims, or that he harbored the independent felonious purpose to rob them. Rather, the evidence contradicted a robbery theory and instead supported a theory that any request for property from the victims was either to facilitate the killings or merely incidental to them. (RAOB 105-125.)

Respondent simply contends that appellant's request for Encinas' wallet just prior to the shooting constituted sufficient evidence of the specific intent to rob and sufficient evidence that the killing occurred during the commission of an attempted robbery. Respondent posits that appellant intended to permanently deprive the victim of his wallet and shot Encinas only because he was reluctant and slow to comply. Respondent argues that any evidence to the contrary showing that appellant intended to kill and that the robbery was merely a ruse is irrelevant as merely an "alternative view." (RB 80-85.) Appellant disagrees.

First, respondent omits salient facts from the prosecution's case. While still on the sidewalk, appellant asked Encinas, "Do you want to go to sleep?" Encinas did not respond, but told Paula to go to her car. Paula told Encinas to go to his. Appellant then said, "Why are you quiet, I asked you a question?" Encinas and Urrutia got into the car and Encinas said, "Let's get out of here," in Spanish. Appellant pointed a gun at

Encinas, and the other pointed a gun at Urrutia. Appellant said, "Check yourself, check yourself, give me your wallet." Mora told Urrutia to give him his wallet. (3RT 406-407, 4RT 631-637, 5RT 699, 710.) 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 Urrutia 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.)

Contrary to respondent's contention, these facts do not constitute substantial evidence of an independent felonious purpose to rob nor a specific intent to permanently deprive the victims of their property. Respondent points to the fact that the wallets were within view when the police arrived as support for its theory that appellant and Mora shot the victims because they were slow to comply with their demands. However, while Urrutia's wallet was found on the passenger seat (and it is unclear whether it was visible before the body was moved), Encinas's wallet was found still inside the console. (9RT 1432.) In any event, the issue is not the intent of the victims in getting their wallets, but rather the intent of appellant and Mora in shooting them without regard to the wallets.

Because the trial evidence was legally insufficient to sustain appellant's attempted robbery convictions, 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.

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.

Appellant asserts that the multiple murder special circumstance must be reversed since there was insufficient evidence that appellant intended to kill Urrutia as required by Penal Code section 190.2, subdivision (c), and because the jury may have relied upon an improper theory, i.e., that as an aider and abettor, reckless indifference to human life was sufficient for finding the multiple murder special circumstance to be true. (RAOB 126-138.)

Respondent contends that there was substantial evidence that appellant intended to kill Uruttia and that even if there was not, that the law in effect at the time of Rangel's trial enabled the jury to properly have found appellant guilty of multiple murder because he aided and abetted Mora in the robbery of Uruttia with a reckless indifference to human life. (RB 86-94.) Respondent is wrong.

The reckless indifference theory does not apply to the multiple murder special circumstance. Rather, the reckless indifference exception is found in Penal Code section 190.2, subdivision (d) which governs the felony murder special circumstance (Pen. Code § 190.2, subd., (a)(17).) The multiple murder special circumstance is governed by Penal Code section 190.2, subdivision (c), which clearly requires an intent

to kill by a person who is not the actual killer.;[23] (Pen. Code §§ 190.2, subds., (a)(3), (c); see also CALCRIM 702, 703.) Here, the trial court conflated the two sections by instructing the jury with CALJIC 8.80.1. (5RT 1144-1145; 14 RT 2219-2222.) Further, in each of the two cases relied upon by respondent, *People .v Dennis* (1998) 17 Cal.4th 468 and *People v. Rogers* (2006) 39 Cal.4th 826, the defendant was the actual killer of both victims. Consequently, the multiple-murder special circumstance in those cases was governed by section 190.2, subdivision (b), not, as here, subdivision (c).

Under subdivision (c), there was insufficient evidence that appellant intended to kill Uruttia. Although 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?")], it failed to present sufficient evidence that appellant intended to kill Urrutia.[24] It is obvious this point was not lost on the prosecutor who, as argued in the Opening Brief, focused on the reckless indifference of an aider and abettor to robbery

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

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

[24] 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.)

theory to support the multiple murder special circumstance, rather than the intent to kill theory. (14 RT 2236, 2272-2273.) 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.

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 finding of multiple murder on this theory or on the invalid theories of felony murder or reckless indifference to human life. Because the jury was misinstructed that it could find the multiple murder special circumstance true under the inapplicable reckless indifference exception, 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.

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, 8.81.3 and the modified CALJIC 8.80.1. (5 CT 1136, 1144-1146.) 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* (1993) 4 Cal.4th 1116, 1129.)

Finally, contrary to respondent's state-law based argument, there is a heightened-reliability standard for capital cases. Here, 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. (U.S. Const., Amends. 5th, 8th & 14th; Cal. Const., art. 1, sections 1, 7, 15, 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *People v. Marshall* (1997) 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.

Appellant contends that it was error for the trial court to instruct the jury that they could find him guilty of first degree murder (Pen. Code, § 189) because that crime was never charged in the information. Rather, the information charged appellant with second degree malice murder (Pen. Code, § 187). Specifically, permitting the jury to convict appellant of an uncharged crime violated his right to due process of law. (U.S. Const., Amends. 5th& 14th; 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.) Further, permitting the jury to convict him of murder without finding the malice (which was an essential element of the crime alleged in the information) also violated his right to due process of law. (U.S. Const., 5th, 6th, 8th & 14th; 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* (1998) 18 Cal.4th 470, 484, 490 and 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. at p. 638.) (RAOB 139-148.)

Respondent contends that this Court has long held that "an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely. (RB 95.) However, because appellant anticipated and argued against this argument in his Opening Brief, no further discussion of the issue is necessary. Accordingly, as argued in the Opening Brief, appellant's convictions 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.

