In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOSEPH ADAM MORA, and RUBEN RANGEL,

Defendants and Appellants.

CAPITAL CASE

Case No. S079925

Los Angeles County Superior Court Case No. TA037999
The Honorable Victoria M. Chavez, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In a four-count information filed by the Los Angeles County District Attorney on May 5, 1998, appellants Rangel and Mora were each charged in counts 1 and 2 with murder (Pen. Code,[1] § 187, subd. (a)) and counts 3 and 4 with attempted second degree robbery (§§ 664, 211). As to counts 1 and 2, a multiple-murder special circumstance (§ 190.2, subd. (a)(3)) and a murder-during-commission-of-robbery special circumstance (§ 190.2, subd. (a)(17)) were alleged as to each defendant. As to all counts, it was further alleged that each defendant personally used a firearm during the commission of the offense. (§ 12022.5, subd. (a)(1).) (2CT 501-504.)

Appellants pled not guilty. (2CT 547-550.) On July 9, 1998, the prosecution stated its intent to seek the death penalty against appellants. (3CT 565-566.) Jury selection began on January 11, 1999. (4CT 880.) A jury was impaneled on January 12, 1999. (4CT 893.) At the end of the guilt phase, the jury found appellants guilty of first degree murder in counts 1 and 2 and guilty as charged in counts 3 and 4. The jury also found the firearm and special circumstance allegations true. (4CT 1010-1019.) After the penalty phase, the jury fixed the penalty at death for both appellants. (5CT 1221-1222.)

As to both appellants, the court imposed the death sentence on counts 1 and 2. As to count 3, the court imposed the midterm of two years as the base term, plus the high term of ten years for the firearm enhancement. The same term was imposed as to count 4. Punishment as to counts 3 and 4 were ordered to run concurrently to counts 1 and 2. (45CT 11896A -11905, 11914-11922.)

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

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

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecution Evidence

a. Appellants' Arrival at Lourdes Lopez's Party

On August 24, 1997, sometime in the evening, Lourdes Lopez paged appellant Mora, the father of her child, to come to her house. (6RT 1003-1010.) That same night, Ramon Valadez, working as a delivery person, went to Lopez's home, located at 1005 South Castlegate in Compton, to pick up a refrigerator to deliver to another location in Southgate. (6RT 842-843.) When Valadez arrived, a party had already begun at the house. (6RT 843.) A few individuals helped Valadez move the refrigerator into his truck. Thereafter, Valadez stayed at the party to "hang out." (6RT 844.) A few hours later, appellants arrived at the party in an Oldsmobile Cutlass. Appellant Mora was introduced to Valadez as an ex-boyfriend of Lopez. (6RT 845-848.) Appellant Mora was introduced as "Joker" and appellant Rangel as "Stranger." (6RT 847, 1011.) Appellant Mora wore extremely large shorts. (6RT 986.) Appellants left and returned to the party a few times. (6RT 849.)

At some point, Lopez, who had left her home before appellants' arrival, returned home. (6RT 1010.) She arrived to find appellants in her kitchen drinking and "getting high" with three other males. (6RT 1011-1012.) Lopez saw appellant Rangel with a gun in his waist. (7RT 1076-

1077.) At some point, Lopez danced with appellant Mora, who at the time did not have his shirt on. (7RT 1107.)

b. Lopez's Observations Before, During, and After the Shooting

At about 2 a.m., Lopez saw appellant Rangel walk outside the house and thereafter, heard him calling out to appellant Mora. (6RT 1019.) Appellants left the house through the kitchen door at some point. (6RT 1067.) Appellant Mora was not wearing a shirt when he left. (6RT 1108.) Three minutes later, Lopez heard gunshots. (6RT 1019.) At the time of the gunshots, Lopez observed that appellants were the only two from the party who were outside the house. (7RT 1110.) A minute after the gunshots, appellants re-entered the house through the kitchen door. (7RT 1068, 1073, 1117.) Lopez at the time believed that the gunshots were either "for" appellants or "they had done them."[2] (7RT 1137.)

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[2] Lopez testified that she made statements to the police that incriminated appellants because the police officers who interviewed her had been hostile and threatened to take her child away from her through the social services if she did not change her initial statements that tended to exculpate appellants. (7RT 1138, 1142-1143.) There were two interviews that were conducted on the same day. The first lasted about 45 minutes. She remained at the police station in between the interviews. (7RT 1145, 1158.) During the interview, the officers started and stopped the tape "many" times to direct Lopez as to what should be said. (7RT 1143; 8RT 1239-1240.) When the tapes of the interview were played, Lopez admitted that there were no instances in either of the tapes where the recorder was turned off and on. (8RT 1268-1269.) Lopez then claimed there were other tapes. (8RT 1271.) According to Lopez's trial testimony on cross-examination, people at the party, including herself, were using methamphetamine. She returned home, found appellants in the kitchen, and observed appellant Rangel with a gun in his waist. Prior to the gunshots, appellant Rangel called appellant Mora to the kitchen door. (7RT 1194; 8RT 1279.) Lopez did not see appellants leave the house from that time until the gunshots. (7RT 1195.) She heard gunshots while she was in the bathroom, and when she exited, she did not see anyone with any

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c. Eyewitness Account of the Shooting

Paula Beltran, Yesenia Jimenez, and Mayra Fonseca left a night club earlier that night and were on their way to meet Beltran's boyfriend, Andy Encinas (one of the victims), when Beltran's car, a Honda Civic, suffered a flat tire. (3RT 398; 8RT 1303.) Beltran paged Encinas, who shortly thereafter arrived in his Toyota 4-Runner with his friends Anthony Urrutia (the second victim) and Fidel Gregorio. (3RT 399-400; 4RT 625-626; 8RT 1304.) After a mechanic fixed the tire, Encinas, driving his car, followed Beltran's car on her way home. (3RT 400; 4RT 627.) While on the freeway, Yesenia said she wanted to go home, so both vehicles exited the freeway at some point and arrived at Yesenia's home on Castlegate Street. Encinas parked in front of Beltran's car. Everyone exited the cars except Urrutia and Gregorio. (3RT 402; 8RT 1306.) Urrutia sat in the front passenger seat. (3RT 406.) Gregorio, who was sitting behind Urrutia, was asleep by then. (4RT 628.) The time was about 3 a.m. (3RT 429.)

Encinas used the restroom in Yesenia's house. Yesenia then walked Fonseca, Beltran, and Encinas to the gate. As the three walked out of the gate, two Hispanic males with bald heads, appellants approached and walked past Beltran's car toward Encinas's car. Appellant Rangel was wearing light-colored pants and a large dark-colored shirt with short sleeves that extended down below the elbow. Appellant Mora was shirtless, had a tattoo on his "belly," and wore sagging light-colored "Joe Boxer Shorts." (3RT 403-404, 410-411; 4RT 644-646; 8RT 1307-1310.)

(...continued)
guns. Everyone was "panicky." She saw appellant Rangel, who had a shirt on, in the kitchen. Appellant Mora was with him. Lopez did not see, but only heard, "cars being moved." When the police arrived, Lopez observed that appellant Rangel did not have a shirt. Lopez testified that "Jade," another person at the party, also did not have a shirt on. (7RT 1147-1165, 1191-1192, 1203.)

Gregorio had woken up at this point and was able to see appellants standing nearby smiling. Affording lighting to the area were street lamps. (4RT 661-662; 5RT 714.) Gregorio closed his eyes and went back to sleep. (4RT 629, 631, 661-662; 5RT 714.)

Appellant Rangel asked Encinas, "Do you want to go to sleep?" At the time, appellant Rangel was about 15 feet from Beltran. Encinas and Beltran told each other to enter their respective vehicles. (3RT 405; 4RT 573.) Appellant Rangel spoke again and said, "Why are you quiet? I asked you a question: Do you want to go to sleep?" Fonseca and Beltran entered Beltran's car, and Encinas entered his. (3RT 406; 8RT 1315.) Gregorio heard Encinas say, "Let's get the hell out of there." (4RT 631.) Fonseca saw appellant Rangel pulled out a chrome gun and screamed for Beltran to leave. After Beltran and Fonseca screamed at each other over a disagreement as to whether to leave, Beltran drove away. (4RT 1316; 8RT 1317-1318, 1324.)

Appellant Rangel went and stood outside the driver's window of the 4-Runner. (3RT 407, 632.) Appellant Rangel produced a gun and pointed it at Encinas. (3RT 407-408; 4RT 633; 8RT 1325.) Appellant Rangel said, "Check yourself. Check yourself. Give me your wallet." (4RT 632, 634.) Encinas replied, "Aw, man. Come on, man. Aw." (4RT 634.) As Encinas leaned over to retrieve his wallet, appellant Rangel fired his gun at Encinas. (4RT 635.) Appellant Mora then approached the front passenger window and stated to Urrutia, "Give me your wallet." (4RT 634.) Gregorio, at the time, was able to see appellant Mora's face again, in addition to his tattoo and his shorts. (4RT 740.) Urrutia said, "I don't have any money, but I will give you my wallet anyways." (4RT 637.) Appellant Mora shot Urrutia afterward. (4RT 637-638.) Appellant Rangel fired more shots at Encinas thereafter. (4RT 638.)

John Youngblood, who lived at 1019 South Castlegate, which was located behind the 4-Runner on the same side of the street, heard two gunshots and looked out his window. Appellant Rangel, who was facing "northwestbound" and thus was facing Youngblood's direction, was standing at the driver's side of a 4-Runner. Youngblood could only see the back of the individual standing at the passenger side of the 4-Runner. The area was lighted such that it was "just like day." Youngblood also saw a car speeding off "going up the street." As Youngblood left the window to open his front door, he heard four more gunshots. Appellant Rangel then walked by Youngblood's house as Youngblood opened his door. (10RT 1626-1633, 1639, 1648.)

After the shooting, appellants ran northbound. Gregorio exited the car and yelled for help. (4RT 639-640; 10RT 1650.) Youngblood, who by that time had exited his house, saw the two victims "with their head[s] back" inside the car and tried to calm Gregorio down. (10RT 1634-1635.) Gregorio was informed by two Black males that they had already called the police. (4RT 641.) Gregoria sat down on the sidewalk and waited for the police. (4RT 642.)

d. Appellants Fleeing the Location of the Shooting And Entering Lopez's Residence

Sheila Creswell, who lived at 1000 Castlegate and could not sleep that night because of the party at Lopez's house directly across the street from her house, observed appellant Rangel to be among the individuals at the party. (4RT 788-789.) At some point, she heard gunshots, about three in number, and ran to her bedroom window. (4RT 789-790.) The area was well-lit. (4RT 806.) She observed two males, with shaved heads, run from a truck parked about six houses down the street from her house. One of the

two males was appellant Rangel.[3] The two ran toward the house hosting the party and entered it.[4] (4RT 791-792, 805.) Her observation of the two males running to the house lasted about two seconds, during which she saw the right side of their faces. (4RT 798-799.) Prior to that incident, Creswell had seen both appellants every weekend at the house where the party had been taking place that night. (4RT 802.) After the two males ran inside the house, all the lights inside the house were turned off. (4RT 806.)

e. Appellants' Admissions After They Entered Lopez's Residence

Inside Lopez's residence, Valadez heard the gunshots and shortly thereafter observed appellants entering the house carrying firearms. Appellant Mora had a black machine gun and appellant Rangel had chrome handgun. (6RT 850-851, 868, 980.) Appellant Rangel was wearing a black shirt while appellant Mora was shirtless. (6RT 858, 860.) Both appellants bragged that they had just "shot a couple guys." (6RT 852-853.) One of them said, "Fucking blew their heads off." (6RT 853.) One of them mentioned that a bullet was still stuck inside his gun, and said, "We would have kept on going if the gun hadn't got jammed." (6RT 873, 975.) Panic and chaos ensued. (4RT 856.) Someone told appellant Rangel to take off his shirt and to wipe his own arms with it to get rid of gunshot residue. (4RT 859.) Appellant Rangel took off his shirt and wiped his arms with it. (4RT 860; 7RT 1105.) Both appellants, at some point, ran outside with the

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[3] Creswell picked out photograph 6B as belonging to the second male who was running with appellant Rangel into Lopez's house. (5RT 825.) Creswell testified she had seen that person "every day" outside Lopez's residence. (5RT 826.) The photograph is that of someone with a shaved head. (5RT 826.) Photograph 6B apparently is a photograph of Jade Gallegos. (7RT 1176.)

[4] She recalled that appellant Rangel was wearing a short sleeve shirt. (3RT 809-810.)

firearms, and returned to the house without them. (4RT 977.) Appellant Mora, after entering the house, "grabbed" his car keys and moved his Oldsmobile into the garage. Appellant Mora then parked Lopez's car behind his car. (7RT 1082-1083, 1094, 1103.) Everyone inside the house soon heard sirens and helicopters, and the lights and music were turned off.[5] (4RT 857, 862; 7RT 1081.) Appellant Mora also told Lopez to enter her bedroom so "the baby won't wake up" and see "her daddy go to jail." (7RT 1088, 1091-1092.) Appellant Mora put on a shirt at some point. (7RT 1108.)

f. Paula Beltran Calls 911

Before the shooting, after the two had entered Beltran's car, Beltran argued with Fonseca regarding whether to leave. After the two screamed at each other, with Fonseca urging her to drive away, Beltran reluctantly made a U-turn and drove her car away from the scene prior to the shooting. As they drove away, Fonseca kept screaming and crying. Beltran thereafter drove to a nearby payphone and called 911. She gave the police the descriptions of the two Hispanic males. (3RT 408-409; 8RT 1317-1320.) Beltran and Mayra stayed at the telephone booth until the police picked them up. (3RT 412-414.)

g. On-Scene Investigation

Compton Police Officer Raymond Brown responded to the shooting and observed both victims in the south-bound parked 4-Runner with gunshot wounds. Officer Brown observed expended casings, 9 millimeter in caliber, in and around the car and saw two wallets in plain view inside the car. The two wallets contained identification information belonging to

[5] Valadez admitted to using "two lines of methamphetamine" and drinking beer during the party. The methamphetamine "wakes" him up. (6RT 978.)

the two victims. One wallet was in the center console and the other one was in the passenger seat. A beer can was found at the left rear wheel area of the car. A ring was found outside the passenger door between the car and the curb. These items were collected as evidence by Compton Police Detective Marvin Branscomb. (9RT 1431-1433; 10RT 1523, 1525-1539.) Detective Branscomb also observed bullet holes to the car. (10RT 1580-1581.) Officer Brown observed there was lighting at that location coming from the street lights, lights from houses, and the 4-Runner itself. (9RT 1434.)

Creswell approached the officers and spoke with Officer Eric Strong. (3RT 807; 11RT 1765.) Officer Strong and other officers thereafter went to Lopez's home to search for the suspects, described as "two male Latin[o] adults, with bald heads, dark pants; one had a shirt and one did not have a shirt on." Lopez opened the door. Several individuals including Valadez and appellants were inside the house. Others include Russell Tungett, Jose Jimenez, Ricardo Zavalos, Enrique Ibarra, Jade Gallegos, and Nancy Gonzalez. Appellant Mora was found sitting on the toilet. They were all escorted outside the house. (6RT 862; 8RT 1435; 11RT 1757-1770.) Officer Strong obtained consent from Lopez to search the house and found an empty gun case for an Intratec firearm. (11RT 1771) Officer Strong observed that the beer cans found inside the house were of the same kind as the can found underneath the victim's vehicle, described as a "wide mouth can" of Budweiser beer. (11RT 1780.)

Valadez informed the police that he had a panel truck parked in the front of the residence. (11RT 1773.) Valadez's truck was searched and nothing was found. (11RT 1773.) Ricardo Zavalos also reported that he owned a burgundy Chrysler parked on the street. A search of that car did not reveal any evidence. (11RT 1173-1174.) The officers searched Lopez's Honda Accord and found nothing. (11RT 1774.)

Thereafter, Officer Brown found an Oldsmobile parked halfway into the garage of Lopez's residence. After Lopez gave consent for the search of that car, which she said belonged to her boyfriend, Officer Brown conducted the search and found two firearms on the floorboard on the passenger side. (8RT 1436; 11RT 1775.) Detective Branscomb collected the two firearms, one being a loaded TEC-9 nine-millimeter semiautomatic assault rifle with a long magazine clip. The gun had the words "Intratec" written on it. The other firearm was a loaded chrome-plated semiautomatic pistol with a brown grip and a bullet jammed at the breech. (10RT 1540-1549; 11RT 1776.) Officer Strong asked appellant Mora if the Oldsmobile belonged to him, and appellant Mora denied it. (11RT 1777.) Appellant Mora's cousin, Candy Lopez, confirmed at trial that the Oldsmobile, which was registered in her name, actually belonged to appellant Mora, who did not share it with anyone else. (11RT 1807-1810.)

The occupants of the house were thereafter shown to witnesses of the shooting in a field line-up. (6RT 863.)

h. Field Line-Up

After Beltran and Fonseca were picked up by the police, they were first interviewed at the police station and later brought to the front of Lopez's house for an in-field lineup composed of about ten individuals. There, they identified appellants as the males who approached the victims. (3RT 412-414, 444, 448, 454; 6RT 863-864; 8RT 1322.) At the time of the identification, appellant Rangel was not wearing a shirt while appellant Mora was wearing one. According to Beltran, this was in contrast to the time before the shooting, when appellant Rangel wore a shirt while appellant Mora did not. (3RT 414.) [Double Check]

Before the in-field lineup was conducted for Gregorio, he drew a picture for the police of the tattoo that he observed on appellant Mora and described it as a cross. Gregorio was then shown about nine to ten people

in a lineup outside of Lopez's house. Out of the group, Gregorio asked that appellant Mora, who was wearing "Joe Boxer" shorts, to lift up his shirt so that Gregorio could see whether he had the tattoo of a cross he earlier observed. After confirming the presence of the tattoo, Gregorio identified appellant Mora as the shooter on the passenger side of the car. (5RT 651-652, 655.) During trial, appellant Mora was asked to lift up his shirt for the jury to observe a tattoo on his abdomen; the tattoo was of a handwritten name. A vertical scar extended across the tattoo such that the figure of a cross was formed. (5RT 656.) Gregorio also identified appellant Rangel from the group as the assailant on the driver's side of the vehicle. (5RT 660.)

Detective Branscomb and Sergeant Swanson interviewed Lourdes Lopez at some point. The interview was tape-recorded, resulting in two taped statements. In between the two taped statements, Lopez was hungry and was given "jail food." (10RT 1549-1550.) Detective Branscomb did not stop the tape at will, did not threaten Lopez, and was not hostile to her. (10RT 1551.) Nor did Detective Branscomb speak with the social services that day. (10RT 1610.)

After conducting interviews of various witnesses, Detective Branscomb went inside Lopez's residence and searched for a black shirt and found it. (10RT 1553.) That shirt was booked into evidence. (10RT 1554.)

i. Autopsy

Los Angeles County Deputy Medical Examiner Solomon Riley examined the body of Andy Encinas and found that he suffered a gunshot wound to the left shoulder caused by a trajectory that eventually entered the left chest and struck both the lung and an aorta. That bullet was recovered from the chest cavity, and the wound was fatal. (11RT 1718 -1724.) Dr. Riley also examined the body of Jose Urrutia and found a gunshot wound

to the right side of the face caused by a bullet that went through the mouth and throat and eventually perforated a large blood vessel on the left side of the neck. That bullet was recovered from the decedent's back near the neck. The wound caused Urrutia to bleed to death. (11RT 1725, 1731.) There was a gunshot graze wound to the Urrutia's forearm. (11RT 1727.)

j. Forensic Evidence

Los Angeles County Sheriff's Criminalist Dale Higashi examined the Intratec semiautomatic firearm and the Astra semiautomatic pistol recovered in this case. (12RT 1830.) The Astra pistol, at the time it was recovered, was jammed with the bullet due to a feeding problem. (12RT 1832.) After examining the ballistic evidence recovered from the crime scene and making a comparison with the recovered firearms, Higashi determined that three of the expended casings from the scene were fired from the Astra pistol while an expended cartridge case came from the Intratec pistol. Higashi also found that two expended bullets from the scene were fired from the Astra Pistol. A bullet recovered from Encinas's body matched the Astra pistol. A bullet recovered from Urrutia's body matched the Intratec pistol. (12RT 1834-1836.)

2. Appellant Rangel's Defense

Compton Police Officer Gonzalo Cetino was the officer who made contact with Beltran at the public telephone booth. (12RT 1897-1900.) Beltran informed Officer Cetino that she believed her boyfriend had been shot. (12RT 1901.) Officer Cetino drove Beltran and Fonseca to the police station. (12RT 1902.) Beltran described one suspect as a Hispanic male, about twenty years of age, five feet eight inches tall, weighing 165 pounds, wearing no shirt, and having a shaved head. She described the other suspect as a Hispanic male of roughly the same height, weight, and age, having a shaved head, and wearing a light brown shirt. (12RT 1903-1904.)

Beltran said the one with no shirt was on the driver's side of the victim's car and was the one who said, "You want to go to sleep?" (12RT 1907-1909.) Officer Cetino then drove Beltran to an in-field lineup.[6] (12RT 1905.)

After Police Officer Sergio Lepe arrived at the scene of the shooting with his partner, Officer Brown, they "handled" the scene. Sometime later, Officer Lepe made contact with subjects inside Lopez's house. Officer Lepe testified that his police report reflected that at about 12:45 p.m. on August 24, 1997, he had arrested Jade Gallegos on an arrest warrant. Gallegos was described as five feet eight inches, wearing blue shirt and shorts. (12RT 1940, 1946.) Based on the booking slip, Officer Lepe testified that Gallegos had a tattoo on his stomach. The booking information also showed him to weigh 145 pounds. (12RT 1948, 1955.)

Compton Police Officer Ed'ourd Peters also responded to the scene of the shooting. (12RT 1958.) Officer Peters interviewed Gregorio, who told him the person without a shirt and wearing sagging "khakis" was on the passenger side of the victim's vehicle. (12RT 1960, 1967.) Gregorio told Officer Peters that the person on the driver's side had a blue shirt. (12RT 1967.) Gregorio identified only one person from the field show-up, i.e., appellant Mora, and indicated he was the one who demanded Urrutia's wallet. According to Gregorio, Urrutia said, "Here, take it." Appellant Mora thereafter shot Urrutia from the passenger side. (12RT 1967-1968,

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[6] Officer Cetinas testified on cross-examination that no names were used during the interview with Beltran. (12RT 1912.) Officer Cetinas testified that Beltran identified appellants out of a group of individuals in the field lineup. (12RT 1914.) At trial, Officer Cetinas identified appellants as the ones selected by Beltran but could not remember which one was appellant Rangel and which one was appellant Mora. (12RT 1916-1923.)

1977, 1979, 1983, 1985.) Officer Peters's report did not indicate the existence of a tattoo on one of the shooters. (12RT 1974.)

Officer Cetinas's partner, Officer Timothy Dobbin, participated in the interview of Mayra Fonseca. (13RT 2011-2013.) From the subsequent field show-up, Fonseca identified someone as the one who said, "You want to go to sleep," and who went to the driver's side of the victim's vehicle. Officer Dobbin thereafter, through his effort, determined that the person identified was appellant Mora. Officer Dobbin acknowledged it may have been possible that he reversed the identities of the two defendants. (13RT 2017-2021, 2027.)

Sheriff's Criminalist Michelle Lepisto testified that the gunshot residue analysis conducted upon appellant Rangel revealed no particles of gunshot residue on the hand surfaces and that "no conclusion can be drawn based on the result of this analysis." (13RT 2040-2051.) The inconclusive nature of the analysis was due to the fact that gunshot residue wear away over time and there was no specific time noted for when the sample was collected. Also, gunshot residue can easily be removed by wiping or washing. (13RT 2053-2058.) Lepisto did find lead and tin particles on appellant Rangel which were consistent with gunshot residue. But, because the particles were irregularly shaped, Lepisto could not determine whether they were gunshot residue. (13RT 2060-2061.) Compton Police Sergeant Ronald Thrash testified that he collected that residue sample minutes before 9:37 a.m., the time it was sealed on August 24, 1997. (13RT 2089-2091, 2100-2103.)

Compton Police Officer Jeff Slutske testified that on the night of the shooting, he was a new officer under training by Officer Eric Strong. (13RT 2074-2075.) Officer Slutske interviewed Youngblood, who said he heard a vehicle but did not see one. Youngblood also said he was asleep

and was awakened by the first gunshot. Youngblood did not give a description of the clothing of the suspects. (13RT 2079.)

3. Appellant Mora's Defense

Appellant Mora did not present evidence in his defense save for a stipulation with the prosecution that Exhibit GG was a true and correct photograph of the way appellant Mora looked on August 24, 1997. (14RT 2156.)

4. Prosecution Rebuttal

Detective Branscomb testified that the beer can recovered from underneath the victim's car had in fact been sent for fingerprint analysis by Detective Piaz. (14RT 2164-2166.)

B. Penalty Phase

1. Appellant Rangel's Vehicular Burglary

Alejo Esquer, a reluctant witness who was surprised to see appellant Rangel in the courtroom, testified that on October 28, 1995, at about 2:50 a.m., he was awakened in his house by his cousin, who informed him that Esquer's car was being stolen. Esquer exited his house in his shorts and saw appellant Rangel pushing Esquer's truck while someone else was in the driver's seat steering the truck. The window of the truck, which had been intact before, was broken, and the stereo had been pulled out. (16RT 2510-2513, 2525.) The truck had also been painted with the number "13" and a word that began with "T." (16RT 2514.) Esquer and his two brothers approached. Appellant Rangel and his cohort began to run. Esquer and his brother caught up to appellant. (16RT 2543-2544.) They argued and began a physical struggle with him. Appellant Rangel at some point told Esquer to stop and made the gesture of a gun with his hand. (16RT 2516-2519.) Appellant Rangel also threatened to kill him if he called the police. Appellant Rangel said, "We know where you live." (16RT 2528.) Los

Angeles County Sheriff's Deputy Kevin Hilgendorf and his partner, Deputy Avina, who received a broadcast about the incident, arrived and arrested appellant and his cohort. Deputy Hilgendorf saw the words "KCC" spray-painted on Esquer's truck. (16RT 2549, 2555-2559.) Esquer told Hilgendorf he took appellant Rangel's threat seriously because he knew he was a gang member. (16RT 1570.) During the arrest, appellant Rangel and his cohort were joking about the whole incident as if they were not worried about the arrest. (16RT 2585.)

2. Appellant Mora Instigating Group Assault on Jail Inmate

Paul Juhn testified that while in county jail for a probation violation on July 29, 1996, appellant Mora demanded Juhn turn over his mattress. When Juhn refused, appellant Mora swung at him. Juhn stood up to fight back but appellant Mora left Juhn's cell with his mattress by that time. Appellant Mora then returned with five other individuals, and the group insulted Juhn with ethnic slurs and assaulted him, causing various injuries throughout his body. (19RT 2676-2682.) Jail deputies arrived and conducted a lineup comprising of Hispanic inmates. Juhn identified appellant Mora and three other individuals as the assailants. Appellant Mora's listed address was 1039 Glenco in Compton. Appellant Mora had a tattoo on his chest made up of three words. (19RT 2700-2722.) Jail deputy Kresimir Kovac documented Juhn's injuries as a swelling to the right side of his face, 15 bruises to his back, scrapes to his right hand and left ear, and pain to his head and face. (19RT 2728-2729.)

3. Victim Impact Testimony

Urrutia's sister Olivia Perez testified about Urrutia's life, explaining what various family photographs depicted. (16RT 2591-2595.) Perez described how Urrutia had always been close with his father until his father became bedridden just before passing away. (16RT 2595-2596.) Urrutia

was a loving and easygoing person, who loved to help people. He played football and baseball in high school, where he met Encinas and became friends. (16RT 2597, 2598.) He participated in neighborhood community programs to "clean up in the area," including a program conducted by the Long Beach Neighborhood Service Bureau, and volunteered his services as an interpreter for St. Mary's hospital. (16RT 2597-2598, 2602.)

Urrutia's dream was to become a police officer. He joined the explorer scouts of the police department while in high school. After graduating from high school, he volunteered at St. Mary's hospital, interpreting for those who could not speak English. He attended city college and while there, passed the police department's exam before he turned 21. Urrutia was told to apply to the department when he met the minimum age of 21 years old. Urrutia stayed in college until he found a job as a loan representative in Long Beach. (16RT 2597-2599.) Four months before his death, he passed the test for the police department again, and was contemplating whether to enter the department despite his mother's worries about the risks of the career path. (16RT 2600.-2601) When Urrutia died, the city of Long Beach set up a mural for him for the month of September. The loan company shut down for a week out of respect for him. (16RT 2599, 2601-2602.) Urrutia's death devastated his family. (16RT 2604-2607.) One fond memory that Perez had was Urrutia, at age 14, being hired by the International House of Pancakes restaurant at Long Beach to wear the costume of a pancake. (16RT 2666.)

Urrutia's nephew, Javier Soto, reiterated how Urrutia was a loving and friendly individual, whose death had "torn [the family] apart." (16RT 2610-2615.)

Urrutia's mother, Virginia Urrutia, testified that Urrutia had been an altar boy since age seven and had dreamed of becoming a police officer despite the risks. Urrutia had always been a devoted son, who would take

his family to clean the grave of his father after he passed away. (16RT 2617-2622.)

Andy Encinas's sister, Luz Gamez, testified that Encinas was a football, baseball, and basketball player at St. Anthony's high school. Encinas's family would attend those games. After graduating high school, he worked as a Triple A dispatcher while attending city college. He was a loving person who was helpful to everyone. Encinas took care of Gamez's son and grew close to him. Encinas, like Urrutia, wanted to be a police officer, and two months prior to being killed, had passed the department examination. (17RT 2632-2644.)

Sergio Encinas, the older brother of Andy Encinas, described Encinas as a "300-pound teddy bear" friendly to everyone. (17RT 2645-2646.) When Encinas passed the police department examination, Encinas's father was very proud of him. (17RT 2647.) Sergio would not let his father know that the trial was ongoing because the murder had taken a toll on the health of his parents. (17RT 2651.) Encinas's death was a pain to Sergio that would never go away. (17RT 2654.)

Paula Beltran testified about Encinas and her plan to marry him and to have a family. (17RT 2659.) Beltran testified that Encinas's dream was to become a police officer first and thereafter marry Beltran. (17RT 2660.) Beltran could not forgive herself for having paged Encinas to inform him of her flat tire. She felt that had she not paged him, the shootings would not have occurred. (17RT 2661.) Beltran had nightmares sleeping and did not want to wake up in the morning. (17RT 2662.)

4. Appellant Rangel's Defense

Appellant Rangel's mother, Linda Rangel, testified that she began living with appellant Rangel's father, Ruben Gomez Rangel, when she was just 17 years old. (1RT 2780.) Linda was tired of living at her own home because after her mother passed away, she had acted as a mother figure to

her younger siblings and carried heavy household responsibilities. (1RT 2780.) Linda and Ruben eventually moved into an apartment, and a year later, their first child, Carmen, was born on February 28, 1972. (1RT 2777, 2782.) Appellant Rangel was born on March 12, 1975, out of wedlock. (17RT 2776.)

Linda, who did not use drugs or alcohol during pregnancy, began drinking after giving birth to appellant Rangel, but she only drank occasionally. (17RT 2785, 2810.) In 1980 or 1981, Linda began using heroin when she found out Mr. Rangel had been doing so. (17RT 2786-2787.) Once in 1983, when appellant Rangel was nine years old, he walked in on Ruben and Linda making preparations in the bathroom for the use of heroin. (17RT 2790-2791.) Ruben and Linda frequently used the bathroom to consume heroin for "hours on end" while their kids were in the house. (17RT 2792.) During this period, about once a week, Ruben would return home intoxicated and beat Linda in front of the children. He would also call her bad names. (17RT 2793-2794.) Linda would sometimes use heroin with her sister Crystal in Crystal's bathroom as the children were in the living room. (17RT 2796.) Linda never left appellant Rangel unattended by an adult. (17RT 2812.)

When appellant Rangel was five years old, Ruben found someone else and separated from Linda. (17RT 2793, 2797-2798.) Linda turned the children over to Ruben's care. (17RT 2798.) Linda then stayed for some time with her alcoholic father. She lived on the streets for two years, prostituting to support her heroin habit. She sometimes would visit appellant Rangel. (17RT 2799-2801.) Around 1987, Linda's sister, Rachel, died from a heroin overdose. (17RT 2788.) In 1988, Linda stopped using heroin because she found God. (17RT 2796.) As of the time of trial, she had been drug-free from 11 years. (17RT 2813.) Linda began

to involve Ruben in church. (17RT 2811.) Linda never told appellant Rangel that she had been a prostitute. (17RT 2812.)

Ruben Gomez Rangel, appellant Rangel's father, testified that he and Linda used heroin together around 1979 or 1980. (17RT 2857-2864.) Ruben also used cocaine. (17RT 2865.) At some point, while the children were inside the house, they were using heroin everyday inside the bathroom away from the children. (17RT 2865-2870.) The drug habit was in part funded by a court settlement Ruben received for a work-related injury. (17RT 2884-2885.) Sometimes, after returning home without being able to purchase heroin, Ruben would hit appellant Rangel out of frustration using his hand or belt. (17RT 2872-2874.) He would also sometimes hit Linda. (17RT 2873.) Once, while he was drunk, Ruben struck Linda in front of appellant Rangel, causing a scar to Linda. (17RT 2876.) When Ruben separated from Linda, appellant Rangel wanted to be with Linda, but Linda told him to stay with Ruben. Appellant Rangel cried at the time. (17RT 2874.) Ruben testified that because of his drug habit, he often neglected to buy food and clothing that his children needed. (17RT 2875-2876.)

Ruben testified that the day before the murder, appellant Rangel had been at his home drinking with him and others the whole day. (17RT 2878.) Appellant Rangel had five shots of tequila and more than six beers. (17RT 2880.) Ruben was not aware that appellant Rangel used cocaine or methamphetamine. (17RT 2881.) That night, at about 11:30 p.m., after receiving a page, appellant Rangel left Ruben's home intoxicated. (17RT 2883.)

Ruben testified that he had been a member of the Compton Varrio gang from age 15 through age 28. Appellant Rangel was born sometime during that period and knew of Ruben's gang membership. (18RT 2898.) Ruben had been shot once by a rival gang member while he was with appellant Rangel. Appellant Rangel was ten years old at the time. (18RT

2903.) Ruben advised appellant Rangel to stay away from gangs. (18RT 2902-2904.)

Appellant Rangel's sister, Carmen Menendez, testified that before her parents separated, she was aware they were using drugs from the objects they were leaving around the house. Carmen testified that her parents would go into the bathroom for about an hour as she and appellant Rangel watched television. (18RT 2935-2937.) Appellant Rangel would always wonder what they were doing in there. (18RT 2937.) Carmen testified that for roughly two years, they sometimes did not have food to eat. (18RT 2938.) Carmen also remembered that Ruben would hit appellant Rangel and her frequently. (18RT 2939.) Ruben also remembered several occasions when Ruben struck Linda in the presence of the children. (18RT 2947.) Appellant Rangel would ask Ruben to stop, to no avail. (18RT 2947.) When appellant Rangel was eight, their parents separated; appellant Rangel stayed with their father while Carmen stayed with their mother. (18RT 2942.) For a short period of time, Carmen went to live with Ruben and appellant Rangel, and during this time, she and appellant Rangel would be left to the care of a female friend of Ruben's. (18RT 2945.) Carmen testified that appellant Rangel was a methamphetamine user and that she used drugs with him. At the party on the day before the murder, appellant Rangel had also been drinking. (18RT 2950-2951.) Carmen was the one who gave appellant Rangel a ride when he left the party. (18RT 2953.) Carmen noticed that appellant was not slurring or stumbling, but had the smell of alcohol. (18RT 2975.)

Jose Jimenez testified he was a bible study teacher and had met appellant Rangel through a home bible study in 1989, when appellant Rangel was 16 years old. Appellant Rangel attended these bible studies until 1992. (17RT 2816-2817.) Appellant Rangel married his wife in Jimenez's house. (17RT 2818.) After appellant Rangel made a choice to

stop going to church, Jimenez tried unsuccessfully persuade him to return. (17RT 2834-2835.) Based on Jimenez's association with appellant Rangel, he found it was hard to believe that appellant Rangel committed the murder. (17RT 2819.) Jimenez testified that he would be surprised if he were to hear about appellant Rangel's attempt to take a car and his threats to kill the owner. Jimenez also could not picture appellant Rangel as a gang member. (17RT 2821-2822, 2829-2831.)

Aurora Rangel, appellant Rangel's wife, testified she and appellant Rangel have a daughter, Vanessa, who was born in 1992. (17RT 2839-2840.) Appellant Rangel was very close to Vanessa. (17RT 2841.) At some point, they separated because appellant Rangel found another woman. However, appellant Rangel visited his daughter every two weeks to take her on outings. (17RT 2848-2849, 2855.) After appellant Rangel was arrested, Vanessa, who missed her father, repeatedly inquired where he was but Aurora could not tell her the truth. (17RT 2851.)

Desiree Leanos testified that she became appellant Rangel's girlfriend in 1995, when she met him in church. (18RT 2907.) Appellant Rangel and Leanos had two children together, the youngest born after appellant Rangel's arrest for the murders. (18RT 2908.) Leanos testified that appellant Rangel was a methamphetamine user and drank a six-pack of beer every day. (18RT 2915, 2920.) Leanos testified that appellant Rangel was at a party at his father's house the day before the shooting and was drinking tequila. He left his father's house at 11:30 p.m. on the night of the shooting. (18RT 2916, 2918.) Leanos brought appellant Rangel's children to see him at the jail after the arrest. (18RT 2917.) Leanos admitted that after separating from appellant Rangel months before the arrest, appellant Rangel found a new girlfriend named Joanne. (18RT 2922.)

5. Appellant Mora's Defense

It was stipulated that appellant Mora did not have a prior felony conviction on his record. (18RT 2760.)

Cruz Mora testified that he was not sure that he was appellant Mora's father because appellant Mora's mother, Rosita Mendez, were having sexual relationships with other members of Cruz's family, including his brother, his uncles, and cousins. (19RT 2994.) Nonetheless, Cruz decided to marry Rosita after she became pregnant. (19RT 2995.) The two divorced when appellant Mora was four and Cruz had very little contact with appellant Mora thereafter. (19RT 2995.) The one exception was when Appellant Mora was shot and hospitalized when he was 19 years old. Appellant Mora and his girlfriend, Lourdes Lopez, and their child thereafter moved in with Cruz only to be asked to leave sometime later because they left the house very dirty. Cruz thereafter had very little contact with appellant Mora. (19RT 2998.)

Rosita Mendez testified that she and Cruz had a verbally and physically abusive relationship and that appellant Mora once witnessed Cruz throw a lamp at Rosita, causing cuts to her head. (19RT 3004-3006.) They divorced when appellant Mora was four years old. (19RT 3007.) Appellant Mora then went to stay with Rosita's sister. (19RT 3007.) Appellant Mora returned to her when he was five years old. At some time thereafter, Mendez had another child. When appellant Mora was 13 years old, he was sent away again because Rosita was getting married. (19RT 3008, 3013.) While appellant Mora was staying with Rosita, she frequently went out dancing and using drugs, leaving her children by themselves at home. (19RT 3010.) After appellant Mora left, he lived with different relatives. (19RT 3010.) Rosita testified that she wished it was her that would be executed because she had been a bad mother. (19RT 3011.)

Appellant Mora's aunt, Victoria Cokerill, confirm that after Cruz and Rosita separated, Rosita began "going out and drinking." (19RT 3020-3022.) During the year that she had care of appellant Mora, Cokerill, who did not drink, never abused him and took good care of him. (19RT 3022-3023.)

Appellant Mora's cousin, Candy Lopez, who was Cokerill's daughter, testified that during appellant Mora's childhood, appellant Mora's father dated other women. (19RT 3026-3028.) Appellant Mora's younger sister, Alicia Mora, testified that when she was seven or eight years old, Rosita frequently left her, appellant Mora, and Alicia's infant brother at home by themselves. (19RT 3045.) Alicia testified that appellant Mora had been shot once when he was 18 years old which caused him to lose his spleen. (19RT 3046.)

6. Prosecution Rebuttal

Compton Police Officer Andrew Zembal testified as a gang expert. (20RT 3078.) Officer Zembal testified that the King City Criminals ("KCC"), originally a tagging crew, became a full-fledged street gang in 1994 as a result of a meeting of several gangs in the area. (20RT 3079-3081.) Appellant Rangel was a self-admitted gang member of KCC who sported numerous gang tattoos, including those representing the notion of "my crazy life" and one explicitly stating, "Compton King City Criminals." (20RT 3090-3098.)

ARGUMENT

I. DISCOVERY DELAYS DID NOT VIOLATE APPELLANTS' CONSTITUTIONAL RIGHTS; ANY ERROR WAS CLEARLY HARMLESS

Appellants first urge reversal because of the prosecution's discovery violations. Specifically, appellant Mora contends that various instances of late disclosure of evidence by the prosecution violated the state discovery rules and further constituted *Brady*[7] error. Appellant Rangel essentially makes the same contention, except he frames the argument in terms of error from the trial court's refusal to grant a mistrial due to the discovery violations. (RAOB 33-54; MAOB 31-50.) These contentions must be rejected, as there was no violation of the state discovery statute in many instances, and even if there was, the resulting error was harmless. Moreover, appellants cannot demonstrate any *Brady* error. Finally, the trial court's denial of mistrial requests was proper.

A. Relevant Proceedings

1. Disclosure of GSR Reports

On Friday, January 8, 1998, after hardship issues were addressed as to potential jurors, a discussion was held about GSR reports showing appellant Mora to have tested positive for GSR but reflecting inconclusive results as to appellant Rangel, that had just been turned over to the defense on January 7, 1998. Appellant Mora sought the exclusion of the GSR report as to him because of the failure to turn over the material 30 days before trial. (1RT 63-66.) The prosecutor informed the court that she had repeatedly called the laboratory for the analysis to be performed, but because of the backlog, she received the reports on January 7, 1998. (1RT

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[7] *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215].

66-67.) The court held that the evidence should be excluded. (1RT 67.) The court allowed appellant Rangel to present GSR evidence as to his client and to argue the GSR results turned out negative. (1RT 68.)

2. Claim that Second Transcript of Lourdes Lopez's Statement Was Missing

The jury began to hear the evidence at the guilt phase on January 12, 1999. (4CT 893.) Paula Bertran testified on the same day. (4CT 893.) On January 13, 1999, Beltran finished testifying, and Fidel Gregorio began his testimony. (4CT 897.) On January 14, 1999, Gregorio finished his testimony and Sheila Creswell began her testimony. (4CT 901-902.) On the next court date, January 19, 1999, Valadez began and completed his testimony. Thereafter, Lourdes Lopez was called to the witness stand. (4CT 916.)

During Lopez's testimony, counsel for appellant Rangel claimed to only have received from the prosecution the first transcript of Lopez's police statement and not the second.[8] After further discussion, it became undisputed that appellant Mora's counsel had both transcripts. The prosecution indicated it had given both transcripts to both appellants. (6RT 1021-1025.) The court resolved the problem by concluding the court session for that day (at "a quarter to 4:00") so that appellant Rangel's counsel could obtain a copy of the second transcript and be able to resume the next day "in the same position as everybody else." There was no objection to this proposed course of action. (6RT 1025-1026.)

3. Disclosure of Two Diagrams

Counsel for appellant Rangel then raised a discovery issue, stating that the previous week, she saw that Detective Piaz's notebook contained a

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[8] The first transcript was ten pages in length (1CT 1-10) and the second, 24 pages (1CT 11-34).

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.) The prosecutor stated she turned over all the materials that she had and that she did not have those diagrams either. (6RT 1027.) Counsel for appellant Mora stated that she also did not have the two diagrams. (6RT 1028.) It was agreed that appellant Rangel's counsel would examine the police notebook that same day to determine what else was not turned over. (6RT 1027-1028.)

4. Disclosure of Four Police Reports Containing Witness Statements

The next morning, on January 20, 1999, appellant Rangel's counsel reported that she found four reports that she did not previously receive. She represented that the first was a six-page report that contained statements from 13 different witnesses. She felt at least two of the statements were relevant to the credibility of witnesses who have already testified. (7RT 1037-1038.) Counsel stated that she had no reason to believe that the prosecution was in possession of these reports, but nonetheless, she concluded that the Compton Police Department and the prosecutor were practically equivalent, and this discovery violation should result in dismissal of the action. (7RT 1038-1039.)

Appellant Mora's counsel joined in the objection, asserting that the nondisclosure also constituted a *Brady* violation, because the material would have allowed the parties to cross-examine the witnesses differently. (7RT 1041.) The materials in question were: (1) a four-page police report dated August 24, 1997 concerning Enrique Duenas Parra; (2) an eight-page police report dated August 24, 1997, concerning Jade Gino Gallegos; (3) a nine-page follow-up investigation report, apparently dated August 25,

1997, containing a number of witnesses's statements; and (4) a police report concerning Ramon Valadez. (7RT 1043-1045.) The court stated its concern about a statement made by William Florence that he saw a black Hyundai or Honda traveling northbound on Castlegate out of view. The court noted another statement about someone hearing a car "taking off after the shots," which the court stated was "a little inconsistent with what we have heard so far." The court also noted that someone heard a woman's voice. (7RT 1046-1047.)

Appellant Rangel's counsel requested a week's continuance for her investigator to investigate the statements in the reports. (7RT 1045.) The court noted it was Wednesday morning and was willing to give the defense a continuance until Monday. (7RT 1047.) Appellant Mora's counsel stated," We'll do the best we can within that time frame, your honor." (7RT 1047.) The court then stated its concern about the failure to turn over the reports to the defense and stated its intent to order the Compton Police Department to show cause why monetary sanctions should not be imposed on them. The court indicated its expectation for the chief of the police department to be present for that hearing. (7RT 1048.) Appellant Mora's counsel indicated that her investigator was ill but would try to "work through it." The court offered to appoint another investigator if counsel so wished. (7RT 1048-1049.) The court ordered a status conference to be held two days later, on Friday. (7RT 1047, 1049.)

The prosecutor then stated on the record that the documents that were not disclosed to the defense were also not in her possession. (7RT 1049-1050.) The prosecutor then explained that the case, during the course of the investigation, had changed hands from one police detective, Detective Branscomb, to another, i.e. Detective Piaz, and it was due to this transfer that some documents were mistakenly assumed as having previously been disclosed. (7RT 1050.)

5. Disclosure of Additional Report Regarding Yesenia Jimenez

On Friday, January 22, 1999, the prosecutor turned over an additional report documenting Yesenia Jimenez's statements to deputies Lepe and Thrash. She also turned over a warrant regarding Jade Gallegos and two receipts for gunshot residue testing. Counsel for appellant Rangel then indicated she would be ready to proceed on Monday. (8RT 1057, 1061.) Counsel for appellant Mora indicated that her team had not been able to reach Fredericka Wilkerson nor Yesenia Jimenez. (8RT 1057.) The court indicated that the parties should not be concerned about Yesenia's statements because that witness had been known about before. The court then noted that Wilkerson, by all accounts, was reachable and cooperative, and expressed confidence that Wilkerson could be interviewed sometime during the weekend. (8RT 1059-1060.)

Counsel for appellant Mora stated for the record that the new report on Yesenia "is totally contradictory to the other report that we previously had." (8RT 1060.) After further discussion, appellant Mora sought dismissal of the case. The court denied the request, indicating the suspension of the trial was enough remedy. Appellant Mora's counsel then expressed a desire to request a jury instruction regarding the discovery violation. The court asked that the instruction be drafted and submitted for review. (8RT 1062.)

On Monday, January 25, 1999, the parties proceeded to the direct examination of Lourdes Lopez without further discussion on the discovery matter. (8RT 1064.) At the end of court session that day, the prosecutor informed the court that she had subpoenaed the witnesses that the belatedly disclosed police reports concerned, i.e., John Youngblood, Barbara Youngblood, William Florence, and Armando Martinez. (8RT 1228.) The prosecutor reported that during her conversation with these witnesses, she

discovered the following: (1) Youngblood was able to identify appellant Mora by photograph; (2) another witness said he or she saw the back of the car while the report indicated he or she "didn't see anything." (8RT 1229.) Appellant Rangel interposed an objection to the prosecution being able to call any of the witnesses in the newly disclosed reports. (8RT 1232.) The court reserved ruling until those witnesses would be called. (8RT 1232.)

On the next day, January 26, 1999, Lopez concluded her testimony and Mayra Fonseca began her testimony. (8RT 1235, 1302.) On January 27, 1999, Fonseca concluded her testimony and Officer Raymond Brown testified. (9RT 1367, 1429.)

6. Appellant Mora's Investigative Report on John Youngblood

On January 28, 1999, Detective Branscomb testified. (10RT 1521.) After Detective Branscomb's testimony, the prosecutor asked to call John Youngblood to the witness stand. (10RT 1621.) The parties agreed that appellant Mora had obtained a six-page statement from Youngblood and that that statement showed that Youngblood, contrary to what he told appellant Rangel's investigator, was ready to identify appellant Rangel as one of the assailants, but not appellant Mora. (10RT 1621-1622.) Appellant Rangel's counsel objected, on fair trial grounds, to the calling of Youngblood at that time because she had not read that six-page statement yet. The court disagreed that it was a denial of a fair trial to allow Youngblood to testify at that point. (10RT 1622.) Youngblood subsequently testified and identified appellant Rangel as standing on the driver's side of the 4-Runner when Youngblood looked out his window after hearing the gunshots. (10RT 1626-1631, 1637.)

At the end of the direct examination of Youngblood, appellant Rangel's counsel told the court she needed time to read the report produced by appellant Mora. She also requested that the prosecution turn over

Youngblood's rap sheet. The prosecution agreed that she would run the rap sheet and stipulate to any convictions in it. The court indicated that the examination should proceed but that the witness would be placed on call thereafter, and any of Youngblood's prior convictions could be stipulated to in the meantime. (10RT 1652.) Appellant Rangel's counsel objected, stating that proceeding with cross-examination at that point constituted a denial of her client's right to a fair trial and to due process. (10RT 1652.) The court gave appellant Rangel's counsel some time before proceeding with cross-examination. (10RT 1653.) Thereafter, the trial court informed the jury that appellant Rangel's counsel was "reading a statement she was just given, so it will be a moment or two." (10RT 1653.) Appellant Rangel's counsel then stated, "I'm going to try to start." (10RT 1653.) Appellant Rangel's counsel then began and completed the cross-examination that day. (10RT 1653-1698.)

7. Disclosure of Fingerprint Analysis Report

On February 2, 1999, the day that the prosecution eventually rested its case in the guilt phase, the defense received from the prosecution a four-page fingerprint examination report that was dated December 3, 1997. (13RT 1990.) The report indicated that the Intratec firearm along with the ammunition found inside it, plus four expended shell casings and a Budweiser beer can had been analyzed. The report concluded that no prints were developed from any of the objects. (13RT 1990-1991.)

The prosecutor stated that she had repeatedly called the police department and asked whether any prints were recovered and was told "no" every time. (13RT 1991.) She, in turn, would inform the defense that no prints were found on any evidence in this case. She had no knowledge there was any documentation to this effect. Then, on February 1, 1999, after Detective Branscomb testified that the Budweiser had not been examined for fingerprint, Detective Piaz told the prosecution he

remembered that the can had been sent out for such examination. Detective Piaz was instructed to obtain any documentation of such, and he returned with the report the morning of February 2, 1999. (13RT 1991-1992.) Appellant Rangel's counsel indicated that when he looked over the police's murder book, she did not see that report. (13RT 1992.)

Counsel for both appellants requested a mistrial. (13RT 1993.) Counsel for appellant Mora complained that the failure to disclose the evidence had been a "continuum" in this case and that the defense, as a result, had to "scramble" in their preparation. (13RT 1993-1994.) The court stated that these items of evidence should have been disclosed earlier and asked for the proposed remedy. (13RT 1994.) Appellant Mora's counsel stated that she could have proceeded differently had she had the report. (13RT 1994.) Counsel argued that if mistrial was not granted, that the report be excluded that that the defense be allowed inform the jury that the defense had been informed by the prosecution that there had not been any fingerprint analysis. (13RT 1994.)

Appellant Rangel joined in appellant Mora's arguments, and further argued that because she had been prepared to argue that no prints were analyzed when the police had the opportunity to do so, the appearance of this report would preclude such a defense, thus causing an unfair effect on the defense. Appellant Rangel asked for mistrial. (13RT 1997.) Appellant Rangel asked that if mistrial was not granted, that heavy monetary sanctions be levied against the prosecution and the police department. Appellant Rangel also asked that the jury be informed of "continuing disrespect and disobedience to the discovery rules." (13RT 1997.) Appellant Rangel also joined in the request to exclude the report. (13RT 1998-1999.) The court responded that it intended to hold sanction proceedings at the end of trial. (13RT 1997-1998.)

The prosecutor indicated that she did not call any fingerprint expert and would not seek to re-open the prosecution case to call the expert. (13RT 1999-2000.) The court indicated its inclination to inform the jury of the report but also advise them of its late disclosure. (13RT 2001.) Appellant Mora's counsel complained that such a course of action would benefit the prosecution because the defense, who had been eliciting evidence all along that no fingerprint analysis had been conducted, would "look like a fool." The court stated that the problem could be addressed with an instruction about the late disclosure. (13RT 2001.)

The court stated that it did not see how informing the jury of the report would injure the defendants. (13RT 2003.) Appellant Mora asked the court to instruct the jury that the defense had been misled by the prosecution. (13RT 2003.) The court denied the request, indicating it would tell the jury what happened and let them reach whatever conclusion would be appropriate. (13RT 2003.) The court indicated that it would discuss the wording of the discovery instruction later. (13RT 2004.) Appellant Mora's counsel then complained about Detective Piaz willfully letting misleading testimony be elicited. The court responded that Detective Piaz had raised this issue without delay upon hearing Detective Branscomb's testimony. (13RT 2005.)

The discovery violation instruction given to the jury stated, in pertinent part:

> In this case, the Compton Police Department failed to timely disclose the following evidence: [¶] 1) Witness statements elicited from people residing on Castlegate Avenue on August 24, 1997, including a statement from John Youngblood; and [¶] 2) Fingerprint analysis report dated December 3, 1997. [¶] Although the Compton Police Department's failure to timely disclose evidence was without lawful justification, the Court has, under the law, permitted the production of this evidence during the trial. [¶] The weight and significance of any delayed disclosure are matters for your consideration. However, you

should consider whether the untimely disclosed evidence pertains to a fact of importance, something trivial or subject matters already established by other credible evidence.

(5CT 1114.)

B. Legal Principles Regarding the People's Discovery Obligations

California's statutory discovery law provides:

The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies :

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

(b) Statements of all defendants.

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

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

(e) Any exculpatory evidence.

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

(§ 1054.1.) Under the same discovery statutory scheme, the necessary disclosure

shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial,

> disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred. "Good cause" is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement.

(§ 1054.7.)

To prevail on appeal on a claim of a discovery violation, "the defendant must establish that there is a reasonable probability that, had the evidence been disclosed . . . the result of the proceedings would have been different." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1132.)

In *Brady*, the United States Supreme Court held that "... the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Brady v. Maryland*, *supra*, 373 U.S. at p. 87; see also *In re Sassounian* (1995) 9 Cal.4th 535, 543.) Hence, *Brady* error occurs where: (1) the government suppresses evidence; (2) the suppressed evidence is favorable to the defendant; and (3) the suppressed evidence is material to the issues at trial. (*Brady v. Maryland*, *supra*, at p. 87.) The duty to disclose had been extended to situations where there had been no request by the accused. (*United States v. Agurs* (1976) 427 U.S. 97, 107 [96 S.Ct. 2392, 49 L.Ed.2d 342].) *Brady* obligations also extend to evidence "known only to police investigators and not to the prosecutor." (*Kyles v. Whitley* (1995) 514 U.S. 419, 438 [115 S.Ct. 1555, 131 L.Ed.2d 490]; see also *In re Brown* (1998) 17 Cal.4th 873, 879.) Hence, "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." (*Kyles v. Whitley*, *supra*, 514 U.S. at p. 437.) "For *Brady* purposes, evidence is favorable if it helps the defense or hurts the prosecution, as by impeaching

a prosecution witness." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1132.)

> Evidence is material if there is a reasonable probability its disclosure would have altered the trial result. [Citation.] Materiality includes consideration of the effect of the nondisclosure on defense investigations and trial strategies. [Citations.] Because a constitutional violation occurs only if the suppressed evidence was material by these standards, a finding that *Brady* was not satisfied is reversible without need for further harmless-error review. [Citation.]

(*Id.* at pp. 1132-1133.)

> [The] touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

(*Kyles v. Whitley*, *supra,* 514 U.S. at p. 434.)

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. (See *People v. Verdugo*, (2010) 50 Cal.4th 263, 283 ["Moreover, the statement was disclosed at trial, and hence was not suppressed for *Brady* purposes."]; *see also People v. Morrison* (2004) 34 Cal.4th 698, 715 ["In any event, evidence that is presented at trial is not considered suppressed, regardless of whether or not it had previously been disclosed during discovery."].)

In any event, delayed disclosure clearly cannot pose a due process violation where the delay was not prejudicial, i.e., where a continuance would have cured the harm or where the defense would not have been

different.[9] (*See People v. Pinholster* (1992) 1 Cal.4th 865, 941, disapproved on another point in *People v. Williams* (2010) 49 Cal.4th 405, 459; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 951; *People v. Garcia* (2000) 84 Cal.App.4th 316, 330-331.)

Also, while "the prosecution may not withhold favorable and material evidence from the defense, neither does it have the duty to conduct the defendant's investigation for him. [Citation.] If the material evidence is in a defendant's possession or is available to a defendant through the exercise of due diligence, then ... the defendant has all that is necessary to ensure a fair trial. . . ." (*People v. Salazar* (2005) 35 Cal.4th 1031, 1048-1049; see also *People v. Morrison* (2004) 34 Cal.4th 698, 715.)

A trial court's ruling on a *Brady* motion is subject to independent review, although the trial court's factual findings "are entitled to great weight when supported by substantial evidence." (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042.)

C. Appellants Cannot Demonstrate *Brady* Error or Prejudicial Statutory Discovery Violations

As explained in detail below, appellant's discovery error contentions should be rejected because there was either no statutory discovery violation or any violation was harmless. Simply put, while there were a number of

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[9] Various federal authorities discuss whether the evidence was disclosed in time for the defense to effectively make use of the material in defending the prosecution. (See *United States v. Devin* (1st Cir.1990) 918 F.2d 280, 289 ["When the issue is one of delayed disclosure rather than total nondisclosure, however, the applicable test is whether defense counsel was 'prevented by the delay from using the disclosed material effectively in preparing and presenting the defendant's case.' [Citations.]"]; see also *United States v. Scarborough* (10th Cir. 1997) 128 F.3d 1373, 1376; *United States v. Tarantino* (D.C.Cir. 1988) 846 F.2d 1384, 1416; *United States v. Allain* (7th Cir.1982) 671 F.2d 248, 255; *United States v. Ziperstein* (7th Cir. 1979) 601 F.2d 281, 291; *United States v. McPartlin* (7th Cir. 1979) 595 F.2d 1321, 1345-1347.)

discovery items which were not timely turned over, these items, singly or collectively, were inconsequential to the conduct appellants' defense. Appellant also cannot demonstrate any *Brady* error. Also, many of the alleged errors were forfeited on appeal.

1. GSR Evidence

Appellant Rangel complains that the GSR results which came out inconclusive were belatedly turned over. (RAOB 48.) This contention should be rejected, first of all, because it is forfeited from appellate consideration. Appellant Rangel, upon being told by the trial court that he had the option of presenting the GSR results and arguing to the jury that the test came out "negative" as to him, did not raise any objections based on either a statutory discovery violation or a *Brady* violation. (1RT 67-68.) Any complaint by appellant Rangel based on the ground of a discovery violation or a *Brady* error must be deemed forfeited. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1001 [failure to object to prosecutorial misconduct forfeits the issue on appeal]; (see also *People v. Carpenter* (1997) 15 Cal.4th 312, 411 [failure to object to false evidence forfeits the claim on appeal].)

Moreover, no discovery violation occurred. The prosecutor's account, undisputed by the defense, was that the defense had been duly informed of a pending GSR analysis during pretrial stages. (1RT 66.) It was further not disputed that the Sheriff's laboratory had a backlog and did not generate GSR results until January 7, 1998, a day before trial, and that the next day, the prosecution turned the results over to the defense. (1RT 66-68.) Because the results had been disclosed immediately after it came into the possession of a party within the meaning of section 1054.7, there was no

violation of the discovery rules.[10] (*People v. Verdugo* (2010) 50 Cal.4th 263, 287 ["The prosecutor produced the notes to the defense the same morning that he received them, which satisfies the statutory requirement of immediate disclosure of materials that become known during trial."]; *People v. DePriest* (2007) 42 Cal.4th 1, 37-38 [disclosure of evidence the morning after its discovery timely under § 1054.7].)