Appellant asserts that 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. Amends. 5th, 6th, 8th & 14th; Cal. Const., art. I, §§ 7, 15, 16 & 17.) Specifically, 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.) However, the trial court did not instruct the jury that it had to agree unanimously on which type of first degree murder appellant committed. (RAOB 149-158.)

Respondent contends that this Court has long held that there is "no such requirement for juror unanimity on the actual theory of liability." (RB 95.) Because appellant anticipated and argued against this argument in his Opening Brief, no reply is necessary.

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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.

Appellant asserts that the trial court's refusal to instruct the jury that appellant should not have been held liable on a felony murder theory if the jury found that his primary purpose was to kill rather than to rob, 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.) (RAOB 159-167.)

Respondent first contends that the pinpoint instruction was properly refused because it conflicted with appellant's defense theory, i.e., that he was misidentified as the second shooter. (RB 98-99.) Respondent next contends that even if the instruction was consistent with appellant's theory of defense it was duplicative of other instructions given, i.e., CALJIC Nos. 8.21 and 8.27[25] and that it was a questionable statement of the law. (RB 99-100.) Finally, respondent argues that even if it was error to refuse the instruction, the error was harmless because the jury "necessarily resolved the issues raised in the special instruction against appellant Rangel." (RB 100.) Appellant disagrees.

First, appellant's misidentification defense was not inconsistent with his theory that the prosecution failed to prove all the elements of the charges beyond a reasonable doubt. It is clear from the record, that both were valid theories of defense to be

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[25] That these two instructions "covered the issue" was the only ground upon which the court relied in denying the requested instruction. (14RT 2172-2173.)

considered by the jury and that appellant relied upon both. In fact, in addition to arguing misidentification in her closing argument, Rangel's counsel also argued that the elements of aiding and abetting had not been met and that just because the prosecutor told the jury "We know two people were murdered" and "We know it was during the course of a robbery," did not make it so. (14RT 2278-2279.) Appellant ended her closing argument by pointing out to the jury that *not only* did they have a duty to find "the elements of the criminal activity" beyond a reasonable doubt, but that they *also* were charged with finding the element of identification beyond a reasonable doubt. (14RT 2305.) Thus, where as here, the instruction was not inconsistent and focused upon a theory which seeks to negate an element of the offense, the instruction should have been given upon request. (See *People v. Sedeno* (1974) 10 Cal.3d 703, 716, overruled on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 195; see also *People v. Howard* (1988) 44 Cal.3d 375, 442.)

Second, contrary to respondent's assertion, the instruction was not a "questionable" statement of law since it explained to the jury that the robbery required an independent felonious purpose apart from the murder and could not have been committed merely to facilitate or conceal the homicide. (*People v. Sears* (1970) 2 Cal.3d 180, 187-188.) California Law is in accord. "[W]here an accused's primary goal was not to kidnap but to kill, and where a kidnaping was merely incidental to a murder but not committed to advance an independent felonious purpose, a kidnaping-felony-murder special circumstance finding cannot be sustained." (*People v. Riel* (2000) 22 Cal. 4th 1153, 1201, quoting *People v. Weidert* (1985) 39 Cal.3d 836, 842.) The special circumstance at issue required an independent felonious purpose to commit one of the listed felonies (in this case, attempted robbery). In other words, the robbery could not be merely incidental to the murder, with the murder being the defendant's primary purpose. (See *People v. Brents* (2012) 53 Cal.4th 599, 608-609.) Respondent also contends and this Court has found that sufficient evidence can support this special circumstance so long as there was a

concurrent purpose to commit both the murder and one of the listed felonies. (RB 99-100; *Id* at p. 609.) Here, however, the prosecution relied on the theory that appellants' intent from the outset was to the victims, and the evidence presented tended to show that the attempted robberies were merely incidental to that killing. The record includes no evidence of an independent purpose to rob the victims, as such the court's refusal of the pinpoint instruction was error.

Moreover, the requested instruction was not duplicative of the language in CALJIC 8.21 and 8.27, both of which instructed the jury, in pertinent part, that the intentional or unintentional killing of a person during the attempted commission of robbery is felony murder. (CALJIC 8.21, 8.21; CT 1136, 1137.) Neither instruction "pinpoints" the legal requirement that in order to be liable under a felony murder theory, appellant's primary purpose *must* have been to rob, not to kill, e.g., he must have had an independent felonious purpose to rob.. This distinction is particularly important where as here, the prosecutor spent a significant amount of time arguing that appellant's primary purpose was not to rob, but instead to kill. Had the jury believed, as the evidence tended to indicate, that appellant's primary purpose was to kill and that the attempted robbery was merely a ruse to facilitate the murder, that would have negated an essential element of felony murder, i.e., that appellant harbored the specific intent to rob.

Finally, respondent's contention that the jury's true finding on the special circumstances instruction proves that the jury would have found appellant guilty under a felony murder theory despite the pinpoint instruction is not persuasive since the jury was charged with determining the validity of the substantive offense *before* the special circumstances. Thus, had the jury been properly instructed, not only may they have been unable to find appellant guilty under a felony murder theory, but they may have also been unable to find the robbery special circumstance true for the same reasons. (See Argument VI, ante; see also *People v. Mendoza* (2000) 24 Cal.4th 130, 182.)

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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.

Appellant asserts that 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.) The 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.)

Respondent contends that this Court has previously rejected these claims. Appellant has anticipated and argued against this argument in his Opening Brief, accordingly no reply is necessary.

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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.