Moreover, to the extent that the inconclusive laboratory results can be considered exculpatory, a proposition that is highly questionable, that evidence was in no way "suppressed." There is no dispute that the GSR results was disclosed to the defense once it came into existence. As such, there was no suppression to speak of. (See *People v. Verdugo*, *supra*, 50 Cal.4th at p. 283 ["Moreover, the statement was disclosed at trial, and hence was not suppressed for *Brady* purposes."]; *see also People v. Morrison* (2004) 34 Cal.4th 698, 715 ["In any event, evidence that is presented at trial is not considered suppressed, regardless of whether or not it had previously been disclosed during discovery."].)

Assuming that appellant Rangel can somehow characterize what happened as an act of suppression by the government, ultimate disclosure was not too late for the defendant to make use of it. Here, appellant Rangel was given the evidence before jury selection and thus, had ample time to incorporate it into his defense, which he eventually did without difficulties (13RT 2040-2061 [testimony by Sheriff's Criminalist Michelle Lepisto regarding the inconclusive nature of the GSR examination results]).

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[10] Nonetheless, the trial court went out of its way to protect appellants in this instance. It ordered, on grounds of belated discovery, that the GSR results which inculpated appellant Mora be suppressed. (1RT 67.) Appellant Mora, therefore, has no grounds to, and indeed does not now, complain of any discovery violation relating to this item of evidence. (MAOB 31.)

Furthermore, very little about this GSR evidence helped appellant Rangel. In fact, when the evidence was ultimately presented by way of Criminalist Lepisto's testimony, it tended to hurt the defense's identity defense, as Criminalist Lepisto testified that lead and tin particles consistent with gunshot residue were in fact found on appellant Rangel. (13RT 2060-2061.) After hearing testimony by Valadez that appellant Rangel, at the suggestion of someone at the party, had taken his shirt off and wiped his arms to eliminate traces of gunshot residue (4RT 859), the exculpatory aspect of this GSR evidence became entirely unimpressive. In view of the overwhelming evidence of appellants' guilt presented in this case (see *infra*), no reasonable likelihood of a different outcome can be shown under these circumstances. Hence, appellant Rangel cannot now demonstrate materiality (as required for *Brady* error), or that any discovery violation was prejudicial.

In sum, as to the GSR evidence, appellant Rangel forfeited his current contention, but in any event, can demonstrate neither a statutory discovery violation or a *Brady* error.

2. Second Transcript of Lourdes Lopez's Statement

Appellant Rangel's current contention about only receiving one of two transcripts of Lopez's statement to the police must also fail. (RAOB 32-33.) First, the issue is forfeited on appeal. At the time of this discussion, appellant Rangel failed to claim discovery or *Brady* error based on his allegation that he was missing one of the transcripts of Lopez's statements to the police. Therefore, he is now precluded from raising the issue now on appeal. (*People v. Cunningham*, *supra,* 25 Cal.4th at p. 1001; *People v. Carpenter*, *supra,* 15 Cal.4th at p. 411.)

In any event, the claim is without merit. It is undisputed that both appellant Mora's counsel and the trial court had both transcripts at the time of appellant Rangel's complaint at trial about the missing transcript. The

prosecution certainly insisted that it gave both copies to both defendants. (6RT 1021-20125.) Within the four corners of the record, there is at best an unresolved conflict as to what occurred with regard to that purportedly missing transcript. Appellant Rangel, therefore, is unable to demonstrate on appeal that there was a discovery violation of any kind. (See *People v Jenkins*, *supra,* 22 Cal.4th at p. 952 ["As we have emphasized in the past, our review on direct appeal is limited to the appellate record . . . . Because defendant's claim is dependent upon evidence and matters not reflected in the record on appeal, we decline to consider it at this juncture."]; see also *People v. Jones* (2003) 29 Cal.4th 1229, 1263 [issues requiring review of matters outside the record are better raised on habeas corpus rather than on direct appeal]; *People v. Sanchez* (1995) 12 Cal.4th 1, 59 [because claim of prosecutorial misconduct involved events not reflected in the appellate record, claim "must be presented by petition for writ of habeas corpus rather than by appeal"].)

In any event, there clearly was no *Brady* error because Lopez's second transcript was inculpatory. (1CT 11-34.) It was, furthermore, not helpful impeachment material to the defense. Because Lopez at trial had been attempting to retract the statements she made to the police, the only party to which the transcript could serve as favorable impeachment material was the prosecution. As the material in question was not exculpatory and/or helpful as impeachment material for the defense, appellant Rangel cannot now demonstrate *Brady* error in this instance.

Moreover, because the second transcript had in fact been turned over at trial, there can be no suppression within the meaning of *Brady.* (*People v. Verdugo*, *supra*, 50 Cal.4th at p. 283; *People v. Morrison*, *supra,* 34 Cal.4th at p. 715.)

Nor, for purposes of showing prejudice, can appellant Rangel demonstrate how having the entire transcript of Lopez's statements to the

police earlier than when he actually received it could in anyway have changed the outcome of the case at the guilt phase, given the overwhelming evidence of his guilt. (See Argument I(C)(4), *infra.*) As such, appellant Rangel cannot demonstrate materiality for *Brady* purposes or prejudice from any statutory discovery violation.

3. Two Diagrams of the Scene

Appellants, furthermore, cannot demonstrate, based on the record, any discovery violation and/or *Brady* error with respect to the two diagrams of the scene.

First, the instant appellate complaint must fail because appellants did not assign discovery error to the prosecution's conduct with respect to the diagrams. As such, they have forfeited this claim on appeal. (*People v. Cunningham*, *supra,* 25 Cal.4th at p. 1001; *People v. Carpenter*, *supra,* 15 Cal.4th at p. 411.)

Moreover, a violation of section 1054.1, or a *Brady* violation for that matter, cannot be established because the diagrams do not fit into any category, statutory or otherwise, of discoverable material. Those diagrams (see 4RT 940), apparently prepared by one Sergeant Swanson to depict a map-like layout of the scene, were certainly not identifying information of witnesses, statements of defendants, or information regarding a prior felony conviction. Nor can the diagrams be characterized as exculpatory. Nothing in the record demonstrates that they were "real evidence" obtained during the investigation or that they were part of statements of witnesses the prosecution intended to call. As such, no statutory discovery violations occurred.

Moreover, the diagrams were in fact turned over during trial. As such, no act of suppression within the meaning of *Brady* occurred. (*People v. Verdugo*, *supra*, 50 Cal.4th at p. 283; *People v. Morrison*, *supra,* 34 Cal.4th at p. 715.)

Finally, appellants cannot demonstrate how receipt of these diagrams at an earlier stage, particularly in light of the overwhelming evidence of guilt (see Argument I(C)(4), *infra*) presented by the prosecution, could in any way cause a different outcome. (See *People v. Verdugo, supra,* 50 Cal.4th at p. 282 [general claim that "[t]imely disclosure of the information would have enabled counsel to adjust his theory of the case to fit the facts" is insufficient to demonstrate prejudice where "[d]efendant does not explain what counsel would have done differently if the notes had been disclosed sooner."].) As such, materiality under *Brady*, as well as prejudice arising from any discovery violation, cannot be shown here.

4. Four Police Reports Containing Witness Statements

Appellants' current complaint about the police department's failure to turn over four police reports is likewise unavailing.

The reports apparently related to Enrique Duenas Parra, Jade Gino Gallegos, Ramon Valadez, and a number of residents of the neighborhood, including John Youngblood, Barbara Youngblood, William Florence, and Armando Martinez. (7RT 10343-1045; 8RT 1228.) According to the court, Florence said he saw a Black Hyundai or Honda traveling northbound on Castlegate. Another witness said he or she heard a car "taking off after the shots." The court stated another witness said he or she heard a woman's voice. (7RT 1046-1047.)

While Valadez eventually did testify for the prosecution, thus possibly implicating the disclosure requirements under subdivisions (a) and (f) of section 1054.1, and while William Florence, according to the trial court, gave observations that could be exculpatory, thus implicating subdivision (e), appellants fails to explain how the reports on remaining witness who were not called by the prosecution were exculpatory or otherwise discoverable under section 1054.1 and the dictates of *Brady*. Moreover,

because the parties agreed that the prosecutor did not have the police report regarding John Youngblood before its discovery by the defense (7RT 1038-1039), the record lacks any evidence that the prosecutor before trial knew of, or intended to call, Youngblood within the meaning of section 1054.1, subdivisions (a) and (f).

But even if there was any statutory discovery violation as to materials relating to Valadez, Youngblood, Florence, or any other of the witnesses in question, appellants simply cannot demonstrate any prejudice.

Here, the trial court, by stopping the proceedings mid-week (on Wednesday) and continuing the trial to the subsequent Monday, essentially gave the defense five more days for it to investigate the witnesses contained in the newly disclosed police reports. (7RT 1047 .) The adequacy of this continuance is demonstrated by appellant Rangel's in-court representation two days later that he was ready to proceed on Monday. (8RT 1057, 1061.) Indeed, appellant Mora indicated the only witness out of those contained in the four reports that he had not been able to reach was Fredericka Wilkerson, and did not dispute the court's characterization that Wilkerson was cooperative and could be interviewed within the remaining time of the continuance period. (8RT 1057.) By Monday, none of the parties declared themselves unprepared before proceeding to further examination of Lourdez Lopez. (8RT 1064.) As such, the record amply supports the conclusion that the trial court's remedy for the belated discovery was more than adequate. Any discovery error was therefore harmless. (*People v. Verdugo*, *supra,* 50 Cal.4th at p. 281 [no prejudice from violation of section 1054.1 where the court's grant of a continuance was "more than adequate to remedy the violation of the discovery statute."].)

The lack of prejudice is particularly apparent in view of the fact that the prosecution's evidence of appellants' guilt was overwhelming. Against appellants' mistaken identity defense at trial, the prosecutor produced

witness after witness to either identify appellants as the shooters or attest to highly incriminating observations.

The first of these were eyewitnesses present during the shooter's confrontation of the victims and during the actual shooting. Encinas's girlfriend, Paula Beltran, who was walking with Encinas back to his car from Yesenia's house when the killers confronted them, obviously had plenty of opportunity to observe the killers before driving away. (3RT 403-411.) She was able to identify both appellants from a group of ten or eleven individuals during the field lineup outside Lopez's residence. (3RT 414.) Mayra Fonseca, who was with Beltran throughout the entire encounter, likewise identified appellants out of the group of individuals taken from Lopez's house. (3RT 1322.) Fidel Gregorio, who was in the 4-Runner in the right rear passenger seat during the shooting and as a result was able to observe the face of the shooter on the driver's side and the tattoo on abdomen of the shirtless shooter on the passenger side, also identified appellants during the field lineup outside Lopez's residence. (5RT 651-652, 655, 660.) His observation of appellant Mora's tattoo as being cross-shaped, further matched what appeared on appellant Mora's abdomen, a tattoo inscribed across a vertical scar. (5RT 656.)

Sheila Creswell, who lived directly across from Lopez's residence (4RT 788-789) and had regularly seen appellants at Lopez's residence (4RT 802), heard the shooting and immediately observed two males, including appellant Rangel, run from a "truck" and disappear into Lopez's residence (4RT 791-792, 805).[11]

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[11] John Youngblood, who attested that the scene of the murder was so well lit that it was "just like day," lived just behind the parked 4-Runner and clearly saw, just after the shooting, appellant Rangel on the driver's side of the truck and another person on the passenger side. (10RT 1626-1631, 1637.) As the admissibility of Youngblood's testimony due to the

(continued...)

While Creswell, seeing only the right side of the males' faces, dubiously identified Jade Gallegos as the other male, the fact that appellant Mora in fact was the other male Creswell saw running into the Lopez residence was conclusively demonstrated by two other witnesses. First, Lourdes Lopez herself during the interview with the police admitted that at the time of the shooting, appellants were the only two individuals from the party not inside the house, and that a minute after the gunshots were heard, appellants re-entered the house. (7RT 1068, 1073, 1110, 1117.) She also recounted how appellant Mora told her to take her child into the bedroom so that she would not see appellant Mora be led away to jail by the police. (7RT 1088, 1091-1092.)

Dispelling all doubts about Lopez's veracity during the police interview were observations by the uninvited party-attendee, Ramon Valadez, who was inside Lopez's house during the gunshots. After the gunshots, he observed appellants entering house carrying firearms and boasting about the killings. Valadez confirmed Gregorio's observation that appellant Mora was shirtless when he entered the house. (6RT 850-853, 858, 860, 868.)

Valadez, in addition to bearing the credibility of a disinterested witness, also gave testimony corroborated by physical evidence. He attested that one of the two appellants, after entering the house, mentioned how they would have continued shooting had his gun not jammed. (6RT 873, 975.) As it turned out, among the two firearms later confirmed to be the murder weapons (12RT 1834-1836) recovered from an Oldsmobile parked at Lopez's garage (10RT 1540-1549; 11RT 1776; 12RT 1832),

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(...continued)
alleged discovery violation is in contention on this appeal, respondent does not include Youngblood's observations in demonstrating how airtight the prosecution case was.

which Oldsmobile belonged to appellant Mora (11RT 1807-1810), was an Astra semiautomatic pistol with a bullet jammed at its breech (10RT 1548; 12RT 1832). The very fact that the murder weapons were found in appellant Mora's Oldsmobile, in itself, also points convincingly to appellant Mora as being one of the shooters.

Meanwhile, appellant Rangel could only point to the fact that the gunshot residue examination conducted on him had been inconclusive. But the gunshot residue examination revealed lead and tin particles consistent with gunshot residue. (13RT 2060-2061.) Moreover, Valadez had already testified that appellant Rangel, after the shooting, took his shirt off and wiped his body with it for the purpose of eliminating gunshot residue. (4RT 859-860.)

With such overwhelming proof of appellants' guilt, there was no "reasonable probability" (*People v. Watson* (1956) 46 Cal.2d 818, 836) that had the reports been timely turned over or had John Youngblood's testimony been excluded as a sanction against the prosecution, that the outcome would be any different. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1135, fn. 13 [*People v. Watson*'s reasonable probability test of harmless error applies to statutory discovery violations].)

In the same vein, even assuming that some of the materials in the police reports in question could be construed as exculpatory, no *Brady* violation could have occurred simply because appellants cannot demonstrate materiality. The three items of evidence which the trial court cited on the record as being potentially exculpatory are, in fact, quite inconsequential. William Florence's observation that he saw a black Hyundai or Honda traveling northbound on Castlegate (7RT 1046) nothing more than coincided with the prosecution evidence that Beltran, after a quick dispute with Fonseca about whether to leave, did in fact drive away quickly by making a U-turn and heading northbound on Castlegate (3RT

398 [Beltran drove a Honda Civic]; 3RT 408 [Beltran making a U-turn before the shooting and driving to the nearest pay phone]; 10RT 1523 [victim's SUV facing southbound]; 3RT 402 [Beltran parked "right in back" of victim's SUV].). That another witness heard a car "taking off after the shots" (7RT 1047) again coincided with Beltran's car leaving the scene just as the shots were being fired.

The fact that according to defense counsel and the court, there may have been "three people arguing" and a "woman's voice was out there also" (7RT 1047) is unsurprising. Upon being approached by appellants that night, Fonseca told Encinas to enter his car. (3RT 405.) After that, Fonseca began screaming for Beltran to open the door to her car. (3RT 406.) In this context, that surrounding neighbors could have heard a dispute and could hear a woman's voice during this time was not exculpatory. Meanwhile, the evidence of appellants' guilt was overwhelming, as previously indicated. There was no reasonable probability that had the defense received these reports much earlier that the outcome would have been any different. As such, appellants failed to demonstrate the requisite materiality of these belatedly disclosed reports.

In any event, since these items of evidence had been disclosed in the middle of the trial, there was no suppression to speak of, and no *Brady* error occurred. (*People v. Verdugo*, *supra*, 50 Cal.4th at p. 283; *People v. Morrison*, *supra,* 34 Cal.4th at p. 715.)

Any complaint that appellant Rangel has about the subsequent introduction of John Youngblood's testimony (RAOB 48) must fail. Appellants received the police report on Youngblood on January 20, 1999. (7RT 1037-1038.) Appellant Rangel does not deny that during the subsequent continuance period, he had the opportunity to interview Youngblood. In fact, on Monday January 25, 1999, Youngblood was brought into court by the prosecution's subpoena for both parties to

interview him. (8RT 1229.) Any discovery error up to this point was therefore cured by the continuance. The trial court, therefore, properly did not exclude Youngblood from testifying on January 28, 1999 (10RT 1626). (*People v. Jenkins* (2000) 22 Cal.4th 900, 951 [court has discretion to determine what sanction is appropriate to ensure fair trial].)

Thereafter, any surprise arising from Youngblood's trial testimony came not from the prosecution, but from appellant Mora's own investigations revealing that Youngblood was able to identify appellant Rangel as one of the killers. Such inculpatory evidence, of course, did not implicate *Brady*. Moreover, since appellant Mora's investigative report did not come from the prosecution, there was not prosecutorial violation of the discovery statute. As such, appellant Rangel's complaint about the introduction of Youngblood as a witness is groundless. But even assuming there was error from the introduction of this evidence, because the evidence of appellants' guilt was overwhelming as detailed above, there was no reasonable probability of a different outcome had Youngblood's testimony been excluded.

5. Report Regarding Yesenia Jimenez

To the extent appellants are complaining about the late delivery of a report (4CT 958-959) about Yesenia Jimenez, such a complaint is without merit.

First, because Yesenia's statements were given to the defense at trial, no suppression within the meaning of *Brady* could have occurred. (*People v. Verdugo*, *supra*, 50 Cal.4th at p. 283; *People v. Morrison*, *supra,* 34 Cal.4th at p. 715.)

Moreover, Yesenia did not testify as a witness in the case. Thus, the record does not show the prosecutor intended to call her as a witness within the meaning of section 1054.1, subdivision (f). Nor was there anything in Yesenia's statements -- that she entered her home by herself to use the

bathroom and that while inside, she heard the shootings outside -- which would exculpate appellants' involvement in the crime. As such, no statutory discovery violation is discernible.

Assuming arguendo that appellant Mora's trial counsel was correct that Yesenia's statements did conflict with other witness's statements (7RT 1056, 1060) such that the statements can be characterized as exculpatory under section 1054.1, subdivision (e), the exculpatory value, if any, is inconsequential. Yesenia seemed to have suggested that she was the only one who entered her house after arriving home, and that after entering her house, she heard the gunshots. (4CT 959) The other witnesses recounted that Encinas, Fonseca, Beltran had entered the house with Yesenia so that Encinas could use the restroom and that it was after Yesenia escorted them out of the gate that the assailants approached the victims. (3RT 403-404, 410-411). Any conflict between Yesenia's statement and various witnesses's testimony at trial could not have any effect on the trial. Various reasons were readily apparent to explain any discrepancy between the report and various witness statements, including an understandable fear of being identified as an eyewitness to a cold-blooded murder. Very telling was the fact that *neither* appellant found Yesenia worthy enough to be incorporated into their defense case. Under these circumstances, it is apparent that any exculpatory value to Yesenia's statements was immaterial to the outcome of the case.

Nor could appellants demonstrate why the granted continuance could not have cured any harm from the late disclosure of Yesenia's statements, especially in light of the overwhelming evidence of guilt (Argument I(C)(4), *supra*) presented by the prosecution. As such, any statutory discovery violation in this regard did not prejudice appellants and no *Brady* error occurred because the evidence lacked materiality.

6. Fingerprint Analysis Report

Appellants likewise cannot demonstrate that they are entitled to any appellate relief as to the belatedly disclosed fingerprint analysis report.

Assuming that these reports should have been disclosed pursuant to section 1054.1, appellants cannot demonstrate prejudice from such an error and/or materiality within the meaning of *Brady*. The fact that both parties sought to exclude the fingerprint report illustrates that any exculpatory value to the fingerprint report was marginal. (13RT 1994, 1998-1999.) While both appellants argue on appeal that the discovery violations caused the defense to prepare its theory based on erroneous assumptions, very little specifics are given as to how the defense would have been different. (See MAOB 49-50; RAOB 52-53.) The instance at trial where such an argument was developed, albeit to a very minimal extent, was when appellant Rangel represented at trial that prior to the disclosure of the evidence, she had been prepared to argue that "there were no prints done [when the police] had the opportunity to do it." (13RT 1997.)

But even assuming that the report was excluded and counsel were allowed to make such an argument to this jury, the glaring weakness of such an argument against the overwhelming evidence of guilt (see Argument I(C)(4), *supra*) is clear. Specifically, whether or not the police had the opportunity to conduct a fingerprint analysis becomes relatively unimportant when mutually corroborating testimony by numerous eyewitnesses pointed convincingly to appellants as the killers. This is particularly true in light of the fact that if the report were excluded, the jury could just as well infer, adversely against appellants, that had the fingerprints been analyzed, appellants' identity as the killers could be further confirmed.

Nor can appellants now explain how a different defense, other than identity, could remotely be successful, in light of clear evidence that each

of the killers fired his own weapon in a cruel and deliberate fashion in the process of demanding wallets from their victims. In other words, appellants simply cannot demonstrate prejudice from the statutory discovery violation, if any, and/or "materiality" within the meaning of *Brady*. This is not to mention the fact that no *Brady* violation could, at any rate, be established simply because the evidence, to the extent it can be considered exculpatory, had not been suppressed, as it was disclosed at trial. (*People v. Verdugo*, *supra*, 50 Cal.4th at p. 283; *People v. Morrison*, *supra,* 34 Cal.4th at p. 715.)

7. Denial of Dismissal Motion

To the extent appellants contend that dismissing the charges would have been the only permitted sanction in this case (RAOB 33; MAOB 49-50), such a contention is clearly without merit. Dismissal of charges as a sanction for a discovery violation is permitted only if "required ... by the Constitution of the United States." (§ 1054.5, subd. (c).) As previously demonstrated, the items of evidence in question were not suppressed and were not material to the case. As such, they did not fall within the due process guarantee of *Brady*. The inquiry should end there, as a criminal defendant has no constitutional right to discovery save for that which applies to *Brady* exculpatory evidence. (*Weatherford v. Bursey* (1977) 429 U.S. 545, 559; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1258.)

But even if more is required, appellants cannot otherwise make any showing that the delayed disclosures denied him a fair trial. As previously demonstrated, appellants simply cannot show how a different but viable defense could have been presented absent the discovery violations which would have chaged the outcome. This is especially true when the trial court remedied the discovery delays with adequate continuances and a sanctioning jury instruction regarding discovery (5CT 1114). As such, no

constitutional violation can be demonstrated here such as to warrant a dismissal under section 1054.5.

II. THE SPECIAL INSTRUCTION ON DISCOVERY VIOLATION WAS PROPERLY DECLINED; TRIAL COURT'S INSTRUCTION PURSUANT TO CALJIC NO. 2.28 DID NOT PREJUDICE APPELLANTS; TRIAL COURT'S LIMITATION ON APPELLANTS' CLOSING ARGUMENT WAS ALSO PROPER

During the discussion on jury instructions at the guilt phase, appellants submitted a special instruction, entitled "Prosecution Misconduct," for the court to include in the instructions to address the alleged discovery violations. The instruction stated:

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

(5CT 1169.) The trial court indicated that by the next court date, it would consider the matter and decide what instruction to give to address the discovery violation. (13RT 2132.)

The next day, the court indicated it was giving a modified version of CALJIC No. 2.28, which was worded as follows:

> The prosecution and the defense are required to disclose to each other before trial the evidence each intends to present at trial so as to promote the ascertainment of the truth, save court time and avoid any surprise which may arise during the course of the trial. Delay in the disclosure of evidence may deny a party a sufficient

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

(5CT 1114.) The court indicated it specifically left out the word "intentional" in describing the failure to disclose material because it felt that there was no showing of "intent." The court found the non-disclosure to be "more negligence than anything else." The court stated that the defense could not argue to the jury that the non-disclosure was intentional. (14RT 2175.) Neither appellant objected to this ruling or to the instruction given by the court. (14RT 2175.) Appellant Mora's proposed special instruction was not given, and the court's file reflects that the instruction was "refused" by the court. (14RT 1169; 5CT 1169.)

Appellants now contend that the trial court erred in disallowing the special instruction. They also contend that the trial court's restriction, prohibiting defense counsel from arguing that the discovery violations were intentional, was error. (RAOB 55-69; MAOB 51-71.) These contentions are without merit. The trial court's instruction on the discovery violation was not error, and the trial court did not err in precluding the defense from

arguing intentional discovery violation. In any event, appellants have forfeited either part or all of the instant contentions.

A. Appellants Forfeited All or Parts of Their Contention

Preliminarily, failure to request a special instruction waives the issue on appeal. (*People v. Bacon* (2010) __ Cal.4th __ [2010 WL 4117545, *30] [failure to request special instruction at penalty phase forfeits issue].) Since appellant Rangel never joined in the request to submit the special instruction, he is barred by the doctrine of forfeiture from complaining on appeal about the trial court's refusal of that instruction. (*People v. Wilson* (2008) 44 Cal.4th 758, 793 [failure to join in objection of codefendant forfeits the issue on appeal]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1048 [defendant's failure to join codefendant's motion waived his objection on appeal].)

Moreover, both appellants are barred by the doctrine of forfeiture from complaining on appeal about the version of CALJIC No. 2.28 that the court gave the jury at trial, which omits the notions that the discovery violation was "intentional," was attributable to the prosecutor, and inadequately informed the jury as to how to evaluate the discovery violation. The failure to request a curative admonition forfeits the claim of prosecutorial misconduct. (*People v. Prince* (2007) 40 Cal.4th 1179, 1275.) By logical extension, when such a curative instruction is given, it is incumbent upon the proponent of the instruction to complain about any wording of that instruction he finds objectionable. (See *People v. Bolin* (1998) 18 Cal.4th 297, 326 ["At the time the court discussed jury instructions, defense counsel agreed the evidence supported CALJIC No. 2.06 and did not object to the court's proposed wording. Any claim of error is therefore waived."].) Specifically, where a defendant challenges a sanctioning instruction regarding discovery "because it informed the jury that it 'may find' a discovery violation occurred, but did not provide

guidance as to how it was to make that determination," he forfeits "a challenge to the completeness of the instruction by failing to request clarifying or amplifying language" at trial. (*People v. Riggs* (2008) 44 Cal.4th 248, 309.) The absence of any objection to the trial court's instruction pursuant to CALJIC No. 2.28 here therefore waived the issue on appeal.

Finally, when the trial court ruled that the defense could not argue that there was "intentional" non-disclosure of discoverable evidence, neither appellant voiced an objection. As such, their current complaint about the court's limitation of their closing argument in this fashion is also forfeited. (See *People v. Henderson* (1865) 28 Cal. 465,473 ["parties interested consent to such a course of proceeding" and thus "cannot be permitted to repudiate the proceedings and avail themselves of the chances of a more favorable result on second trial"].)

B. The Court Properly Declined to Give The Requested Special Instruction

"[The reviewing court] generally review[s] a trial court's ruling on matters regarding discovery under an abuse of discretion standard. In particular, a trial court may, in the exercise of its discretion, consider a wide range of sanctions in response to the prosecution's violation of a discovery order." (*People v. Ayala* (2000) 23 Cal.4th 225, 299, internal citations and quotations omitted.) "[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) For discovery violations, the court may impose any appropriate sanctions, "including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order." (§ 1054.5, subd. (b).) The court could also "advise the jury of any failure or refusal to disclose and of any

untimely disclosure." (*Ibid.*) "The court may prohibit the testimony of a witness pursuant to subdivision (b) only if all other sanctions have been exhausted." (§ 1054.5, subd. (c).)

Moreover, the "usual remedy for noncompliance with a discovery order is . . . a continuance." (*People v. Robbins* (1988) 45 Cal.3d 867, 884.) If no adequate continuance was given, the defendant must demonstrate prejudice. (*Ibid.*) The burden is on the defendant to show that the discovery violation was prejudicial and that a continuance would not have cured the harm. (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 950; *People v. Pinholster* (1992) 1 Cal.4th 865, 941.)

1. Appellants Were Not Entitled to the Requested Special Instruction

Appellants' current contention about the court's failure to permit the requested special instruction must fail because appellants were not entitled to any sanctioning instruction in the first place.

As previously demonstrated, appellants failed to disprove on appeal that the continuance granted by the court did not give appellants enough time to investigate the various witnesses whose statements appeared in the belatedly-disclosed police reports and to make necessary adjustments to their defense based on their investigation. (See Argument I(C)(4).) Hence, no further remedy, including the instruction pursuant to CALJIC No. 2.28 that was actually given, was necessary. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1131 [where arrest report "was not made available to the defense until late in the trial," the Supreme Court held that the appellant "had the opportunity to seek a continuance in order to develop a response. He was entitled to no more."].) As to the fingerprint analysis report, because its late disclosure was entirely inconsequential to the cause of action (see Argument I(C)(6)) due to its neutral nature, there was no harm

to cure. Thus, appellants really were not entitled to any sanctioning instructions against the prosecution.

2. The Special Instruction Was Repetitive of CALJIC No. 2.28

In any event, the trial court properly declined to give the special instruction because it is largely repetitive of the court's instruction pursuant to CALJIC No. 2.28. The first two sentences of the special instruction, informing the jury that the prosecution violated discovery laws by failing to turn over materials within 30 days prior to trial, was covered by the court's instruction regarding the police's failure to timely disclose evidence without lawful justification within the 30 days deadline. The "unfairness" described by the special instruction was further covered by the court's instruction that the discovery laws prevents "surprise" and a violation would result in the denial of sufficient opportunity to adequately present contrary evidence. The special instruction's attribution of fault to the Compton Police Department was directly covered by the court's instruction referring to the Compton Police Department as having "failed to timely disclose" various evidence. Finally, the special instruction's admonition regarding the jury's ability to give the discovery violation whatever weight it finds to be fitting had also been directly covered by the second to last sentence of the court's instruction. Because the import of the proffered special instruction was covered by the court's instruction pursuant to CALJIC No. 2.28, the special instruction was properly rejected. (See *People v. Friend* (2009) 47 Cal.4th 1, 50 ["Because the issue was adequately covered by the existing instructions, the trial court did not err in refusing to give a duplicative special instruction."]; see also *People v. Carter* (2003) 30 Cal.4th 1166, 1231; *People v. Gurule* (2002) 28 Cal.4th 557, 659-660.)

To the extent appellants are now complaining that the court's instruction failed to convey to the jury the notion that the police department "withheld" the evidence, such a complaint is equivalent to their argument that the court's instruction pursuant to CALJIC No. 2.28 should have referred to "intentional" non-disclosure or "concealment." As discussed below, such a claim is without merit.

C. The Court's Instruction Pursuant to CALJIC No. 2.28 Was Not Error

Appellants set forth three reasons why they believe the court's instruction pursuant to CALJIC No. 2.28 was incomplete. First, they claim that the failure of that instruction to explain how the belated disclosure should be taken into account prejudiced them. Second, the instruction only faulted the Compton Police Department and thus allowed the prosecution to distance itself from the discovery violation. Third, the instruction failed to inform the jury that the discovery was "concealed" by the Compton Police Department. (RAOB 60-61; MAOB 59.) None of these arguments carry any merit.

First and foremost, as previously stated, any potential for the defense case to be prejudiced by the late disclosures was either averted by the court's grant of an adequate continuance or, in the case of the fingerprint report, non-existent. As such, appellants were simply not entitled to any sanctioning instruction (*People v. Barnett, supra,* 17Cal.4th at p. 1131), which when actually given in this case in the form of CALJIC No. 2.28, served as no less than a windfall to the defense. As such, any inadequacy to CALJIC No. 2.28 simply could not have prejudiced the defense. Moreover, as demonstrated below, appellants' complaint about the version of CALJIC No. 2.28 given by the court is groundless.

It is true that, as appellants observed, CALJIC No. 2.28 has been found to be a problematic instruction by several courts of appeal due to its

deficiency in explaining how the discovery violation actually affected the aggrieved party's ability to present its case and thus, how specifically the jury could factor into its deliberation the fact of this discovery violation. (*People v. Lawson* (2005) 131 Cal.App.4th 1242, 1248; *People v. Cabral* (2004) 121 Cal.App.4th 748, 751; *People v. Saucedo* (2004) 121 Cal.App.4th 937, 942; *People v. Bell* (2004) 118 Cal.App.4th 249, 255-256.) In all of these cases, however, the potential for jury speculation became problematic, because the sanctioning instructions were issued against the defense, allowing the jury to "disbelieve, discount, or look askance at the defense witnesses" without knowing why. (See *Ibid.*) Here, the sanctioning instruction was issued against the prosecution, allowing the jury to discredit prosecution witnesses based on the fact of a discovery violation alone. The lack of prejudice is apparent, as any shortcoming in the wording of the instruction could only have prejudiced the prosecution, not the defense. (See *People v. Riggs* (2008) 44 Cal.4th 248, 309 [instruction which informed jury "it may" find a discovery violation without giving guidance on the question is harmless under any standard because it could only be "beneficial" to the defense].) Appellants' first argument, therefore, is unavailing.

Appellants' second argument, that the instruction should have attributed fault to the entire prosecution team rather than just the police department, is without merit. It was well within the trial court's discretion to state what in fact happened to the jury. And, since there was no evidence whatsoever that the prosecution knew of any non-disclosure, the trial court's statement that "the Compton Police Department failed to timely disclose" the evidence in question was nothing less than a true statement. Appellants cite no authority requiring that in situations where the non-disclosure was entirely the fault of the law enforcement agency, the resulting sanctioning instruction must also fault the prosecutor. Appellants'

current suggestion, in fact, is entirely contrary to the plain language of section 1054.1, subdivision (a), which emphasizes a distinction between the prosecutor and the investigating agency by obliging disclosure of discoverable evidence only "if it is in the possession of the *prosecuting attorney* or if the *prosecuting attorney* knows it to be in the possession of the *investigating agencies*." (§ 1054.1, subd. (a), emphasis added.)

Finally, it was well within the trial court's discretion to not specifically inform the jury that there was "intentional" misconduct, as the trial court's finding that any discovery violation in this case was not willful was supported by substantial evidence. (See, e.g., *People v. Alexander* (2010) 49 Cal.4th 846, 887 [trial court's finding that confidential information was not disclosed to prosecutor reviewed for substantial evidence]; *Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 730, fn. 4 [trial court's finding during recusal motion hearing that prosecutor did not improperly dissuade a witness reviewed for substantial evidence].)

While the two items of evidence, i.e., the police reports regarding various neighborhood residents and the fingerprint analysis reports, were belatedly disclosed, there was very little evidence, if any at all, that the Compton Police Department did so intentionally. For one, none of the police detectives involved nor any custodian of records from the police department were placed on the witness stand so that testimony could be elicited to show that the discovery violation was willful. In fact, at the trial level, neither appellant disputed the court's finding regarding the unintentional nature of the belated disclosure. (See 14RT 2175.) And, in fact, the court's finding of non-willful conduct appears to be the correct one when the items of evidence are reviewed for their exculpatory value. None of the reports supplied evidence that was exculpatory to any significant degree. (See Argument I.) The fingerprint reports themselves, neutral at best, did not help either the defense or the prosecution. There was no

particularly reason why the police would deliberately conceal these two items of evidence. In fact, much of the non-disclosure could be explained by the fact, undisputed by both parties, that the criminal investigation, while it was ongoing, had changed hands from one police detective to another. (7RT 1050.)

As such, there was clearly substantial evidence to support the court's finding that the belated disclosure of the two items of evidence was not willful. (See *People v. Reyes* (1974) 12 Cal.3d 486, 501-502 [trial court's finding that late disclosure was unintentional and inadvertent upheld where the evidence at most showed that officer did not incorporate his notes of a witness interview into the formal police report and that when defense attorney examined the police file, he did not see those notes].) It must be emphasized that it is immaterial that the facts, as scant and as undeveloped as they appear in the record, may be susceptible to the contrary inference that the late disclosure was willful. (See *People v. Kraft* (2000) 23 Cal.4th 978, 1054 [where substantial evidence is the test and where "the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment"].)

Under these circumstances, the trial court's instruction to the jury pursuant to a finding it made that was supported by substantial evidence cannot be error.

D. Restriction By the Trial Court on Closing Argument Was Proper

Likewise, appellants' argument that the trial court erred in restricting the defense from arguing that the police department intentionally withheld evidence is without merit. A closing argument must be based on the evidence presented to the jury. (*People v. Mayfield* (1997) 14 Cal.4th 668,

781-782.) No evidence had been presented to the jury regarding the police department's handling of discovery materials. Arguing that the police intentionally withheld discoverable materials under these circumstances would clearly be improper. The trial court, having also found, based on substantial evidence, that there was no willful discovery violation (See Argument II(D)), had acted properly in precluding the defense from arguing outside of the record in this fashion. Appellants' current contention must fail.

E. Any Error Was Harmless Given the Overwhelming Evidence of Guilt

Finally, even if the court should have given the special instruction requested, worded its instruction pursuant to CALJIC No. 2.28 according to what is now urged by appellants, and allowed the defense to argue bad faith conduct by the police, appellants were not prejudiced. The evidence of appellants' guilt, as previously discussed, was simply overwhelming. (See Argument I(C)(4).) No amount of inferences of bad faith conduct on the part of the police could undermine to any appreciable degree the credibility of prosecution witnesses and the testimony they gave from different perspectives which collectively identified appellants as the killers. As such, any error was harmless under any standard. (See *People v. Riggs*, *supra,* 44 Cal.4th at p. 309 [error due to incompleteness of CALJIC No. 2.28 was harmless under any standard]; *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *People v. Watson*, *supra,* 46 Cal.2d at p. 836.)

III. THE TRIAL COURT ACTED PROPERLY IN PROCEEDING WITH THE CROSS-EXAMINATION OF JOHN YOUNGBLOOD WITHOUT ANY UNNECESSARY DELAY

Appellant Rangel contends that the court erred by forcing him to conduct the cross-examination of Youngblood without giving him sufficient time to review a newly acquired six-page statement Youngblood gave to appellant Mora's investigator. Appellant Rangel argues that the trial court's refusal to give him time to prepare for the cross-examination of Youngblood deprived him of his right to confrontation. (RAOB 70-76.) This contention is without merit.

First, the trial court here did give appellant Rangel's counsel some time to read and digest the six-page statement and instructed the jury to this effect. (10RT 1653 ["Ladies and gentlemen, Ms. Trotter is reading a statement she was just given, so it will be a moment or two."].) It was only thereafter, when appellant Rangel's counsel announced she was ready to proceed, that the cross-examination began. (10RT 1653.) As such, appellant Rangel's current contention that he was not given enough time to prepare for the cross-examination of Youngblood is not supported by the record. His claim must fail on this ground alone.

Moreover, it is the trial court's duty "to safeguard and promote the orderly and expeditious conduct of its business and to guard against inept procedures and unnecessary indulgences which would tend to hinder, hamper or delay the conduct and dispatch of its proceedings." (*In re Barnett* (2003) 31 Cal.4th 466, 472.) Pursuant to this duty, the trial court should not grant any extensive recess in the middle of the proceedings when it was not legally obligated to do so. This was the case here.

The record shows that the defense knew about Youngblood since January 20, 1999. (7RT 1037-1038.) Appellant Rangel further admits, as he must, that he had had the opportunity to interview Youngblood prior to

his testimony. (RAOB 71.) It was at that earlier interview that Youngblood had indicated he could only identify appellant Mora. (10RT 1622-1625.) It was through no fault of the trial court or the prosecution that sometime thereafter, upon being interviewed by appellant Mora's investigator, that Youngblood took the position that the individual he could identify was not appellant Mora, but appellant Rangel. In other words, the prosecution did nothing to cause this surprise. Even had Youngblood been disclosed to the defense earlier by the prosecution, nothing would preclude the same from happening. Rather, what occurred here was essentially what occurs regularly at trials, i.e., that a party is surprised by a known witness who gives unexpected testimony. Under such circumstances, appellant Rangel's recourse was to impeach Youngblood with his prior inconsistent statements (see *People v. Underwood* (1964) 61 Cal.2d 113, 123-124 ["A party may, of course, impeach his own witness by the use of prior inconsistent statements where he has been damaged and surprised by the witness' testimony . . ."]), not to unreasonably insist on a recess, a remedy that litigants under the same circumstances simply are not entitled to. No error occurred.

In any event, appellant Rangel cannot pinpoint how he could have cross-examined Youngblood differently had he been given the additional time he requested. A review of the record showed that appellant Rangel's counsel, despite claiming insufficient time to review the six-page report, in fact extensively and rigorously cross-examined Youngblood. (10RT 1653-1698.) Also, Youngblood's testimony was but a minute portion of the prosecution's evidence, which overwhelmingly showed appellant Rangel's guilt. Hence, even assuming any constitutional error, it was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

IV. THE TRIAL COURT PROPERLY PERMITTED THE PROSECUTION TO PLAY FOR THE JURY THE TAPED INTERVIEW OF LOPEZ

Appellants contend that the trial court should not have permitted the prosecution to play the unredacted tape of Lopez's police interview. Appellant Rangel contends that the disclosure of gang evidence in the process prejudiced him. Appellant Mora makes the same claim, but also complains about references in the tape to other facts, i.e., appellant Mora's propensity for violence, his recent incarceration in jail, and an outstanding warrant. (RAOB 70-90; MAOB 74-87.) These contentions lack merit.

A. Relevant Proceedings

During voir dire, during the discussion about a prospective juror whom appellant Mora's counsel represented to have expressed an inability to be fair to gang members, appellant Mora expressed concern that gang evidence may "slip out" and cause the juror to be unable to deliberate fairly. The court corrected counsel by indicating that the juror actually said that while he disliked gang members, he could set that feeling aside in considering the case. During the same discussion, the prosecution indicated that it did not intend to elicit gang evidence in the case. The court found an insufficient basis to sustain the challenge of the prospective juror for cause. (2RT 265-266.)

Just before opening statements, the court asked the prosecutor whether there was any anticipation that references to gangs could be "blurt[ed]" out by any one of the witnesses. The prosecutor replied, "I would tell them not to." (3RT 358.) In response to appellant Mora's concern that when witnesses described the suspect's clothing that gang references could be made. The court asked counsel to guide the witnesses closely so that no such references to be made. The court noted that "if it

looks like we can't go any other way, then I ask that we approach." (3RT 359.)

At trial, Lopez gave testimony that significantly diverged from her earlier statements, made during two interviews with the police, during which she revealed details highly incriminating toward appellants. Lopez claimed at trial that her earlier statements to the police were the result of police threats to dispossess her of her child, which threats were made during repeated interruptions to the tape recording. (7RT 1138, 1142-1143, 1145, 1158; 8RT 1239-1240.) Lopez testified that if she were to hear the tape, she "might" be able to tell where the tapes were stopped by the officers so that she could be threatened further. (8RT 1240.) The prosecutor then sought to play the tapes in front of the jury for her to identify when, during the interview, the tape was stopped. (8RT 1240-1241.)

Appellant Rangel objected, arguing there were gang references in the tapes and that the better method of impeachment was to have the witness listen to the tapes outside the presence of the jury. (8RT 1240-1241.) Appellant Mora joined in the objection and additionally observed that there were references to custody time in jail. Appellant Mora also asserted that Lopez would be incapable of telling when a tape had been stopped, since such an ability fell into the realm of a "scientific" expert. (8RT 1241.)

The prosecutor offered to fast-forward the tape when references to jail or gangs were made. She also offered to redact those portions from the transcript. (8RT 1243.) The court stated:

> Well, I do have a bit of a problem. She did say that – she put the entire interview in a suspicious posture. She has accused the police of doing all sorts of threatening things and misdeeds and turning on and off the tape. And it does seem that the jury should hear the way in which the interview was conducted. It's certainly a better thing for them to judge, since the issue is whether her statement was believable at the time it was given.

> Unless you can show me something other than maybe a general references where maybe an inference can be drawn of gang membership, it didn't sound like the references to the defendant exists.

(8RT 1244.) As appellants pinpointed references to gangs in the transcript, the trial court noted that none of those references directly identified appellants as gang members. (8RT 1244-1245.) The court further noted that even if the references did suggest appellants' gang membership that an instruction that gang membership was not an issue would cure any prejudice. (8RT 1246.) Appellants argued that since there was a ruling to exclude gang evidence and the jury had not been voir dire on gang issues that the court's ruling would "undermine" the defense's selection of the jury panel. (8RT 1246-1247.) Appellant Rangel claimed that one of the jurors responded in the questionnaire that it would make a difference to her in deliberating penalty that a defendant is a member of a gang. (8RT 1248.)

The court responded that the parties, as reflected in their earlier discussions, knew that gang reference could nonetheless surface collaterally. The court stated:

> "You also know from all the experience that you have that with lay witnesses, that these things come out sometimes. I am not going to keep out pertinent information when the entire statement given by this woman has been attacked every which way. I'm not going to keep it out because there might be a reference to gang membership which will not be dwelled on, argued and I will even entertain a jury instruction on it, if that's what you want. But I don't think you can have it both ways. The parties did discuss the possibility that sometimes these things do come out by way of lay witnesses, some kind of reference.

(8RT 1250.)

The court also ruled that having heard the tapes once, it determined that there would be no undue prejudice in light of the fact that the prosecution was not arguing gang evidence in the case. (8RT 1251.)

Appellant Rangel then cited to Lopez's statement admitting appellant Mora had been involved in fights and had been in jail. (8RT 1252-1253.) The court rejected the defense arguments, indicating, "I don't think there is any choice but to let the jury hear this tape and the questioning in view of the challenge to it that this witness has made." (8RT 1253.)

Appellant Rangel also objected to hearsay statements in the transcript made when the police, in their questioning, mentioned that "someone told us everybody that was in the house was awake and saw these guys run in with guns." (8RT 1254-1255.) The court rejected the argument, noting that the statement was part of a question. (8RT 1256.)

Thereafter, the trial court instructed the jury that the transcript served only as an aid to understand the tape. The court instructed that hearsay statements may be made as part of the question and answers recorded in the tape. The court stated, "Those, if it's hearsay and it's not something that this witness talked about, then – excuse me for pointing at you – they are probably things that you are not going to need to consider. The purpose for you hearing this is to clarify the issues that have come up in the course of this witness's testimony." The two tapes were then played. (8RT 1256-1262.) The transcript reflects that during the taped interview, Lopez talked about a party she went to earlier in the day when someone named John from the gang North County Locos approached her and her friends looking to start trouble. (1CT 13.) Lopez indicated that no one from the Lynwood Tiny Locs were with her at the time. (1CT 14.) Lopez indicated someone named Dreamer was in the car and he had been shot during an earlier occasion. (1CT 15.) Lopez then called appellant Mora, her "baby's daddy," and told him about the confrontation and asked him to go to her house in case someone from the other party went to her home looking for more trouble. (1CT 15-16.) After hearing the gunshots outside her home, Lopez immediately believed that appellant Mora had been involved in a

shooting outside her house. (1CT 21.) Lopez told the police that appellant Mora had been involved in fights before but never committed a "cold" act. (1CT 31.) Lopez informed the police that she had very little contact with appellant Mora since he was released from jail. (1CT 32.)

Lopez, who listened to those tapes in the courtroom, could not pinpoint instances during the tape recording when the recording allegedly was stopped. (8RT 1268-1269.)

B. The Trial Court Properly Permitted the Entire Tape to be Played to the Jury

Appellants argue the trial court erred, under Evidence Code section 352, by allowing prejudicial hearsay and improper character evidence to be revealed to the jury by way of Lopez's unredacted tape-recorded statements. (RAOB 77-90; MAOB 78-87) Respondent disagrees.

Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact of consequence to the determination of an action. (Evid.Code, § 210.) Even if evidence is relevant, a trial court has the discretion to determine that its probative value is substantially outweighed by the probability that its admission will either be unduly time consuming or create a substantial danger of undue prejudice, confusion of the issues, or misleading the jury. (Evid. Code, § 352.) The type of prejudice Evidence Code section 352 addresses is not the damage to a defense that naturally results from relevant evidence, but an irrational and emotional bias against the defendant and/or the use of the evidence in a manner unrelated to the issue for which the evidence was admitted. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1016; *People v. Kipp* (2001) 26 Cal.4th 1100, 1121; *People v. Zapien* (1993) 4 Cal.4th 929, 958.) A trial court abuses its discretion when deciding whether to admit evidence only when it acts in an "arbitrary, capricious, or patently absurd manner that

resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

The trial court here did not abuse its discretion. During trial, Lopez disavowed most of her earlier statements to the police by accusing the police detectives of engaging in misconduct during her interview. Specifically, she accused the detectives of having stopped the tape of her interview several times to issue threats against her so that she would offer incriminating statements against appellants. (7RT 1143; 8RT 1239-1240.) When challenged as to whether she could demonstrate where the recording stoppages occurred in the tape, she testified she might be able to do that. (8RT 1240.) Under these circumstances, allowing her to do so as the tape played in front of the jury permitted the jury to listen to the actual tone of questioning and the dynamics of the interview so as to more fully evaluate the circumstances surrounding any point in the interview where recording stoppage allegedly occurred. The jury could thereafter better determine for themselves whether the witness was lying about the recording interruptions. As such, the entire tape recording was relevant to the credibility of Lopez.

The trial court ruled that the playing of the tape would not pose undue prejudice within the meaning of Evidence Code section 352. (8RT 1251.) In doing so, the court did not abuse its discretion in finding that there was not much choice but to "let the jury hear this tape and the questioning in view of the challenge to it that this witness has made." (8RT 1253.) First, much of the tape, containing prior statements by Lopez inconsistent with her trial testimony, was not only admissible, but highly probative evidence because they were prior inconsistent statements that impeached Lopez's evasive trial testimony. (Evid. Code § 770 [extrinsic statement inconsistent with witness's testimony can be given if "[t]he witness was so examined while testifying as to give him an opportunity to explain or to deny the

statement"]; *People v. Zapien* (1993) 4 Cal.4th 929, 951-952 [recording of prior inconsistent statement by a witness is admissible].)

As to the references to gangs, a prior fight, and appellant Mora's prior incarceration, the court properly determined that any dangers of prejudice that might arise therefrom did not outweigh the probative value of having Lopez support her claims of coercion in the most direct and logical way possible, i.e., pinpoint, as the tape was playing, the many alleged instances in which the recording had allegedly been stopped. Indeed, merely because the tape referred to gangs and to bad character does not end the inquiry. While it may be true that "admission of evidence of a criminal defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged" (*People v. Williams* (1997) 16 Cal.4th 153, 193), this Court has routinely upheld section 352 challenges against the introduction of gang evidence or other bad character evidence due to the probative value of the evidence being presented. (See, e.g., *Id.* at p. 193; *People v. Brown* (2003) 31 Cal.4th 518, 547; *People v. Gurule* (2002) 28 Cal.4th 557, 654-655.) Here, because Lopez was a percipient witness whose statements strongly inculpated appellants, her credibility was important and the probative value of playing the entire taped interview, therefore, was high. The trial court cannot be said to have acted in an irrational and capricious manner in determining that the dangers of prejudice did not substantially outweigh the probative value of the evidence in question.

C. Appellants Cannot Demonstrate Prejudice

In any event, appellants cannot demonstrate they were prejudiced by hearing the tape played to the jury. This Court has held that "the application of ordinary rules of evidence like Evidence Code section 352 does not implicate the federal Constitution, and thus we review allegations of error under the 'reasonable probability' standard of [*People v. Watson*

(1956) 46 Cal.2d 818, 836]." (*People v. Marks* (2003) 31 Cal.4th 197, 226-227.) Here, it cannot be concluded that it was reasonably probable that the jury would have reached a more favorable verdict but for the introduction of the tape. Even with the tape redacted to delete references to gangs, prior incarceration, and appellant Mora's involvement in a fight, Lopez's prior inconsistent statements recounted how appellants left the house just before the shooting and entered the house after the shooting. Appellant Mora thereafter exchanged the positions of his Oldsmobile with Lopez's vehicle. Appellant Mora even told Lopez to enter the bedroom so that his child would not see him taken to jail. (6RT 1019; 7RT 1067-1068, 1073, 1082-1083, 1088, 1091-1094, 1103,1108, 1110, 1117, 1137.) This account lent crucial credibility to Valadez's observations of appellants entering the house with guns right after the shots and bragging to people inside the house about the shooting. Such evidence, along with testimony by other witnesses referenced previously (see Argument I(C)(4)), combined to produce overwhelming evidence of guilt. Any error was therefore harmless. (See *People v. Earp* (1999) 20 Cal.4th 826, 878 [any error from admission of evidence in violation of Evidence Code section 352 is harmless where evidence of guilt is overwhelming].)

V. THE TRIAL COURT PROPERLY DECLINED TO EXCUSE JUROR NO. 7

Appellant Rangel contends that Juror No. 7 should have been excused because she was told by one of appellants' mother that a 25-years-to-life term was offered to one of the defendants. Specifically, appellant Rangel contends that the juror's exposure to a plea deal suggests "a defendant who has made a conscious decision to 'roll the dice' with a trial, and who therefore might 'deserve' to be sentenced to death in the event he is found guilty" and further would allow the juror to infer guilt based on the fact that

the defendants were considering the plea bargain. (RAOB 91-104.) This contention is without merit.

A. Relevant Proceedings

On January 13, 1999, a Wednesday, which was the second day of evidence presentation, Juror No. 7 informed the court that on the Monday of that week, before she was ever questioned on voir dire, the mother of one of the defendants offered her a cookie and the juror had refused. The mother said she was there every day for her son's case. The mother stated that "she was sure she was going to lose him because he had been offered a plea of 25 to life" and that "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." The juror clarified that the mother did not state any names and the juror did not "encourage any other conversation." (4RT 524.) The mother further told the juror, that she had been looking for work and now had to wait for "this whole ordeal" to be over before resuming her search. The juror stated that she did not know who the woman was at the time. It was only after seeing that same woman in court the same day she brought the matter to the court's attention that the juror drew the connection that the woman was one of the defendant's mother. (4RT 525.)

The court asked Juror No. 7 if these facts would affect her in fulfilling her duties as a juror in either the guilt or penalty phase, and Juror No. 7 responded in the negative. (4RT 525-526.) Appellant Rangel's counsel asked a few questions which did not yield any new answers. (4RT 527-528.) The prosecutor asked whether the juror could disregard the conversation and not be affected by it in anyway during either phase of the trial. The juror reaffirmed that she could. (4RT 528.) After the juror left the courtroom, the prosecutor stated that there was never any 25-to-life offer that was made. (4RT 529.) Appellant Rangel's counsel also stated

that she never "mentioned to anyone that kind of offer was made." (4RT 529.) She then moved for excusal of the juror:

> I have a problem with this juror remaining because it indicates to me if she thinks an offer was made, that the defendants may have been considering that offer, which perhaps could point up that they are saying that "well, maybe I did this and I better take this deal." Even though all of this was not communicated to her, I think it conjures up that question. I'm going to ask that she be excused.

(4RT 529.) Appellant Mora's counsel did not join in the motion, and instead stated, "I believe the juror said she could be fair and impartial." Appellant Mora's counsel asked that all members of the audience be admonished not to make statements about the case. (4RT 530.) Appellant Mora's counsel also confirmed that any talk about a deal occurred within the defense team and that no offer was made by the prosecution. (4RT 530.)

The court declined to excuse the juror, stating the following:

> She has been a strong individual. She made every effort to communicate to us this situation, and she is adamant about her ability to set it aside. I don't see there is grounds to remove her.

(4RT 531.) The court also observed, "The difference between this case and a non-death-penalty case is, we have talked to them about penalty and they do have to ultimately address that issue. So it's less concern to me than if this were a case where they have no clue what the potential sanctions are." (4RT 531.)

B. Appellant Rangel Waived A Part of His Claim

Preliminarily, appellant Rangel's current argument, that the information Juror No. 7 became exposed to could cause her to punish appellant Rangel for proceeding to trial rather than accepting a plea deal by seeking the imposition of the death penalty (RAOB 98), is forfeited. The trial court was deprived of the opportunity to address this argument in the

first instance because appellant Rangel did not present it at trial. As such, he is barred from raising that argument on appeal. (See *People v. Cowan* (2010) 50 Cal.4th 401, 485-486 [objecting on a specific ground as to the testimony of a particular witness but failing to raise other grounds for excluding that testimony forfeits the right to complain on appeal based on those other grounds]; *People v. Demetrulias* (2006) 39 Cal.4th 1, 21 [defendant forfeits argument on appeal by failing to make a timely evidentiary objection on specific ground raised on appeal].)

C. Trial Court Properly Declined To Excuse Juror No. 7

In any event, neither of the two grounds for the excusal of the juror carries any merit, and the trial court properly declined to excuse Juror No. 7. Section 1089 provides, in pertinent part:

> If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors.

Before a trial court is obligated to remove a juror for good cause,

> the juror's inability to perform a juror's functions must be shown by the record to be a "demonstrable reality." The court will not presume bias, and will uphold the trial court's exercise of discretion on whether a seated juror should be discharged for good cause under section 1089 if supported by substantial evidence.

(*People v. Holt* (1997) 15 Cal.4th 619, 659; see also *People v. Holloway* (2004) 33 Cal.4th 96, 124-125.) The "demonstrable reality" test is a "heightened standard" and requires a "stronger evidentiary showing than mere substantial evidence." (*People v. Wilson* (2008) 44 Cal.4th 758, 840.)

There is no "demonstrable reality" that Juror No. 7 could not perform her duties as a juror. There was no dispute that the juror did not intentionally seek the extraneous information in question, but had come across it accidentally through a conversation initiated by one of appellants' mothers. The juror, being responsible and conscientious, informed the court about the receipt of extraneous information immediately after she realized that her interaction was with one of the defendants' mother. Nothing about what the juror said during the subsequent inquiry by the court and the parties came close to reflecting a bias on her part as a result of the extraneous information. In fact, she did nothing but affirm that she could set aside the extraneous information. (4RT 528.) Apparently, there was no reason to disbelieve her, as even appellant Mora's counsel found it unobjectionable to keep her on the jury panel. (4RT 530.) The trial court here would be remiss to find a "demonstrable reality" that the juror, as a result of the outside information, would not be able to fulfill her duties as a juror within the meaning of section 1089.

Contrary to appellant Rangel's central contentions on appeal (RAOB 99-101), the extraneous information the juror received was not inherently prejudicial. Appellant Rangel's argument -- that there is a substantial likelihood that the juror would punish the defendant for proceeding to trial rather than accepting a deal -- aside from being forfeited on appeal as discussed earlier, must be rejected. Jurors receiving the extraneous information would just as likely infer innocence because the defendants had rejected a favorable plea. Either conclusion would be nothing but baseless speculation and conjecture.[12]

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[12] Appellant Rangel misguidedly impugns the integrity of Juror No. 7 with Juror No. 7's response on her jury questionnaire that "[a] person who has no regard for another's life shouldn't use taxpayer's money in

(continued...)

Indeed, appellant Rangel's argument to the contrary contravenes the legal presumption that the jurors understood and followed the instructions given. (*Francis v. Franklin* (1985) 471 U.S. 307, 324-325, fn. 9 [105 S.Ct. 307, 85 L.Ed.2d 344].) This Court has held that even when misconduct occurrs, "[t]he presumption of prejudice may be dispelled by an admonition to disregard the improper information . . . [and the reviewing Court will] generally presume that jurors observe such instructions." (*People v. Zapien*, *supra*, 4 Cal.4th at p. 996; see also *People v. Pinholster* (1992) 1 Cal.4th 865, 925.) Here, the juror, through questionings by the court and the parties, was informed of the duty to disregard the extraneous information and to not be influenced by it. (4RT 528.) The jury, furthermore, had been instructed that they were only to base their verdict on what the evidence at trial shows, and not only any other source of fact. (5RT 1097.) Juror No.7, as well as the entire jury, is presumed to have followed such an instruction.

Nor is appellant Rangel's second argument (presented to the court at trial) tenable that jurors would likely infer guilt from the fact that appellants had considered a plea deal. This argument assumes facts in the record that simply do not exist. The woman who interacted with Juror No. 7 never told the juror that appellants were entertaining the plea deal, but just that the deal had been extended by the prosecution. (4RT 524.) The very fact that the prosecution had extended a plea offer does not in any way suggest that

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(...continued)
prison . . . [and that] once you have been convicted and found guilty beyond a reasonable doubt, sentenced to death, and I think it should be carried out [because too] much time is wasted on the criminals." (RAOB 97.) But, there was nothing improper about this written response. Indeed, appellant Rangel did not challenge her for cause or through a peremptory challenge. The juror's point was not that all murderers should be given the death penalty, but rather, that those who have received the death verdict should have their penalty "carried out" without unjust delay.

appellants considered it. As such, appellant Rangel cannot demonstrate inherent prejudice in the manner he now suggests.