Appellant asserts that the cumulative effect of the guilt phase errors is so harmful that reversal is required. (RAOB 179-180.) Respondent contends that there were either no errors, or even assuming any errors, the errors neither individually nor collectively prejudiced appellant Rangel by undermining his conviction or sentence. (RB 102-103.) Appellant disagrees.

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.) Here, the prosecution cannot prove that the errors, either alone or in some combination, were harmless beyond a reasonable doubt. First and foremost, the prosecution's repeated discovery violations resulted in appellant being tried largely by ambush. Further, his rights to confrontation, to present a defense, due process and a fair trial were all violated by the prosecution's repeated statutory and constitutional discovery violations, the trial court's failure to effectively remedy them, the trial court's impairment of appellant's right to effectively cross-examine witnesses, the improper admission of hearsay and irrelevant and prejudicial gang evidence, the trial court's refusal to protect appellant's right to a fair jury, the insufficiency of the evidence of felony murder and lack of instruction requiring the jury to agree to the theory upon which appellant was convicted, the insufficient of the evidence of multiple murder, the refusal of appropriate and relevant instructions and allowing a conviction for a crime not alleged in the Information. Thus, the guilt phase errors were sufficient to undermine the prosecution's case and the reliability of the jury's ultimate verdict, and none can properly be found harmless beyond a reasonable doubt. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-282; *Chapman v. California, supra*, 386 U.S. at p. 24.) These errors 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* (1985) 472 U.S. 320, 330-331; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *People v. Brown* (1988) 46 Cal.3d 432, 448.) Because the cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process, appellant's convictions must be reversed. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 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.

Appellant asserts that the admission of irrelevant and unduly prejudicial gang evidence in the penalty phase constituted prejudicial error both because of the evidence's inflammatory effect and because in voir dire and in preparation of its defense, appellant detrimentally relied on the prosecution's promise that it would not present any gang evidence. (RAOB 181-199.)

Respondent first contends that appellant forfeited his claims on appeal because defense counsel did not specifically object to the gang evidence on relevance and prejudice grounds when she opposed the admission of the attempted burglary offense or while the testimony was presented. (RB 112.) However, the prosecution's "Statement in Aggravation" filed November 23, 1998 made no mention of the gang-related evidence, thus it is reasonable to assume appellant was not on notice of such. (3CT 783-784.) It wasn't until the hearing on the evidence on December 8, 1998, that the prosecution mentioned the gang evidence as background to the admission of the threat appellant allegedly made to the victim during the attempted auto burglary. (16 RT 2482-2483.) The victim Alejo Esquer Corral did not testify to any direct gang evidence, thus there was no need to object during his testimony. (16RT 2508-2532) When the prosecution attempted to elicit from Deputy Hilgendorf that the graffiti appellant allegedly sprayed on the truck was gang-related, appellant immediately sought and was granted a 402 hearing excluding

the evidence. (16RT 2561-2566.) Thereafter, when the prosecutor tried to elicit from the deputy that the victim was scared because he thought appellant was a gang member, defense counsel again immediately objected that there was no foundation for the gang evidence to come in. The court disagreed and overruled the objection, allowing Deputy Hilgendorf to testify that the victim told him he thought appellant was a gang member. (16RT 2567-2570.) When the prosecution sought to elicit from the deputy that "KCC" was the name of a gang, appellant again objected on relevance, hearsay, speculation, and foundation grounds, but to no avail. (16 RT 2582-2583.) Further, appellant's objections during Jose Jimenez' testimony that the gang questions "assumed facts not in evidence," were in substance and effect, relevancy objections to the gang evidence. (18RT 2823-2829.) By the time Officer Zembel testified as a gang expert, appellant had already repeatedly objected that his gang testimony was improper rebuttal to Jimenez' opinion that the shooting was out of character for appellant. Specifically, counsel objected that Zembel's gang testimony would be a violation of appellant's "right to a fair trial, a violation of [his] Fourth, Fifth, Sixth and Eighth, Fourteenth Amendment to the Constitution" since it would infer to the jury that appellant has been involved in other criminal activity through his membership in a gang. (20RT 3066-3067, 3072-3073.) These objections were more than sufficient to preserve the issue for appeal.

Respondent also contends that appellant forfeited his claim on appeal that in voir dire he detrimentally relied on the prosecution's promise not to present gang evidence at

trial. However, this claim is apparent from the record below and was clearly apparent to the trial court throughout the trial, beginning with voir dire. (2RT 266 [the court and all parties confirming that gang evidence is not anticipated at trial unless it was inadvertently blurted out]; 3RT 358 [same]; 8RT 1246-1249 [defense counsel pointing out that they selected the jury based upon the 402 motion excluding gang evidence and at least one seated juror said it would make a difference to her whether the case was gang-related].) As such the claim is not forfeited and this Court must consider whether the gang evidence impermissibly admitted at the penalty phase rendered the proceeding fundamentally unfair.

Respondent contends that the evidence that appellant sprayed "KCC" on a truck he attempted to burglarize and then threatened the owner was relevant and admissible, as was the gang expert's testimony that appellant was a hardcore member of the King City Criminals with "a wanton disregard or respect for life." (RB 113-116.) Respondent also contends that the evidence was permissible to rebut testimony of appellant's good character presented through Rangel's bible study teacher Jose Jimenez. (RB 114-115.) Respondent is correct to a point. "Once appellant placed his general character in issue, the prosecutor was entitled to rebut with evidence or argument suggesting a more balanced picture of his personality." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 791.) However, this Court cautioned in *Rodriguez* that "good character" evidence does not open to door to any evidence the prosecution can dredge up. "As in other cases, the scope of

rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf." (*Id.* at p. 792, fn. 24.) The cases cited by respondent are distinguishable from the case at bar. In *People v. Williams* (1997) 16 Cal.4th 153, the Court affirmed the admission of paraphernalia seized from the defendant's home to rebut the defendant's own testimony that he no longer belonged to a gang. In *People v. Fierro* (1991) 1 Cal. 4th 173, 237-38, evidence of membership in youth gangs was relevant to rebut the defendant's good character evidence. (RB 114-115.) Here, the defense presented Jose Jimenez who testified that about five years before the crime, appellant attended church and bible study from 1989 through 1992 with his family. The testimony from Jimenez was that he thought murder would be out of appellant's character. The prosecutor rebutted this testimony by cross-examining Jimenez about appellant's gang membership, despite the fact that Jimenez clearly knew nothing about it. (18RT 2829-2832, 2837.) This evidence did not relate directly to a particular incident (the murder) or the character trait that Rangel presented on his own behalf (that Jimenez thought it would be out of character for Rangel to commit murder). As such, the trial court abused its discretion in its admission of the evidence.

As appellant has further anticipated and argued against this argument in his Opening Brief, he relies on the argument set forth previously for determination of this claim and the prejudice resulting therefrom. (RAOB 181-199.)

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

Appellant asserts that he was denied the right to a fair and reliable penalty phase when the trial court refused to instruct the jury with defense instructions pinpointing his theory that life in prison was a more appropriate sentence than death. The requested instructions would have told the jury that: (1) death must be considered a more severe penalty than LWOP; (2) neither evidence of appellant's drug and alcohol use nor his background could be used as aggravation; and (3) aggravating factors must be substantial enough to warrant a death sentence, i.e., LWOP could still be the appropriate sentence *even if* the aggravating factors substantially outweighed the mitigating factors, *even if* there was only a single mitigating factor, and *even if* there were no mitigating factors at all. Each of these were correct statements of law and none of them were adequately conveyed by the instructions given to the jury. (See RAOB 200-218) Respondent's contentions to the contrary must fail.

A defendant is entitled to requested pinpoint instructions unless they are argumentative, duplicative or confusing. A defendant's right to pinpoint instructions is so important to due process that although a court may refuse an argumentative or irrelevant instruction, it has a duty to modify an otherwise proper instruction to eliminate faults and to tailor it to the facts of the case. (*People v. Earp, supra,* 20 Cal.4th at 886; *People v. Fudge* (1994) 7 Cal.4th 1075, 1110; *People v Hall* (1980) 28 Cal.3d 143, 158-159,

overruled on other grounds in 21 Cal.4th 413, 415.) Here, the court refused the instructions entirely and without modification, despite the fact that they were correct statements of the law narrowly tailored to appellant's case for life and were not duplicative of other instructions given.

First, the trial court refused the proposed instruction regarding the relative severity of the death penalty on the grounds urged by the prosecutor, i.e., that there was no legal authority for the instruction and that the jury should decide which punishment is more severe. (20RT 3131-3132.) As argued in Appellant's Opening Brief, both the prosecution and the trial court were wrong since both the California and the United States Supreme Court have recognized that death is the most severe penalty under the law. (RAOB 202-203.) Respondent now contends, for the first time on appeal, that the jury need not be specially instructed that death is more severe than LWOP because, coupled with the jurors' common sense, the concept is adequately covered in CALJIC 8.88, citing *People v. Cook* (2007) 40 Cal.4th 1334, 1363. (RB 121.) However, CALJIC 8.88 does not expressly state that death is to be considered a more severe sentence than LWOP. The closest CALJIC 8.88 given in this case comes to explaining the severity of the death penalty is when it instructs the jury that in order to return a verdict of death, it must be persuaded that the aggravating factors are so substantial in comparison to the mitigating factors that they warrant death instead of LWOP. (CALJIC 8.88; 5CT 1211-1212; 21 RT 3294-3296.) Further, it is evident not only from the voir dire in this case where five

jurors stated their opinion that LWOP was worse or as bad as death, but also from other capital cases, that jurors' "common sense" does not necessarily encompass the idea that death is always more severe than LWOP. (RAOB 203-204; See *People v Tate* (2010) 49 Cal.4th 635, 706-707 [after having been instructed with CALJIC 8.88, jury sought clarification as to whether death or LWOP was the more sever punishment]; see also *People v Thomas* (2011) 52 Cal.4th 336, 361 [trial court has discretion to instruct jury that death is the more severe penalty].) Because respondent cannot show that no juror voted for death based on a mistaken belief that death was more lenient than LWOP, the judgment of death must be reversed.

Respondent also contends that the trial court properly refused to instruct the jury that appellant's drug or alcohol intoxication could not be considered aggravation citing *People v. Tafoya* (2007) 42 Cal.4th 147, 188 and *People v. Farnam* (2002) 28 Cal.4th 107, 191.) However, neither of those cases address a trial court's rejection of a defense requested pinpoint instruction on this point, but rather the general proposition that a court need not *sua sponte* instruct the jury as to which statutory factors are relevant solely as aggravating or solely as mitigating. This is a completely different inquiry. A court's duty to instruct on the relevant principles of law sua sponte is much narrower than a court's duty to give requested pinpoint instructions based upon the facts and circumstances presented in a specific case. (Compare *People v. Breverman* (1998) 19 Cal.4th 142, 162 with *People v. Earp, supra,* 20 Cal.4th at p. 886.)