Appellant Rangel, despite his failure to ask the trial court to query further of the juror, and despite his own failure to query the juror further, now seeks to argue on appeal that the trial court should have probed the juror more to see if she had communicated this extraneous information to others in the panel. (RAOB 100-102.) This is precisely the type of situation where the application of the doctrine of forfeiture is not only appropriate, but compelled. (*In re Seaton* (2004) 34 Cal.4th 193, 198 ["To consider on appeal a defendant's claims of error that were not objected to at trial 'would deprive the People of the opportunity to cure the defect at trial and would "permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal"'"].)

In any event, the trial court, as well as appellant Mora's counsel, was obviously satisfied, and for good reasons, that Juror No. 7, who was conscientious enough to perceive this extraneous information as a sufficiently serious problem that necessitated immediate disclosure to the court, would not under the same circumstances, seek to aggravate the problem by communicating the extraneous information to her fellow jurors. The trial court did not abuse its discretion in so concluding. (*People v. Seaton* (2001) 26 Cal.4th 598, 676 ["specific procedures to follow in investigating an allegation of juror misconduct are generally a matter for the trial court's discretion"]; see also *People v. Thompson* (2010) 49 Cal.4th 79, 137 [scope of inquiry into juror misconduct within trial court's discretion].) Appellant Rangel's current argument must fail.

As the trial court here did not abuse its discretion under section 1089 in not excusing Juror No. 7, the instant claim must fail.

VI. THE EVIDENCE WAS SUFFICIENT TO CONVICT APPELLANTS OF ATTEMPTED ROBBERY, FELONY MURDER BASED UPON ATTEMPTED ROBBERY, AND TO SUPPORT A TRUE FINDING ON THE ROBBERY SPECIAL CIRCUMSTANCE

Appellants contend that the evidence was insufficient to support their convictions for attempted robbery, conviction of felony murder based upon attempted robbery, and the robbery special circumstance allegation. (RAOB 105-125; MAOB 88-102.) This contention is without merit.

Contrary to appellant Rangel's argument (RAOB 118), there are no heightened reliability requirements in capital cases when reviewing the record for sufficiency of the evidence to support a conviction. (*People v. Letner* (2010) 50 Cal.4th 99, 161.) The standard is the same for capital and non-capital cases, i.e.:

> "review [of] the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence that is, evidence-that is reasonable, credible, and of solid value-from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt [,] . . . presum[ing] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."

(*Ibid.*)

> Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] [The reviewing court will] resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.

(*People v. Maury* (2003) 30 Cal.4th 342, 403.) Moreover, "if the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be

reconciled with a contrary finding." (*People v. Farnam* (2002) 28 Cal.4th 107, 143.)

Applying these principles of review, the record discloses sufficient evidence to sustain appellants' convictions for attempted robbery, robbery-murder felony murder, and the robbery-murder special circumstance.

A. There Was Sufficient Evidence of Attempted Robbery

Appellants first contend that there was insufficient evidence that they had the specific intent to permanently deprive the victims of their property within the meaning of the crime of attempted robbery. (MAOB 111-114; RAOB 143-145.) This contention is meritless.

"[T]o be convicted of attempted robbery, the perpetrator must harbor a specific intent to commit robbery and commit a direct but ineffectual act toward the commission of the crime." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) Robbery requires a "specific intent to permanently deprive [the victim] of [his] property." (*People v. Young* (2005) 34 Cal.4th 1149, 1176-1177; *People v. Lopez* (2003) 31 Cal.4th 1051, 1058; § 211.) "[T]he intent required for robbery ... is seldom established with direct evidence but instead is usually inferred from all the facts and circumstances surrounding the crime." (*People v.. Lewis* (2001) 25 Cal.4th 610, 643.) "[N]either a completed theft [citation] nor a completed assault [citation], is required for attempted robbery." (*People v. Medina* (2007) 41 Cal.4th 685, 694.)

Here, the evidence, viewed most favorably toward the prosecution's case, showed that appellant Rangel stood outside the driver's window, pointed a gun at Encinas, and said, "Check yourself. Give me your wallet." (3RT 407-408; 4RT 632-634; 8RT 1325.) Encinas complained, stating, "Aw, man. Come on, man. Aw," before leaning his body one way to retrieve his wallet. It was at this point that Appellant Rangel fired his gun. (4RT 634-635.)

Appellant Mora then, standing at the front passenger window, also told Urrutia, "Give me your wallet." (4RT 634.) When Urrutia stated his intention to comply but also stated he did not have any money, appellant Mora shot him. (4RT 637-638.) When police arrived on the scene, they observed, in addition to expended shell casings, two wallets which belonged to the victims in plain view inside the car. (9RT 1431-1433; 10RT 1523, 1525-1539.)

Such evidence clearly supported an inference that appellants, at the point they demanded the victims' wallets at gunpoint, harbored the specific intent to permanently deprive them of the wallets, and that when the victims' were slow and expressed reluctance to comply, they followed through with the threat implied from the display of their firearms. The fact that the wallets were ultimately not taken can reasonably be construed as, among other things, an abandonment of the original purpose to deprive property after appellants realized the gravity of the shootings they had just committed. But, by the time of such an abandonment, appellants had already committed direct acts toward the purpose of depriving the victims of their wallet, i.e., by pointing a gun at them and demanding their wallets. (See, e.g., *People v. Bonner* (2000) 80 Cal.App.4th 759, 764, fn. 3 [there was "clear intention to rob" employees of a hotel where the defendant "made detailed preparations for the crime, went armed to the scene, placed a mask over his face, waited in hiding moments before his victim's approach, and gave up the enterprise only when discovered by other hotel employees."].) The jury could also have inferred that the act of shooting was motivated by the intent to incapacitate the victims from engaging in the further delay of, and possible resistance against, the taking of the wallet. As such, contrary to appellants' contentions, there was substantial evidence of a specific intent to permanently deprive property from the victims.

Any interpretation otherwise, i.e., that the evidence showed that appellants never seriously wanted to take property and that the demands for the wallets was a "pretext for some other objective" (see, e.g., MAOB 112), serves only as an alternative view of the evidence, especially given the fact that the evidence showed that the victims had in fact removed and exposed their wallets in response to appellants' demands. On appeal, of course, the existence of such an alternative view is an inadequate ground to find insufficiency of the evidence. (*People v. Catlin* (2001) 26 Cal.4th 81, 139 ["the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment"].)

B. There Was Sufficient Evidence of Robbery-Murder Felony Murder

"One who unlawfully kills a human being during the commission of a robbery or an attempted robbery is guilty of first degree murder under the felony-murder rule." (*People v. Thompson* (2010) 49 Cal.4th 79, 115; see §§ 187, 189; see also *People v. Young* (2005) 34 Cal.4th 1149, 1175.) "Under the felony-murder rule, a strict causal or temporal relationship between the felony and the murder is not required; what is required is proof beyond a reasonable doubt that the felony and murder were part of one continuous transaction. [Citation.] This transaction may include a defendant's flight after the felony to a place of temporary safety." (*People v. Young*, *supra*, 34 Cal.4th at p. 1175.) "[R]eliance on the continuous-transaction doctrine is consistent with the purpose of the felony-murder statute, which 'was adopted for the protection of the community and its residents, not for the benefit of the lawbreaker, and this [Court] has viewed it as obviating the necessity for, rather than requiring, any technical inquiry concerning whether there has been a completion, abandonment, or desistence of the [felony] before the homicide was completed." (*People v.*

Chavez (1951) 37 Cal.2d 656, 669670 [Chavez].) "[F]elony-murder liability attaches only to those engaged in the felonious scheme before or during the killing." (*People v. Cavitt* (2004) 33 Cal.4th 187, 207.) Moreover, the person killed need not be the target of the underlying felony where the homicide is committed in the perpetration of the felony if the killing and felony are parts of one continuous transaction. (*People v. Davis* (2005) 36 Cal.4th 510, 563565; *People v. Welch* (1972) 8 Cal.3d 106, 118119.)

Here, there was clearly sufficient evidence that the murder and the attempted robbery were part of one continuous transaction. The evidence clearly supported an inference that the shooting occurred during an attempt to obtain wallets from the victims by force and fear. As previously observed, any interpretation that there never was a specific intent to take the victims' wallets was but a mere alternative interpretation of the evidence that must be rejected here on appeal. As such, appellants' contentions that there was insufficient evidence of robbery-murder felony-murder must be rejected.

C. There Was Sufficient Evidence of To Sustain the Robbery-Murder Special Circumstance Finding

Appellants also challenge the special circumstance finding based on robbery-murder. They specifically contend that there was no evidence that the homicide was committed to advance the robbery. (MAOB 149-151; RAOB 115-118.) This contention, of course, is without merit.

" '[T]o prove a felony-murder special-circumstance allegation, the prosecution must show that the defendant had an independent purpose for the commission of the felony, that is, the commission of the felony was not merely incidental to an intended murder.'" (*People v. Horning* (2004) 34 Cal.4th 871, 907, internal citation omitted.) "'In other words, if the felony is merely incidental to achieving the murder-the murder being the

defendant's primary purpose-then the special circumstance is not present, but if the defendant has an "independent felonious purpose" (such as burglary or robbery [or rape]) and commits the murder to advance that independent purpose, the special circumstance is present.' [Citations.]" (*Id.* at p. 908.) However, "the felony-murder special circumstance does not require a strict 'causal' or 'temporal' relationship between the 'felony' and the 'murder' " and "extends even to the situation in which the 'murder was committed while the defendant was engaged in ... the immediate flight after committing' the felony." (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

As previously set forth, the sequence of events, according to the evidence presented by the prosecution, showed that appellants, at the point they demanded the victims' wallets at gunpoint, were driven by the purpose of permanently depriving the victims of their wallets, and when the victims were slow to comply, appellants followed through with their threat, implied in the aiming of guns at the victims, to shoot them for non-compliance. (See Argument V(A), *supra.*) The killing that resulted, while not the best way to expedite the robbery, cannot in any sense be characterized as merely "incidental" to the robbery. (See *People v. Rundle* (2008) 43 Cal.4th 76, 156 ["although intentionally killing the victim during an attempted rape ultimately might thwart, in the legal sense, the perpetrator's goal of committing a rape, this circumstance does not mean the murder was not "committed while the defendant was engaged in ... the ... attempted commission of ... [¶] ... [¶] ... Rape," which is what the [special circumstance] statute requires"], disapproved on unrelated grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

As such, appellants' instant sufficiency of the evidence challenge must fail.

VII. THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN THE MULTIPLE MURDER SPECIAL CIRCUMSTANCE FINDING; NO INSTRUCTIONAL ERROR OCCURRED

The jury in this case was instructed on the multiple murder special circumstance in the form of CALJIC Nos. 8.80.1 and 8.81.3. The court's instruction pursuant to CALJIC No. 8.80.1 stated in pertinent part:

> If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider and abettor, you cannot find the special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill, aided [or] abetted . . . in the commission of the murder in the first degree, or with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of the crime of attempted robbery which resulted in the death of a human being.

(5CT 53-54, brackets in text deleted.) The court's instruction pursuant to CALJIC No. 8.81.3 states:

> To find that the special circumstance, referred to in these instructions as multiple murder convictions, is true, it must be proved: A defendant has in this case been convicted of at least one crime of murder of the first degree and one or more crimes of murder of the first or second degree.

Appellants now contend that the multiple murder special circumstance must be reversed because there was insufficient evidence that either one of them intended to kill the victim they did not shoot and because the jury was instructed it could find the circumstances true without finding an intent to kill. (RAOB 126-138; MAOB 152-159.) Appellants' contention is without merit.

In *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 153-154, this Court interpreted the felony-murder special circumstance of the 1978 death penalty law as requiring an intent to kill in all instances, even when the

defendant was the actual killer. This Court so construed the California's law to avoid equal protection and cruel and unusual punishment concerns. (*Id.* at pp. 151 ["If the initiative were construed to impose a penalty of death or life imprisonment without parole for unintended felony murder, it would punish more severely a defendant who did not intend to kill than one who did. Such a distinction would create problems under both the Eighth Amendment and the equal protection clause."].) In doing so, the *Carlos* court relied heavily on the decision in *Enmund v. Florida* (1982) 458 U.S. 782, 801 [102 S.Ct. 3368, 73 L.Ed.2d 1140], where the United States Supreme Court found that the Eighth Amendment prohibited the imposition of the death penalty on a getaway driver for a robbery without proof that he "killed or attempted to kill." (*Carlos v. Superior Court*, *supra*, 35 Cal.3d at p. 150 ["The holding in *Enmund* was carefully limited to the case of a defendant who did not kill, attempt to kill, or contemplate that life would be taken. The reasoning of the case, however, raises the question whether the death penalty can be imposed on anyone who did not intend or contemplate a killing, even the actual killer. The court's analysis of the deterrent and retributive purpose of the death penalty focuses on the subjective intent and moral culpability of the defendant, and in this context there is no basis to distinguish the killer from his accomplice."]

The *Carlos* ruling, along with its rationale, was later extended in *People v. Turner* (1984) 37 Cal.3d 302, where this Court held that the multiple-murder special circumstance also requires such an intent to kill. (*Id.* at p. 328-329 ["Again, no different analysis is required because two persons instead of one were unintentionally killed."].)

After *Turner*, a momentous decision by the United States Supreme Court in *Cabana v. Bullock* (1986) 474 U.S. 376 [106 S.Ct. 689, 88 L.Ed.2d 704], held that the Eighth Amendment permits the imposition of the death penalty not only in cases where there was an intent to kill, but

also where the defendant "in fact killed." (*Id.* at p. 386.) A subsequent decision in *Tison v. Arizona* (1987) 481 U.S. 137 [107 S.Ct. 1676, 95 L.Ed.2d 127], left no doubt that as far as the nation's highest court is concerned, intent to kill is not an absolute necessity for the imposition of the death penalty even for an aider and abettor; rather, without such an intent, "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result." (*Id.* at p. 157.)

With the previous constitutional concerns allayed by these United States Supreme Court decisions, this Court, in *People v. Anderson* (1987) 43 Cal.3d 1104, revisited the *Turner* holding. Overturning *Carlos*, the *Anderson* court found that a sound application of the rules of statutory construction should not have resulted in the earlier foisting of an "intent to kill" requirement into the felony-murder special circumstance provision of section 190.2, subdivision (a)(17). (*Id.* at p. 1146.) The *Anderson* Court observed that section 190.2, subdivision (a)(17), if read alone, did not require an intent to kill. (*Id.* at p. 1141.) But, when read in conjunction with section 190.2, subdivision (b), as it existed at the time[13], section 190.2, subdivision (b), essentially "lays down a special rule for a certain class of

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[13] In 1987, subdivision (b) of 190.2, states "Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true."

first degree murderers: if the defendant is guilty as an aider and abettor, he must be proved to have acted with intent to kill before any special circumstance (with the exception of a prior murder conviction) can be found true." (*Id.* at p. 1142.) Thus, the *Anderson* Court announced that under the death penalty law as it existed at that time, "intent to kill is not an element of the felony-murder special circumstance; but when the defendant is an aider and abettor rather than the actual killer, intent must be proved." (*Id.* at p. 1147.)

The *Anderson* Court then observed, "In construing [the multiple murder special circumstance provision] to the contrary in *Turner*, we relied on our decision in *Carlos*. But we have now rejected the reasoning of *Carlos*. With its support gone, *Turner* must also fall." (*Id.* at p. 1149.) As a result, the *Anderson* Court announced that as to the law on multiple-murder special circumstance as it existed at the time, "intent to kill is not an element of the multiple-murder special circumstance; but when the defendant is an aider and abettor rather than the actual killer, intent must be proved." (*Id.* at pp. 1149-1150.)

The significant fact that cannot be overlooked in this case is that the murders in the instant case were committed in August 1997. Section 190.2 was changed by then, exhibiting the general form of the statute that exists today but having first become effective in 1996 after voter approval. (See amended Stats.1995, c. 477 (S.B.32), § 1.) In subdivision (b), the 1996 statute clarified that

> *Unless an intent to kill* is specifically required under subdivision (a) for a special circumstance enumerated therein, an *actual killer*, as to whom the special circumstance has been found to be true under Section 190.4, *need not have had any intent to kill* at the time of the commission of the offense which is the basis of the special circumstance in order to suffer death or confinement in the state prison for life without the possibility of parole.

(*Emphasis added.)* In subdivision (c), the statute set forth clarifying language providing that the death penalty could be imposed on an aider and abettor who harbored an intent to kill:

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.

The 1996 statutory amendment also introduced a major change. A new category of perpetrators were henceforth eligible for special circumstance charges. In subdivision (d), the statute provided:

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

(*Italics added.*) The "reckless indifference" language, of course, reflects the United States Supreme Court's "reckless disregard" language in *Tison v. Arizona*, 481 U.S. at p. 157.

In this light, appellants' complaints that the trial court erred in its instructions by not requiring from the jury a finding of an intent to kill before they could find true the special circumstance allegation for an aider and abettor is simply without merit. The trial court's instruction pursuant to CALJIC Nos. 8.80.1, in giving the jury the option to find either intent to kill or reckless indifference for an aider and abettor to be eligible for special circumstance sentencing, did nothing more than instruct on the most current

version of the law at the time on special circumstances. In fact, the instruction carefully tracked the language of section 190.2, subdivision (d), in describing the second option. (See 5CT 53-54 ["with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of the crime of attempted robbery which resulted in the death of a human being."].) Such an instruction was correctly given. (See, e.g., *People v. Jennings* (2010) 50 Cal.4th 616, 669 [upholding instructions which "correctly stated the law" and "were responsive to the evidence"].)

Moreover, both options supplied by the instruction were supported by the evidence. The record first discloses substantial evidence that each of the defendants acted with reckless indifference to human life as major participants of an attempted robbery. The phrase "reckless indifference to human life" is commonly understood to mean that the defendant was subjectively aware that his or her participation in the underlying felony involved a grave risk of death. (*People v. Estrada* (1995) 11 Cal.4th 568, 578.) The United States Supreme Court has noted that "reckless disregard for human life [is] implicit in knowingly engaging in criminal activities known to carry a grave risk of death...." (*Tison v. Arizona*, *supra,* 481 U.S. at p. 157.) Attempted robbery with a firearm clearly falls into this type of criminal activity. (See *People v. Terrill* (1979) 98 Cal.App.3d 291, 305; see also *Carlos v. Superior Court* , *supra*, 35 Cal.3d at p. 138 [robbery listed as felony inherently dangerous to human life].)

Here, minutes before the shooting, appellant Rangel called appellant Mora out of Lopez's house. (6RT 1019.) The jury could infer that it was at this time that the two agreed to approach the victims to rob them at gunpoint. Indeed, shortly thereafter, they did approach the victims, each of them armed beforehand. Thereafter, the two defendants, one after the other, proceeded to demand property from the victims at gunpoint but killed

them when they were slow to comply. (4RT 632-638.) As to each of the victims, either of appellants, at the very least, acted with reckless indifference to human life as major participants of an attempted robbery. Appellants' sufficiency of the evidence contentions must therefore fail on this ground alone.

Moreover, appellants overlook the fact that they each did not just aid and abet in their cohort's killing of the victim they did not shoot, but were also a *direct perpetrator* -- and thereby an *actual killer* -- as to the victim they did shoot. As explained below, because they each were an actual killer, the requirements of the multiple murder special circumstance were easily satisfied.

In *People v. Dennis* (1998) 17 Cal.4th 468, this Court observed:

> We have never held that the multiple-murder special circumstance requires a jury to find the defendant intended to kill every victim. We also have never held that the intent to kill one victim and the implied malice murder of a second victim is insufficient to establish a multiple murder special circumstance."].)

(*Id.* at pp. 515-517.) In *People v. Rogers* (2006) 39 Cal.4th 826, this Court held that even for murders occurring between 1984 and 1987 (i.e., post *Turner* and pre-*Anderson*), the "intent to kill" requirement for an aider and abettor charged with the multiple murder special circumstance is satisfied so long as there was an intent to kill as to one of the murders. (*Id.* at p. 892.)

The import of *Dennis* and *Rogers* dictates that whatever prerequisite that exists separate and apart from the language of subdivision (a) of section 190.2 defining the multiple murder special circumstance, whether it be the prerequisite that the defendant be an actual killer under subdivision (b), that the defendant harbor an intent to kill as an aider under subdivision (c), or that the defendant act with reckless indifference as a major

participant in a dangerous felony under subdivision (d), such a prerequisite is satisfied so long as it is satisfied as to one of the two murders. Here, it is indisputable that if appellants committed any crime at all, they each shot a victim and thus were an actual killer within the meaning of subdivision (a) of section 190.2. No additional prerequisite need be satisfied as to the second murder, which can be of any type and of any degree.

The record is replete with evidence that points to various different theories as to that second murder (the murder of the victim that each appellant did not actually shoot). For one, the evidence showed that each appellant, as to the victim that they did not actually shoot, at least committed felony murder by aiding and abetting in a pre-planned robbery, during which a killing occurred. (*People v. Pulido* (1997) 15 Cal.4th 713, 721 [all persons aiding and abetting the commission of robbery are guilty of first degree murder when one of them kills in furtherance of common design].) The evidence could also showed that each appellant, by approaching the victims with a cohort that was armed and thereafter demanding wallets from the victims at gunpoint, at the very least aided and abetted in an armed confrontation, the natural and probable consequence of which was murder. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123 [aider and abettor not only guilty of the intended crime but any other crime the direct perpetrator commits that is a natural and probable consequence of the target offense].)

For this reason, appellants' current claim of insufficiency must fail. Indeed, the case they rely upon, *People v. Williams* (1997) 16 Cal.4th 635, to assert a proof requirement of an intent to kill as to both murders in this case, for each of them, is entirely inapposite. The murder in *Williams* occurred on August 31, 1984, and thus fell into a sui generis category of cases which became subject to the *Carlos* requirement that even an actual killer must harbor an intent to kill to be eligible for the death penalty.

(*People v. Williams, supra,* 16 Cal.4th at p. 688.) The instant case, involving murders occurring in 1997, is, as previously indicated, governed by the 1996 amendment of the death penalty statute, which provides that the aider and abettor can be subject to a special circumstance finding if he acted with reckless disregard for human life as a major participant in an enumerated dangerous felony (§ 190.2, subd. (d)), and further provides that an actual killer need not harbor an intent to kill (§ 190.2, subd. (b)). As previously indicated, under *People v. Dennis* and *People v. Rogers*, each defendant in this case, based on the evidence, fulfilled the prerequisite of an actual killer (§ 190.2, subd. (b)) and thus, no additional prerequisite was needed for the second murder. In any event, each appellant, as an aider and abettor, also satisfied the reckless disregard prerequisite (§ 190.2, subd. (d).)[14]

For the foregoing reasons, appellants' current sufficiency of the evidence claim must fail.

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[14] Even applying the pre-*Anderson* standard that there be proof an intent to kill, each appellant here, having pulled the trigger multiple times to kill the victim closest to him, clearly demonstrated such requisite intent. As such, there clearly was sufficient evidence to support the multiple murder special circumstance allegations as to each defendant. Assuming that the given instruction on special circumstances was faulty in not requiring an intent to kill at least as to one of the murders, such an error would clearly be harmless, as there can be no doubt from the evidence presented at trial that each defendant harbored the requisite intent to kill when each pulled the trigger to kill the victim closest to them. (*People v. Carter* (2005) 36 Cal.4th 1114, 1187 ["We have held that error in failing to instruct that a special circumstance contains a requirement of the intent to kill is harmless [beyond a reasonable doubt] when the evidence of defendant's intent to kill ... was overwhelming, and the jury could have had no reasonable doubt on that matter." instructional error harmless beyond a reasonable doubt when the government's evidence on the issue is overwhelming." (internal quotes omitted and brackets in original)].)

VIII. THE TRIAL COURT DID NOT ERR IN PERMITTING THE JURY TO CONSIDER PREMEDITATED MURDER AND FIRST DEGREE FELONY-MURDER DESPITE THE FACT THAT THE INFORMATION CHARGED APPELLANTS WITH MURDER IN VIOLATION OF SECTION 187

Appellants next complain that the trial court erred in instructing the jury on first degree premeditated murder and first degree felony-murder, because the information only charged appellants with second degree malice-murder in violation of Penal Code section 187. (RAOB 139-148; MAOB 114-121.) Such a claim adheres to a position that has long been rejected by this Court. (See *People v. Geier* (2007) 41 Cal.4th 555, 591 ["an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely" as "there is but a single offense of murder" and different theories of murders, such as "felony murder and premeditated murder are not distinct crimes"]; see also *People v. Hughes* (2002) 27 Cal.4th 287, 369; *People v. Silva* (2001) 25 Cal.4th 345, 367.) As such, this claim must fail.

IX. THE TRIAL COURT DID NOT ERR IN NOT REQUIRING JUROR UNANIMITY AS TO THE THEORY OF FIRST DEGREE MURDER

Appellants contend that the trial court committed reversible error and denied him his constitutional rights by failing to require the jury to agree unanimously on whether appellants had committed a premeditated murder or a felony-murder before returning a verdict finding them guilty of murder in the first degree. (RAOB 149-158; MAOB 132-140.)) As is the case for the previous claim, the current claim has been repeatedly rejected by this Court, as there is no such requirement for juror unanimity on the actual theory of liability. (See, e.g., *People v. Jennings* (2010) 50 Cal.4th 616, 639; *People v. Tate* (2010) 49 Cal.4th 635, 697; *People v. Benavides* (2005)

35 Cal.4th 69, 100-101; *People v. Nakahara* (2003) 30 Cal.4th 705, 712-713; *People v. Kipp* (2001) 26 Cal.4th 1100, 1132; *People v. Carpenter* (1997) 15 Cal.4th 312, 394-395; *People v. Beardslee* (1991) 53 Cal.3d 68, 92.) As such, the instant claim must also fail.

X. THE TRIAL COURT PROPERLY DECLINED TO GIVE A DUPLICATIVE PINPOINT INSTRUCTION REGARDING FIRST DEGREE FELONY MURDER WHICH, IN ANY EVENT, DID NOT PINPOINT THE DEFENDANT'S THEORY OF THE CASE

During the discussion on first degree felony murder, appellant Rangel requested a special instruction to supplement the court's instruction pursuant to CALJIC No. 8.21.[15] The special instruction read:

> To prove the felony murder of first degree murder, the prosecution must prove beyond a reasonable doubt that the attempted robbery was done for the independent purpose of committing the felony rather than for the purpose of committing the homicide. [¶] If the defendant's primary purpose was to kill or if he committed the attempted robbery to facilitate or conceal the homicide, then there was no independent felonious purpose. If from all the evidence you have a reasonable doubt that the defendant committed the attempted robbery for such independent felonious purpose, you must find the defendant not guilty on the felony murder theory.

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[15] CALJIC No. 8.21, as given by the trial court, states:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs [during the commission or attempted commission of the crime] of robbery is murder of the first degree when the perpetrator had the specific intent to commit that crime. [¶] The specific intent to commit robbery and the commission or attempted commission of such crime must be proved beyond a reasonable doubt.

(4CT 1043.) The trial court declined to give the special instruction, indicating that it was covered by the court's instructions pursuant to CALJIC Nos. 8.21 and 8.27. (14RT 2172-2173.)

Appellant Rangel now contends on appeal that the pinpoint instruction should have been given so that the jury could determine whether appellant Rangel had an independent felonious purpose to commit the attempted robbery. (RAOB 159-167.) This contention is meritless.

The rule requiring independent felonious purpose stems from the "merger doctrine," which prohibits the use of the felony-murder theory where the underlying felony is "integral" to the homicide. (See *People v. Ireland* (1969) 70 Cal.2d 522, 539.) This Court, in *People v. Wilson* (1969) 1 Cal.3d 431, in expounding on the *Ireland* merger doctrine as it relates to first degree felony-murder, explained:

> The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit. Where a person enters a building with an intent to assault his victim with a deadly weapon, he is not deterred by the [burglary-murder] felony-murder rule. That doctrine can serve its purpose only when applied to a felony independent of the homicide.

(*Id.* at p. 440, citation and quotations omitted.) Recently, in an attempt to clarify the merger doctrine, this Court in *People v. Chun* (2009) 45 Cal.4th 1172, found that all assaultive-type crimes merged with the charged homicide to so as to preclude reliance on the felony-murder theory based on those crimes. (*Id.* at p. 1200.)

Appellant Rangel's current contention is that the jury should have been given the special instruction he requested at trial so as to pinpoint this question of whether there was this independent felonious purpose to commit robbery. (RAOB 159-161.) As to pinpoint instructions, the law is that a criminal defendant, generally speaking, "is entitled, on request, to instructions that pinpoint the theory of the defense case." (*People v.*

Gutierrez (2002) 28 Cal.4th 1083, 1142.) "Such instructions relate particular facts to a legal issue in the case or 'pinpoint' the crux of a defendant's case, such as mistaken identification or alibi," and are required to be given upon request "when there is evidence supportive of the theory. . . ." (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.) Thus, for example, it would be "error to refuse to give an instruction requested by a defendant which "directs attention to evidence from ... which a reasonable doubt of guilt could be engendered." [Citation.]'" (*People v. Wright* (1988) 45 Cal.3d 1126, 1140, quoting *People v. Sears* (1970) 2 Cal.3d 180, 190.)

However, pinpoint instructions need not be given in all circumstances. For example, a pinpoint instruction should not be given if it is argumentative or duplicative. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 99; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142; *People v. Hughes* (2002) 27 Cal.4th 287, 361; *People v. Earp* (1999) 20 Cal.4th 826, 886.) A trial court can "properly refuse [a pinpoint] instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence." (*People v. Hovarter* (2008) 44 Cal.4th 983, 1021.) Also, no instructions at all, much less a pinpoint instruction, on a defense theory is required if the instructed theory is inconsistent with the defendant's theory of the case at trial. (See *People v. Sedeno* (1974) 10 Cal.3d 703, 716 [instruction on a particular defense theory is required only if defendant is relying on such theory or there is substantial evidence supporting the theory and it is not inconsistent with the defendant's theory of the case].)

The instruction here was properly refused because appellant Rangel's theory of defense at trial was not to question the fact that the perpetrator had an independent purpose to commit a robbery at the time he committed the killing, but rather, to question the identity of the perpetrator. (See 14RT 2299 [closing argument fingering "Jade" as the second shooter rather than

appellant Rangel]; 14RT 2305 [counsel concludes by stating "And it's our belief, our contention that the identification of Mr. Rangel is a misidentification."].) Since the proffered pinpoint instruction did not even "pinpoint" appellant Rangel's theory at trial, and in fact, was inconsistent with it, the trial court did not err in declining to give it.