Respondent next contends that the trial court properly refused to instruct the jury that appellant's background could not be considered aggravation citing *People v. Carey* (2007) 41 Cal.4th 109, 134-135, *People v. Hinton* (2006) 37 Cal.4th 839, 912; and *People v. Ochoa* (2001) 26 Cal.4th 398, 457.) Again, both the prosecution and the trial court believed that the instruction misstated the law and that there was no authority for it. (20 RT 3134.) However, the instruction did correctly state the law. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1033.) Moreover, the cases cited by respondent are distinguishable from the present case. In *Hinton*, the Court only relied on previous cases where it had held generically that a trial court had not duty to identify for jurors which sentencing factors are aggravating and which are mitigating. (*People v. Hinton, supra*, 37 Cal.4th at 912.) In *Carey* and *Ochoa*, the Court held that there was no error in giving the proposed instruction because the defendant's criminal background could be used as aggravation. (*People v. Carey, supra*, 41 Cal.4th at 134-135; *People v. Ochoa, supra*, 26 Cal.4th at 457.) Here, the proposed instruction specifically excluded the aggravating factors upon which the jury would have already been instructed. (4CT 1063, 20 RT 3113.) Further, absent the proposed instruction being given, the prosecutor was able to argue that appellant's upbringing by neglectful heroin-addicted parents was no excuse for being a "cold-blooded killer" and that his status as a father just showed his callousness because he shirked his parental duties. (20 RT 3197, 3228.) Thus, turning potential mitigation into almost certain aggravation. Because the State cannot show that no juror weighed this

evidence on the side of aggravation in choosing death, appellant's death sentence must be reversed.

Respondent finally contends that appellant's proposed instructions clarifying the weighing of aggravation and mitigation were properly rejected because this Court has previously held that defendants are not entitled to such instructions. (RB 121-122.) However, each instruction was a correct statement of the law and not covered by the standard instructions given. (RAOB 215-216; CALJIC 8.88; *People v. Hinton, supra*, 27 Cal.4th at 912 [holding that a single factor in mitigation was a sufficient basis to sentence the defendant to life in prison].) Even the new CALCRIM instructions approved by the judicial council has included some of the proposed language into the standard instructions given to capital juries. (CALCRIM No. 766 ["Death penalty Weighing Process . . . Even without mitigating circumstances, you may decide that the aggravating circumstances are not substantial enough to warrant death."].) Because appellant's jury was not given the benefit of the specific defense requested pinpoint instructions which would have lawfully highlighted appellant's theory that he deserved life over death, his death sentence must be reversed.

Where, as here, reasonable jurors could have found the evidence did not overwhelmingly support a death sentence, it is more than possible that the instructional omissions 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 the improper refusal to give the requested penalty phase instructions 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.) 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* (1983) 462 U.S. 862, 879; see also *Furman v. Georgia* (1972) 408 U.S. 238; *Godfrey v. Georgia,* (1980) 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. The death sentence must be reversed.

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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.

Appellant asserts that the trial court violated appellant's constitutional rights to a fair trial, to present a defense, equal protection, a reliable penalty phase, the effective assistance of counsel and due process when it refused to allow the defense a continuance to the next court day to obtain a necessary surrebuttal witness and prepare for penalty phase closing argument after the rejection of defense requested pinpoint instructions. (RAOB 219-232.)

Respondent first contends that defense counsel failed to make a good cause showing for the requested continuance to obtain appellant's father as a surrebuttal witness because she failed to make a sufficient offer of proof that the expected testimony was material and non-cumulative. Respondent also contends that appellant has "only himself to blame" because he had the audacity to present a character witness in the penalty phase. (RB 125-126.) Appellant disagrees. First, appellant did make a good cause showing through an offer of proof; counsel's only "failing" was that she was unable to contact and present a witness on an hour and a half's notice. Defense counsel notified the court that it sought to present appellant's father to rebut the devastating effect of the prosecution's rebuttal gang expert. This was not a witness with which the court was previously unfamiliar. The court had already witnessed appellant's father's testimony earlier in the

penalty phase (*after* the cross-examination of Jimenez) demonstrating his knowledge of gangs and of appellant's personal experience. (19RT 2897-2902.) Thus, appellant's identification of a witness the court knew had familiarity with gangs and his stated intent to specifically rebut the prosecution's gang expert was a sufficient offer of proof. The real issue is that the court was not only inclined, but determined to deny the continuance regardless of the offer of proof:

The Court: Are you going to offer any surrebuttal?

Defense Counsel: Well, may I ask for a continuance to do so?

The Court: You can ask, but I'm not going to give it.

Defense Counsel: Well, I'm asking for it.

The Court: I'm not going to give it. Do you have a lead on something? If you can give me some facts.

Defense counsel then explained to the court that she intended to recall appellant's father, but she understandably needed time to talk to him first. (20RT 3108-3109.) The court's meager allowance of giving counsel only the lunch recess to contact and procure her witness while simultaneously preparing for and discussing potential penalty phase jury instructions was unreasonable to say the least.

Respondent next contends that appellant has failed to demonstrate why the court should have allowed her a continuance from 3:55 p.m. to the next morning to begin her penalty phase closing argument. (RB 126-127.) Yet, it fails to dispute or even mention that during the prosecutor's emotional closing argument, the court took a fifteen minute

recess ostensibly because the jury was distracted by the victims' family and friends crying in the audience. Respondent also fails to acknowledge that appellant's argument was truncated by both a recess to accommodate a restroom break for a juror and the court's threat that any interruptions to appellant's argument would result in "the end of [appellant's] argument." (20 RT 3258-3259.)

Respondent finally contends that appellant has forfeited his claim that defense counsel could have used more time to reorganize her notes to incorporate the refused defense requested jury instructions because defense counsel did not specifically argue this ground to the court. (RB 127.) Appellant respectfully disagrees. The court was fully aware of the proceedings and denied the continuance in light of all the facts regardless of whether appellant stated the obvious – the record clearly shows that 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. The consequences of the unreasonable denial of the continuance by the trial court for both the surrebuttal witness and for the preparation of closing argument 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 Amends. 5th, 6th, 8th, & 14th; 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. at p. 24.) Moreover, even under the standard articulated in *People v. Watson* (1956) 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 VICTIM IMPACT EVIDENCE WITHOUT LIMITATION, OR EXCLUSION OF WITNESSES, AND WITHOUT USE OF AN APPROPRIATE JURY INSTRUCTION.

Appellant asserts that Penal Code section 190.3, subdivision (a) is vague and overbroad as applied in California in general and in appellant's case specifically because the courts have not limited the use of victim impact evidence as "circumstances of the crime" in any meaningful way. (RAOB 233-253.)

Respondent contends that appellant's challenge against the victim impact evidence presented in this case must fail based upon repeated holdings of this Court affirming its use. Respondent also contends that the jury was adequately instructed on how to consider victim impact evidence by CALJIC 8.84.1 and 8.85. (RB 136) Respondent finally contends that appellant forfeited his claim that the trial court should have excluded victim impact witnesses from hearing other penalty phase witness testimony because he "made no motion for such exclusion at trial." (RB 136) Appellant disagrees on all points.

First, appellant made an objection on February 8, 1999 that, unlike in the guilt phase, testifying penalty phase witnesses were not being excluded from each other's testimony. Counsel expressed her concern about testifying family members staying throughout the testimony because it was "getting too emotional." The trial court agreed that it did not want any emotional displays to interrupt the proceedings or influence the jury, but that it did not see any reason to exclude anyone since none of the witnesses

testimony was likely to influence the content of another witness' testimony. (16RT 2494-2495.) Thus, the claim has not been forfeited. Next, since respondent's argument regarding the instructional error component of this claim was anticipated in the drafting of the Opening Brief and breaks no new ground, appellant relies on the argument as previously set forth in the Opening Brief for determination of this claim. (RB 136; RAOB 247-253.)

Finally, respondent's reliance on strictly California cases approving the use of victim impact evidence is misplaced as it ignores the federal basis of this claim. California courts, including the trial court in this case, have improperly expanded the permissible use of victim impact evidence as outlined by the United States Supreme Court in *Payne v. Tennessee* (1991) 501 U.S. 808, 827 and as a result, Penal Code section 190.3(a) fails to channel the sentencer's discretion by clear and objective standards that provide the specific and detailed guidance required for the imposition of the death penalty. (See *Godfrey v. Georgia, supra,* 446 U.S. at p. 428.) Respondent concedes as much by citing a plethora of California cases, all affirming the use of unbridled victim impact evidence under the theory that *Payne* only bars evidence which is "so prejudicial as to render the trial fundamentally unfair." (RB 134-135.) Indeed, the fact that no penalty phase in California has ever been reversed on the basis of improper victim impact evidence despite the seemingly unrestricted extension of what constitutes "circumstances of the crime," supports the contention that California's statute is vague and overbroad.

In *Payne*, the high court sanctioned "victim impact" evidence to show that the victim's death represented a "unique loss," thus, evidence showing the specific harm caused by the defendant was relevant at sentencing. However, *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. and dis. opn. 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.)

Here, the prosecution presented six witnesses, only one of whom was present during the crime. All of whom were allowed to stay in the courtroom and hear the others testify, allowing the jury to see not only the testimony itself, but also the emotional toll the testimony had on the two victims' families. The witnesses recounted the adult victims as children, repeatedly including personal characteristics of the victims that were unknown to appellants at the time of the crime. (See RAOB 239-241.) The witnesses testified about their relationship with the victims from the time they were children through the time of their deaths, including what they were like as children. Their testimony was aided by photo boards showing photos of the victims both as babies and as young children and at holidays and weddings. (Exs. 53, 54; 16 RT 2591-2607; 17 RT 2610-2623, 2632-2662.) Although the trial court was concerned that the families of both victims were having "something like a wake," during their testimony, the court allowed

the proffered evidence because it related "the losses that they suffered" and there was "a lot of benefit to them in talking about it." (17 RT 2663-2664.) The trial court, like many other California courts, effectively weighed the perceived benefit to the victims families over the due process rights of appellant. This is error.

Since *Payne*, although California courts have purported to require a "careful balance" between probative and prejudicial victim impact evidence, they have yet to actually limit it in any meaningful way. In the twenty years since *Payne*, California courts have allowed full life histories including childhood photos, videos and photo montages depicting funerals, weddings, music, etc., holding repeatedly that state law is consistent with federal law -- that "[u]nless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime...." (*People v. Garcia* (2011) 52 Cal.4th 706, 751.) The problem with such an approach is that the threshold for inviting a purely irrational response is nearly impossible to reach.

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").) 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.

Further, the presentation of such irrelevant and emotionally charged "victim impact evidence" 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. (U.S. Const. Amends 5th, 6th, 8th & 14th; Cal. Const. Art. I, §§ 7, 15, 17 & 24; Pen. Code, sec. 190.3; Evid. Code, sec. 210 & 352.) 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. at p. 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 at p. 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.

Appellant asserts that failed in its duty to hold a hearing on appellant's allegations of prejudicial juror misconduct during penalty phase deliberations violating 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. Amends. 5th, 6th, 8th & 14th; Cal. Const. Art. I, §§ 15, 24 & 29.) (RAOB 254-161.)

First, respondent contends appellant has forfeited this claim because it was not raised in his motion for new trial and was not objected to at trial. (RB 141.) This is incorrect. 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.) Further, appellant Mora subsequently filed a motion for a new penalty trial, based on jury misconduct. (45 CT 11829-11839.) However, it was clear even to the prosecutor that appellant Rangel had joined in that motion as well. In the "People's Opposition to Defendants' Motion for New Trial," the jury misconduct claim is specifically argued against the contentions of *both* defendants in the plural. (45 CT 11850-11856.) Thus, appellant Rangel has not forfeited this claim.