Assuming arguendo no such inconsistency, the special instruction was not even necessary, because it was repetitive of other properly given instructions. CALJIC No. 8.21, as given by the court, required, as a predicate for first degree felony murder, the "commission or attempted commission of the crime of robbery." (5CT 1136.) CALJIC No. 8.27 similarly instructed the jury that as an aider and abettor to felony murder, the defendant must have been "engaged in the commission of the attempted robbery." (5CT 1137.) As to the crime of robbery, the jury was instructed on the requirement that the defendant must have had the specific intent to permanently deprive the victim of property. (5CT 1148.) These instructions combined to require that appellant's purpose at the time of the killing was to commit robbery, which fully conveyed the law in this area.

Moreover, respondent notes that the statement in the proposed instruction, "If the defendant's primary purpose was to kill or if he committed the attempted robbery to facilitate or conceal the homicide, then there was no independent felonious purpose," appears to be incorrect. The law does not prohibit the application of the felony murder rule when multiple purposes were intended during a homicide or when the purpose to kill is "primary." This is so because the requisite purpose to commit the underlying felony is examined to determine whether it is "collateral," as well as "independent," to an intent to kill. (See *People v. Chun*, *supra*, 45 Cal.4th at p. 1193 [second degree felony murder appropriate where "underlying felony's purpose 'was independent of or collateral to an intent to cause injury that would result in death.'"].) Such a rule, of course,

contemplates the application of the felony murder rule when a defendant harbors multiple purposes at the time of the killing. (See *People v. Smith* (1984) 35 Cal.3d 798, 805-806 ["Even if the felony was included in the facts of the homicide and was integral thereto, a further inquiry is required to determine if the homicide resulted "from the conduct for an independent felonious purpose" as opposed to a "single course of conduct with a single purpose'"], interpreting *People v. Burton* (1971) 6 Cal.3d 375, 387-388 [observing that the merger doctrine applies when "there was a single course of conduct with a single purpose" but that "in the case of armed robbery . . . there is an independent felonious purpose, namely . . . to acquire money or property belonging to another].) If under the rule, the underlying felony can be but a "collateral" purpose, then the same rule certainly would not prohibit the simultaneous existence of a homicidal purpose, primary or not. Thus, the trial court here properly declined to give a legally questionable instruction.

Finally, even if the proffered special instruction correctly stated the law and had to be given in this case upon request, any error was clearly harmless. The jury, which was also instructed with the more rigorous requirements of felony murder special circumstance, was told in that instruction that the murder must be "committed in order to carry out or advance" the robbery and that the robbery cannot be "merely incidental to the commission of the murder." (5CT 1147.) Such an instruction clearly embodied the requirements in the special instruction in that it required that the homicidal purpose not be primary and that the robbery not be a pretext to the commission of the murder. The jury found this special circumstance true. (4CT 1014.) Hence, the jury, by its verdict, necessarily resolved the issues raised in the special instruction against appellant Rangel. (*People v. Sedeno*, *supra*, 10 Cal.3d at p. 721.) Any error, therefore, was clearly harmless.

XI. THE GUILT PHASE INSTRUCTIONS GIVEN WERE PROPER

Appellants contend that various instructions given at the guilt phase violated their constitutional rights to due process, a fair trial, and trial by jury. They also contend that these instructions violated the fundamental requirement of reliability in a capital case by allowing a conviction without requiring the prosecution to present the full measure of proof. (RAOB 168-178; MAOB 122-131.) These contentions must be rejected.

A. CALJIC Nos. 2.01 and 2.02

Appellants first contend that the standardized CALJIC Nos. 2.01 and 2.02 undermined the requirement of proof beyond a reasonable doubt as it reduced the threshold of certainty of guilt to "reasonableness" and shifted the burden of proof to the defense. (RAOB 171-172; MAOB 123-125.) This contention must also fail because it has been repeatedly rejected by this Court. (See *People v. Tate* (2010) 49 Cal.4th 635, 698; see also *People v. Samuels* (2005) 36 Cal.4th 96, 131 [CALJIC No. 2.01 does not undermine the requirement of proof beyond a reasonable doubt]; *People v. Stitely* (2005) 35 Cal.4th 514, 555-556 [CALJIC No. 2.01 does not diminish prosecution's burden of proof]; *People v. Stewart* (2004) 33 Cal.4th 425, 521 [CALJIC Nos. 2.01 and 2.02 do not unconstitutionally lessen the prosecution's burden of proof].)

B. CALJIC Nos. 2.21.1, 2.21.2, 2.22, 2.27, and 8.20

Appellants next contend that CALJIC Nos. 2.21.1, 2.21.2, 2.22, 2.27, and 8.20 individually and collectively diluted the constitutionally mandated reasonable doubt standard. (RAOB 172-176; MAOB 125-128) This contention must fail because it has been repeatedly rejected by this Court. (See *People v. Tate*, *supra*, 49 Cal.4th at p. 698; see also *People v. Hartsch* (2010) 49 Cal.4th 472, 506 [CALJIC No. 8.20 does not improperly suggest

the defendant must eliminate the possibility of premeditation, even though it is phrased in terms of conditions "precluding the idea of deliberation."]; *People v. Carey* (2007) 41 Cal.4th 109, 130 [CALJIC No. 2.21.1 does not dilute prosecution's burden of proof beyond a reasonable doubt]; *People v. Crew* (2003) 31 Cal.4th 822, 847-848 [CALJIC Nos. 2.21.2 and 2.22 do not improperly lessen the prosecution's burden of proof]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [CALJIC Nos. 2.02, 2.21, and 2.27 do not permit conviction upon proof less than beyond a reasonable doubt].)

For the foregoing reasons, appellants' challenges to the standardized guilt phase instructions must fail.

XII. EVEN IF CONSIDERED COLLECTIVELY, ANY ERRORS OR ASSUMED ERROS DID NOT PREJUDICE APPELLANT RANGEL

Appellant Rangel next contends that reversal of his conviction is required because the cumulative effect of errors collectively undermined the fundamental fairness of the guilt phase and the reliability of the verdicts of guilt. (RAOB 179-180.) As discussed previously, there was either no error, or even assuming any errors, they were clearly harmless in light of the overwhelming evidence of guilt and the procedural posture in which they arose. A defendant is entitled to a fair trial, not a perfect one. (*People v. Welch* (1999) 20 Cal.4th 701, 775.) Even assuming arguendo any error(s) existed, appellant Rangel has at most shown that his "'"trial was not perfect – few are,"' especially few of the lenth and complexity of this trial. There was no prejudicial error either individually or collectively." (*People v. Cooper* (1991) 53 Cal.3d 771, 839, citation omitted.) Appellant Rangel received a fair trial. As such, "[w]hether considered independently or together, any errors or assumed errors are nonprejudicial and do not

undermine defendant's conviction or sentence." (*People v. Watson* (2008) 43 Cal.4th 652, 703.)

XIII. THE TRIAL COURT PROPERLY DECLINED APPELLANT MORA'S REQUEST FOR AN INSTRUCTION ON THE OFFENSE OF ACCESSORY AFTER THE FACT; ANY ERROR WAS HARMLESS

During the discussion on jury instructions for the guilt phase, appellant Mora requested that the trial court give an instruction on accessory after the fact. The court observed that such an instruction would be as to a lesser related offense. (13RT 2133.) Appellant Mora's counsel stated that a witness had identified Jade Gallegos as one of the shooters and appellant Mora's defense would finger Gallegos as one of the shooters. Appellant Mora argued that if the jury still believed that appellant Mora moved the cars thereafter, that it could then find that appellant Mora was only an accessory after the fact. (13RT 2133.) The trial court asked for time to research the issue. (13RT 2133-2134.)

The next day, the trial court indicated that it felt that the instruction was not warranted by the evidence. The court held, "I don't think they have to have a backup just in case they want to find him guilty of something." (14RT 2171-2172.) Appellant Mora's counsel asked, "Will I be allowed to argue that even if they believe he moved cars around or hid guns he's not guilty?" The court replied, "Of course. He's not charged with anything other than the murder and the attempted robbery, and if they don't think he was the person that was there, then he's not guilty." Appellant Mora's counsel stated, "Thank you." (14RT 2172.) The discussion on the instruction ended there.

Appellant Mora now contends that the trial court erred when it declined to grant his request for an instruction on the offense of accessory after the fact. (MAOB 88-102.) This contention should be rejected.

While a court has the responsibility to instruct on principles of law relevant to the evidence that was presented (*People v. Blair* (2005) 36 Cal.4th 686, 744), it only has to instruct on an uncharged offense when that offense is a lesser included offense of one of the charged offenses (*People v. Birks* (1998) 19 Cal.4th 108, 129). Hence, even if a lesser related offense is supported by the evidence, a defendant, even if he specifically requests it, is not entitled to an instruction on that lesser offense. (*Id. at p.* 136 [criminal defendant does not have "unilateral entitlement to instruction on lesser offenses which are not necessarily included in the charge].) The federal constitutional does not require otherwise. (*Hopskins v. Reeves* (1998) 524 U.S. 88, 97.)

Appellant Mora here was charged and convicted of murder. It is settled that the offense of accessory after the fact is but a lesser related offense of murder, not a lesser included offense. (*People v. Majors* (1998) 18 Cal.4th 385, 408; *People v. Preston* (1973) 9 Cal.3d 308, 319; see also *People v. Schmeck* (2005) 37 Cal.4th 240, 291.) As such, it is clear that appellant Mora was not entitled to an instruction on accessory after the fact as he now claims.

Appellant Mora cites two curious factors that allegedly distinguish his case from the dictates of *Birks*, none of which is availing. Appellant Mora first contends that *Birks* did not involve the situation here, where the lack of such a lesser related offense instruction weighed unfairly in favor of the prosecution's theory. (MAOB 91.) Specifically, appellant Mora relies on the court's instruction pursuant to CALJIC No. 2.03 (13RT 2141-2142 [Consciousness of Guilt – Falsehood]) allowing the jurors to infer consciousness of guilt from appellant Mora's denial that the Oldsmobile was in his car. He argues the instruction precluded the jury from considering appellant Mora's placement of the murder weapons in his car

as simply an act to assist the actual shooters in covering up their crimes. (MAOB 92-96.)

First, this Court has not recognized, and respondent cannot find any authority for the existence of, an exception to the rule in *Birks* where the totality of the jury instructions, absent one on a lesser related offense, would somehow work an unfair advantage to the prosecution. Second, appellant Mora's argument incorrectly assumes an adverse effect from CALJIC No. 2.03 that simply does not exist. Nothing in CALJIC No. 2.03 precluded the jury from considering and adopting any defense argument at trial that the most that appellant Mora was guilty of was to hide the murder weapons for the actual murderers. CALJIC No. 2.03 simply employs conditional and unmistakably permissive language, making it clear that the jury must first find that the defendant lied, and even after that, it "may," rather than "should," infer a consciousness of guilt therefrom. (See 5RT 1103.) Even then, this rather cautiously worded instruction admonished the jury that such a consideration was insufficient by itself to show guilt, and even clarified that the "weight and significance" of such an inference was for the jury to decide. (*Ibid.*) Because the inference of a consciousness of guilt was only permissive under the instruction and nothing in that instruction prohibited a finding of appellant Mora as a mere accessory, the instruction in no way hamstrung appellant Mora from arguing effectively to the jury that despite any lies appellant Mora told, all he did was help the actual shooters hide the weapons after the fact. There was no need to counteract this instruction with an instruction on accessory after the fact to ensure fairness; if the jury believed he only helped hide weapons after the fact, it would simply have found him not guilty of the charged crimes.

Appellant Mora's second attempt to distinguish *Birks* is equally meritless. He argues that he was entitled to such an instruction because it reflected his theory of defense. (MAOB 91-92.) But this is no more than

an attempt to do indirectly what he could not do directly, i.e., under the guise of a defense theory, ask for a finding that he was guilty of a lesser related offense, in violation of *Birks*. (See *People v. Kraft* (2000) 23 Cal.4th 978, 1064 ["Even were there evidence supporting a theory of accessory liability . . . defendant was not entitled to instructions on lesser related offenses"].) Indeed, in *People v. Schmeck*, *supra*, 37 Cal.4th 240, this Court specifically held that a court's refusal to instruct on accessory after the fact did not deprive the defendant of an opportunity to present a defense where "[t]he jury fully was apprised of the theory of the defense through defendant's statement to the police, the defense's impeachment of prosecution witnesses, and defense counsel's closing argument." (*Id.* at p. 292.) Here, appellant Mora was never restricted by the trial court from arguing that he was a mere accessory. In fact, he was fully allowed to make this argument in referencing CALJIC No. 2.03 (15RT 2335), and extensively pursued this theory by pointing to Jade Gallegos as being the other shooter, rather than himself (see, e.g., 15RT 2337, 2347).

Appellant Mora's attempt to bring this case outside the rule set forth in *Birks* is unpersuasive and must therefore be rejected. But even if the trial court had given the instruction requested, because the theory of defense had been, in any event, vigorously pursued during closing argument and because the evidence, at any rate, was overwhelming that appellant Mora was one of the actual shooters (see Argument I(C)(4)), any error was harmless under any standard. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Watson* (1956) 46 Cal.2d at p. 836.)

XIV. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 2.03

Appellant Mora contends that the trial court's instruction to the jury pursuant to CALJIC No. 2.03 regarding consciousness of guilt denied him

his Sixth, Eighth, and Fourteenth Amendment rights. Specifically, he contends that the instruction was unnecessary and impermissibly argumentative, and because it permitted the jury to drawn an irrational and unjust inference from the evidence. (MAOB 103-113.) This contention has been rejected by this Court. (*People v. Page* (2008) 44 Cal.4th 1, 50 [CALJIC No. 2.03, which "benefits the defense" by "admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory" is not duplicative of CALJIC Nos. 2.00 and 2.01 "which address more general principles of evidence"; CALJIC No. 2.03 not argumentative -- just because it "addresses evidence indicating that a defendant made false or misleading statements concerning the crimes does not alter the circumstance that the instruction addresses the law applicable to the evidence rather than any party's version of the facts."; CALJIC No. 2.03 does not allow irrational inferences, as "[a] reasonable juror would understand 'consciousness of guilt' to mean 'consciousness of some wrongdoing' rather than 'consciousness of having committed the specific offense charged.]; see also *People v. Nakahara* (2003) 30 Cal.4th 705, 713; *People v. Crandell* (1988) 46 Cal.3d 833, 871.) As such, the instant claim must fail.

XV. THE TRIAL COURT PROPERLY ADMITTED RELEVANT GANG EVIDENCE AT THE PENALTY PHASE

A. Introduction

During discussions before the penalty phase, the prosecution indicated that it was planning to present evidence that appellant Rangel vandalized a truck by spray-painting it with the words "KCC," tried to steal the truck, and thereafter threatened the truck owner's life if he reported the incident. Appellant Rangel's counsel objected to introduction of the evidence

because the crime was only a misdemeanor and thus inadmissible as an aggravating circumstance. After the prosecutor highlighted the fact that the underlying crime was "terrorist threats" and appellant Rangel was given probation with one year in county jail, the trial court observed, "That's not a misdemeanor sentence." The prosecutor also noted that the plea offer was for a plea to felony burglary. The trial court overruled appellant Rangel's objection to this evidence. (16RT 2478-2479, 2483.) There was no other objection to this evidence. (16RT 2483.)

The prosecutor also indicated that she planned to introduce evidence of appellant Mora's involvement in a 1996 assault that occurred in county jail. The prosecutor stated that she was not planning to introduce gang evidence against appellant Mora. (16RT 2486-2488.)

Subsequently, during the penalty trial, evidence of the auto burglary by appellant Rangel was introduced, and the evidence included references to gang activity. (16RT 2510-2519, 2525, 2528, 2543-2559.) Thereafter, the prosecutor introduced evidence of the jailhouse assault on Paul Juhn, which appellant Mora instigated and took part in. (19RT 2676-2682.) The prosecution called jail deputy Kresimir Kovac to testify about his investigation of the assault. Deputy Kovac attested that Juhn stood behind a peephole and identified four Hispanics as the assailants from a field lineup. (18RT 2701.) The prosecution asked why such an identification procedure was used. Appellant Mora's counsel objected based on relevance. The objection was overruled. Deputy Kovac then testified that if someone identified an "attacker or something like that, there is a real threat of retaliation from that individual, the suspect, or from one of his other gang members that he knows." (18RT 2701.) After testifying that the individuals that Juhn identified included someone by the name of "Joseph Mora," Deputy Kovac looked at appellants in court and was unable to be certain whether appellants were among the attackers or whether he

had seen them on other occasions in county jail. (18RT 2705.) Thereafter, a hearing was held outside the presence of the jury. (18RT 2705.) During that hearing, the court overruled appellant Rangel's request to strike Deputy Kovac's last comment. (18RT 2705.) Appellant Mora's counsel indicated her concern about the references to other occasions when Deputy Kovac came into contact with appellant Mora in jail. (18RT 2706.) At that point, the prosecution interjected and asked to have Deputy Kovac identify appellant Mora as the attacker based on the tattoo on his chest. (18RT 2706.)

Appellant Mora's counsel objected on ground of Evidence Code section 352 to the introduction of the "Kings City" tattoo on appellant Mora's chest "just for merely a point of identification." (18RT 2710-2711.) Appellant Mora's counsel then indicated that she was "willing to stipulate that Mr. Mora was the person [Deputy Kovac] contacted." (18RT 2713.) The court noted for the record the prosecution's refusal to accept the stipulation. (18RT 2714.) The bailiff, at the order of the court, examined appellant Mora and reported that there was a tattoo that said "King City Criminals" across appellant Mora's chest. (18RT 2714.) The prosecutor indicated that Deputy Kovac listed in his report that the assailant had a tattoo "King City Criminals" on his chest. (18RT 2715.) The court suggested that Deputy Kovac examine appellant Mora out of the presence of the jury and indicate, without revealing the tattoo, whether that was the same tattoo that he recorded in his report. (18RT 2717.) The court precluded the witness from saying, "King City Criminals." (18RT 2719.)

Deputy Kovac thereafter testified that he wrote down the name of the inmate Juhn identified, "Joseph Mora," based on the inmate's jail wristband. (18RT 2720.) Deputy Kovac testified that he also notated the fact that the assailant had a tattoo of three words on this chest. (18RT 2722-2723.)

Another hearing was held outside the jury's presence during which the prosecutor suggested that the content of the tattoo be revealed to the jury. The court held that the prejudicial effect outweighed the probative value. (18RT 2724.) The court thereafter instructed Deputy Kovac not to reveal the words to the jury. (18RT 2725.) Deputy Kovac thereafter testified that he inspected appellant Mora's body and found the same tattoo that he documented in his report regarding the assailant that Juhn had identified in county jail. (18RT 2726.)

The prosecution then asked, "Now, on your report do you write down all the tattoos or do you just pick one?" Deputy Kovac testified, "No. I will pick out one very distinguishable. And if at all possible, I will pick out a tattoo that shows a gang name, gang affiliation, anything like that." (18RT 2726-2727.) No objections were made at that point. (18RT 2727.) In a hearing sometime later, the court ruled that the prosecutor could not argue that the tattoo in question was a gang tattoo. (18RT 2764-2765.)

During appellant Rangel's defense, Jose Jimenez testified about appellant Rangel's church activities and how the murder appellant Rangel was charged with was "out of his character." (18RT 2815-2821.) The prosecution, outside the presence of the hearing, argued to the court that the witness had opened the door to appellant Rangel's gang membership. The trial court agreed that such questioning tested the witness's knowledge of appellant Rangel. Appellant Rangel objected that such questioning would assume facts not in evidence. The court stated that the prosecution, with good faith belief in appellant Rangel's gang membership, was entitled to cross-examine the witness on this subject. (18RT 2823-2829.) The trial court also ruled that the prosecutor was permitted to introduce gang evidence during rebuttal against appellant Rangel. (18RT 2828.)

Thereafter, over appellant Rangel's objection, the prosecutor questioned Jimenez whether the fact that appellant Rangel was a gang member would surprise him. (18RT 2829-2832.)

During rebuttal, the prosecutor called Compton Police Officer Andrew Zembal as a gang expert and Officer Zembal testified to appellant Rangel's membership in the Compton King City Criminals street gang. (20RT 3078-3098.)

During the discussion on jury instructions, the court declined to give a requested instruction by appellant Rangel that gang membership is not a crime and thus could not be considered as an aggravating factor. (20RT 3140, 3148.) Acknowledging that gang evidence as to appellant Rangel was allowed to refute the good character evidence appellant Rangel presented, the court nonetheless agreed that the way the special instruction was worded seemed to suggest that the gang evidence was irrelevant to any issue. The court also secured the assurance of the prosecutor that she would not make any arguments about gang membership in her closing argument. The court did not find a need to instruct the jury that gang membership was not a crime, noting that "there are lots of things that are not a crime" and the gang evidence was not "presented as though it were a crime." (20RT 3148-3149.)

B. Appellants' Contentions

Appellant Rangel now contends that the trial court erred in admitting any of the evidence of appellant's gang membership. He argues that since the gang evidence was only "tangentially relevant," while being highly prejudicial, it should have been excluded under *People v. Gurule* (2002) 28 Cal.4th 557, 653 and Evidence Code section 352. He also argued that such evidence made the trial unfair because the jury was not voir dired on gang evidence in reliance on the prosecutor's representation that no gang evidence would be introduced. (RAOB 181-199.)

Appellant Mora similarly contends that the trial court erred in allowing the prosecutor to elicit from Deputy Kovac testimony how the identification procedure protected victims from gang members because such evidence was only tangentially relevant. (MAOB 165-167.) He further argues that the trial court erred in allowing the evidence regarding how deputy Kovac was able to identify appellant Mora at trial, because appellant Rangel was willing to stipulate to the issue of identity at trial. Appellant Mora also argues that the error was compounded by the fact that the jury was not voir dired as to gang evidence. (MAOB 167-168.)

As explained below, none of these contentions carry merit.

C. Appellant Rangel's Contentions Must Be Rejected

Preliminarily, appellant Rangel's contentions must be rejected because his contentions were forfeited on appeal. When the prosecution sought to introduce testimony about appellant Rangel's vehicular burglary, the only complaint appellant Rangel had at the time was not that the testimony would refer to prejudicial gang evidence, but that the crimes in that incident were only misdemeanors. (16RT 2478-2483.) Thereafter, when the prosecution sought to impeach Jimenez's knowledge of appellant Rangel's character by asking about appellant Rangel's gang membership, the only objection appellant Rangel lodged was that such questioning assumed facts not in evidence, i.e., that appellant Rangel was a gang member. (18RT 2823-2829.) When Officer Zembal testified as a gang expert, there were no objections that the gang evidence was irrelevant or prejudicial. (20RT 3078-3098.) Nor did appellant Rangel object to these items of evidence on the ground he now states on appeal, that the jury had not been voir dired on the issue of gang evidence. As appellant Rangel did not interpose any objection to the gang testimony based on the arguments he now raises here, he has forfeited his rights to make such complaints on appeal. (See *People v. Gutierrez* (2009) 45 Cal.4th 789, 818 [Murder

defendant forfeited appellate review of those portions of testimony of state's expert witness on subject of gangs to which he did not object at trial.]; *People v. Williams* (1997) 16 Cal.4th 153, 250 ["The record reveals defendant objected to admission of the gang paraphernalia solely on relevance grounds. Thus, defendant waived any section 352 objection and cannot raise it on appeal."].)

Even assuming appellant Rangel preserved his current complaints about the introduction of gang evidence, none of them carry any merit. It is true that "[b]ecause evidence that a criminal defendant is a member of a juvenile gang may have a 'highly inflammatory impact' on the jury, trial courts should carefully scrutinize the evidence before admitting it." (*People v. Champion*, supra, 9 Cal.4th at p. 922.) It is also true that, as appellant Rangel pointed out (RAOB 190), this Court in *People v. Gurule* (2002) 28 Cal.4th 557, has stated that gang 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' or, as relevant here, will jump to the conclusion the defendant deserves the death penalty." (*Id.* at pp. 653-654, internal citations omitted.)

But the remainder of the *Gurule* decision is equally important and it certainly does not help appellant Rangel's position. As this Court in *Gurule* proceeded to observe:

> [s]uch [gang] evidence can, however, be relevant in the penalty phase. Section 190.3 specifically provides that the jury should consider past criminal behavior involving violence or the threat of violence, and we have held that the prosecution in a capital case properly may divulge to the jury the circumstances of those prior instances of violent criminal activity.

(*People v. Gurule*, *supra*, 28 Cal.4th at pp. 653-654.) The *Gurule* court applied these principles to the facts of that case and upheld the trial court's

admission of the evidence under Evidence Code section 352: "Testimony explaining the reasons for the fight at the Lark-Ellen Home for Boys and for the assaults on Patchett and Monday was relevant to show the crimes were 'evidently not the product of a personal grievance but of a larger social evil.'" (*Id.* at p 654, citing *People v. Tuilapea* (1992) 4 Cal.4th 569, 588.)

Here, appellant Rangel's past offense for vehicular burglary had been noticed by the prosecution in its November 23, 1998, Statement In Aggravation, pursuant to section 190.2 as a prior felony offense to be introduced at the penalty phase as an aggravating factor. (3CT 783.) The evidence of appellant Rangel's King City Criminals graffiti in that case and the accompanying threat to the victim's life were essentially what this Court, according to *Gurule*, would find acceptable evidence at the penalty phase of "past criminal behavior involving violence or the threat of violence" which "divulge[s] to the jury the circumstances of those prior instances of violent criminal activity." (*People v. Gurule*, *supra*, 28 Cal.4th at pp. 653-654.) As such, the trial court properly exercised the broad discretion it had to admit this evidence. (*People v. Brown* (2003) 31 Cal.4th 518, 547 [alleged violations of section 352 tested by abuse of discretion standard].)

Appellant Rangel's complaint about the cross-examination of Jimenez regarding appellant Rangel's gang membership and the subsequent rebuttal evidence to that effect is unavailing. In *People v. Williams* (1997) 16 Cal.4th 153, the prosecution sought to present at the penalty phase gang paraphernalia seized from the defendant's home to rebut the defendant's testimony at the penalty phase that he no longer belonged to a gang. (*Id.* at p. 249.) The defendant contended on appeal such evidence was irrelevant and unduly prejudicial. (*Ibid.*) This Court in *Williams* rejected these arguments, observing the fact "[t]hat defendant testified he had terminated

his gang membership in May 1980 made evidence to the contrary relevant, if only as "rebuttal to the defense penalty evidence." (*People v. Williams*, *supra*, 16 Cal.4th at p. 249.) Rejecting the defendant's Evidence Code section 352 challenge in that case, the *Williams* Court took note of "highly inflammatory impact" of gang evidence but noted the probative value of the evidence to rebut the defendant's testimony and observed that the trial court adequately scrutinized the gang evidence before admitting it. (*Id* at p. 250.)

Here, appellant Rangel at the penalty phase presented to the jury a bible study teacher, Jose Jimenez, to paint appellant Rangel as a religious person whose character was inconsistent with that of the perpetrator who committed the instant crime. (17RT 2816-2817, 2819.) It was incumbent upon the prosecution to rectify such a misleading portrayal of appellant Rangel's character with cross-examination of Jimenez about his knowledge of appellant Rangel's gang membership and with subsequent extrinsic evidence that appellant Rangel had consciously chosen to be part of a street gang that regularly committed crimes in the neighborhood. As in *Williams*, the evidence was highly probative to rebut defense evidence at the penalty phase.

Just as important, this Court in *People v. Fierro* (1991) 1 Cal.4th 173, directly held that evidence of membership in youth gangs was relevant to rebut testimony of a criminal defendant's good character evidence. (*Id.* at p. 238.) As such, under *Williams* and *Fierro*, the trial court here cannot be said to have abused its discretion.

Even assuming arguendo there was any error, it was clearly harmless. Trial error at the penalty phase of a capital case requires reversal only when there is a "reasonable (i.e., realistic) possibility" the error affected the verdict. (*People v. Cowan* (2010) 50 Cal.4th 401, 491; *People v. Brown*, (1988) 46 Cal.3d 432, 447-448.) This standard is "the same, in substance and effect," as the harmless-beyond-a-reasonable-doubt standard of

Chapman v. California, *supra*, 386 U.S. at p. 24. (*People v. Cowan*, *supra*, 50 Cal.4th at p. 491; *People v. Ochoa* (1998) 19 Cal.4th 353, 479.)

The prosecution's case on aggravating circumstances was overwhelming. (See *People v. Turner* (1990) 50 Cal.3d 668, 714[no "reasonable possibility" error affected the verdict in "view of the overwhelming balance of valid aggravating evidence"].) Even if all gang references had been excised from the prosecution's penalty case, the bare account of the prior vehicular burglary incident in which appellant threatened to kill the owner of the truck if he reported the burglary would nonetheless divulge appellant Rangel to be a criminal who victimized neighborhood residents. Meanwhile nothing changed as to the overwhelming evidence that appellants were the perpetrators in this case. The circumstances of the instant killings, including the fact that the victims, having no prior quarrel with appellants, were shot in cold blood -- either because they were slow to comply with demands for their wallets or because they were targetted at the outset for murder -- and the fact that there was post-crime braggadocio, betrayed a high degree of viciousness and cruelty. Indeed, as previously observed (see Argument V(C)), the prosecution also presented powerful victim impact testimony showing that the victims were good-hearted individuals who had already exerted, and would have continued to exert, a positive impact on their community, and whose death devastated family, friends, and community alike. (16RT 2591-2662.) In this light, it cannot be said that there was a "reasonable possibility" that the gang references affected the penalty verdict. Any error was therefore, harmless.

D. Appellant Mora's Contentions Must Be Rejected

Appellant Mora's similar challenge cannot fare any better on appeal. First, the prosecution simply did not present gang evidence against him at the penalty phase. The most that Deputy Kovak revealed was that in

practice, assault victims in jail identified assailants through a peephole so that they could avoid retaliation by gang members. (18RT 2701.) While nothing precluded the jury from guessing that appellant Mora was a gang member, such a conclusion would be no more than just that; a guess. The same applies to Deputy Kovak's later statement that he usually documented, in his report on assault incident, external identifying features of suspect inmates, such as a tattoo that would shows gang name or affiliation. Deputy Kovak never told the jury that the tattoo on appellant Mora was a gang tattoo. To assume it was such a tattoo would be nothing more than speculation on the jury's part. (See *People v. Bolden* (2002) 29 Cal.4th 515, 555 [court holding that it is "doubtful that any reasonable juror would infer from the [witness's] fleeting reference to a parole office that defendant had served a prison term for a prior felony conviction."].)

Indeed, neither the court nor the prosecutor committed any error in this case. There was nothing inappropriate about the prosecutor's question why a peephole was used for the identification of suspects in jail, as the circumstances of any identification bore on how reliable the identification was. (See, e.g., *People v. Ochoa* (1998) 19 Cal.4th 353, 412 [reliability of identification depends on, inter alia, totality of the circumstances of the identification].) Neither the court nor the prosecutor could know that Deputy Kovak would refer to gangs, rather than explaining that the procedure would generally protect victims from future retaliations by the same assailants.

Similarly, the prosecutor's question regarding the tattoo went to the heart of the identification of Juhn's assailant. Contrary to appellant Mora's assertion, the prosecution was not required to accept any stipulation on identity by the defense. (*People v. Salcido* (2008) 44 Cal.4th 93, 147 ["the prosecution is not required to accept a stipulation 'if the effect would be to deprive the state's case of its effectiveness and thoroughness,' nor is it

'obligated to present its case in the sanitized fashion suggested by the defense.'"]; see also *People v. Garceau* (1994) 6 Cal.4th 140, 182; *People v. Bradford* (1997) 14 Cal.4th 1005, 1050-1051; *People v. Pinholster* (1992) 1 Cal.4th 865, 959.) As such, the prosecutor's question on identity was entirely proper. And, neither she, nor the court, could foresee that the witness, after being specifically ordered not to reveal that gang nature of the tattoo, would refer generally to gang tattoos when discussing his practice of documentation. As there was no error committed by the prosecutor nor the court, appellant Mora's instant complaint must fail. (See, e.g., *People v. Valdez* (2004) 32 Cal.4th 73, 128 [motion for mistrial denied where the witness's testimony took the prosecutor by surprise].)

It is also important to note that if appellant Mora was concerned about the jury speculating on his gang membership, he certainly did not request a mistrial when these two references to gangs by were made by Deputy Kovac in front of the jury. As such, the instant contentions must be deemed forfeited on appeal. (See, e.g., *People v. Foster* (2010) 50 Cal.4th 1301, 700 [failure to request mistrial for juror misconduct forfeits the issue on appeal].)

Finally, as previously alluded, the prosecution's case at the penalty phase was overwhelming. As such, there was no reasonable possibility that any error arising from these passing references to gangs by Deputy Kovac affected the penalty verdict.

E. Lack of Jury Voir Dire on Gangs

Appellants both contend that the reference to gangs compounded the error because they have foregone the voir dire of the jury on the issue of gangs in reliance on the prosecutor's pretrial representation to the court that it would not present gang evidence. (RAOB 189-190; MAOB .) This argument cannot stand, as appellants each made a conscious tactical choice

to refrain from such voir dire knowing that sporadic references to gangs during the trial were inevitable.

As previously summarized, when appellant Mora's counsel expressed concern about a juror's inability to be impartial in gang cases, the court asked, "Is there any gang evidence that you will elicit in this case? Is there any gang evidence." The prosecutor answered at the time, "Not that I know of." (2RT 266.) Nonetheless, appellant Mora's counsel acknowledged that there was still the possibility that some gang references could "slip[] out." (2RT 266.) Indeed, even after the jury was selected, the court acknowledged the inevitability of gang-related evidence. The court ruled that should references to gangs, such as when witnesses gave descriptions of the perpetrator's identifying traits, become impossible to avoid, then the parties should approach and discuss the matter outside the jury's presence. (3RT 359.)

That was why when appellants objected to the gang references in the tape of the police interview of Lourdes Lopez, the trial court observed the following regarding appellants' choice of foregoing jury voir dire on gangs:

> "You knew it; it was a tactical decision you made. I have to – you knew what your client's gang status was when you made those choices. [¶] You also know from all the experience that you have that with lay witnesses, that these things come out sometimes. I am not going to keep out pertinent information when the entire statement given by this woman has been attacked every which way. I'm not going to keep it out because there might be a reference to gang membership which will not be dwelled on, argued and I will even entertain a jury instruction on it, if that's what you want. But I don't think you can have it both ways.

(8RT 1248.)

Under these circumstances, there was no guarantee, on which appellants could reasonably rely, that gang references would not surface at some point during trial. And indeed, as previously indicated, it was only

after appellant Rangel portrayed himself in a misleading light during penalty phase that on rebuttal, the prosecution found the need to present expert testimony on gangs to give the jury a complete picture of appellant Rangel's life. Prior to that, the prosecution, pursuant to the court's order during voir dire (3RT 359 [court noted "if it looks like we can't go any other way, then I ask that we approach."]), sought permission to present the facts and circumstances of the vehicular burglary incident (16RT 2483), which was a prior offense that was perfectly proper for jury consideration (see e.g., § 190.3, subds. (b), (c)), but which was helplessly intertwined with facts relating to gangs because the offense was essentially a gang-related activity. Such inescapable references to gangs were well within what appellants should have anticipated when they consciously chose to forego voir dire questions regarding gangs. Thus, appellants cannot now fault the trial court or the prosecutor for what was an obvious tactical decision. (See, e.g., *People v. Horton* (1995) 11 Cal.4th 1068, 1123-1124 ["counsel's failure to voir dire individual jurors on sensitive issue of racial bias was other than the result of sound tactical decision such as determination that indirect questions were more likely to disclose bias"].)

For the reasons set forth above, appellants' instant claim must fail.

XVI. THE TRIAL COURT PROPERLY REFUSED APPELLANT RANGEL'S PROPOSED PENALTY PHASE INSTRUCTIONS

Appellants next contend that various special instructions that were proposed at the penalty trial were incorrectly refused. These contentions are meritless.

Appellants first contend that the trial court erroneously declined to instruct the jury that it could not regard death as a less severe penalty than life in prison without the possibility of parole. (RAOB 201-205; MAOB

211-213.) This same contention has been rejected by this Court, noting that instructions such as CALJIC No. 8.88, which was given in this case (see 5CT 1211), coupled with the jurors' common sense, rendered such a special instruction "argumentative, duplicative, and unnecessary." (*People v. Cook* (2007) 40 Cal.4th 1334, 1363.) There is no reason to diverge this Court's holding here.

Appellants also contend that the court should have given the proposed special instruction that drug or alcohol intoxication "may be considered as a mitigating factor and not as an aggravating factor." (RAOB 205-210; MAOB 214-218.) However, this Court has long held that trial courts do not need to advise the jury "which statutory factors are relevant solely as mitigating circumstances and which are relevant solely as aggravating circumstances." (*People v. Tafoya* (2007) 42 Cal.4th 147, 188; *People v. Farnam* (2002) 28 Cal.4th 107, 191.)

Appellants next contend that the trial court erred in declining to give the special instruction proposed by the defendants which would have advised the jury that evidence which was presented regarding the defendant's background may only be considered by the jury as mitigating evidence. (RAOB 210-213; MAOB 219-221.) This Court has likewise rejected this precise claim in past cases. (*People v. Carey*, *supra*, 41 Cal.4th at pp. 134-135; *People v. Hinton*, *supra*, 37 Cal.4th at p. 912; *People v. Ochoa*, *supra*, 26 Cal.4th at p. 457.)

Appellants' other proposed instructions regarding the penalty weighing process (RAOB 213-217; MAOB 221-224) were properly rejected by the trial court. As to the proposed instruction that "even if aggravating factors substantially outweigh mitigating factors," the jury "may still find" life imprisonment without the possibility of parole the appropriate sentence, this Court has found that defendants are not entitled to such an instruction. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1179;

People v. Page (2008) 44 Cal.4th 1, 58.) As to the proposed instruction that any mitigating factor alone could be sufficient to support a life imprisonment sentence, this Court likewise has found in the past that capital defendants are not entitled to such an instruction. (*People v. Burney* (2009) 47 Cal.4th 203, 261-262.) As to the proposed instruction that "even in the absence of mitigating evidence," the jury may decide that the aggravating evidence was not substantial enough to warrant death, this Court, in the past, has also upheld the trial court's refusal to give it. (*People v. Snow* (2003) 30 Cal.4th 43, 124.)

As such, appellants' current instructional challenges must fail.

XVII. THE TRIAL COURT PROPERLY DECLINED TO GRANT A CONTINUANCE FOR THE SEARCH OF A SURREBUTAL WITNESS; THE TRIAL COURT PROPERLY DECLINED TO TERMINATE PROCEEDINGS EARLY SO THAT APPELLANT RANGEL COULD BEGIN HIS CLOSING ARGUMENT THE NEXT DAY

Appellant Rangel next faults the trial court for not granting a continuance so that he could find appellant Rangel's father and call him back to the witness stand as a surrebutal witness. Appellant Rangel also faults the trial court for not ending court session early after the prosecutor's closing argument so that he could begin his closing argument the next day. (RAOB 219-232.) These contentions are without merit.

A. Relevant Proceedings

Near the end of the defendants' penalty case, the prosecution advised that it was going to call a gang expert to rebut Jimenez's claim on the witness stand that the crime committed was out of character with his knowledge of appellant Rangel. (20RT 3068.) The prosecution had also turned over to the defense a four-page document summarizing the

anticipated testimony. (20RT 3068-3069.) The court noted that the defense had been given such information even though the prosecution was "not required to give any advance notice of rebuttal witnesses." (20RT 3069.) Appellant Rangel's counsel expressed a desire to know the identity of the expert witness and the trial court replied, "I appreciate that you do, but they are not required to tell you." (20RT 3069.) Thereafter, appellant Mora indicated that they had opted not to call the remaining witnesses they were planning to present. (20RT 3069-3070.) The prosecution then indicated it was ready to present the gang expert. (20RT 3070.) Officer Zembal was called as a rebuttal witness a short while later. (20RT 3077.)

After Officer Zembal's testimony ended that same day, the following exchange occurred:

> The Court: Are you going to offer any surrebuttal?
>
> [Appellant Rangel's counsel]: Well, may I ask for a continuance to do so?
>
> The Court: you can ask, but I'm not going to give it.
>
> [Appellant Rangel's 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.
>
> [Appellant Rangel's counsel]: Yeah. I might need – I can't give you any facts, because I need to talk with a witness first.
>
> The Court: Do you have a witness?
>
> [Appellant Rangel's counsel]: Possible.
>
> The Court: You have to tell me.
>
> [Appellant Rangel's counsel]: His father.
>
> The Court: Are you going to call the defendant's father back up?
>
> [Appellant Rangel's counsel]: I might.
>
> The Court: Is he here?
>
> [Appellant Rangel's counsel]: No, he's not.

> The Court: I'm not inclined to give a continuance for that purpose. If you can get him here by 1:30 and you have an offer of proof as to what he's going to say and it seems to be surrebuttal, I may consider it. But I'm not making any promises.

(20RT 3108-3109.) The parties proceeded to discuss jury instructions. (20RT 3110.)

After the discussion on jury instructions, the court recessed for a lunch break. Thereafter, appellant Rangel's counsel stated to the court that she had not been able to contact the witness anticipated for surrebuttal and asked for a recess until the next day. (20RT 3149.) Counsel also stated that she "would be able to contact him during the evening." (20RT 3149.) The court stated, "I'm going to deny your request." Appellant Rangel's counsel then stated such a denial was a violation of appellant Rangel's fair trial, equal protection, and due process rights. (20RT 3150.)

The prosecution finished its opening argument at 3:40 p.m. A 15-minute recess was taken. (20RT 3236.) A conference at the bench took place, during which appellant Rangel's counsel stated, "I object to being forced to do my closing at this time. As the court can see, it's four o'clock --." The court replied, "No. It's like five minutes before 4:00 and I just gave you the 15-minnute break that I promised you." Counsel objected that it would be unfair for her to proceed with closing argument at this time, as she would have to "rush" and the jurors were tired. The court stated, "I would not agree with that at all, Ms. Trotter. The jurors seem to be listening. They haven't been in the courtroom too much today because so many things have taken so much time. We are in session until 4:30. If you are close to finishing, then I will let you go until after then if you like." Counsel responded, "And the jurors will not be listening." The court stated, "I refuse to believe that. Your objection is noted." (20RT 3237.) Argument by appellant Rangel's counsel, which had been interrupted by a

sidebar conference and a short brief bathroom and "stretch[ing]" break, was eventually completed at 4:50 p.m. (20RT 3259.)

B. The Trial Court Properly Denied the Continuance Requests

A trial court has the broad discretion to determine whether there is good cause to grant a continuance of the trial. (§ 1050, subd. (e); *People v. Frye* (1998) 18 Cal.4th 894, 1012.)

> When a continuance is sought to secure the attendance of a witness, the defendant must establish "he had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven." [Citation.] The court considers " 'not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion.' " [Citation.] The trial court's denial of a motion for continuance is reviewed for abuse of discretion. [Citation.]

(*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) Substantial deference to the trial court's determination on these issues is necessary. (*People v. Howard* (1992) 1 Cal.4th 1132, 1172.)

Here, in the first instance where continuance was denied, appellant Rangel at trial failed to sustain his burden of proving good cause for his continuance request. Because he did not make an offer of proof as to the content of the anticipated surrebuttal testimony when given the opportunity to do so, and in fact, was unsure what his father would say (20RT 3108-3109 ["I can't give you facts because I have to talk to the witness first"]), appellant Rangel failed to make the requisite showing that the expected testimony was material and non-cumulative or that the facts to which his father would testify could not otherwise be proven. The offer of proof

being woefully inadequate, the trial court had acted well within its discretion in denying the continuance request.

Appellant Rangel's current argument that the request for continuance was reasonable because appellant was "sandbagged" by gang testimony is untenable. (RAOB 228.) Appellant Rangel had only himself to blame for the introduction of rebuttal gang evidence because he, in the first instance, chose to present character evidence portraying himself as someone who would not have committed the murders. (*People v. Fierro* (1991) 1 Cal.4th 173, 238 [evidence of membership in youth gangs was relevant to rebut testimony of defendant's good character].)

As to the request to postpone the defense closing argument until the next day, appellant Rangel fails to demonstrate why such a request should have been granted. (See § 1044 ["It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."].) "In the absence of a showing of an abuse of discretion and prejudice to the defendant, a denial of his or her motion for a continuance does not require reversal of a conviction." (*People v. Somayoa* (1997) 15 Cal.4th 795, 840.) No abuse of discretion occurs "as long as there exists 'a reasonable, or even fairly debatable justification, under the law, for the action taken. . . .'" (*Gonzales v. Nork* (1978) 20 Cal.3d 500, 507.)

Here, the reasons appellant Rangel gave at trial for the requested postponement of his closing argument was that he did not want to "rush" his argument as they were nearing the end of court session and that the jurors, in any event, were tired. (20RT 3237.) But, the trial court correctly observed that the jury had not listened to proceedings for much of the day. (20RT 3237.) The record showed that the only presentation to the jury that

day was the short testimony of Officer Zembal. (20RT 3077-3107.) Moreover, the trial court was willing to extend court hours that day to accommodate the length of appellant Rangel's closing argument. (20RT 3237.) Given these two facts, and given the trial court's duty under section 1044 to limit argument with a view toward expediting the scertainment of truth, the court here cannot be said to have abused its discretion in denying the continuance request.

Appellant Rangel's additional reason for the continuance, presented for the first time on appeal, that his counsel needed time to reorganize her notes in light of the refused proposed instructions (RAOB 226), is entirely forfeited. No appellate evaluation of the court's discretion for abuse is possible when a defendant withholds from the trial court a reason in favor of his trial request and then thereafter presents that reason for the first time on appeal. The forfeiture doctrine is designed specifically for such a situation. (See *People v. Smith* (2007) 40 Cal.4th 483, 507 [trial court had no opportunity to address factual disputes raised at appeal]; *People v. Ray* (1996) 13 Cal.4th 313, 339 [suppression motion at trial complained only of delay and appellate claim of involuntariness of confession based on promised benefit forfeited on appeal].) This specific argument is therefore barred from appellate review.

Assuming any error, appellant Rangel cannot demonstrate what testimony his father could have presented to rebut the prosecution's gang evidence. Nor does he supply any basis for this Court to conclude that a postponement of argument would result in a qualitatively different or "better" defense argument that would somehow have an impact on the case. As such, any error was harmless under any standard. (*Chapman v. California*, *supra,* 386 U.S. at p. 24; *People v. Watson*, *supra,* 46 Cal.2d at p. 836.)

XVIII. THE TRIAL COURT'S RULING ON DEFENSE DISCOVERY OF PROSECUTION REBUTTAL WITNESSES DOES NOT REQUIRE REVERSAL OF APPELLANT MORA'S SENTENCE

Appellant Mora contends that because at the penalty phase, the prosecution was not required by the court to disclose the identity of its witnesses in rebuttal to appellant Mora's scheduled mitigation witnesses, appellant Mora was deprived of a meaningful opportunity to make an informed decision about whether to present that mitigation evidence. (MAOB 177-202.) Respondent submits that any error in this regard was forfeited. In any event, the error was clearly harmless.

A. Relevant Proceedings

At the conclusion of the guilt phase, the prosecutor indicated that she had disclosed of all of her penalty evidence to the defense. (15RT 2470-2471.) Appellant Mora's counsel asked for the prosecution's penalty phase witness list. (15RT 2471.) The prosecutor stated that the list was on the jury questionnaire. (15RT 2471.) The prosecutor then indicated that neither defendant had turned over discovery materials for the penalty phase. (15RT 2472.) The court ordered defense disclosure by 2 p.m. Saturday, which would be 24 hours after the guilty verdict. (15RT 2473.) The prosecution also corrected the names of two witnesses that she planned to introduce. (15RT 2473.) Thereafter, appellant Mora's counsel indicated for the record that she was filing her witness list at that point in time. (15RT 2473.)

At the next court date, the court stated that it had just received appellant Rangel's witness list for the penalty phase. (16RT 2476.) Appellant Mora's counsel indicated that she had given additional names, along with accompanying discovery materials, to the prosecution that morning. (16RT 2488.) She also informed the court that a Deputy Page

was under subpoena. (16RT 2488.) The prosecutor thereafter stated that while reading the defense's discovery material, she learned about a claim that appellant Mora had been a "trustee" of some sort since his arrest. The prosecutor stated that she spoke "to a Deputy Lucero," who told her that appellant Mora "was not a trustee per se . . . that she had no information that he was a trustee" and that "he wasn't housed with the trustees." (16RT 2489-2490.) The prosecutor stated, "I may bring that in in rebuttal, depending on what the officer states as to [appellant Mora's] trustee status." Appellant Mora's counsel then stated that all of the deputies listed on the list gave statements indicating appellant Mora was a "trustee" and discovery materials relating to this had been turned over to the prosecutor. The court then stated, "It sounds like that would be an issue of fact for the jury to resolve if indeed Lucero is going to say that, but that doesn't sound like a problem." (16RT 2490.)

Appellant Mora's counsel thereafter told the jury during opening remarks at the penalty phase that they would hear from three deputies Sheriff, i.e., Deputies McDonald, Hoffman and Page, that during the time appellant Mora had been incarcerated in county jail, he had been a "module trustee" who was entrusted with serving food and cleaning duties. (16RT 2506.) The deputies purportedly would testify that appellant Mora worked throughout the day, "was very respectful in that controlled area," followed orders, "was not violent," and "posed no problems." (16RT 2506.) The three deputies were the ones appellant Mora "worked for" while he was incarcerated in county jail. (16RT 2506.)

On February 11, 1999, after appellant Mora presented much of her mitigation case, appellant Mora's counsel inquired whether the prosecutor had rebuttal evidence she wished to present. (19RT 3055.) The prosecutor stated:

> Not at this time; however, I'm certain they are going to call some deputies, and based on what they say, I will have someone available just in case. I have no idea what they could rebut, since I haven't heard any testimony. I have some idea it might have something to do with being a trustee, but I don't have any statement.

(19RT 3055-3056.) The parties proceeded to discuss other matters. (19RT 3056.)

On the morning of the next court date, Tuesday, February 16, 1999, an Evidence Code section 402 hearing was held to discuss the testimony of Deputies McDonald and Hoffman. Appellant Mora assured the court that the testimony would be about appellant Mora's work as a module trustee. (20RT 3063.) Counsel stated, "Other than that, we wouldn't go into that he's a good guy or anything like that." (20RT 3064.)

The prosecutor stated:

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

(20RT 3064-3065.) Appellant Mora's second counsel stated that such evidence was not necessarily character evidence. (20RT 3065.) The court held such evidence admissible but stated the following:

> If you want to present it, that's fine, but I do think it opens the door. How much it opens the door remains to be seen. If all they testify to is he behaved himself appropriately while under their – in custody during the time, whatever the specific time period is, that's fine, then I will address any arguments that you may make if the People choose to rebut that. But I do think there is definitely a crack in the door at that point. How far it

> goes remains to be seen. [¶] I won't let the People bring in something remote in response to that, in rebuttal to that, but if it's something else about his jail behavior that may be less than positive, I would see no trouble letting that come in.

(20RT 3065-3066.) The court did not preclude the possibility that evidence could be brought in for conduct prior to the "jail stint" that appellant Mora "did over the past year and a half." (20RT 3066.) The parties proceeded to a discussion on other matters.

During a discussion about appellant Rangel's desire to know the identity of the prosecutor's gang expert, the trial court stated, "I appreciate that you do, but they are not required to tell you." (20RT 3069.)

B. Any Error Was Forfeited; In Any Event Any Error Was Clearly Harmless

Where the defendant is required by law to disclose evidence of its defense, the defendant is entitled, under due process, to the government's disclosure of its rebuttal witnesses. (*Wardius v. Oregon* (1973) 412 U.S. 470, 478-479 [93 S.Ct. 2208, 37 L.Ed.2d 82].) In addressing California's reciprocal discovery rules, i.e., section 1054, et. seq., this Court in *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, observed that although the "enumeration of a criminal defendant's discovery rights under section 1054.1 does not specify that rebuttal witnesses are included, . . . the only reasonable interpretation of the requirement that the prosecution disclose "[t]he names and addresses of persons the prosecutor intends to call as witnesses at trial" is that this section includes both witnesses in the prosecution's case-in-chief and rebuttal witnesses that the prosecution intends to call." (*Id.* at p. 375.) As to what it means to "intend" to call a witness, the *Izazaga* Court adopted the test that witnesses the prosecution "intends to call at trial" includes all witnesses "it reasonably anticipates it is likely to call." (*Id.* at p. 376, fn. 11.) Such right to reciprocal discovery was extended by this Court to the penalty phase. (*People v. Superior Court*

(Mitchell) (1993) 5 Cal.4th 1229, 1239.) In *People v. Gonzalez* (2006) 38 Cal.4th 932, this Court confirmed that at the penalty phase, a defendant has the right to reciprocal discovery of "any of [the prosecution's] witnesses who will be used in refutation of the defense witnesses if called." (*Id.* at p. 957.)

Preliminarily, appellant Mora forfeited his right to complain of this error because at trial, he did not even request the disclosure of the identity of the prosecutor's possible rebuttal witness. (Comp. *People v. Gonzalez*, *supra,* 38 Cal.4th 932, 958 ["Not providing discovery the defense *specifically requests* merely because defense counsel did not cite the right statute would be inconsistent with the high court's holding "that the due process clause requires 'notice that [the defendant] would have an opportunity to discover the State's rebuttal witnesses." (emphasis added)].)

Even assuming the claim is preserved and assuming arguendo a denial of appellant Mora's discovery rights at the penalty phase, such error is not reversible per se; the reviewing Court must determine "whether there is a reasonable possibility the error affected the verdict." (*People v. Gonzalez*, *supra*, 38 Cal.4th at p. 960.) Specifically, to find prejudice, this Court must find

> both (1) a reasonable possibility defense counsel would have presented the mitigating evidence had he received the discovery he requested (otherwise the error would not have affected the trial at all), and (2) a reasonable possibility the verdict would have been different had defendant presented the mitigating evidence.

(*Id.* at p. 961.) Here, there was no reasonable possibility the verdict would have been different had appellant Mora presented his proffered mitigating evidence.

The proffered evidence was not at all helpful to appellant Mora. According to the defense proffer, the most that the deputies would testify to

was that appellant Mora, in a confined environment, i.e., the county jail, was given the status of a module "trustee" who was entrusted by prison authorities to perform various work in county jail and had performed that work without problems. But such evidence in no way measured up to overwhelming evidence that appellant Mora and his cohort, outside such a confined environment, chose to target innocent unsuspecting individuals for a murder and/or armed robbery, and after killing the individuals in cold blood, bragged to their friends about the killings. In fact, such proffered evidence of good behavior in county jail could not be persuasive to any degree in view of fact that the prosecution had already presented, it its affirmative penalty case, evidence of appellant Mora's instigation of, and involvement, in a physical assault of Juhn on another occasion in the same kind of setting -- a jail facility -- during a 1996 incarceration. (19RT 2676-2682, 2700-2722.) There was simply no possibility, much less a reasonable one, that the proffered evidence could have had any effect on the powerful penalty case the prosecution presented. As such, any error was clearly harmless.

XIX. THE "CIRCUMSTANCES OF THE CRIME" PROVISION IN SECTION 190.3, SUBDIVISION (A) IS NOT UNCONSTITUTIONALLY VAGUE

Appellant Rangel next contends that the "circumstances of the crime" language of section 190.3, subdivision (a), which supplied the basis of "victim impact" evidence, is vague and overbroad, leading to the introduction of "victim impact" evidence without limitation. He argues that the victim impact evidence in this case "goes beyond 'the nature and circumstances of the crime' as intended by [] section 190.3, subdivision (a)." He also argues that the witnesses should have been excluded during each other's testimony, and that there should have been pinpoint

instructions advising the jury how the evidence should be considered. (RAOB 233-253.) This contention must be rejected.

"Unless 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 under section 190.3, factor (a)." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1056-1057; see also *People v. Cruz* (2008) 44 Cal.4th 636, 682.) "The federal Constitution bars victim impact evidence only if it is so unduly prejudicial as to render the trial fundamentally unfair." (*Id.* at p. 1056, internal quotations and citation omitted, quoting *Payne v. Tennessee* (1991) 501 U.S. 808, 825.)

Appellant Rangel's contention that the "nature and circumstance" language is unconstitutionally vague must be rejected. This Court has repeatedly rejected this claim in the past. (See, e.g., *People v. Ervine* (2009) 47 Cal.4th 745, 792; *People v. Cruz* (2008) 44 Cal.4th 636; *People v. Salcido* (2008) 44 Cal.4th 93, 151; *People v. Kelly* (2007) 42 Cal.4th 763, 793.)

Appellant Rangel's argument that the "victim impact" evidence in this case exceeded what was contemplated by the "nature and circumstance" language is utterly without merit. This Court, as recently as last year, summarized the law on this area as follows:

> As we have previously observed, victim impact evidence is not limited to the effect of the victim's death on family members (*People v. Pollock* (2004) 32 Cal.4th 1153, 1183, 13 Cal.Rptr.3d 34, 89 P.3d 353), but may include its effects on the victim's friends, coworkers, and the community. (*People v. Huggins* (2006) 38 Cal.4th 175, 222, 238-239, 41 Cal.Rptr.3d 593, 131 P.3d 995 [testimony from friends and coworkers mourning the loss of the victim and describing the erection of a bronze statue of the victim by the community was relevant to the circumstances of the crime]; accord, *McClain v. State* (1996) 267 Ga. 378, 477 S.E.2d 814, 824 ["the trial court has discretion

> to question witnesses regarding the effect of the victim's death on the community"].) Nor are victim impact witnesses limited to expressions of grief, for our case law permits a showing of "the specific harm caused by the defendant" (*People v. Edwards*, *supra*, 54 Cal.3d at p. 835, 1 Cal.Rptr.2d 696, 819 P.2d 436), which encompasses the spectrum of human responses, including anger and aggressiveness (*People v. Gutierrez* (2009) 45 Cal.4th 789, 802, 89 Cal.Rptr.3d 225, 200 P.3d 847), fear (*People v. Wilson* (2005) 36 Cal.4th 309, 357, 30 Cal.Rptr.3d 513, 114 P.3d 758), and an inability to work (*Gutierrez*, *supra*, 45 Cal.4th at p. 802, 89 Cal.Rptr.3d 225, 200 P.3d 847). Nor does the admissibility of such evidence render section 190.3, factor (a) unconstitutionally vague. (*Wilson*, *supra*, 36 Cal.4th at p. 358, 30 Cal.Rptr.3d 513, 114 P.3d 758.)

(*People v. Ervine*, *supra*, 47 Cal.4th at p. 792.) Moreover, the introduction of photographs and videotape of the victims and their family have routinely been upheld by this Court. (See *People v. Mills* (2010) 48 Cal.4th 158, 211; *People v. Bramit* (2009) 46 Cal.4th 1221, 1240-1241; *People v. Zamudio* (2008) 43 Cal.4th 327, 363-368 [14 minutes of videotape containing montages of victim's life]; *People v. Kelly* (2007) 42 Cal.4th 763, 793-799 [20 minutes of videotape containing montages of victim's life from infancy to the time she was killed]; *People v. Prince* (2007) 40 Cal.4th 1179, 1289 [25 minutes of videotape of the victim].)

The victim impact testimony in this case, involving the showing of photographs, descriptions of the victims' positive impact on family, friends, and community, and testimony about the devastating impact of their deaths, was well within the contours described by this Court in the aforementioned decisions. Appellant Rangel's current challenge against the victim impact evidence presented in this case must fail.

Appellant Rangel (RAOB 250-253), as well as appellant Mora (MAOB 224-230), faults the court for not giving a proposed special instruction, which stated:

> Evidence has been introduced for the purpose of showing specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role of deciding whether the defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of irrational, purely subjective response to emotion evidence and argument.

(4CT 1070.) But, this Court has held that where a court has given the standardized instructions pursuant to CALJIC Nos. 8.84.1 and 8.85, such an instruction adequately instructs the jury on how to consider victim impact evidence. (*People v. Bramit* (2009) 46 Cal.4th 1221, 1245; *People v. Zamudio*, *supra*, 43 Cal.4th 327, 369-370.) Such instructions were in fact given in this case. (5CT 1193-1194 [must not be influenced by bias nor prejudice, nor swayed by public opinion or public feelings, must "follow the law, exercise your discretion conscientiously, and reach a just verdict," and must "face this obligation soberly and rationally and may not reach any decision as an irrational response to emotional evidence or argument].) As such, appellants' current argument must fail.

Finally, appellant Rangel complains about the court's failure to exclude witnesses from hearing each other's victim impact testimony. (RAOB 235-236.) But, he made no motion for such exclusion at trial, nor did he seek a mistrial when the defense allegedly observed a showing of emotion on the part of the spectators. Therefore, he has forfeited his right to complain about the trial court's omissions in this regard. (See *People v. Guy* (1961) 191 Cal.App.2d 714, 719.)