Next, respondent contends the claim is meritless because the trial court had no obligation to hold a hearing based upon hearsay statements of defense counsel and arguendo, defense counsel failed to show juror misconduct rendering any hearing a mere "fishing exhibition." (RB 143-144.) Respondent is wrong on both counts.

First, the trial court has an inherent power to investigate claims of juror

misconduct regardless of sworn juror declarations, particularly in a case where, as the trial court noted, the misconduct was significant and needed to be fully explored. (21 RT 3310); See *People v. Tuggles* (2009) 179 Cal.App.4th 339, 385-387 [trial court has inherent power to investigate]; see also *People v. Bryant* (2011) 191 Cal.App.4th 1457, 1468 [sworn statements not required where allegations give rise to presumption of prejudice]; Pen. Code, § 1181, subds., (2), (3); Cal. Code Civ. Pro., §§ 206, 237.) Indeed, this Court has held that it is error for a trial court to conclude it has no power to order a hearing where jurors decline to cooperate with defense counsel: "Where the trial court is presented with a credible prima facie showing that serious misconduct occurred, the trial court may order jurors to appear at the hearing and to answer questions about whether the misconduct occurred." (*People v. Cox, supra,* 53 Cal.3d at p. 700.) Respondent's reliance on *People v. Hayes* (1999) 21 Cal.4th 1221 and *People v. Carter* (2003) 30 Cal.4th 1166 is misplaced. (RB 142.) In both of those cases, the defendant's proffer was supported by hearsay statements not made under penalty of perjury *and* were contradicted by sworn statements from jurors denying the allegations of misconduct. (See *People v. Hayes supra,* 21 Cal.4th at p. 1253; see also *People v. Carter, supra,* 30 Cal.4th at p. 1217.) In contrast, here, defense counsel's declarations were executed under penalty of perjury and were not contradicted by any juror.

Respondent's further contention that a hearing would be a mere "fishing expedition" is similarly without merit since it is clear that at least three jurors' verdicts were affected by the alleged misconduct. Here, the facts the jurors relayed to the defense attorneys created a presumption of prejudicial juror misconduct which required further investigation to support the misconduct claim. Appellants were stymied because they had no way of conducting that investigation absent access to the jurors. The absence of any means to further investigate this matter deprived appellant of his constitutional guarantees to due process, equal protection, a fair trial, and a reliable penalty verdict.

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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.

Appellant asserted at trial and in his Opening Brief that without the proposed clarifying instruction[26], CALJIC No. 8.85[27] impermissibly permitted the jury to double count the special circumstances in aggravation. This is so because under CALJIC 8.85 as given, the jury's special circumstance findings that: (1) multiple victims were murdered; and (2) they were murdered during an attempted robbery, could be double counted again as "circumstances of the crime" under Penal Code section 109.3(a).

Respondent seemingly concedes that the trial court erred, however argues that since the prosecutor did not suggest to the jury that it double-count aggravating factors, the standard version of CALJIC 8.85 regarding the weighing of aggravating factors was sufficient to avoid prejudicial error. (RB 147-148.) Respondent does not contend what the prosecutor and the trial court did below, that is, that "there is no bar on double counting" since there is no "limit on how many times [the jury can] use [the same fact]"

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26 "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.)

27 The jurors were instructed under CALJIC 8.85 that they could consider "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of special circumstance found true." (5 CT 1194.) This language parrots that found in Penal Code section 190.3, subdivision (a). (Pen. Code § 190.3, subd., (a).)

to aggravate appellant's sentence from life to death. (20 RT 3119-3120.)

Respondent's argument now, like the prosecution's argument below, must fail. The case upon which respondent relies is easily distinguishable. In *People v. Russell* (2010) 50 Cal.4th 1228, 1270, the California Supreme Court held in a claim identical to appellant's:

> "Even if the court erred by failing to provide defendant's requested instruction, we have repeatedly held that no prejudice results from such an error where, as here, the prosecutor does not suggest that double-counting aggravating factors is permissible and the jury receives the standard instruction concerning the weighing of aggravating and mitigating factors, (Citations omitted.)"

Here, the prosecutor explicitly told the jury that it could use the evidence presented supporting the special circumstance findings both as the existence of the special circumstances and as "circumstance of the crime" aggravation under Penal code section 190.3(a). The prosecutor argued to the jury:

> "Factor A, the circumstances of the crime the defendant was convicted of and the existence of any special circumstances found true. ¶ What does this mean? This means the circumstances of the crime, not only what we heard, *everything we heard here in the court during the guilt phase*, but also what is involved in the circumstances of the crime, is the impact it had on the victims' families and their lives, how they will be forever changed. ¶ That all goes under [factor] A. ¶ *And any of the special circumstances found true...*" *(Emphasis added. 20 RT 3195-3196.)*

Thus, in this case, unlike in *Russell*, 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. The lack of clarification made it likely that the jurors understood the CALJIC 8.85 in a way that allowed them to sentence appellant to death by double-counting and over weighing the robbery and multiple murder as both circumstances of the crime and as special circumstances. This error 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. Amends. 5th, 8th & 14th; Cal. Const. Art. I §§ 7, 17 & 24.)

As pointed out in Appellant's Opening Brief, the death penalty was by no means a foregone conclusion in this case since 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 "the circumstances of the crime," aggravation 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 only 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. at p. 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* (2009) 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.