In any event, to the extent that victim-impact witnesses had exhibited emotions while listening to other victim impact witnesses testify, it is well established that mere showing of emotion in court is not necessarily error. (See *People v. Verdugo* (2010) 50 Cal.4th 263, 298 [finding no error when the victim's mother cried while testifying as "tears reflected a normal

human response to the loss of a child, a response that the jury would reasonably expect a mother to experience]; *People v. Jurado* (2006) 38 Cal.4th 72, 132-134 [finding no error when testimony from multiple family members caused some jurors to cry as the record does not support that the jurors were unable to make rational determination of penalty].)

In any event, "[m]isconduct on the part of a spectator is a ground for mistrial if the misconduct is of such a character as to prejudice the defendant or influence the verdict." (*People v. Lucero* (1988) 44 Cal.3d 1006, 1022.) The trial court is afforded broad discretion in determining whether spectator conduct is prejudicial and "it is generally assumed that such errors are cured by admonition, unless the record demonstrates the misconduct resulted in a miscarriage of justice." (*People v. Hill* (1992) 3 Cal.4th 959, 1002, overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

The jury were given the instruction (5CT 1193) that it was to refrain from "irrational response to emotional evidence or argument" and to not be influenced by bias or prejudice or public opinion or feelings. The jury is presumed to have followed such an admonition. (*People v. Holt*, *supra*, 15 Cal.4th 619, 662, fn.5.) Moreover, the current record demonstrates no miscarriage of justice.

Assuming audience members did exhibit emotion, the record does not support the fact that the jury had acted irrationally as a result of observing such a display. Here, the jury retired to deliberate on penalty at 11:35 a.m. on February 17, 1999. (4CT 1087.) The jury then requested a readback of testimony from three witnesses. (4CT 1088.) The next morning, the jury received further readback of testimony. (4CT 1223.) It was at 1:34 p.m. that day that the jury announced it had reached its verdict. (4CT 1224.) The fact that the jury did not immediately return a death verdict, coupled with the fact that they requested and heard several readbacks of testimony,

showed that "rather than rushing to judgment under the influence the influence of unbridled passion, the jurors arrived at their death verdict only after a full and careful review of the relevant evidence and of the legitimate arguments for and against the death penalty." (*People v. Jurada*, *supra*, 38 Cal.4th at p. 134.) Hence, any error was clearly harmless.

XX. THE TRIAL COURT PROPERLY REJECTED APPELLANT MORA'S MOTION FOR NEW TRIAL BASED ON JUROR MISCONDUCT WITHOUT HOLDING AN EVIDENTIARY HEARING

Appellants next contend that the trial court's failure to conduct an evidentiary hearing on defense allegations of juror misconduct requires reversal of the death judgment and a remand for a hearing on juror impartiality. (RAOB 254-270; MAOB 236-250) This contention is without merit.

A. Relevant Proceedings

On March 5, 1999, after the death verdict, appellant Mora moved for disclosure of juror identity and contact information to obtain necessary declarations for a motion for new trial. The disclosure motion was based on post-verdict discussions with jurors during which one juror, Juror No. 2, had stated that he determined, based on his military training, that appellant Mora, because he shot the victim in the head, had in fact executed the victim. The juror had shared his views with the other jurors. The motion alleged that Juror No. 2 stated that once he determined that the murder was an execution, he automatically determined that appellant Mora deserved the death penalty. The pleading also alleged that Juror No. 7 revealed that she changed her mind during deliberations based on the "execution" argument. This second juror allegedly stated that while appellant Rangel did not commit an execution, the jury's deliberation as to his penalty was brief

because of his "overall reprehensible" conduct. Based on these facts, appellant Mora moved for disclosure of juror identification and contact information to investigate possible juror misconduct. (45CT 11759-11770.)

On March 8, 1999, appellant Rangel moved for new trial based on various non-statutory grounds, none of them involving juror misconduct. (45CT 11770-11788.)

On March 18, 1999, appellant Rangel joined in appellant Mora's motion for disclosure of juror information. (21RT 3310.) The trial court, stating its desire for this issue to be fully addressed, asked the defense to comply with the court rules by noticing a hearing to litigate the requested disclosure. (21RT 3311.)

On April 27, 1999, the disclosure motion was heard before the court. The court informed the parties that for those who had responded to the court's inquiry regarding their willingness for disclosure of personal information, nine of the twelve, i.e., Jurors Nos. 1, 2, 4, 5, 6, 7, 8, 9, and 10, had indicated they did not wish to have their identity and contact information disclosed. (21RT 3316-3318.) Jurors 1, 2, 6, 8, and 9 had appeared in court that day, and four of them, Jurors Nos. 1, 2, 6, 8, had been granted permission to watch the proceedings that day. (21RT 3316, 3318.) The court then stated that it was the jurors' right to refuse to speak with the defense and based on their express desire to not be contacted, the court ruled to deny access to information as to the nine jurors. (21RT 3319.) As to the three jurors who had not replied to the court's inquiry on the matter, the court granted disclosure as to their contact information. (21RT 3319.) The court granted the defense 30 days to file or re-file their motions for new trial. (21RT 3320.)

On May 17, 1999, appellant Mora filed his motion for a new penalty-phase trial based on essentially the same previously-alleged facts. Appellant Mora's second counsel at trial, Mr. McLarnon, additionally

declared that at some point in the deliberation, the vote was eight to four in favor of a death verdict. McLarnon also declared that he spoke by telephone with R.M., one of the three jurors whose contact information the court, on April 27, 1999, gave out to defense counsel. R.M. told McLarnon that he did not remember any facts based on military expertise, but that the jurors had considered, and agreed to, the fact that "these murders would never have occurred if Mora had not paged or called Rangel that evening." (45CT 11829, 11839.)

On May 27, 1999, the court heard arguments on both defendants' motions for new trial. (21RT 3343.) Appellant Rangel's counsel, when asked whether he wished to present argument, simply indicated that she would simply incorporate all arguments set forth in her moving papers. (21RT 3344.) She then concurred with the court's summary of the grounds appellant Rangel was setting forth for the motion for new trial, none of them involving juror misconduct. (21RT 3344.)

After appellant Mora and the prosecution delivered their arguments, the court first denied appellant Rangel's motion for new trial, setting forth various reasons. (21RT 3352.) Thereafter, it ruled on appellant Mora's motion for new trial. (21RT 3352.) The court concurred with the prosecution that the declarations offered by counsel for appellant Mora in support of the motion were inadmissible hearsay. Nonetheless, the court found that even considering the contents of the declarations, there was no juror misconduct. (21RT 3353.) The trial court addressed appellant Mora's argument that there was insufficient information that was developed in support of the motion. The court observed that the jurors were not required to speak to counsel after the verdict for the purpose of supplying information to support a motion for new trial. (21RT 3353.)

B. Appellant Rangel Forfeited Her Right to Raise the Juror Misconduct Issue on Appeal

Appellant Rangel does not raise juror misconduct in her motion for new trial and did not otherwise interpose an objection based on such a ground at trial. As such, he clearly forfeited his right to raise the current issue on appeal. (*People v. Dykes* (2009) 46 Cal.4th 731, 808, fn.22 [capital murder defendant's failure to raise certain alleged instances of juror misconduct in the trial court in connection with his motion for new trial or his request for an evidentiary hearing resulted in forfeiture of those claims on appeal; the fact that defendant raised some juror misconduct claims in his motion for new trial did not serve to preserve claims regarding other instances for appeal].)

C. In Any Event, The Juror Misconduct Claim Is Meritless

Assuming the juror misconduct claims presented here are preserved, they nonetheless are meritless. Essentially, appellants argue that once the trial court knew about (1) Juror No. 2's reliance on his military experience to reach a decision and did so without considering mitigation evidence, (2) that Juror No. 7 had been affected by such a view after it was expressed during deliberation, and (3) that juror R.M. remembered that the jury considered the fact that the murder would not have occurred had appellant Mora not called out or paged appellant Rangel, that it should have conducted an evidentiary hearing to investigate possible juror misconduct. (RAOB 261-268 ; MAOB 242-250.) This contention is without merit.

"[W]hen a criminal defendant moves for a new trial based on allegations of juror misconduct, the trial court has discretion to conduct an evidentiary hearing to determine the truth of the allegations." (*People v. Hedgecock* (1990) 51 Cal.3d 395, 415.) Such a hearing is not to be used, however, as a "fishing expedition" to search for possible misconduct.

(*People v. Avila*, *supra*, 38 Cal.4th at p. 604.) Indeed, this Court has stressed that:

> the defendant is not entitled to such a hearing as a matter of right. Rather, such a hearing should be held only when the trial court, in its discretion, concludes that an evidentiary hearing is necessary to resolve material, disputed issues of fact. Also, a hearing should be only held when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing.

(*People v. Hardy* (1992) 2 Cal.4th 86, 174, internal quotes and fn. omitted.)

Moreover, "hearsay is not sufficient to trigger the court's duty to make further inquiries into a claim of juror misconduct." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1256.) Hence, where the defense presented no statement by any juror and thus proceeded by statements by defense investigator and defense counsel, this Court found no abuse of discretion in failing to conduct an evidentiary hearing. (*Id.* at p. 1256.) Likewise where hearsay, in the form of a newspaper article and the defense investigator's statement, served as the only basis for the misconduct claim, the trial court was under no obligation to investigate them before denying the motion for new trial. (*People v. Carter* (2003) 30 Cal.4th 1166, 1217.)

Even if a hearing is held, the trial court "must take great care not to overstep the boundaries set forth in Evidence Code section 1150." (*Id.* at p. 418.) "Evidence Code section 1150 distinguishes between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved." (*People v. Collins* (2010) 49 Cal.4th 175, 249, quoting from *People v. Steele* (2002) 27 Cal.4th 1230, 1261.) "'The only improper influences that may be proved under [Evidence Code] section 1150 to

impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration.' " (*Ibid.*)

"Although misconduct raises the presumption of prejudice '[t]he presumption of prejudice may be rebutted, inter alia, by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm.'" (*People v. Hord*, supra, 15 Cal.App.4th at p. 725.)

In evaluating juror statements made during deliberation for the purpose of evaluating juror misconduct, it must be borne in mind that "[n]ot all comments by all jurors at all times will be logical, or even rational, or, strictly speaking, correct. But such comments cannot impeach a unanimous verdict; a jury verdict is not so fragile." (*People v. Riel* (2000) 22 Cal.4th 1153, 1219.) Also, that jurors have individualized personal knowledge about particular facts, and that they use such knowledge, extraneous to evidence presented at trial, during deliberation is expected.

> The jury system is an institution that is legally fundamental but also fundamentally human. Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system. It is also one of its weaknesses: it has the potential to undermine determinations that should be made exclusively on the evidence introduced by the parties and the instructions given by the court. Such a weakness, however, must be tolerated. "[I]t is an impossible standard to require ... [the jury] to be a laboratory, completely sterilized and freed from any external factors." [Citation.] Moreover, under that "standard" few verdicts would be proof against challenge.'"

(*People v. Riel* (2000) 22 Cal.4th 1153, 1219.)

Under these principles, appellants' instant juror misconduct contention must fail. It must fail, first of all, because it is based not on the jurors' own statements, but on hearsay statements by defense counsel. As such, the trial court, under such circumstances, had no obligation to conduct

an evidentiary hearing. (*People v. Hayes*, *supra*, 21 Cal.4th at p. 1256; *People v. Carter*, *supra,* 30 Cal.4th at p. 1217.) Despite precedent to the contrary, appellants cite *People v. Brown* (2003) 31 Cal.4th 518, 581-582, and argues that this Court in that case evaluated the attorneys' declaration there for sufficiency of showing without "any indication whatsoever that the attorneys' declarations were insufficient for this purpose." (RAOB 266.) But, that is precisely the problem. "It is axiomatic . . . that a decision does not stand for a proposition not considered by the court." (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 332.) Moreover, even if the dicta in *Brown* could stand for the proposition appellants now urge, it is inapposite, as the attorney's declarations submitted in that case were largely undisputed. This is so, because the interviews of the jurors were conducted in the presence of both the prosecution and defense attorneys, and the declarations by both the prosecuting attorney and the defense attorney documenting the interview were mutually corroborative. (See *People v. Brown*, *supra*, 31 Cal.4th at p. 582 [observing, on a particular point, how the prosecutor's declaration and the defense declaration regarding the interview of jurors coincided].) As such, the *Brown* decision cannot be used to bypass the rule against consideration of hearsay to grant an evidentiary hearing.

Second, the misconduct claim must also fail because the showing at trial disclosed no juror misconduct, much less a "strong possibility" of prejudicial misconduct, thus rendering any evidentiary hearing a mere fishing expedition. Specifically, the views expressed by Juror No. 2 during deliberation, and the fact that Juror No. 7 relied on those views, did not support a finding of misconduct. What Juror Nos. 2 and 7 did here was nothing more than what jurors ordinarily do, consider the evidence by applying their own common sense based on their background.

People v. Steele, *supra*, 27 Cal.4th 1230, is dispositive. There, this Court found insufficient showing of misconduct where it was alleged that several jurors "drew upon their experience" in the military and medical field in evaluating and interpreting evidence that the defendant was a Vietnam veteran suffering from post-traumatic stress syndrome (PTSD) and "organic brain dysfunction." (*Id.* at pp. 1259-1260, 1265-1266.) Specifically, jurors reported that the jury "had two persons 'with medical experience who told the rest of us that the criteria that the Doctor's [sic] used to establish the validity of the B.E.A.M. Test' was 'inadequate' based on 'what they have learned in their own experience in the medical field.'" (*Id.* at p. 1260.) Similar to the current case, two jurors in *Steele* alleged that the other jurors' military and medical experience helped them determine that the defendant was not suffering from PTSD or from "any problem with his brain." (*Id.* at pp. 1259-1260.)

This Court in *Steele* held that the allegations were insufficient to show that any jurors had "crossed the line into misconduct," because the expressed views were consistent with the presented evidence and there was no showing the jurors refused to "decide the case solely on the evidence before it." (*Id.* at pp. 1266-1267, 1280.) This Court in *Steele* observed that "during the give and take of deliberations, it is virtually impossible to divorce completely one's background from one's analysis of the evidence. We cannot demand that jurors, especially lay jurors not versed in the subtle distinctions that attorneys draw, never refer to their background during deliberations." (*People v. Steele*, *supra*, 27 Cal.4th at p. 1266.)

What Juror No. 2 did in this case was no more than what the jurors in *Steele* had done, i.e., expressly referring to one's own experience in making a conclusion about a factual issue in the case. Similar to *Steele*, Juror No. 2's express views here, that a shot in the head was essentially an execution-style murder, was not inconsistent with the facts of the case. Juror No. 7's

alleged reliance on these views cannot be misconduct, as jurors in the *Steele* case also relied on the views expressed there based on two jurors' medical experience. As such, as in *Steele,* the trial court cannot be said to have abused its discretion in denying an evidentiary hearing to investigate Jurors Nos. 2 and 7.

As to Juror R.M.'s comment about an agreement by the jury that the murders would not have occurred had appellant Mora not paged or call appellant Rangel about the presence of the victims, appellants' argument that the jurors had relied on evidence presented during the defense mitigation case to impose the death penalty (RAOB 267-268; MAOB 248) is unavailing. Even if the jury did rely on evidence that one of the defendants presented during its mitigation case, there exists no rule, and appellants cites none, making such reliance unlawful. The jury here was asked to consider the evidence from any part of the trial as to the circumstances of the crime to determine penalty. (5CT 1194 [CALJIC No. 8.85 advising the jury: "you shall consider all of the evidence which has been received during any part of the trial of this case" and "be guided by the following factors, if applicable . . . (a) The circumstances of the crime of which the defendant was convicted"].) Hence, if the jury did rely on defense evidence in reaching its penalty verdict, it was doing nothing more than fulfilling its duties. (*People v. Daniels* (1991) 52 Cal.3d 815, 865 [a juror's duty includes the obligation to follow the instructions of the court].) No juror misconduct can be discerned.

Finally, Evidence Code section 1150 supported the trial court's rejection of the motion for new trial without a hearing. As this Court in *People v. Steele* stated:

> Over three decades ago, we noted that the distinction between proof of overt acts - which is admissible to impeach a verdict – and proof of the jurors' subjective reasoning process-which is not admissible - has been advocated by commentators

> [citations], and has been the basic limitation on proof set by the leading decisions allowing jurors to impeach their verdicts. [Citation.] This distinction serves a number of important policy goals. It prevents a juror from impugning one or more jurors' reasoning processes. It excludes unreliable proof of thought processes and thereby preserves the stability of verdicts. It deters the harassment of jurors by the losing side seeking to discover defects in the deliberative process and reduces the risk of postverdict jury tampering. It also assures the privacy of jury deliberations. [Citations.] Not all thoughts "by all jurors at all times will be logical, or even rational, or, strictly speaking, correct. But such [thoughts] cannot impeach a unanimous verdict; a jury verdict is not so fragile." [Citation.]

(*People v. Steele*, *supra,* 27 Cal.4th at pp. 1261-1262.) Here, appellants sought to prove the thought process of the jurors, i.e., that they relied on inappropriate factors, including facts from specialized training and facts from the defense's mitigation case, to reach a verdict. That is exactly the intrusion into the deliberative process of the jury that section 1150 prohibits. As such, the trial court here properly declined to conduct an evidentiary hearing on a topic that was legally off limits.

For the foregoing reasons, appellants' current juror misconduct claim must be rejected.

XXI. THE TRIAL COURT'S REFUSAL TO MODIFY CALJIC NO. 8.85 TO REQUIRE THAT THE JURY NOT "DOUBLE COUNT" AN AGGRAVATING FACTOR IS NOT REVERSIBLE ERROR

The trial court below refused to modify CALJIC No. 8.85 to add the following language proposed by appellants: "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." (5CT 1214; 20 RT 3118-3120.) Appellants claim such refusal was error. (RAOB 279; MAOB

203-.) However, this Court has "repeatedly held that no prejudice results from such an error where [] 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." (*People v. Russell* (2010) 50 Cal.4th 1228, 99-100.) The prosecutor never suggested to the jury that it double-count aggravating factors and the jury here received the standard instruction concerning the weighing of the relevant factors (5CT 1194 [CALJIC No. 8.85]). As such, no reversible error occurred.

XXII. CALIFORNIA'S MUTLIPLE MURDER SPECIAL CIRCUMSTANCE DOES NOT VIOLATE THE CONSTITUTION

Appellants contend that the multiple murder special circumstance provision in California violates the Eighth and the Fourteenth Amendments because it encompasses an overly-broad class of persons with vastly different levels of culpability. (RAOB 280-282; MAOB 231-235.) This claim must fail because this Court has previously rejected such a claim. (*People v. Boyer* (2006) 38 Cal.4th 412, 483 ["The multiple-murder special circumstance (§ 190.2, subd. (a)(3)) is not constitutionally overbroad insofar as it encompasses a wide range of culpable conduct, theoretically including two accidental felony murders. Categorizing those who commit two or more murders subject to a single prosecution as especially deserving of the death penalty is not arbitrary or irrational, and it adequately narrows the pool of death-eligible offenders."]; see also *People v. Boyette* (2002) 29 Cal.4th 381, 440; *People v. Box* (2000) 23 Cal.4th 1153, 1217.)

XXIII. CALIFORNIA'S DEATH PENALTY STATUTE AS APPLIED BY THIS COURT AND THE TRIAL COURT DOES NOT VIOLATE THE CONSTITUTION

Appellants assert various constitutional challenges to the way California courts apply the state's death penalty statute. (RAOB 283-321; MAOB 257-267.) These challenges must fail, as explained below.

A. Penal Code section 190.2 Is Not Impermissibly Broad On Its Face Or As Applied

Appellants contend that section 190.2 is impermissibly broad because it fails to provide a meaningful basis for distinguishing the few cases in which death is imposed from the many cases in which it is not. Appellants also contend that the statute has been applied in a "freakish and wanton" manner such that prosecutors could characterize any feature of a murder as aggravating. (RAOB 285-290; MAOB 251-253.) This exact claim has been repeatedly rejected by this Court. (See, e.g., *People v. Verdugo*, *supra*, 50 Cal.4th at p. 304.)

B. California's Death Penalty Does Not Violate *Apprendi* and Its Progeny

Appellants next contend that California's death penalty scheme is unconstitutional because death verdicts are not premised on findings beyond a reasonable doubt by a unanimous jury that one or more aggravating factors existed and that these factors outweighed mitigating factors. Appellants contend that such a scheme violated *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] and its progeny, namely *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]; and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]. (RAOB 291-303; MAOB 253-255, 261-262.) This contention has been repeatedly rejected by this court. (See *People v.*

Jennings (2010) 50 Cal.4th 616, 689.) Indeed, "[t]he death penalty scheme is not unconstitutional because it fails to allocate the burden of proof-or establish a standard of proof-for finding the existence of an aggravating factor." (*People v. Friend* (2009) 47 Cal.4th 1, 89.) "Unlike the guilt determination, 'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) The instant arguments by appellants must fail.

C. Failure to Instruct that Some Burden of Proof is Required Or That There Was No Burden of Proof

Appellant Mora also contends that the court should have either instructed that either the People had the burden of proof or there was no burden of proof. (MAOB 255-256.) This claim had also been rejected by this Court. (*People v. Gamache* (2010) 48 Cal.4th 347, 406 [there is no burden of proof at the penalty phase]; *People v. Leonard* (2007) 40 Cal.4th 1370, 1429 [trial court is not required to instruct the jury that neither party bears the burden of proof].)

D. The Due Process Clause and the Cruel and Unusual Punishment Clause Are Not Violated by California's Death Penalty Scheme

Appellant Rangel claims that the due process clause of the Fifth and Fourteenth Amendment alone with the rule against cruel and unusual punishment in the Eighth Amendment require that the jury be persuaded beyond a reasonable doubt that the aggravating factors exist and outweigh the mitigating factors and that death is the appropriate remedy. (RAOB 303-306.) Again, this Court has rejected such arguments in the past. (*People v. Cowan* (2010) 50 Cal.4th 401, 508-509; *People v. Rogers*, *supra*, 39 Cal.4th at p. 893.)

E. Death Penalty Law Not Unconstitutional For Not Requiring Written Findings Regarding Aggravating Factors

Appellants contend that the state's death penalty law is unconstitutional because it does not require that the jury base any death sentence on written findings regarding aggravating factors. (RAOB 306-309; MAOB 264.) This Court has repeatedly rejected this argument in the past and there is no reason to do otherwise in this case. (*People v. Gamache, supra,* 48 Cal.4th at 407; *People v. Mills* (2010) 48 Cal.4th 158, 214.)

F. Death Penalty Law Not Violative of Eight Amendment For Not Requiring Inter-case Proportionality Review

Appellants' argument (RAOB 309-311; MOB 266), that California's death penalty law is unconstitutional for not requiring inter-case proportionality review should be rejected as was done by this Court in the past. (*People v. Curl* (2009) 46 Cal.4th 339, 362; *People v. Lewis* (2008) 43 Cal.4th 415, 538.)

G. The Use of Unadjudicated Criminal Activity as Aggravating Factor is Constitutionally Permissible

Appellants also claim that the use of unadjudicated criminal activity by the jury as an aggravating factor violated the Fifth, Sixth, Eight, and Fourteenth Amendments. (RAOB 311-312; MAOB 258-259.) This Court has rejected this argument in the past. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 507; *People v. Balderas* (1985) 41 Cal.3d 144, 204-205 & fn. 32.)

H. The Use of Restrictive Adjectives In the List of Potential Mitigating Factors Did Not Violate the Constitution

Appellants contend that the use of adjectives such as "extreme" and "substantial" in the list of potential mitigating factors acted as barriers to

the consideration of mitigation in violation of the Sixth, Eight, and Fourteenth Amendment. (RAOB 312; MAOB 264.) This Court has also repeatedly rejected this same exact claim in the past. (*People v. Rogers*, *supra*, 39 Cal.4th at pp. 893, 895; *People v. Avila* (2006) 38 Cal.4th 491, 614; *People v. Ghent* (1987) 43 Cal.3d 739, 776.)

I. No Need to Instruct That Statutory Mitigating Factors Were Relevant Solely As Potential Mitigating Factor

Appellants next argue that the failure to instruct that statutory mitigating factors were relevant solely as potential mitigators precluded the reliable, individualized, capital sentencing determination required by the Eighth and the Fourteenth Amendments. (RAOB 313-316; MAOB 265-266.) This Court has repeatedly rejected this argument in the past. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1430; *People v. Hillhouse* (2002) 27 Cal.4th 469, 509.)

J. Use of the Term "Substantial" Is Not Vague or Ambiguous

Appellant Mora contends that California law is unconstitutionally vague and ambiguous in allowing death to be imposed when aggravating circumstances are "substantial" in comparison with the mitigating circumstances. (MAOB 259.) However, this Court has held that such wording in the standardized CALJIC No. 8.88 is not inadequate or misleading. (*People v. Arias* (1996) 13 Cal.4th 92, 171; see also *People v. Breaux* (1991) 1 Cal.4th 281, 315-316.) This claim must fail.

K. No Need To Instruct the Jury that the Central Determination is Whether Death is the Appropriate Punishment

Appellant Mora contends that the instructions failed to inform the jurors that the central determination is whether death is the appropriate punishment rather than merely a "warranted" punishment. (MAOB 260.)

However, in rejecting such a claim in the past, this Court explained "[b]y advising that a death verdict should be returned only if aggravation is 'so substantial in comparison with' mitigation that death is 'warranted,' the instruction clearly admonishes the jury to determine whether the balance of aggravation and mitigation makes death the appropriate penalty." (*People v. Arias* (1996) 13 Cal.4th 92, 171; see also *People v. Taylor* (2009) 47 Cal.4th 850, 899-900; *People v. Griffin* (2004) 33 Cal.4th 536, 593.)

L. No Need to Instruct the Jury That If It Determined that Mitigation Factors Outweighed Aggravating Factors, It was required to Return a Sentence of Life Without the Possibility of Parole

Appellant Mora argues that the trial court should have instructed the jury that if it determined that mitigation factors outweighed aggravating factors, that it was thus required to return a penalty verdict of life imprisonment without the possibility of parole. (MAOB 260-261.) This Court has repeatedly rejected this claim, and there is no reason to do otherwise in this case. (*People v. Taylor* (2009) 47 Cal.4th 850, 900 [principle that jurors "must return a verdict of life without [the] possibility of parole if mitigation outweighs aggravation . . . is clearly implicit in the standard instruction"].)

M. California's Death Penalty Law Does Not Violate Equal Protection For Failure to Afford Procedural Safeguards Available to Non-Capital Defendants

Appellants contend that because capital defendants during penalty are not afforded the safeguards available to non-capital defendants such as juror unanimity, articulated reasons for sentencing, and findings of aggravating circumstances beyond a reasonable doubt, the state's death penalty scheme violates the Equal Protection Clause. (RAOB 316-319; MAOB 266.) This contention has been rejected by this Court and there is no reason to do otherwise in this case. (*People v. Solomon* (2010) 49

Cal.4th 792, 844; *People v. Leonard*, *supra*, 40 Cal.4th at p. 1430; *People v. Manriquez* (2007) 37 Cal.4th 547, 590; *People v. Blair*, *supra*, 36 Cal.4th at p. 754; *People v. Smith* (2005) 35 Cal.4th 334, 374-375.)

N. Failure to Instruct on Presumption of Life Not Violative of Constitution

Appellant Mora contends that the trial court's failure to instruct the jury that the law favors life and presumes life imprisonment violated his rights to due process, to be free from cruel and unusual punishment, and to equal protection. (MAOB 263.) This same contention has likewise been repeatedly rejected by this Court. (*People v. Foster* (2010) 50 Cal.4th 1301, 158; *People v. D'Arcy* (2010) 48 Cal.4th 257, 301.)

O. Failure to Delete Inapplicable Sentencing Factors From Instructions Not Violative of the Constitution.

Appellant Mora contends that the trial court's failure to delete inapplicable sentencing factors from CALJIC No. 8.85 likely confused the jury and prevented it from making any reliable determination of the appropriate penalty. (MAOB 264-265.) This contention is without merit, as this Court has previously found in *People v. Cook* (2006) 39 Cal.4th 566, 618.

P. California's Use of Death Penalty as a Regular Form of Punishment Does Not Fall Short of International Norms of Humanity and Decency and Is Not Violative of the Constitution

Appellants contend that the regular use of the death penalty by the United States falls short of international norms and violates the Eighth and Fourteenth Amendments of the Constitution. (RAOB 319-322; MAOB 267.) This same contention has been repeatedly rejected by this Court. (See *People v. Jennings* (2010) 50 Cal.4th 616, 690 ["We again reject the argument that California's death penalty scheme is contrary to international norms of humanity and decency, and therefore violates the Eighth and

Fourteenth Amendments of the United States Constitution. . . . . 'International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements.' . . . . Because we conclude that defendant's sentence was rendered in accordance with those requirements, we need not consider whether alleged violations of such requirements also would violate international law."].)

XXIV. APPELLANT MORA'S CUMULATIVE ERROR CLAIM MUST BE REJECTED

Appellant Mora contends that the errors occurring at the guilt and penalty phase, singly, or in combinantion, had a prejudicial effect on either the conviction or the death sentence. (MAOB 269-272.) As discussed previously, there was either no error, or even assuming any errors, they were clearly harmless in light of the overwhelming evidence the prosecution presented at both the guilt and penalty phase. As previously noted, a defendant is entitled to a fair trial, not a perfect one. (*People v. Welch, supra,* 20 Cal.4th at p. 775.) Even assuming arguendo any error(s) existed, appellant Rangel has at most shown that his ""trial was not perfect – few are," especially few of the lenth and complexity of this trial. There was no prejudicial error either individually or collectively." (*People v. Cooper*, *supra*, 53 Cal.3d at p. 839, citation omitted.) Appellant Mora received a fair trial. As such, "[w]hether considered independently or together, any errors or assumed errors are nonprejudicial and do not undermine defendant's conviction or sentence." (*People v. Watson*, *supra,* 43 Cal.4th a p. 703.)

CONCLUSION

For the reasons stated, respondent respectfully asks that the judgments as to appellants be affirmed in their entirety.

Dated: February 10, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 46,556 words.

Dated: February 10, 2011

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DECLARATION OF SERVICE

Case Name: ***People v. Joseph Adam Mora and Ruben Rangel*** No.: **S079925**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On February 11, 2011, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

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On February 11, 2011, I caused the Original and 1 copy of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, San Francisco, California 94102, by **US Mail**.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 11, 2011, at Los Angeles, California.

Maria Lasso
Declarant

Maria Lasso
Signature

LA1999XS0014
John Yang