Appellant asserts that California's multiple murder special circumstance is unconstitutional. (RAOB 280-282.) Respondent contends that appellant's claim must fail as this Court has previously rejected such claims under different circumstances. (RB 148.) Appellant acknowledges this Court's rejection of similar claims. However, appellant does not concede that his claim must fail, particularly since he only personally shot one of the victims. Under these circumstances, a death sentence is not justified compared to others found guilty of multiple murder and thus does not meaningfully distinguish the few cases in which the death penalty is imposed from the many in which it is not. (See *Zant v. Stephens* (1983) 462 U.S. 862, 877; see also *Furman v. Georgia* (1972) 408 U.S. 238, 313.) Thus, this Court should reexamine its previous holdings to the contrary, and declare this special circumstance unconstitutional, and reverse appellant's conviction of capital murder. Appellant further relies on the arguments as set forth in his Opening Brief for determination of this claim. (RAOB 280-282.)

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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.

Appellant asserts that California's death penalty statute as interpreted and applied is unconstitutional. (RAOB 283-322.) Respondent contends that appellant's challenges to the constitutionality of California's death penalty scheme must fail as each one has been repeatedly rejected by this Court. (RB 149-155.) Appellant recognizes that this Court has previously found that California's death penalty sentencing scheme does not violate the federal constitution. However, in light of United States Supreme Court precedent, appellant requests this Court reconsider its previous rulings with respect to whether the following, *inter alia*, are required to assure the constitutionality of California's sentencing scheme: meaningful narrowing of the class of offenders eligible for the death penalty; proof beyond a reasonable doubt of aggravating factors; proof beyond a reasonable doubt that aggravating factors outweigh mitigating factors; proof beyond a reasonable doubt that death is the appropriate remedy; explicit written findings by the jury of the factors found in aggravation; juror unanimity of aggravating factors; inter-case proportionality review; elimination of unadjudicated criminal activity as an appropriate aggravating factor; elimination of restrictive adjectives when describing mitigating factors; instructions that statutory mitigating factors are relevant solely as potential mitigators; minimizing the risk of arbitrary and capricious action; and equal protection provided to capital defendants.

Under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, "beyond a reasonable doubt," is the appropriate burden of proof for proving aggravating factors and unanimous jury agreement is required. (*Ring v. Arizona* (2002) 536 U.S. 584, 589, quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 494; *Harmelin v. Michigan* (1991) 501 U.S. 957.) Further, the United States Supreme Court has repeatedly approved proportionality review as a safeguard against arbitrary imposition

of the death penalty. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 198; *Proffitt v. Florida* (1976) 428 U.S. 242, 259; *Pulley v. Harris* (1984) 465 U.S. 37, 50-51.) Moreover, California' capital sentencing scheme does not meaningfully narrow the class of persons who are death eligible. (See *Lowenfield v. Phelps* (1988) 484 U.S. 231, 244; *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988.) California' death penalty scheme also violates the federal Equal Protection Clause as it provides different procedural protections to capital and non-capital defendants. (See; *Ring v. Arizona, supra,* 536 U.S. at 589; *Tigner v. Texas* (1940) 310 U.S. 141, 146-147.) Finally, California caselaw is replete with cases where the defendant received life in prison with facts far more aggravating than the ones in this case. (See e.g., *People v. Nazeri* (2010) 187 Cal.App.4th 1101; *In re Rozzo* (2009) 172 Cal.App.4th 40.) The arbitrariness of California's death penalty scheme is evident from the district attorney's discretionary choice to pursue it all the way through the jury's decision to impose it. Each of the constitutional infirmities argued by appellants Rangel and Mora contribute to the arbitrary nature of imposition of the death penalty in California. Appellant further relies on the arguments as set forth in his Opening Brief.

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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 Respondent has failed to address appellant's cumulative penalty phase error issue (RAOB, 324-325) in its Respondent's Brief, appellant assume Respondent concedes the issue and agrees that the judgment of death must be reversed based upon the cumulative affect of the penalty phases errors.

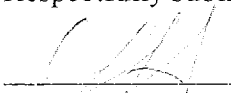
Since there is at least a reasonable possibility that the guilt and penalty phase errors taken together and in any combination had a prejudicial effect upon the jury's consideration of whether or not to return a judgment of death, reversal of the death sentence is mandated because the People cannot show 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. 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 were the circumstances of the crime and the single incident of vehicle burglary. Appellant presented mitigation evidence through the testimony of his parents, his sister, his ex-wife, his girlfriend and Jose Jimenez that he was abused and neglected as a child because his parents were heroin addicts and that he was intoxicated the night of the shooting. In light of the limited aggravating evidence and the mitigating evidence presented at the penalty phase, the State cannot demonstrate that the guilt and penalty phase errors did not contribute to at least one juror's decision to impose death. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

CONCLUSION

For all the foregoing reasons, appellant's conviction must be reversed and the judgment of death must be set aside.

DATED: July 2, 2012

Respectfully submitted,



Tara K. Hoveland
Attorney for Appellant

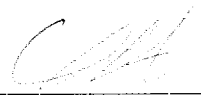
CERTIFICATE OF COUNSEL

(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 Reply 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 21,998 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 2, 2012



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 REPLY 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:

Office of the Attorney General
John Yang, Deputy Attorney General
300 S. Spring St., Suite 1702
Los Angeles, CA 90013

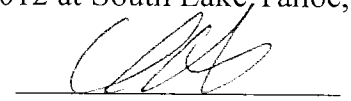
Ruben Rangel #P-43300
P.O. Box P-43300
San Quentin, CA 94974

California Appellate Project
Attn: Valerie Hriciga
101 2nd Street, 6th floor
San Francisco, CA 94105

Addie Lovelace
Capital Appeals Coordinator
210 W. Temple St., Room M-3
Los Angeles, CA 90012

Co-Defendant Counsel
Peter Silten, Deputy State Public Defender
1111 Broadway, 10th Floor
Oakland, CA 94607

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 2, 2012 at South Lake Tahoe, California 96150.



Tara K. Hoveland